IN THE GAUHATI HIGH COURT
(THE HIGH COURT OF ASSAM, NAGALAND, MEEGHALAYA,
MANIPUR, TRIPURA, MIZORAM AND ARUNACHAL PRADESH)
CRL. APPEAL NO. 226 OF 2011
Redaul Hussain Khan,
S/O Late Haji M.H. Khan,
Resident of house No.14, Bye lane No.2,
Tarun Nagar, ABC, PS. Dispur,
Dist. Kamrup, Assam.
….. Appellant
By Advocate:
Mr. DK Misra, Sr. Advocate
Mr. Z. Alam, Advocate
Mr. SP Bhattacharjee, Advocate
Mr. S. Jalan, Advocate.
Vs.
1. The National Investigation Agency,
Through its Standing Counsel.
.....… Respondent
By Advocate:
Mr. D.K. Das, SC, NIA,
Ms. C. Patowary, Advocate
B E F O R E
THE HON'BLE MR.JUSTICE I.A. ANSARI
THE HON'BLE MR.JUSTICE A.C. UPADHYAY
Dates of hearing : 24.01.12, 25.01.2, 27.01.12,
22.02.12, 29.02.12, 01.03.12, 13.03.12,
19.03.12, 02.04.12, 18.04.12, 30.04.12,
03.05.12, 04.05.12, 14.05.12, 15.05.12,
16.05.12, 17.05.12, 25.05.12 &
07.06.2012
Date of delivery of
Judgment & order : 10.09.2012
JUDGMENT & ORDER
(Ansari, J.)
This is an appeal, under Section 21(4) of the National Investigation Agency Act, 2008, (in short, 'the NIA Act'), directed against the order, dated 21.09.2011, passed, in Misc. Case No. (NIA) 31/2011 (arising out

of NIA Case No.01/2009 under Sections 120B/121/121A read with Sections 16, 17, 18, 19 and 20 of the Unlawful Activities (Prevention) Act, 1967) by the Special Court, Guwahati, constituted under the NIA Act, whereby the prayer of the accused-appellant, Redaul Hussain Khan, to allow him to go on bail stands rejected.
BACKGROUND FACTS

2. The material facts, giving rise to this appeal, may, in brief, be set out as under:

(i) Some significant amendments have been made in the Unlawful Activities (Prevention) Act, 1967, by the Unlawful Activities (Prevention) Amendment Act, 2008, the amendment having come into force on 31.12.2008. The amendments, amongst others, introduced certain conditions, whereby the powers of the court, under Section 437 of the Code of Criminal Procedure, have come to be restricted by placing some fetters on the court's discretion to allow an accused person to go on bail.

(ii) Basistha P.S. Case No. 170/2009, under Section 120B/121/121(A) IPC read with Section 25(1B) (A) Arms Act, was, initially, registered against two accused persons, namely, Phojendra Hojai and Babulal Kemprai, on the ground that, on 01.04.2009, at about 4-00 p.m., when vehicle Nos. AS-01-AH-1422 and AS-01-1-0609 were intercepted at 14th Mile G.S. Road, Guwahati, and searched, both the accused, suspected to be cadres and linkmen of a banned organization, namely, DHD (J), were found in the vehicles, wherefrom a sum of rupees one crore, in cash, and two pistols were recovered, the money being

meant for purchase of arms and ammunitions for the said banned organization. The accused were accordingly taken into custody and investigation was started by the Assam Police. On being produced before the Chief Judicial Magistrate, Kamrup, Guwahati, the two accused aforementioned were remanded to police custody.

(iii) On 18.05.2009, both the accused, namely, Phojendra Hojai and Babulal Kemprai, were granted bail by the High Court, in exercise of its powers under Section 439 Cr.PC., in Bail Application No. 1637/2009.

(iv) On 31.05.2009, Mohit Hojai, the then Chief Executive Member, N. C. Hills Autonomous Council, and R. H. Khan (i.e., the accused-appellant herein), who is not only the Deputy Director, Social Welfare Department, but also the Liaison Officer, N. C. Hills Autonomous Council, were arrested by Assam Police and, on their production before the Chief Judicial Magistrate, Kamrup, they were remanded to police custody for two days. The Court, on the prayer for extension of police custody made by the Investigating Officer of the Assam Police, allowed further extension of the police custody for a period of two more days by its order, dated 02.06.2009. However, further prayer for custodial interrogation was rejected by the Chief Judicial Magistrate, Kamrup, who, however, granted permission to the Investigating Officer to interrogate the

present accused-appellant, Redaul Hussain Khan, in Central Jail, Kamrup, Guwahati. On the same day, the learned Court rejected the present appellant's prayer for granting bail.
4
(v) While investigation of Basistha Police Station Case No.170/2009 aforementioned was pending with the State police, the Central Government, in exercise of its power under Section 6(5), read with Section 8 of the NIA Act, directed, on 01.06.2009, investigation of the said case by the National Investigation Agency (in short, 'the NIA'). In terms of the directions, so issued by the Central Government, the NIA registered a case under the NIA Act, the Case being NIA Case No. 1/2009.
(**vi**) Before, however, registration of the case aforementioned by the NIA, three more persons, namely, 1. Mihir Barman @ Jewel Garlossa @ Debojit Sinha, 2. Ahsringdaw Warrisha @ Partha Warisha, and 3. Sameer Ahmed, were arrested by the Assam Police, at Bangalore, in connection with Basistha Police Station case aforementioned, on 30.05.2009 and 03.06.2009. The NIA moved, on 05.06.2009, the Chief Judicial Magistrate, Kamrup, and filed FIR in the NIA Case No. 1/2009 aforementioned. On 06.06.2009, the accused persons were, on being produced before the Chief Judicial Magistrate, Kamrup, remanded to police custody. In terms of the order, passed by the Chief Judicial Magistrate, on 06.06.2009, Basistha P.S. Case No. 170/2009 aforementioned was tagged with the NIA Case No. 1/2009 and, on the basis of the application made by the NIA, the Court allowed accused Mohit Hojai and R. H. Khan (i.e., the appellant herein) to be taken into custody by the NIA for a period of 10 days and the three accused, namely, 1. Mihir Barman @ Jewel Garlossa @ Debojit Sinha, 2.
5
Ahsringdaw Warrisha @ Partha Warisha, and 3. Sameer Ahmed, were remanded, for a period of 14 days, to the custody of the NIA.
(vii) On 11.06.2009, on the prayer of the NIA, the Court of the Chief Judicial Magistrate, Kamrup, added Sections 17/18/19 of the Unlawful Activities (Prevention) Act, 1967, to the NIA Case No. 1/2009 aforementioned and, on the prayer of the NIA, the Court of the Chief Judicial Magistrate, Kamrup, remanded the accused to judicial custody, in exercise of its power under Section 167 of the CrPC, on the ground that no court has so far been constituted under the NIA Act.
(viii) By a Gazette notification, dated 09.07.2009, issued by the Government of India, Ministry of Home Affairs, in exercise of its powers under Section 3 of the Unlawful Activities

(Prevention) Act, 1967, DHD(J) along with its factions, wings and front organizations came to be declared as *'unlawful organization'.*

(ix) Three of the accused persons, namely, R. H. Khan, Ahsringdaw Warisa @ Partha Warisha and Sameer Ahmed, then, approached this Court seeking to invoke its jurisdiction under Section 439 CrPC. None of the accused aforementioned applied for bail to the Chief Judicial Magistrate, Kamrup, or to the Sessions Judge, Kamrup; rather, they applied for bail, directly, to this Court under Section 439 Cr.PC.

(x) One of the important questions, which arose before the High Court, in the matter of application for bail, which the three accused aforementioned had so made, under Section 439

Cr.PC, to this Court, was as to whether the bail applications were maintainable in law.

(xi) Upon a threadbare discussion, the said three bail applications, made under Section 439 CrPC, seeking to invoke High Court's jurisdiction to grant bail in favour of the accused aforementioned, were rejected, on 29.07.2009, by one of us (Ansari, J.) on the ground of lack of jurisdiction, laying down, *inter alia*, that under the scheme of the provisions contained in the NIA Act read with the provisions of remand and bail as stand incorporated in the Code of Criminal Procedure, a person , arrested in connection with an offence, under the NIA Act, can be remanded to custody, police or judicial, by the Special Court, where the Special Court has been constituted, or by the Court of Session, where the Special Court has not been constituted. The Court also held that the source of power of the Special Court or the Court of Session, as the case may be, to consider an application for bail is traceable to, and governed by, the provisions of Section 437 Cr.PC. and while considering such an application for bail, the Special Court or the Court of Session, as the case may be, will not exercise the power of bail as if it is considering an application for bail under Section 439 and, consequently, the Special Court or the Court of Session, as the case may be, would have all the limitations, which a Magistrate has, while deciding an application for bail, under Section 437 Cr.PC and the provisions, contained in Section 439 Cr.PC, cannot be resorted to for the purpose of granting bail and it was also held by the High Court, in its

order, dated 29.07.2009, aforementioned, that against an order, passed by a competent court, rejecting bail, or granting bail, the remedy of an aggrieved party lies in preferring an appeal to the High Court, in terms of Section 21(4) of the NIA

Act, and in not making any application under Section 439 Cr.PC. This Court, therefore, held in its order, dated 29.07.2009, that such an appeal would require hearing by a Division Bench of the High Court and that in such an appeal, even the merit of the order, granting or refusing bail, can be questioned. The decision came to be reported, in **(2009) 3 GLT 855 (Redaul Hussain Khan & Ors vs. State of Assam & Ors**). While laying down the law, as indicated hereinbefore, the Court observed and held as under:

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

8

limitations, which a Magistrate has, while deciding an application for bail, under Section 437 of the Code*.*

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

the investigation, under the scheme of the NIA Act, is taken over by the Agency, it is the Special Court or the Court of Session, as the case may be, which can authorize further detention of an arrested accused. When such an arrested accused applies for bail to the Special Court or the Court of Session, as the case may be, the source of power to consider such an application for bail lies in Section 437 and not Section 439 of the Code. Even a High Court cannot invoke its powers under Section 439, to grant bail if it has been refused by the Special Court or the Court of Session, as the case may be, nor can the High Court, in exercise of its power, under Section 439, cancel bail if bail has been granted to such an accused by the Special Court or the Court of Session, as the case may be. If the bail has been refused or granted by the Special Court or the Court of Session, as the case may be, the aggrieved party may,

9

however, prefer an appeal, in terms of Section 21, to the High Court. Such an appeal has to be heard by a Division Bench of the High Court and in such an appeal, the merit of the order, granting or refusing bail, can be questioned*.*

107*. In the backdrop of the position of law, as indicated above, it becomes clear that the present three applications for bail, which have been made under Section 439 of the Code, are not entertainable in law and must, therefore, fail.*

108*. In the result and for the reasons discussed above, all these three bail applications are hereby dismissed as not maintainable."*

(Emphasis is added)

(xii) Complying with the position of law, as had been laid down, in **Redaul Hussain Khan** (supra), the appellant herein (i.e., Redaul Hussain Khan) filed an application before the Sessions Judge (Special Court), Kamrup, Guwahati, seeking bail, but his bail application came to be rejected on 14.08.2009. Thereafter, on an application, made by the NIA, on 27.08.2009, the learned Sessions Judge (Special Court), Kamrup, Guwahati, by its order, dated 28.08.2009, extended the period for completion of investigation into the case by a further period of 60 days in terms of Section 43D(5)(b) of the 1967 Act read with Section 167 Cr.PC.

(**xiii**) The order, dated 14.08.2009, of the learned Sessions Judge (Special Court), Kamrup, Guwahati, rejecting the bail

application of the appellant herein, came to be unsuccessfully challenged by the appellant herein, namely, Redaul Hussain Khan and some others, before a Division Bench of this Court
10
by way of an appeal under Section 21(4) of the NIA Act. The said appeal came to be dismissed by a Division Bench of this Court on 19.09.2009.

(**xiv**) In the meanwhile, however, the Special Court, Central Bureau of Investigation, Assam, Guwahati, was notified by the Central Government, in exercise of its power under Section 11(1) of the NIA Act, vide Gazette notification, dated 01.09.2009, issued by the Government of India, Ministry of Home Affairs, as the '*Special Court*'.

(**xv)** As against the dismissal of his appeal and rejection of bail by the order, dated 19.09.2009, passed by a Division Bench as mentioned above, the appellant herein carried the matter, by way of a Special Leave Petition, to the Supreme Court. By its decision, on 09.11.2009, reported in (**2010**) **1 SCC 521** (**Redaul Hussian Khan vs. State of Assam & Ors.**), the Supreme Court observed, *inter alia*, that there was little doubt that even on the date, when the petitioner, Redaul Hussain Khan (i.e., the appellant herein) was apprehended, DHD(J) had been indulging in terrorist act, although it came to be declared as a '*unlawful association*' some time latter, i.e., on 09.07.2009. The Supreme Court made it clear, in its order, dated 09.11.2009, that having considered the submissions, made before it, it was unable to agree with the submissions, made on behalf of the petitioner, Redaul Hussain Khan (i.e., the appellant herein) that to the facts of the case, the provisions of the Unlawful Activities (Prevention) Act, 1967, were not attracted.
11
(**xvi)** The Supreme Court further held, in **Redaul Hussain Khan** (supra), that it was unable to accept the submissions, made on behalf of the petitioner, Redaul Hussain Khan (i.e., the appellant herein) that merely because of the fact that DHD(J) had not been declared as an '*unlawful organization*', when Redaul Hussain Khan was arrested, the said organization could not have been taken to have been indulging in *terrorist act*, or that the petitioner could not have been alleged to have the knowledge of such activities of the DHD(J).

(**xvii)** With the conclusions, so reached, the Supreme Court rejected the present appellant's application for bail by laying down that the learned Sessions Judge (Special Court), Kamrup, Guwahati, had the jurisdiction to extend the time for completion of investigation in terms of the amended provisions,

introduced by way of Section 43-D(5)(b) of the 1967 Act, read with Section 167 CrPC. The relevant observations, made by the Apex Court, in **Redaul Hussain Khan** (supra), read as under:

"15. Mr. Rawal submitted that although Mr. Ghosh had referred to some newspaper reports indicating that there was a possibility of amnesty being granted to the members of DHD(J), the same was yet to materialize, and, on the other hand, it also indicated that the said organization was indulging in terrorist activities. Accordingly, ***in view of the definition of "terrorist act" in Section 15 of the 1967 Act and the provisions of Sections 13 and 17 thereof, there was little doubt that even on the date when the petitioner was apprehended, DHD(J) was indulging in terrorist acts, although, it came to be declared as an "unlawful association" sometime later. Mr. Rawal urged that having regard to the above, the Special Leave Petitions filed against the order of the High court refusing to grant bail were liable to be dismissed.***

12

16. We have carefully considered the submissions made on behalf of the respective parties and we are unable to agree with Mr. Ghosh that the provisions of the Unlawful Activities (Prevention) Act, 1967, would not be attracted to the facts of the case. ***We are also unable to accept Mr. Ghosh's submissions that merely because DHD(J) had not been declared as an "unlawful association" when the petitioner was arrested, the said organization could not have indulged in terrorist acts or that the petitioner could not have had knowledge of such activities****.*

17. Accordingly, Mr. Ghosh's submissions regarding the grant of statutory bail have to be rejected since, in our view, the learned Sessions Judge (Special Court) had the jurisdiction to extend the time for completion of the investigation."

(Emphasis is added)

(**xviii)** A *charge-sheet* came to be laid, on 17.11.2009, before the learned Special Court, by the NIA against as many as 14 accused persons, including the appellant herein, and all the arrested persons, whose names have been mentioned above. The three accused persons, namely, Jayanta Kumar Ghosh, Debasish Bhattacharjee @ Bappi, and Sandeep Kumar Ghosh @ Sambhu, had applied for bail, but their applications for bail were rejected by the learned Special Court on

31.12.2009. As against the order, rejecting their prayer for bail, they had preferred appeals, under Section 21 of the NIA Act, to this Court, and these appeals were also dismissed by a Division Bench of this Court on 28.05.2012. The decision of the Division Bench stands reported as **Jayanta Kumar Ghosh and others Vs. State of Assam and others,** reported in **2010 (4) GLT 1.** Similarly, accused Ashringdaw Warrisha and accused Samir Ahmed, too, on failing to obtain bail from the learned Special Court, had, after filing of the *charge-sheet* against them, preferred appeals and these appeals too, having
13
been heard, were dismissed by a Division Bench of this Court. The decisions, with regard to dismissal of appeals of accused Ashringdaw Warrisha and Samir Ahmed, too, stand reported in **Jayanta Kumar Ghosh and others** (supra).

(**xix**) As far as the appellant herein, Redaul Hussain Khan, is concerned, he filed, after the *charge-sheet* stood laid by the NIA, an application for bail in the Special Court, at Guwahati, on the ground of his sickness.

(**xx**) Notwithstanding the vehement objection, raised by the NIA, against the prayer for bail made by the appellant herein, Redaul Hussain Khan, on the ground of his sickness, the learned Special Judge, by its order, dated 22.12.2009, allowed accused Redaul Hussain Khan to go on *interim bail* on the ground of his ill health subject to condition that he would appear in the Special Court on 11.01.2010 at 10.30 am. Accused Redaul Hussain Khan did not appear in the Court as had been directed and an application was moved, on his behalf, informing the Court, *inter alia,* that Redaul Hussain Khan had, again, been admitted in hospital, on 07.01.2010, after having been released on bail, on 26.12.2009, with complain of increased backache and other complications. On hearing the parties and on consideration of the relevant medical report, dated 08.01.2010, the *interim bail* was extended by the learned Special Court, while calling for a joint up-to-date medical report from the departments of medicine and orthopedic of Guwahati Medical College and Hospital
14
(GMCH) on the ground that Redaul Hussain Khan was being treated by the said departments.

(xxi) On production of the medical report, the prayer for making absolute the *interim bail* was renewed by accused Redaul Hussain Khan. The NIA filed its objection to the said prayer and, on hearing both sides, the learned Special Court passed, on 25.01.2010, an order directing the Superintendent, Guwahati Medical College and Hospital, to constitute a Medical

Board with concerning doctors to examine Redaul Hussain Khan thoroughly and to submit report. The medical report was accordingly submitted and, on hearing the NIA and also accused-respondent Redaul Hussain Khan, the learned Special Court made, on 29.01.2010, the *interim order* of bail absolute.

(**xxii)** The order, dated 29.01.2010, passed by the learned Special Court, granting bail to the present appellant, Redaul Hussain Khan, on the ground of his illness came to be challenged by way of an appeal preferred by the NIA, under Section 21 of the NIA Act, seeking to get, *inter alia*, the order, dated 29.01.2010, aforementioned, set aside. The appeal, so preferred by the NIA, gave rise to Criminal Appeal No.25/2010. By judgment and order, dated 28.05.2010, a Division Bench of this Court allowed the appeal of the NIA and set aside the impugned order, dated 29.01.2010, whereby the learned Special Court had allowed the present appellant, Redaul Hussain Khan, to go on bail on the ground of his illness. This decision has come to be reported as **National Investigation**

Agency Vs. Redaul Hussain Khan, reported in **(2010) 3 GLT 302.**

(**xxiii**) Against this Court's order refusing, once again, to grant bail to the accused-appellant, Redaul Hussain Khan, the said accused carried the matter to the Supreme Court by way of a Special Leave Petition, which gave rise to SLP (Crl) No.5063/2010; but, on 25.08.2011, when the matter was called for hearing, accused, Redaul Hussain Khan, sought dismissal of his appeal as withdrawn with leave to him to approach the trial Court, once again, with a fresh application for bail.

3. The above submission, made on behalf of accused Redaul Hussain Khan, seeking to get the Special Leave Petition withdrawn, was resisted by the Union of India on the ground that since the High Court had cancelled the bail, which had been granted by the learned trial Court, it should not be understood by the learned trial Court that by virtue of the order, which accused Redaul Hussain Khan was seeking, in the Special Leave Petition, the order of the High Court stood set aside or interfered with by the Supreme Court, whereupon the Supreme Court made it absolutely clear that this Court's order, in the appeal of Redaul Hussain Khan, cancelling the learned Special Court's order, granting bail, to accused, Redaul Hussain Khan, on the ground of his illness, was not being interfered with by the Supreme Court. The relevant portion of the Supreme Court's order, dated 25.08.2011, read as under:

"It is submitted by Mr. Krishnamani that the petitioner does not wish to proceed with SLP(CrlP No.5063 of 2010, and the same

may be dismissed as withdrawn, with leave to approach the
16
trial court once again with a fresh application for grant of bail. Learned ASG, Mr. Raval, has opposed such prayer for grant of bail, to the extent that since the High Court had cancelled the bail, which had been granted by the trial court, it should not be understood by the trial court that by virtue of this order, the order of the High Court was being set aside or interfered with. Having regard to the submissions made, we allow the prayer made on behalf of the petitioner to withdraw the Special Leave Petition (being SLP (Crl.) No. 5063/10) and the same is, accordingly, dismissed as withdrawn, ***with liberty to the petitioner to apply to the trial court afresh for grant of bail in the event there are any change in circumstances or any fresh facts are placed before the court. We also make it clear that we are not interfering with the order of the High Court****."*
(Emphasis is added)

4. From a careful reading of the Supreme Court's order, dated 25.08.2011, aforementioned, following two things become transparent, namely:

(**a**) the present appellant could not have applied for bail to the learned trial Court afresh seeking bail unless he could show any change in the circumstance or could place fresh facts, in the learned trial Court, entitling him to the grant of bail; and

(**b**) the Supreme Court has made it clear that it was not interfering with the order of this Court meaning thereby that in **National Investigation Agency Vs Redaul Hussain Khan,** reported in **2010 (3) GLT 1,** the law laid down, with regard to the contours of the power, in the matter of granting bail to a person, accused of commission of an offence under Chapter IV and/or VI of the Unlawful Activities (Prevention) Act, 1967, (in short, 'the UA(P) Act'), as well as the ambit of the High Court's appellate power, as
17
conferred by Section 21(4), have not been disagreed with by the Supreme Court.

5. Moreover, the Supreme Court has also agreed, in its order, dated 25.08.2011, passed in the said Special Leave Petition, that the present appellant, Redual Hussain Khan, ought not to have been allowed by the learned Special Court to go on bail on the ground of his illness, which the appellant, Redaul Hussain Khan, had sought to take resort to, and also that the cancellation of bail by the High Court was, in the face of the incriminating materials, which had emerged from the case diary, as against Redaul Hussain Khan, and the law relevant thereto, wholly justified and in accordance with law.

6. Having got his Special Leave Petition dismissed by withdrawing

the same, as mentioned above, the appellant, Redaul Hussain Khan, filed yet another application, in the learned Special Court, seeking bail. This application for bail was rejected by order, dated 21.09.2011, passed by the learned Special Judge, NIA, in NIA Case No.01/2009. Aggrieved by the rejection of his application for bail, the accused-appellant, Redaul Hussain Khan, has, now, impugned the order, dated 21.09.2011, aforementioned, in this appeal.

7. We have heard Mr. D. K. Mishra, learned Senior counsel, appearing on behalf of the appellant, and Mr. D. K. Das, learned Senior counsel, appearing for the NIA. We have also heard Mr. H. P. Rawal, learned Additional Solicitor General, who has appeared, on behalf of the Union of India.

18

PRELIMINARY OBJECTION RAISED BY THE NIA TO THE MAINTAINABILITY OF THE PRESENT APPEAL

8. What may, now, be noted is that the appeal, which has arisen out of NIA Case No. 1/2009, has been resisted, at its threshold, by the NIA, by contending, *inter alia,* that the appellant, Redaul Hussain Khan, had earlier filed an application for bail, in NIA Case No. 1/2009, and the prayer for bail having been rejected by the learned Special Court, the appellant preferred, under Section 21(4) of the NIA Act, an appeal to a Division Bench of this Court and, the Division Bench, too, upheld the order of the learned Special Court rejecting the appellant's prayer for bail and thereby dismissed the appellant's appeal by order, dated 19.09.2009, passed, in Criminal Appeal No.148/09. The appellant, then, applied for bail on the ground of his illness and, in course of time, when the appellant was granted bail on the ground of his illness, the order was challenged by the NIA by preferring an appeal to this Court under Section 21(4) of the NIA Act. The appeal gave rise to Criminal Appeal No.25/2010, which, on being heard, was allowed by a Division Bench of this Court on 28.05.2010 and the order, granting bail to the accusedappellant on the ground of his sickness, was set aside, the decision, in Criminal Appeal No.25/2010, having been reported as **National Investigation Agency Vs. Redaul Hussain Khan,** in **2010 (3) GLT 302**.

9. Aggrieved by the order, dated 28.05.2010, aforementioned, whereby the appellant's bail, granted by the learned Special Court, on the ground of his sickness, was set aside by this Court, the appellant carried the matter, by way of Special Leave Petition, to the

19

Supreme Court and this application gave rise to SLP (Crl.) No.5063/2010.

10. It is also pointed out by Mr. Das, learned Standing Counsel, NIA, that when the Special Leave Petition came up for hearing, the same was withdrawn by the present appellant and, consequently,

the appellant's Special Leave Petition was accordingly dismissed, but he was given the liberty to apply afresh to the learned trial Court for appeal provided '*there is any change in the circumstance or if any fresh facts are placed before the Court*.'

11. In the present case, contends Mr. Das, there is absolutely no change in the circumstance inasmuch as *charge-sheet* had, on completion of investigation by the NIA, already stood laid, in the learned Special Court, before the present appellant had filed his last appeal under Section 21 of the NIA Act, which gave rise to Criminal Appeal No.25/2010 and that this Court, while deciding Criminal Appeal No.25/2010, aforementioned, dealt with the merit of the case as had been revealed by the NIA as against the accused-appellant, Redaul Hussain Khan, and this Court came to a clear conclusion that the materials, which had surfaced as a result of the investigation, brought the case of the appellant within the ambit of the proviso to Section 43D(5) of the UA(P) Act and the appellant was not, therefore, entitled to bail on merit.

12. On merit, therefore, according to this Court's conclusion, contends Mr. Das, the present appellant was not entitled to bail as there were sufficient incriminating materials, collected against him by the NIA, bringing his case within the four corners of Chapters IV and VI of the UA(P) Act.

20

13. However, this Court, points out Mr. Das, learned Senior counsel, did examine, in the earlier appeal, namely, Criminal Appeal No.25/2010, if notwithstanding the fact that the appellant, Redaul Hussain Khan, was, otherwise, not entitled to be released on bail on merit, whether he could have still been released on bail on the ground of his sickness, which the appellant had projected in the learned Special Court. This Court, also points out Mr. Das, came to a clear conclusion (as recorded in its decision rendered in Criminal Appeal No.25/2010) that even on the ground of his sickness, the appellant was, in the facts and attending circumstances of the present case, not entitled to be granted bail.

14. With the conclusions, so reached, further points out Mr. Das, learned Standing Counsel, NIA, the appeal of the NIA was allowed by this Court and the order passed by the learned Special Court, granting bail to the appellant on the ground of his sickness, was set aside.

15. In the circumstances, as indicated above, Mr. Das contends that the present appellant, while making his application for bail, in the learned Special Court, did not bring any such fact to show that there was any change in the circumstance nor did he place any fresh facts entitling him to be released on bail. In such a situation, according to Mr. Das, making of the application for bail, in the learned Special Court, by the present appellant, was contrary to,

and in violation of, the observations made, and the directions given, by the Supreme Court in its order, dated 25.08.2011, aforementioned, passed in SLP (Crl.) No.5063/2010, inasmuch as the Supreme Court had given the present appellant the liberty to
21
apply for bail provided '*there are any change in the circumstances or any fresh facts are placed before the Court'* and, hence, neither the application for bail, which the appellant had made, in the learned Special Court, was maintainable nor is the present appeal maintainable inasmuch as the rejection of the appellant's prayer for bail by the learned Special Court is, in the absence of any change in the circumstances and in the complete absence of any fresh facts having been brought on record, wholly consistent with law and the directions, given in the Special Leave Petition, on 25.08.2011, by the Supreme Court. This Court may not, therefore, interfere in the present appeal with the learned Special Court's order rejecting the present appellant's prayer for bail. So submits Mr. Das.

16. Repeated applications for bail, submits Mr. Das, have, otherwise also, been discouraged by the Supreme Court and, though the doctrine of *res judicata* does not apply to bail applications, the person, moving bail application, if his applications for bail were already rejected, must show new grounds, or change in the circumstances or must point out some new facts having emerged or come on record, which, according to him, entitles him (i.e., the applicant) to apply afresh for bail. Reliance, in support of these submissions, is placed by Mr. Das on the decision, in **State of T.N. –vs- S.A. Raja,** reported in **(2005) 8 SCC 380,** wherein the Supreme Court observed as under:

"Where a learned Single Judge of the same court had denied bail to the respondent for certain reasons and that order was unsuccessfully challenged before the appellate forum, without there being any major change of circumstances, another fresh application should not have been dealt with within a short span of time unless there were valid grounds giving rise to a tenable
22
case for bail. Of course, ***the principles of res judicata are not applicable to bail applications, but the repeated filing of the bail applications without there being any change of circumstances would lead to bad precedents****."*

(Emphasis is added)

17. In the case at hand, submits Mr. Das, there is no change in the circumstances and since not only the learned Special Court, but even this Court and, thereafter, the Supreme Court have not found it fit to allow the appellant, Redaul Hussain Khan, to go on bail in the face of the facts of the case at hand and the law relevant thereto, the appellant, logically speaking, cannot seek bail, once again,

without any change in the circumstances and without any new material having come on record or without any new material having been brought on record as has been directed by the Supreme Court, in its order, dated 25.08.2011, passed in the Special Leave Petition.

18. To put it a little differently, what Mr. Das contends is that since the learned Special Court's earlier order, rejecting bail, in NIA Case No. 1/2009, has been upheld by this Court in appeal, the order of the learned Special Court stands, by operation of law, *subsumed* into the appellate order, passed, in the appellant's earlier appeal, by this Court, by virtue of the doctrine of merger, and, hence, it logically follows that unless there is any change in the circumstances, or some new facts are placed on record, the bail application, in NIA Case No. 1/2009, wherein *charge-sheet* stand submitted, on 17.11.2009, was not sustainable; but, so far as the appeal, arising out of the rejection of the present appellant's prayer for bail by the learned Special Court, in NIA Case No. 2/2009,

wherein *charge-sheet* was submitted on 18.10.2010, is concerned, the same can be heard and decided on merit.

19. In the present case, particularly, in NIA Case No. 1/2009, clarifies Mr. Das, the appellant, Redaul Hussain Khan, has not been able to show any new ground warranting change in the conclusions of this Court, which it had arrived at, while considering the appellant's earlier appeal, that apart from the fact that the appellant was also not entitled to bail on merit inasmuch as the materials, collected against him by the NIA, gave rise to reasonable ground for believing, in terms of the proviso to Section 43D(5) of the UA(P) Act, that accusations, made against the appellant, were *prima facie* true the appellant was also not entitled to bail on the ground of his alleged ill-health.

20. Reacting to the above submissions made by Mr. Das, learned Standing Counsel, NIA, Mr. D.K. Mishra, learned Senior counsel, for the appellant, Redaul Hussain Khan, submits that in Criminal Appeal No.25/2010, no submission had been made, on behalf of the appellant, as regards the merit of the case, which had been set up against him by the NIA in the *charge-sheet*, and, hence, it is open to the appellant, according to Mr. Mishra, to show, now, before this Court that in the face of the materials collected by the NIA, the appellant ought to be allowed to go on bail. This apart, according to Mr. Mishra, the appellant's case was, according to this Court's decision in Criminal Appeal No.25/2010, fell within the ambit of the proviso to Section 43D(5) of the UA (P) Act, though the proviso to Section 43D(5) was, submits Mr. Mishra, not at all attracted to the facts of the case at hand inasmuch as the offences, which have been

made punishable by Sections 16, 17, 18, 19 and 20 of the UA(P) Act

cannot, in the face of the materials collected by the NIA, be *prima facie* said to have been committed by the appellant. In this regard, Mr. Mishra has taken us through the definition of *terrorist act* as embodied in Section 15 of the UA(P) Act and also contended that so far as the alleged funding, conspiracy, *terrorist acts*, etc, are concerned, the same are not sustainable in the face of the materials on record and the law relevant thereto.

21. Controverting the submissions, made on behalf of the appellant, Mr. Das, learned Standing counsel, NIA, submits that considering the fact that *charge-sheet* had already been submitted, in the learned Special Court, even before the appellant's earlier appeal (Crl. Appeal 25/2010) was considered by this Court and when it had been specifically submitted, on behalf of the NIA, in the said earlier appeal, that there were sufficient incriminating materials against the present appellant, it was open to the appellant to repel the submissions, which had been so made, in the earlier appeal, by the NIA, but the appellant remained wholly silent and did nothing, in this regard, indicating thereby that the appellant had nothing to show to establish or convince this Court that the materials on record, collected against the accused-appellant, did not fall within the ambit of the proviso to Section 43D(5) of the UA(P) Act and the accused-appellant was, consequently, entitled to bail on merit.

22. It is, therefore, according to Mr. Das, not open to the appellant, now, to contend, in this appeal, that no case has been made out against him, which attracts the proviso to Section 43D(5) of the

UA(P) Act, particularly, when the Supreme Court, while dismissing the appellant's Special Leave Petition, has, in no uncertain words, made it clear that it (Hon'ble Supreme Court) was not interfering with this Court's order disallowing the appellant's earlier appeal setting aside the appellant's bail, granted by the Special Court, particularly, when this Court had dealt with the merit of the appellant's case to determine if the proviso to Section 43D(5) was or was not attracted and, having come to the conclusion that in the facts and attending circumstances of the present case, the proviso to Section 43D(5) stood attracted, this Court held that the appellant was not, on merit, entitled to bail and, then, this Court considered if, notwithstanding the fact that the appellant was not entitled to bail, on merit, whether he could be given the benefit of his alleged illness in terms of the 1st proviso to Section 437 CrPC and this Court came to the conclusion that even an accused, whose case fell within the ambit of Section 43D(5) of the UA(Petitioner) Act, can be given the benefit of the 1st proviso to Section 437 Cr.PC, but so far as the present accused-appellant was concerned, he could not have been given, in the facts and attending circumstances of the case, the benefit of 1st proviso to Section 437 Cr.PC and the conclusions, so

reached by this Court, have not been interfered with by the Supreme Court in its order, dated 25.08.2011, passed in SLP (Crl.) No.5063/2010, whereby the present appellant's Special Leave Petition has been dismissed on withdrawal by the present appellant.

26

REVISITING THE FINDINGS IN CRIMINAL APPEAL NO. 25/2010 IN THE CONTEXT OF RIVAL SUBMISSIONS MADE ON BEHALF OF THE PARTIES CONCERNED

23. While dealing with the rival submissions noted above, it is our duty to point out that in Criminal Appeal No.25/2010, which was decided by this Court, on 28.05.2010, it was specifically submitted, on behalf of the NIA, that in the light of the materials, which had been unearthed, during investigation, against accused Redaul Hussain Khan, he was involved in arranging funds for terrorist activities and when his acts posed threats to sovereignty, security and integrity of India, the learned Special Court committed serious error in allowing the accused to go on bail. In fact, it was pointed out by Mr. Das, in Criminal Appeal 25/2010, that learned Special Court had not considered at all the incriminating materials, which had surfaced against the accused Redaul Hussain Khan, and allowed him to go on bail entirely basing the grant of bail on the ground of poor state of health of the accused-respondent (i.e., the appellant herein).

24. Coupled with the above, Mr. Das, learned Standing Counsel, NIA, while dealing with the above aspect of the appellant's alleged ill health, clearly submitted, in Criminal Appeal 25/2010, to the effect, *inter alia*, that the nature of sickness of the appellant was not so serious, which warranted his release on bail, particularly, when the materials on record clearly showed that the appellant was involved in threatening his staff and others and thereby helped in collecting funds for terrorist activities and, hence, the release of accused Redaul Hussain Khan, on bail, in a case of this nature, was against

27

the interest of further investigation and trial inasmuch as accused was capable of tampering with the evidence and intimidating the witnesses from disclosing the truth before the investigating agency and the Court.

25. The relevant submissions, appearing with regard to what have been indicated above, in Criminal Appeal No.25/2010, are, for the sake of brevity, reproduced below:

"11. Appearing on behalf of the appellant, Mr. DK Das, learned Senior counsel, has submitted that ***in the light of the materials, which had been unearthed during investigation against accused-respondent Redaul Hussain Khan, particularly, when he was involved in arranging funds for terrorist activities and when his acts posed***

threats to sovereignty, security and integrity of India, the learned Special Court committed serious error in allowing the accused-respondent to go on bail. In fact, points out Mr. Das, learned Special Court did not consider at all the incriminating materials, which have had surfaced against the accused-respondent, and allowed him to go on bail entirely basing the grant of bail on the ground of poor state of health of the accused-respondent.

12. Mr. Das further points out that though the State had come forward to escort Redaul Hussain Khan for appropriate medical examination and treatment to All India Institute of Medical Sciences, New Delhi, (in short, 'AIMS'), the learned Special Court, without assigning any reason whatsoever, did not accede to this request of the NIA and got the accused examined at the Guwahati Medical College and Hospital. According to Mr. Das, since the accused-respondent had already been under treatment at Guwahati Medical College and Hospital, the investigation agency wanted the accused-respondent to be examined by a neutral medical institute, such as, AIMS, so that chance of any kind of manipulation of medical opinion could be reduced. Mr. Das has pointed out that even on the face of the medical report,

it cannot be said that the accused-respondent's sickness was so grave that he could not have been provided with requisite medical treatment, while being kept in judicial custody. What the accused-respondent suffers from, submits Mr. Das, is nothing unusual and the nature of his sickness is not so serious, which would have warranted his release on bail, particularly, when the materials on record clearly show that Redaul Hussain Khan was involved in threatening his staff and others and thereby helped in collection of fund for the terrorist activities. Release of the accused-respondent on bail, in a case of present nature, is against the interest of further investigation and trial inasmuch as accused is capable of tampering with the evidence and intimidating the witnesses from disclosing the truth before the investigating agency and the Court. In these circumstances, particularly, when the medical report, which the learned Special Court has relied upon, does not give any opinion, far less any definite indication, that supervised medical treatment, as suggested by the doctors, was not possible to be given to the accused-respondent, Redaul Hussain Khan, while keeping him in custody, the order making the interim directions for bail, passed in favour of the accused-respondent, absolute was wholly illegal and may, therefore, be interfered with."

(Emphasis added)

26. We may, now, pause here to point out that with regard to the

submissions, which had been made, on behalf of the NIA, in Criminal Appeal No.25/2010, as regard the incriminating materials, which had been unearthed against the present accused-appellant, whose bail was sought to get cancelled by the NIA, in Criminal Appeal No.25/2010, no submission had been made, on behalf of the present appellant, to show that there was no material attracting the
29
offences, which had allegedly been committed by the present appellant.

27. In fact, the present appellant, who was respondent in Criminal Appeal No.25/2010, did not utter a word and did not dispute that in the light of the materials, which had been collected and submitted by the NIA in their *charge-sheet,* a *prima facie* case had been made out against him, which attracted the proviso to Section 43D(5) of the UA(P) Act disentitling thereby the present appellant from being granted bail on merit.

28. In order to make the above position clearer, the submissions, made on behalf of the present appellant in Criminal Appeal No.25/2010, wherein he was respondent, are also reproduced below:

"*13. Controverting the submissions, made on behalf of the appellant, Mr. DK Mishra, learned Senior counsel, submits that the first proviso to Section 437 Cr.PC. empowers the Special Court to grant bail to an accused on the ground of sickness and in the facts and attending circumstances of the present case, the learned Court below was wholly justified in allowing the accused-respondent to go on bail, particularly, when his condition of health is such that it would threaten his very survival if adequate medical treatment is not provided to him. The accused-respondent, in the present case, according to Mr. Mishra, requires proper homely atmosphere for improvement and survival. Nothing has been brought on record, points out Mr. Mishra, to show that the doctors of the GMCH are not neutral and the opinion given by them is a manipulated one. In the absence of any such material, the submissions, which have been made on behalf of the NIA, may not be given any credit. So contends Mr. Mishra.*

14. It is contended by Mr. DK Mishra, learned Senior counsel, that in the case at hand, apart from the fact that the accusedrespondent has been allowed to go on bail on the ground of his
30
sickness, there is no allegation that the accused-respondent has, as a matter of fact, interfered with, or attempted to interfere with, the investigation of the case and/or he has, in any manner, misused the liberty of bail. In such circumstances, contends Mr. Mishra, the impugned order, granting bail, is not, according to Mr. Mishra, interfereable in appeal.

15. Resisting this appeal, Mr. Mishra, learned Senior counsel, has also submitted that since charge-sheet has already been submitted, the accused-respondent, Redaul Hussain Khan, being a resident of Assam, he has his roots in the local society and there is no chance of his absconding, he could have, therefore, been allowed and he has been rightly allowed by the learned Special Court to go on bail. Mr. Mishra further submits that the accused-respondent, Redaul Hussain Khan, is prepared to abide by any condition or conditions as may be imposed by this Court. This appeal, contends Mr. Mishra, is wholly misconceived and not sustainable in facts and law."

29. From the submissions, which had been made in Criminal Appeal No.25/2010, on behalf of the present appellant, and which we have reproduced above, it becomes more than abundantly clear that in Criminal Appeal No.25/2010, it was never contended, on behalf of the present appellant, that the materials, collected against him by the NIA, did not make out any case bringing his case within the ambit of the proviso to Section 43D(5) of the UA(P) Act, though it was specifically contended, in the said appeal, on behalf of the NIA, that there were sufficient incriminating materials against the appellant, which had surfaced from the investigation, but had not been taken into account by the learned Special Court.

30. The appellant, in his earlier appeal (i.e., Criminal Appeal No.25/2010), had taken recourse to the '*first*' proviso to Section 437 31 Cr.PC., which is an '*exception*' to the general power of granting or not granting of bail inasmuch as the '*first*' proviso to Section 437 Cr.PC. makes it clear that even where sufficient materials exist against a person, accused of commission of an offence, disentitling him, ordinarily, to be released on bail, he can still be released on bail if he is *sick* or *infirm*. It is this *exception*, which the accusedappellant, Redaul Hussain Khan, had sought to take recourse to and he had, indeed, received benefit thereof inasmuch as the learned Special Court had, in fact, allowed him the benefit of the first proviso to Section 437 Cr.PC, because the learned Special Court, having rejected the appellant's earlier application for bail on the ground of incriminating materials having emerged from the investigation, allowed, nevertheless, the present appellant to go on bail on the ground of his sickness and the order, so passed, allowing him to go on bail on the ground of his sickness came to be challenged, in the form of appeal, by the NIA in Criminal Appeal No.25/2010.

31. Thus, this Court had no option, but to determine, in Criminal Appeal 25/2010, if there were sufficient incriminating materials attracting application of the proviso to Section 43D(5) of the UA(P) Act and whether the Court, therefore, stood debarred from allowing, on merit, the present appellant to go on bail.

32. In other words, had the present accused-appellant been entitled to bail on merit, there was no question of cancelling his bail. It had *per force* become the duty of this Court to examine the question of application of the proviso to Section 43D (5) for the purpose of determining if release of the present appellant, on bail, stood statutorily barred. This was, therefore, specifically raised, in
32
the last appeal filed by the NIA, if the '*first*' proviso to Section 437 Cr.PC. would apply even to a case, which is, otherwise, covered by the proviso to Section 43D(5) of the UA(P) Act.

33. Having, therefore, discussed the incriminating materials, which had been collected against the accused-appellant and having satisfied itself that there were ample materials disentitling the present appellant to go on bail, because the appellant's case fell within the ambit of the proviso to Section 43D(5), this Court examined, in Criminal Appeal 25/2010, if a person, whose case fell within the ambit of the proviso to Section 43D(5), was, nevertheless, entitled to the benefit of the '*first*' proviso to Section 437 Cr.PC and, in this regard, this Court concluded, in Criminal Appeal No.25/2010, that the '*first*' proviso to Section 437 Cr.PC was available even to a person, whose case is, otherwise, covered by the proviso to Section 43D(5).

34. To put it a little differently, taking note of the rival submissions, made on behalf of the parties, this Court, first, satisfied itself if the appellant's case fell within the ambit of the proviso to Section 43D(5) and, having found that his case did fall within the four corners of the proviso to Section 43D(5), this Court undertook the exercise to determine if, on the ground of the nature of sickness and the offer of treatment, which had been made by the State, the appellant, [who was respondent in Criminal Appeal No.25/2010 and whose case was, otherwise, covered by the proviso to Section 43D(5)], could have been allowed to go on bail by the learned Special Court and this Court came to a clear finding that the present appellant, in the face of the nature of sickness of the
33
appellant and in the light of the offer of treatment, given by the State, ought not to have been allowed to go on bail, when his case was, otherwise, covered by the proviso to Section 43D(5).

35. Consequently, the appeal, which had been preferred by the NIA, was allowed and the order, granting bail to the present appellant, on the ground of his sickness, was set aside. The relevant observations, appearing, in this regard, in Criminal Appeal No.25/2010, are reproduced below:

71. A microscopic reading of the 1st proviso to Section 437 shows that this proviso creates an exception to Clause (i) as well as Clause (ii) of Section 437(1). There is no reason as to why the

1st proviso be not held to be creating an exception even in respect of a case, which is covered by the legally created fiction of Clause (iii). If the proviso to Section 437(1) can be treated to create an exception to the proviso to Sub-Section (5) of Section 43D, it would fall within the ambit of the power of the Special Court to allow an accused to be released on bail on the ground of his sickness even though the proviso to Sub-Section (5) of Section 43D imposes restrictions on such release as indicated hereinbefore.

72. We need to bear in mind that Article 21 guarantees that no person shall be deprived of his life or personal liberty except in accordance with the procedure established by law. Personal liberty of a person being one of the basic rights, any restriction or fetter, on such liberty, has to be strictly construed. The law, therefore, which deprives a person of his personal liberty, has to be interpreted in such a manner, which make such law fair, just and reasonable.

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78. A careful reading of the scheme of the provisions contained in Section 437 clearly bring out the fact that the Legislature, having taken away the power of a Court, other than the High Court and the Court of Sessions, to grant bail in the cases, which are covered by Clauses (i) and (ii) of Section 437(1),
34
has allowed even an accused, who is, otherwise, covered by restrictions contained in Clauses (i) and (ii), to be released on bail on the ground, amongst others, of sickness. This shows that the legislature wants to ensure that when the restrictions, imposed on the liberty of an accused, are pitted against his right not to be deprived of his life (except as may be provided by law), such restrictions do not drive a person to death or cause such damage
to his well being that he suffers irreparably. After all, the entire aim of investigation and trial is to bring a guilty to book. If the person, who faces the accusation of being guilty, is not, ultimately, brought to trial due to the fact that he does not survive or survives in such a shape and condition that he cannot be tried at all, the whole purpose of having a lively scheme of investigation and trial would stand defeated.

79. There is, therefore, no manner of doubt, in our mind, that notwithstanding the limitations, which have been imposed by the proviso to Section 43D(5), it would still remain open for a Special Court, under the NIA Act, to release an accused on bail, on the ground of sickness, by taking resort to the powers conferred on it by the first proviso to Section 437(1) Cr.P.C. However, while considering release of a person on bail on the

ground of sickness, the materials, appearing against him, would be relevant inasmuch as the Court may, in a given case, allow an accused to remain on bail even if his sickness is not of the degree, which would threaten his life provided that the Court is assured of the availability of the accused for further investigation or trial coupled with the reasonable assurance that the accused would, if granted bail, not abuse his liberty. When, however, in the cases of serious nature, there is likelihood of the accused fleeing away from justice or there is reasonable possibility of the accused intimidating witnesses, threatening them and thereby adversely affecting the investigation or trial, the Court would have to be cautious in releasing the accused on bail on the ground of sickness unless the Court forms the view that it is impossible for the accused to receive requisite medical
35
treatment, while remaining in custody. The ground of sickness can mandatorily become a ground for releasing an accused on bail, where the choice is really between protecting the investigation or trial, on the one hand, to advance the course of justice and protecting the life of the accused, on the other, even where there remains a reasonable element of apprehension that the accused might not remain available for further investigation or trial and similar such other considerations.
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82. There is nothing, in the language of Section 43D(5), to show that the proviso thereto supersedes the 1st proviso to Section 437(1); rather, the proviso to Section 43D(5) imposes a limitation in addition to the limitations, which Clauses (i) and (ii) of Section 437 (1) impose on the Court's power to release an accused on bail. Thus, the proviso to Section 43D(5) is an additional restriction on the Court's power to grant bail. This limitation, being of the same nature and extent as the limitations imposed by Clauses (i) and (ii) of Section 437(1) Cr.PC, do not affect, and keep intact, the 1st proviso to Section 437(1) enabling thereby the Special Court to allow an accused to go on bail on the ground of sickness."
(Emphasis is added)
36. To make what we have pointed out above explicit, we reproduce, hereinbelow, our relevant observations, made in the appellant's earlier appeal:
"135. Thus, the case diary contains sufficient materials for forming, at this stage and until shown otherwise, an opinion that there are grounds for believing that the accusations, made against the accused-respondent herein, of his involvement in 'unlawful activities' and 'terrorist acts', as defined under the UA(P) Act, 1967, are prima facie true. This apart, the

respondent herein is also shown to be involved, as a public servant, in acts of manipulation and fabrication of papers,
36
documents and records, such as, bills, receipts, etc. and with the help of such manipulated and fabricated papers, documents and records, etc., committed dishonest misappropriation of Government fund purportedly making payment to suppliers against supply of materials, though no such materials were ever supplied. Thus, there are cogent incriminating materials against Redaul Hussain Khan giving rise to a reasonable belief, at this stage, that he has committed an offence, which is punishable, under Section 409 IPC, by even imprisonment for life. He could not have, therefore, been granted bail by the learned Special Court under Section 437(1) Cr.PC inasmuch as a person, against whom materials exist giving rise to a reasonable belief that he has committed an offence punishable by imprisonment for life, cannot be held, unless his case falls within the proviso to Section 437(1) Cr.PC. The fact that charge-sheet has been submitted against the accused-respondent herein does not automatically entitle him to be allowed to go on bail, particularly, when the charge-sheet has been submitted before the expiry of the statutory period as is applicable to the case at hand. In the present case, as already indicated above, the accused-respondent has already been furnished the copies of the materials, which the prosecution relies upon, and, hence, his bail application has to be, obviously, considered in the light of the powers and limitations of the Special Court.
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138. In the case at hand, there is nothing placed before this Court to show that the accusations, made against the accused, are inherently improbable nor can the accusations be said to be intrinsically unbelievable. In such circumstances, the materials on record, so long as they remain what they are, speak that the accusations are prima facie true. We have already pointed out above that the prosecution case is based on the theory of criminal conspiracy. In the case at hand, there are serious incriminating materials showing, at this stage and, until the contrary is shown, that the accused-respondent was a part of the criminal conspiracy, whereunder the terrorist acts, attributed
37
to the accused-respondent and his co-accused, have been committed, though these acts might have been committed at different places and at different points of time by different persons.
139. ***In short, thus, in the face of the incriminating materials, as indicated above, the respondent was not***

entitled to bail under the proviso to Section 43(D)(5). In fact, the learned Special Court, in the impugned order, has made it clear that the bail has been granted not because of the fact that there was no material against the respondent herein, but on the grounds of his sickness and also for the reason that the co-accused had been granted bail, the accused had remained in custody for a long time and that his liberty, on bail, was necessary not only for his treatment, but also for preparing his defence. When there was reasonable ground to believe that the accused had indulged in commission of offences, under Chapter IV and VI of the UA(P) Act, 1967, and other offences, including one under Section 409 IPC, which is punishable with imprisonment for life, the respondent could not have been released on bail unless his case called for invoking the Special Court's power under the 1st proviso to Section 437(1).

140. The State had pointed out, while objecting to the grant of bail, that the report, dated 16.01.2010, of the doctor of orthopedic and medicine shows that the accused was being treated as an outdoor patient. In his petition, dated 18.01.2010, the accused prayed for making the bail absolute on the ground that the accused require specialised treatment. ***Reacting to his submissions, the State pointed out that the accused may be sent to AIIMS for thorough examination by a neutral Board and definite opinion may be obtained about the seriousness of the respondent's illness along with the opinion whether his treatment is possible by producing him (the accused-respondent) from jail****.*

38

141. ***What the learned Court did by its order, dated 25.01.2010, was to direct the Superintendent, GMCH, to constitute a Board of 'concerning doctors' to examine the accused thoroughly and to report. When the State had sought for examination of the accused by a Board consisting of doctors, who had not examined and treated him in the past, the Court ought to have assigned some reasons as to why it had not acceded to the request of the State and decided that the Board shall consist of those doctors, who are concerned with the treatment of the accused and who had already been examining and treating the accused****. There was no harm if the Court had obtained the opinion of the doctors, from AIIMS, as to what really the state of health of the accused was and whether treatment of the accused was possible, while keeping him in custody, specially when the NIA authority promised to escort*

respondent R H Khan to AIMS for appropriate medical examination.

142. The proviso to Section 43D(5) does not permit release of an accused on bail if the case is found to be prima facie true. The order, dated 29.01.2010, whereby interim order was made absolute, shows, if read carefully, that the learned Court below treated as if the accused-respondent had all along been an indoor patient of the hospital, though it was not true inasmuch as the accused, as revealed from the materials on record, was discharged from the hospital on 26-12-2009, he was to appear in the Special Court on 08-01-2010, he remained in his house till 06-01-2010, he was re-admitted, as an indoor patient, in the said hospital, on 07-01-2010 and did not or could not, therefore, appear, in the Special Court, on 08-01-2010.

143. The findings of the medical Board read:

"The medical report of the Medical Board constituted with Dr. AK Mahanta, Professor and HOD of Orthopedics, Dr. AK Adhikary,
39
Professor and HOD of Medicine and Dr. BD Goswami, HOD of Gastroenterology, was submitted by the said hospital. Supdt through his office memo dtd MCH/82/87/Pt.III/83 dtd 27.01.2010 which states as under:

Mr. RH Khan, 35 years Male HOSP NO.320510/09, Regd. No.INR MPC4/2010 was admitted in Gauhati Medical College Hospital on 7.1.2010 under the Department of Medicine. He is an old treated patient of the Department of Medicine who was admitted in GMCH from 07.12.09 to 26.12.09 for analgesics (NSAID) induced gastro intestinal bleeding.

On 07.01.2010 Mr. Khan was seen by orthopedics consultant. Clinically patient had low back pain and rediculopathy of L2 L3 roots. Radiological investigations including MRI revealed degenerated lumber and cervical spine impingement. He was kept under medical and supervised physiotherapy.

Mr. Khan is undergoing active physiotherapy namely Short wave Diathermy, intermittent traction and exercises with required medication in the GMCH. During the course of treatment he complained of pain abdomen and subsequent investigations revealed bulky pancreas on USG and raised Amylase and Lipase on blood examination.

Under the circumstances, ***the Board is of the opinion that supervised medical management for the patient should continue****."*

144. ***A careful reading of the findings of the Board and its opinion clearly show that the accused had not been suffering from such ailments that it was not possible for***

him to receive treatment, while being kept in custody. In fact, even if the Board had opined that the case of the accused-respondent required 'supervised medical management', it did not mean that the accused must be allowed to go on bail and/or that his treatment was not possible, while remaining in custody. In fact, in the circumstances of the present case, it cannot be said that the accused could not have been treated properly, while being kept detained in custody. Even by keeping the accused in the hospital, as an indoor patient, but in
40
custody of the police, 'supervised medical treatment' could have been made available to him and the apprehensions of the NIA that the accused was likely to misuse his liberty could have been taken care of.
145. The learned Special Court has observed, "The consideration of the bail prayer on the merits of the case whatsoever against RH Khan apart, his bail prayer is being considered only the ground of his said health and it appears that he is sick. The ground of sickness is beyond the purview of the restrictions imposed by Section 437 CrPC, 1973, or by Section 43(D)(5)(6) of the UA(P)Act, 1967, in so far as the consideration of a bail prayer thereunder is concerned. There is nothing at this stage to find that the said sickness of RH Khan is otherwise than a genuine one. Although improving due to treatment, RH Khan is reportedly requires treatment at home with periodical checkup."
146. ***In fact, the learned Court below had observed, even in its interim order, dated 25.01.2010, that despite the fact that merit of the case warranted that the accused be not released on bail, he was being allowed to go on bail solely on the ground of his health. Was this permissible? In a case of serious nature, the accused could not have been allowed to go on bail on the ground of his ill-health unless there was a finding reached by the learned Court below that keeping him in custody, it was not possible for the accused to have adequate medical treatment***.
147. The learned Special Court has dealt with the respondent's bail application in a manner as if no other factor will govern release of an accused on bail if he is found to have been suffering from sickness. A woman can be released on bail, under the 1st proviso to Section 437(1), even when there are reasonable grounds for believing that she is guilty of an offence
41
punishable with death or imprisonment for life. This does not mean that every woman, who is accused of an offence under

Section 302 IPC, must be released on bail. The 1st proviso to Section 437(1) has to be read, construed and treated as an exception to the limitations imposed by Clauses (i) and (ii) of Section 437(1). The Legislative will, thus, clearly is that when a person — man or woman — applies for bail and a Magistrate is of the view that there appear reasonable grounds for believing that the accused is guilty of an offence punishable with death or imprisonment for life, such a person shall not be released on bail except in the circumstances, which are provided in the 1st proviso to Section 437(1). This proviso, being an exception to the general rule, cannot be used in a routine manner and must be invoked only in befitting cases. Neither, therefore, on the ground that an accused is sick or on the ground that the accused is woman, the accused would be released on bail in a routine manner and unless the Court is satisfied that the state of health of the accused so warrants and/or that the female accused person's release on bail is needed in the interest of justice. In either case, however, the Court must also be satisfied that his or her release would not adversely affect investigation and trial. If an accused has to be released on bail on the ground of sickness, the Court must be satisfied, in such a case, that the treatment of the accused would not be possible if he is kept confined in custody. Unless such a finding is reached, it is difficult to perceive as to how, in a present case of serious nature, the accused-respondent could be allowed to go on bail.

148. It needs to be noted that the prime concern of a Court shall be that the accused, if granted bail, would be available for interrogation during investigation and trial if the case ends in charge-sheet. Further indispensable condition is that the Court must have reasonable assurance that the accused would not temper with the evidence or hamper investigation by intimidating, coercing or inducing persons, acquainted with the facts of a given case, from disclosing truth to the investigating

agency and/or to the Court. If the release of an accused on medical ground is likely to have an adverse affect on investigation, the accused cannot be released on the ground of his ill-health unless the Court also takes the view that treatment of the accused is impossible if he is kept in detention. In the absence of such a categorical finding having been reached and when the materials on record show that the accused is likely to interfere with the investigation and/or is likely not to be available for trial or investigation, his release on bail cannot be acceded to.

149. While considering the above aspect of the case, it needs noticing that in the present case, the NIA had also sought for

rejection of bail of the respondent herein on the ground that release of the accused would jeopardize the case inasmuch as there is possibility of accused-respondent harassing the witnesses and adversely affecting thereby the investigation. The learned Court below, however, assigned no reason as to why the factors, which the State had so indicated, were not germane for consideration of bail.

150. The accused, as the impugned order, dated 29.01.2010, shows, was released from hospital on 26.12.2009 and he got readmitted in the hospital on 07.01.2010, when he was to appear, in Court, on 08.01.2010. Though the learned trial Court has noted that it was submitted, on behalf of the accused, that he needs homely atmosphere and free mental set up in order to medically improve, no such opinion had been expressed by the doctors in their report. ***There is absolutely no iota of material to show that keeping of the accused-respondent, in custody, was posing threat to his life or his well-being****.*

151. Though it had been submitted, on behalf of NIA, that the accused would influence the witnesses, the Court expressed no opinion at all as to the correctness of these statements. This

apart, the materials, in the case diary, reveal, until shown otherwise, that the accused-respondent had, by posing threats to the lives of the members of his staff, forced them to prepare and pass bills and make payments against supplies, which were never received. In such circumstances, the capacity of the accused, to influence the witnesses by posing threat to them, is substantial and ought not to be ignored. Without commenting on the question as to whether the accused-respondent, if granted bail, would or would not influence the witnesses, the learned Court below granted bail to the accused-respondent. In fact, the Court's finding is as under:

"In order to know about his latest health status and to pass necessary order thereon leading to the consideration of the bail prayer on the contest, the report of a Medical Board was called for and accordingly the same had reached this Court as reproduced hereinearlier in these orders.

Although the seriousness of the said diseases could not be properly understood by barely going through the medical terminologies contained in the report, it has been understood therefrom that RH Khan being an in-patient at the GMCH has been undergoing necessary treatment due to his said maladies and the related complicacies and he will require continued 'supervised medical management' with the said recent complicacies arisen as to his pancreas and the blood*.*

Considering the above medical aspects in particular and the facts including that of the release of the said two co-accused at the early stage of the case and that of the duration of RH Khan's detention since 30.05.09, in general, it is deemed fit and justified that he should get homely and congenial atmosphere for his early recovery as well as for preparing his defence consulting with his lawyer(s) freely with a view to fairly facing the case against him since there appears no likelihood of his abscondance under the stated circumstances and it would not be a just judicial approach to allow a sick accused in him to be detained for indefinite period, when appearance itself of the accused in the case with one Niranjan Hojai yet to appear, is not complete, on the plea that RH Khan's release might jeopardize the trial of the case."

152. ***The observations made above clearly indicate that the learned Court below could not determine the seriousness of the diseases, which, according to the medical report, the accused-respondent had been suffered from. Without determining the seriousness of the disease***

or the degree of sickness, the question of granting bail on the ground of sickness, in a case of present nature, could not have logically arisen, particularly, when the 'supervised medical treatment' did not mean, and could not have been stretched to mean, 'supervised medical treatment' outside jail and/or outside hospital and/or within the precincts of the house of the accused*.*

153. The learned Court below has also taken into consideration the fact that two accused had released on bail, on 30.05.2009, at the early stage of the investigation. It appears to have escaped attention of the learned Court below that one of the accused, who had been released, had already absconded. This apart, when the clear provisions of Section 43D(5) of the UA(P) Act, 1967, do not permit the Court to allow an accused to go on bail, the fact that a co-accused had been released on bail could not have been made a ground for release of the present accused too. Discrimination must arise out of a valid consideration inasmuch as the co-accused had been released, when the case had not been registered under the NIA Act and the investigation had not been taken over by the NIA; whereas the present respondent's bail application was considered after the NIA had already taken over the investigation and had collected sufficient materials against the accused-respondent involving him in the offences as alleged to have been committed by him.

154. ***We are unable to appreciate the fact that though the State had offered to get the accused-respondent examined***

by a board of doctors, at AIMS, in order to consider the possibility of his treatment, while keeping him in custody, and when the State had expressed its apprehension with regard to the fairness of the medical examination, at GMCH, by contending that the accusedrespondent be examined by a neutral board of doctors, who had not treated him earlier, the learned Special Court did not accept the submissions so made. Why the submissions, so made, were not accepted by the learned
45
Special Court is neither mentioned in the order, dated 25.01.2010, whereby the learned Court below had constituted the Medical Board, nor is there anything discernible, in this regard, from the materials on record to show as to why these apprehensions of the State, in a case of such serious nature, as the one at hand, had not been accepted.
155. When a Court is not assured that an accused would be available for further investigation or trial or that he will not interfere with the investigation by tampering with evidence or by intimidating or inducing the witnesses acquainted with the facts of the case, he cannot be allowed to go on bail; more so, when the statute disempowers a Court from releasing an accused on bail by laying down that where there are reasonable ground for believing that the accused has committed offence(s) under Chapter IV and/or VI of the UA(P) Act, 1967, he shall not be released on bail.
156. ***Even on the ground of sickness, such an accused cannot be released on bail if the Court does not take the view that while remaining under detention, he cannot have adequate medical treatment or that his condition is so serious that his detention in custody, in itself, would threaten his life****. This apart, before the accused is released on the ground of sickness, the Court must be satisfied and must ensure that the liberty of the accused would not adversely affect investigation and that the accused would not abscond. If there are reasonable materials, collected during the investigation, to show that the accused, in all likelihood, would abscond or would interfere with investigation or trial, he cannot be released on the ground that he is sick unless the Court takes the view that he cannot be provided with adequate treatment if he is kept in custody or unless the Court forms the view that the very act of keeping the accused in custody would endanger his life.*
When the State (as in the present case) offers to provide all such treatment, which an accused needs, by keeping
46

him in custody, in order to ensure that the accused does not interfere with the investigation, the Court cannot allow the accused to go on bail on the ground of his sickness unless the Court takes the view that while remaining in custody, the accused cannot be provided with required treatment*.*

157. ***In the case at hand too, when the NIA had offered the accused-respondent, Redaul Hussain Khan, to be examined and treated at AIIMS or in any other medical centre or hospital by keeping him in custody and when the NIA had also brought sufficient materials on record to show that the accused had earlier threatened and/or intimidated witnesses to process false bills to collect money and when there are materials, in the case diary, showing that the accused had indulged in collection of money, which has been used by terrorist outfits in their subversive activities including purchase of arms and ammunitions, he could not have been allowed to go on bail on the mere ground that he (the accused) is sick, particularly, when the medical report, as rightly contended the NIA, did not give any categorical opinion, far less any definite indication, that his treatment was not possible if he were to be kept in custody. The medical opinion, which the learned Court below has relied upon, goes only to the extent that the accused needs 'supervised medical treatment'. Supervised medical treatment does not imply that such treatment can only be made available outside the custody of the Court.***

158. ***Because of what have been discussed, as a whole, above, we are of the considered view that in the facts and circumstances of the present case, we must interfere with the impugned order, whereby the appellant's prayer for bail has been granted. This appeal is, therefore, allowed. The impugned order is set aside****, the respondent's bail is*

hereby cancelled, his surety shall stand discharged and he is directed to surrender, within 2 (two) days from today, into the custody of the learned Special Court, Assam, Guwahati. On being taken into custody, the appellant-respondent, Redaul Hussain Khan, shall be medically examined and he shall be provided with such medical treatment as he may need.

159. Before parting with this appeal, we make it clear that whatever views and opinions we have expressed with regard to the facts discernible from the relevant case diary and the records are tentative in nature and these are meant for the purpose of deciding whether the respondent, at this stage,

deserves to remain on bail or not. Our views and opinions shall not be taken as final views and opinions of this Court as regards the guilt or otherwise of the accused-respondent."
(Emphasis is added)

37. Based on the above conclusions, this Court had allowed the NIA's appeal and cancelled, as already pointed out above, the present appellant's bail by setting aside the order of bail granted by the Special Court on the ground of the state of ill-health of the present appellant and, though, aggrieved by cancellation of his bail by this Court, the appellant carried the matter to the Supreme Court by way of a Special Leave Petition, he, as already mentioned above, got his Special Leave Petition dismissed by withdrawing the same with liberty to apply afresh for bail provided that '*there are any change in the circumstances or if any fresh facts are placed on record*'.

38. In the light of what have been reproduced above from the decision, in **Redaul Hussain Khan** (supra), it becomes clear, if we may reiterate, that having examined, in the light of the submissions made by the NIA and not controverted on behalf of the appellant,
48
whether the appellant was, on merit, entitled to bail and having come to the conclusion that the appellant was, on merit, not entitled to bail, this Court did not stop, but proceeded further and examined if the appellant could, by taking resort to the '*exception*' as has been provided by the '*first*' proviso to Section 437 Cr.PC., have been allowed to go on bail and, on this aspect of the case, this Court concluded that even on the ground of his sickness, the appellant was not, in the context of the facts and attending circumstances, entitled to be released on bail. It is, therefore, not correct to submit, on behalf of the appellant, now, that in the earlier appeal, there was no occasion for the appellant to make submissions on the merit of the appeal.

SCOPE AND EXTENT OF JURISDICTION OF HIGH COURT IN AN APPEAL UNDER SECTION 21 (4) OF NIA ACT

39. At this stage, there is, in the light of the submissions, which have been made on behalf of the NIA, need to point out the effect of an order passed by a High Court in exercise of its appellate jurisdiction under Section 21 of the NIA Act. This exercise is of paramount importance if we have to realistically appreciate as to what the Supreme Court meant in its order, dated 25.08.2011, passed, in SLP(Crl.) No.5063/2010, when it granted liberty to the present appellant to apply afresh for bail *'in the event there are any changes in circumstances or any fresh facts are placed before the Court'.* Since the Supreme Court, while declining to interfere with the High Court's order cancelling the bail of the appellant, gave him (the appellant) liberty subject to the condition that '*there are any*

changes in circumstances or any fresh facts are placed before the
49
Court, it is imperative to have a clear understanding of the nature and effect of the orders, passed by a High Court in exercise of its appellate jurisdiction under Section 21(4) of the NIA Act**.**

40. Admittedly, Section 21(4) of the NIA Act provides that an order of the Special Court, granting or refusing bail, is an appeallable order. The NIA Act, it must be very clearly understood, has not vested, in the High Court, the power to grant bail as a Court of first instance. The question of granting or refusing bail would, in the High Court, arise, in such a case, only when an appeal is brought to the High Court against an order passed by the Special Court refusing or granting bail. At the same time, if one examines the power of the High Court under Section 439 Cr.PC., an accused can, (though not ordinarily), approach the High Court seeking bail, under Section 439 Cr.PC., without even moving the trial Court for bail. An appeal, if provided by a statute, is a continuation of a proceeding to a higher forum. The provisions for appeal do not imply conferring of independent jurisdiction on the High Court; rather, the appellate power confers jurisdiction on the High Court to examine legality, correctness or propriety of the order, which may be challenged, but the ambit of the power remains co-extensive with the power of the trial Court and, in the present case, the Special Court constituted under Section 21(4) of the NIA Act.

41. Thus, the difference in jurisdiction between a trial Court and appellate Court lies in the power of the later to sit, as an appellate Court, over the judgment and order, as the case may be, of the trial Court. In so far as the law applicable to the subject-matter is concerned, there is no distinction between the trial Court and an
50
appellate Court. For instance, if a trial Court holds an accused person's case covered by the proviso to Section 43D(5) and this finding is upheld by the High Court as the appellate Court, the appellate Court cannot hold that notwithstanding the fact that the finding of the trial Court is correct, it would still allow the accused to go on bail. This apart, when an order is passed by the appellate Court agreeing or disagreeing with the order of the trial Court, the trial Court's order is subsumed by the appellate Court's order by virtue of the doctrine of merger. Explaining the doctrine of merger, though in the context of a writ appeal, this Court observed, in the case of **State of Arunachal Pradesh Vs. NEFA Udyog,** reported in **2005(1)GLR 497,** as under:

" 22. What emerges from the law laid down in Kunhayammed (Supra) is that ***where an appeal is provided against an order passed by a Court and the appeal is preferred, then, the decision of the lower Court forum merges into the***

decision of the appellate Court and it is the latter's decision, which subsists, remains operative and is capable of enforcement in the eyes of law*. The position of the special leave applications made under Article 136 is, somewhat, different. The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. , The first stage is up to the disposal of the prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and the special leave petition is converted into an appeal. The doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of the doctrine of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of*
51
the Constitution, the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against only when it exercises appellate jurisdiction (i. e. after the leave to appeal is granted) and not while it exercises the discretionary jurisdiction on the question as to whether the petition for special leave to appeal shall be granted or not. The doctrine of merger, therefore, in such cases, comes into play if the special leave to appeal is granted and not when the question as to whether the leave would be granted or not is considered and decided. An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case, it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. What such an order implies is that the Supreme Court was not inclined to exercise its discretion so as to allow the appeal being filed. If the order refusing leave to appeal is a speaking order, i. e. when reasons are assigned for refusing the grant of leave, then, the order has two implications. Firstly, the statement of law contained in such an order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law. whatever is stated in the order are the findings recorded by the Supreme Court, which would bind the parties thereto and also the Court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country; but is does not mean that the order of the Court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting special leave petition or that the order of the supreme Court is the only order binding

as res judicata in subsequent proceedings between the parties. Once leave to appeal has been granted and the appellate jurisdiction of supreme Court has been invoked, the order passed in appeal would attract the doctrine of merger. On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before the Supreme Court, the jurisdiction of High Court to entertain a
52
review petition is lost thereafter as provided by sub-rule (1) of Rule (1) of Order 47 of the C. P. C."
(Emphasis is added)

42. In the light of the observations, made in **NEFA Udyog** (supra), when one considers the liberty, which has been granted by the Supreme Court to the present appellant to apply afresh for bail to the trial Court '*in the event there are any changes in circumstances or any fresh facts are placed before the Court',* it becomes abundantly clear that having earlier refused to interfere with the order passed by the High Court, when the Supreme Court permitted the present appellant to apply for bail afresh '*in the event there are any changes in circumstances or any fresh facts are placed before the Court',* it did not mean that the appellant would be entitled to re-open the case for bail ; rather, the appellant as well as the trial Court, would still remain bound by the order passed by the High Court as the appellate Court, under Section 21 of the NIA Act, unless there is any change in the circumstance or any fresh fact becomes available on record.

43. Thus, the liberty granted by the Supreme Court to the appellant to *'apply to the trial Court afresh for granting bail'* would mean that the refusal to interfere with the High Court's order, in the Special Leave Petition, would not prohibit the appellant from seeking bail from the learned Special Court provided that the appellant can show change in the circumstances since after the appellant's earlier appeal was dismissed or any fresh facts are placed on record.

44. Unlike rejection of appeal, under Section 437 CrPC, which is not an appealable order, the bail, granted or refused by a Special Court under the NIA Act, is an appealable order. In an appeal, the
53
power of the appellate Court is co-extensive with the power of the trial Court meaning thereby that the High Court, as the appellate Court, has no greater power than the trial Court (i.e., the Special Court) and, if the order of the trial Court is affirmed by the appellate Court, the order of the trial Court merges into the order of the appellate Court and it is the appellate Court's order, which remains in force. Consequently, so long as the facts, settled in the appellate Court's order, remain undisturbed and intact, the trial Court cannot change or vary its order unless there is any change in the

circumstances or any new facts come on record.

45. When, therefore, this Court, in its earlier appellate order, clearly concluded that there were reasonable grounds to believe that the accusations against the accused-appellant were *prima facie true* attracting the proviso to Section 43D(5) of the UA(P) Act, this conclusion could not have been disturbed by the learned Special Court unless fresh facts emerged or change, in the circumstances, as observed by the Supreme Court, in its order, dated 25.08.2011, aforementioned, could have been shown to have taken place.

46. In the present case, as the appellant showed nothing, in the learned Special Court, indicating *any change in the circumstances* since after dismissal of his appeal, i.e., Criminal Appeal No.25/2010, by this Court nor could the appellant place *any fresh facts* on record, the learned Special Court was wholly justified in declining to allow the accused-appellant to go on bail by its order, which stands, now, impugned in the present appeal**.**

47. Since the Supreme Court has observed and held, '*We also make it clear that we are not interfering with the order of the High*

Court', even this Court cannot disturb its finding unless it finds any change in the circumstance or any fresh facts are placed on record and unless, therefore, the appellant can, now, show any change in the circumstances since after the dismissal of his appeal by this Court and/or place fresh facts on record warranting a re-hearing on the complete merit of the case against the appellant, it would not be appropriate for us to sustain the appellant's contention that there is no merit in the case against the present appellant, which the NIA has projected in their charge-sheet. In fact, adopting such a course of action by this Court, now, would run counter to the judicial discipline and go contrary to what the Supreme Court's order, dated 25.08.2011, passed, in SLP(Crl.) No.5063/2010, demands.

ARGUMENTS

48. Though our observations, made above, are sufficient to dismiss the appeal, we may point out that Mr. D.K. Mishra, learned Senior counsel, appearing on behalf of the appellant, has submitted to the effect that the alleged *terrorist acts*, which were committed by DHD(J), with whom the appellant is alleged to be closely associated with, relate to a period before 31.12.2008, and, hence, for such acts, the amendments, which were introduced under the UA(P) Act, with effect from 31.12.2008, cannot be applied. Resultantly, therefore, if what Mr. Mishra contends is correct, even the proviso to Section 43D(5) of the UA(P) Act would not be applicable to the facts of the present case inasmuch as the proviso to Section 43D(5) has been introduced with effect from 31.12.2008. This apart, points out Mr. Mishra, no *terrorist act* is specifically alleged to have been committed by DHD(J), with or without association of the present appellant,

before or after 31.12.2008 and, hence, Section 16, which punishes a *terrorist act*, would be inapplicable to the facts of the present case.

49. Turning to Section 17, which punishes raising of fund for *terrorist act*, Mr. Mishra, learned Senior counsel, submits that a person, in order to fall within the ambit of Section 17, must be shown to have known as to what *terrorist act* he was funding or else, Section 17 would not be attracted. Mr. Mishra, therefore, contends that without knowing as to what *terrorist act* was going to be committed by the fund, which a person provides or intends to provide, Section 17, which stands amended, on 31.12.2008, would not be attracted.

50. As regards Section 18, Mr. Mishra submits that that even Section 18, which punishes *conspiracy*, etc, of a *terrorist act*, requires proof of the fact that the *terrorist act*, sought to be committed, was known to the person, who is prosecuted under Section 18; whereas, in the case at hand, there is nothing, in the materials collected by the NIA, to show that the appellant knew as to what *terrorist act* was to be committed by the DHD(J). Hence, neither Section 17 nor Section 18 of the UA(P) Act is, according to Mr. Mishra, attracted to the facts of the present case.

51. Repelling the submissions, which have been made on behalf of the appellant, Mr. Rawal, learned Additional Solicitor General, has pointed out that the appellant, as a public servant, was bound to protect the interest of the Government; whereas the materials, collected against him, clearly show that he was hand in glove with DHD(J) long before Chapter-IV was amended and the definition of *terrorist act* was expanded and that the appellant, even after the

amendments made in the UA(P) Act, which came into force on 31.12.2008, continued to remain working for DHD(J) by various means, especially, by channelising and misappropriating Government funds by resorting to intimidation of Government employees and these aspects of the matter have already been discussed by this Court in the appellant's earlier appeal, which the Apex Court has refused to interfere with by its order, dated 25.08.2011, passed in SLP(Crl) No.5063/2010.

52. In view of the arguments, so made, it becomes necessary for this Court to analyse various provisions of the UA (P) Act, in order to ascertain whether the case of the appellant, on a *prima facie* basis, can be said to be covered by Chapter IV and/or Chapter VI of the UA (P) Act. If, on an analysis, it is found that the penal provisions, contained in Chapter IV or Chapter VI, are not attracted to the present case, the rigours of Section 43D(5) of the UA(P) Act cannot obviously be applied to the present appeal.

53. What, now, needs to be pointed out is that with the repeal of

Prevention of Terrorist Activities Act, 2002, the UA (P) Act was amended in the year 2004 and terms like ***terrorist acts, terrorist gangs*** and ***terrorist organizations***, were added. Since the UA (P) Act, 1967, has undergone two amendments, once in the year 2004 and the other in the year 2008, it becomes necessary to point out, precisely, as to what were the changes brought, in the UA (P) Act, by the two amending Acts, namely, 2004 and 2008, which may hereinafter referred to as 'the Act of 2004' and 'the Act of 2008' respectively.

57

54. In the UA (P) Act, as it stood prior to the year 2004, there were only three chapters. After the introduction of amendments in the year 2004, the following new chapters were added;

CHAPTER IV—SECTION 15-23-PUNISHMENT FOR TERRORIST ACTIVITIES CHAPTER V- SECTION 24-34- FORFEITURE OF PROCEEDS OF TERRORISM

CHAPTER VI—SECTION 35-40- TERRORIST ORGANISATIONS

CHAPTER VII-– 41-53- MISCELLANEOUS

NATURE OF OFFENCES CONCEIVED AND PENALITIES PROVIDED-POST 2004 AND ALSO 2008-AN ANALYSIS

55. Among the most notable changes, introduced by the Act of 2004, are the definition of terms like ***terrorist acts, terrorist gangs*** and ***terrorist organizations.***

56. Before entering into the discussions, as to what were the changes introduced by the amendments made, in the year 2008, in the UA(P) Act *vis-à-vis* the amendments, which had been introduced in the UA(P) Act, in the year 2004, it may be pointed out here that the amendments, brought in the year 2004, were substantially retained, in the year 2008, with modifications in some provisions, which had been introduced in the year 2004. The numbers of Chapters, even after the 2008 amendments, remain the same.

57. The prominent changes, in the amendments of 2008 *vis-à-vis* the amendments, which had been made in the year 2004, are, as indicated above, relevant in the present case and may, now, be dealt with.

a. CHANGES IN THE SCOPE OF DEFINITION FOR TERRORIST ACT

58

58. Section 15 of the Act of the UA(P) Act, 2004, read as follows:

"15. Terrorist act*.-Whoever,* ***with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any Section of the people in India or in any foreign country, does any act by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals***

or by any other substances (whether biological or otherwise) of a hazardous nature, in such a manner as to cause, or likely to cause, death of, or injuries to any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community in India *or in any foreign country or causes damage or destruction of any property or equipment 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* ***detains any person and threatens to kill or injure such person in order to compel the Government in India or the Government of a foreign country or any other person to do or abstain from doing any act, commits a terrorist act."***

(Emphasis is added)

59. The emphasis of Section 15, in the Act of 2004, was not only on the unity, integrity, security or sovereignty of India in general, but also on the people or any section of people, be it in India or in a foreign country. Any act, therefore, done, with an intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people in India or in any foreign country, was termed as *terrorist act* if in order to materialize such intent, a person used bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal

weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature.

60. The articles, such as, bomb, firearm, etc, mentioned above, ought to have been used in such a manner, which **caused, or was likely to cause,** death, or injuries to any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community in India or in any foreign country or caused damage or destruction of any property or equipment 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.

61. Apart from the above activities, Section 15 further, as stood under the Act of 2004, provided that if, with an intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people, in India or in any foreign country, a person **detains any person and threatens to kill or injure *'such'* person in order to compel the Government in India or the Government of a foreign country or any other person to do or abstain from doing any act, he is said to have committed a**

terrorist act.

62. In the light of the definition of *terrorist act,* as embodied in Section 15 of the Act of 2004, when the act of an individual is examined and found to be covered by the definition so given, then, the act of such an individual would remain a *terrorist act* and such an act would be punishable by Section 16 of the UA(P) Act as the same stood amended in the year 2004.

60

63. In the present case, therefore, if the materials, collected during investigation, would justify, at this stage, a *prima facie* inference that the offence of *terrorist act,* as defined by Section 15 of the UA(P) Act, 2004, had been committed, then, the person or persons concerned would be punishable under Section 16 of the UA(P) Act, as amended in the year 2004. Once it is found that an individual has committed a *terrorist act*, any person, who is found to have had entered into a *conspiracy* or had *raised fund* to strengthen the *terrorist act*ivities, would render himself punishable under Sections 17 and 18 of the Act of 2004, as the case may be.

64. Coming to the Act of 2008, as stands amended with effect from 31.12.2008, one needs to note that the definition of *terrorist act,* under the Act of 2008, has been expanded, with effect from 31.12.2008, by further amending Section 15 and even the act of funding, etc., under the Act of 2008, have been made more expansive inasmuch as those acts, which would not have fallen within the definition of *terrorist act*, have, now, been made *terrorist act* and, similarly, the act of funding or collecting, which would not have fallen within the ambit of Section 17, would, now, become punishable under Section 17, because of the expansion of the scope of Section 17 and so have been done with regard to conspiracy, etc., of *terrorist act,* which are punishable by Section 18.

65. Section 15 of the UA(P) Act, with amendments in the year 2008, reads as under:

"15. Terrorist act. – Whoever does any act with intent to threaten or likely to threaten the unity, integrity, security or sovereignty of India or with intent to strike terror or likely to strike terror in

61

the people of any section of the people in India or any foreign country, -

(a) *** ***

(b) *** ***

(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* ***any other person*** *to do or abstain from doing any act, commits a terrorist act.*

Explanation: -For the purpose of this Section, public functionary

means the constitutional authorities and any other functionary notified in the Official Gazette by the Central Government as a public functionary."

66. The expressions, '***any other act'*** or '***any other person***', which clause (c), now, uses, makes it clear that if one detains, kidnaps or abducts any person and threatens to kill or injure such a 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 '***any other person***' to do or abstain from doing any act, and thereby threatens the sovereignty of India or strike terror in the people or any section of the people in India, commits a ***terrorist act.***

67. Thus, it will be seen that as compared to the Act of 2004, some more activities have been added to Section 15, under the Act of 2008, to bring those activities within the ambit of *terrorist act,* which would have, otherwise, fallen outside the scope of the definition of *terrorist act* as stood defined by Section 15 of the Act of 2004, and the definition of *terrorist act* has been made so expansive that if a person or *association* of persons does any act with a view to compelling not only the **Government of India** or any **State**

Government or **Government of a foreign country**, or **any other person** to do or abstain from doing any act would be treated to have committed a ***terrorist act*** if such an act is done with intent to threaten or likely to threaten the unity, integrity, 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 of India or any foreign country.

68. It may be pointed out, at this stage, that even though the definition of *terrorist act* has been expanded, under the Act of 2008, the punishment provided therefor, under Section 16, remains the same.

b. CHANGES IN THE OFFENCE RELATING TO FUNDING OF TERRORIST ACT

69. Section 17 of the Act of 2004 provided as follows:

"17. Punishment for raising fund for terrorist act.-Whoever raises fund for the purpose of committing 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."

70. A casual reading of Section 17 of the Act of 2004 gives an impression that the dominant expression *whoever raises fund for the purpose of committing a terrorist act* conveys an idea as if the person, who raises the fund, also commits the *terrorist act*. However, a minute reading, along with the other provisions of the Act of 2004, conveys a different meaning. The expression '*whoever raises fund for the purpose of committing a terrorist act'* makes the act of raising of

fund, for the purpose of *terrorist act*, an offence in itself. The
63
emphasis is more on the act of raising fund rather than the person, who raises the fund. The offence has been purposely created to prevent the raising of funds intended to be used for *terrorist acts;* otherwise there was no necessity to create a distinct offence for raising of funds for *terrorist acts* if the funds are meant to be raised by the terrorist himself, because there already existed a penal provision for committing *terrorist act* as had been defined under Section 15 of the UA (P) Act, 2004. Thus, Section 17 of UA (P) Act, 2004, created an offence for those persons, who were found to be involved in the act of raising fund intended to be used for *terrorist act*.

71. Section 17 of the UA(P) Act, now, after undergoing amendment in the year 2008, reads as under:

"*17. Punishment for raising funds for terrorist act.*

Whoever, in India or in a foreign country, directly or indirectly, raises or collects funds or provides funds to any person or persons or attempts to provide funds to any person or persons, knowing that such funds are likely to be used by such person or persons 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."

72. As would be noticed from a mere reading of Section 17 of the Act of 2008, the amendments have been made in order to plug the probable gaps in Section 17, which existed in the Act of 2004. Section 17 of the Act of 2008, now, attempts to address all possible persons, who may be involved in the funding of *terrorist act* by
64
adding the acts of those, who *collect* and *provide* funds, apart from those, who '*raise'* the funds. It also removes the doubt as to the place where the fund is '*raised*', '*collected'* and/or '*provided'* inasmuch as the place, according to Section 17, may be India or a foreign country**.**

73. The penal provisions of Section 17, after the UA(P) Act, 2008, also renders even an attempt to '*provide*' funds a punishable offence. This apart, since direct evidence of *conspiracy* and *intention* may not, ordinarily, be available, the prosecution's burden has been lessened by emphasizing on the term *knowledge*.

74. Thus, a person, who *raises*, *collects* or *provides* funds to an individual having *knowledge* of the fact that those individuals are involved, in *terrorist acts*, would come under the net of Section 17 of the UA(P) Act, as stands amended in the year 2008, irrespective of the fact as to whether he knows or does not know as to what exact

terrorist act was planned to have been committed inasmuch as Section 17 makes even such a person liable, who, knowing that the fund, which he *raises, collects* or *provides*, is likely to be used by a person to commit *terrorist act.* This criminal liability is imposed on him irrespective of the fact as to whether the fund is actually used or not for commission of the *terrorist act.* This clearly shows that the person, who *raises, collects* or *provides* fund, need not necessarily know as to what *terrorist act* is planned to be committed.

75. What follows from the above discussion is that Mr. Mishra's contention that in order to make a person liable under Section 17 of the UA (P) Act, he must know as to what *terrorist act* would be

65

committed by the fund, which he raises, provides or collects, is not in tune with the provisions as stand embodied in Section 17 and cannot, therefore, be accepted.

c. CHANGES IN THE OFFENCE RELATING TO CONSPIRACY ETC. TO COMMIT TERRORIST ACT

76. Under the Act of 2004, Section 18 read as under

"18. Punishment for conspiracy, etc*.-Whoever conspires or attempts to commit, or advocates, abets, advises or incites 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."*

77. A reading of Section 18 of the Act of 2004 makes it clear that not only conspiracy to commit *terrorist act* is made punishable, but attempting, advocating, abetting, advising, inciting the commission of a *terrorist act* is also made punishable. It also goes further by adding the term **knowledge**. Thus, it is not necessary that the person intends to aid a *terrorist act*; it would be sufficient proof for imposing penalty, under Section 18, if the prosecution is able to prove that accused person had the **knowledge** that his acts or omissions would facilitate the commission of a *terrorist act*.

78. Now, Section 18, as it stood in the Act of 2004, has been modified, by the UA(P) Act, 2008, by substituting, in place of the words "*incites or knowingly facilitates*", the words "*incites, directs or knowingly facilitates*". This becomes clear, when we read Section 18 as stands amended in the UA (P) Act, 2008. Section 18 is, therefore, reproduced below:

"*18. Punishment for conspiracy*, etc.-*Whoever conspires or attempts to commit, or advocates, abets, advises or incites,*

66

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."

79. A bare reading of Section 18 shows that though punishment under Section 18 remains unchanged, Section 18 makes not only the person, who conspires or attempts to commit or advocates, abates, advises commission of a *terrorist act* or of any act preparatory to the commission of the *terrorist act*, but also when the person concerned incites, directs or knowingly facilitates commission of a *terrorist act* or any act, preparatory to the commission of *terrorist act*, meaning thereby that the person would fall within the ambit of Section 18 if he directs an act, which would facilitate not only commission of a *terrorist act* but also an act which is preparatory to the commission of a *terrorist act.* Thus, the scope of the nature of conspiracy has been widened by including those persons who *direct* an act which may be otherwise irrelevant but is remotely connected to either a terrorist act or an act which is preparatory to the commission of terrorist.

80. So far as Chapter VI, a new addition to the UA (P) Act, 1967, by the Act of 2004, is concerned, no changes have been brought by the Act of 2008. Hence, the comparative analysis between the Act of 2004, and the Act of 2008, with respect to Chapter VI, is not necessary.

67

d. TERRORIST ORGANISATION AND TERRORIST GANGS

81. Going further with the UA (P) Act, as the same stands today, a careful reading of Sections 15 to 23 would reveal that these offences have not been conceived of, primarily, keeping in mind any *terrorist organization* or *an unlawful association*. The basic thrust is on the individual act, which is so dangerous that it challenges the sovereignty and integrity of India or strikes terror in the people or any section of people in India or any foreign country.

82. Let us take, for instance, the case of Ajmal Kasab. If the allegations, made against Ajmal Kasab, were true, then, his acts of indiscriminate firing on innocent civilians and security forces, the acts of causing explosions in busy civilian areas were acts, which were intended to strike terror in the minds of people and pose a threat to the security of India. Now, in a prosecution for these acts, as *terrorist acts* within the meaning of Section 15 of the UA(P) Act, (as amended), it is not necessary for the prosecution to prove that Ajmal is a member of any '*unlawful association*' or that Ajmal is associated with any *terrorist organization*. The charge, under Section 15 of the UA(P) Act, can be said to be proved if the ingredients of Section 15 are proved against him.

83. It would, therefore, be fallacious to argue that a ***terrorist act*** can be said to be committed only by a ***terrorist organization*** or an ***unlawful association***. If it were to be so, then, there would have

been no necessity to incorporate Chapter IV pertaining to ***terrorist acts***. An individual act, however organized, would not amount to an
68
offence by an *organization*, because Chapter VI specifically deals with acts committed by *terrorist organizations*.

84. ***Terrorist organization***, it may be noted, is akin to an ***unlawful association***. Going by the definition of *terrorist organization*, defined by Section 2(m) of the UA(P) Act (as the same stands today), it becomes clear that a *terrorist organization* would mean an *organization* mentioned in the Schedule to the UA (P) Act or an *organization* operating under the same name as an *organization* so listed. Committing *terrorist act* is one of the acts attributed to such an *organization*. Apart from committing *terrorist act*, preparations for terrorism, or promoting or encouraging terrorism, or otherwise involvement in terrorism, are some other features of a *terrorist organization*. An *organization*, however, dreadful, cannot be termed as a *terrorist organization* unless it has been added, as such, in the Schedule to the UA(P) Act.

85. Thus, if an *organization* has been added in the Schedule to the UA(P) Act, it can be termed as a ***terrorist organization*** and penal consequence would ensue from the very membership of such an *organization* unless, of course, the *organization*'s name, after a statutory review, under Sections 36 and 37 of the UA(P) Act, is denotified.

86. It, therefore, follows that for branding a person as a *terrorist*, his membership of a *terrorist organization* is not *sine qua non*. It is sufficient even if it is shown that his activities are within the scope of a *terrorist act* as stood defined by Section 15 in the year 2004 or as stands defined in the year 2008.
69

87. It equally needs a mention here that in view of the analysis, done hereinbefore, regarding the scope of *terrorist act*, a person, whose activities are, otherwise, covered by Section 15 of the Act of 2004, would not get reprieve, if he is able to bring his case within the scope of Section 15 of the Act of 2008, as is sought to be done by Mr. Mishra, the reason being that the scope of Section 15 has been merely expanded by the Act of 2008, when compared to the Act of 2004 and not diluted. An act, therefore, which fell **within the definition of *terrorist act,* as given in Section 15 of the UA(P) Act in its amendment in the year 2004, would remain a *terrorist act* even under the definition provided u/s 15 of the Act of 2008 and would be punishable under Section 16 under the Act of 2008.**

88. At this stage, the concept, behind the amendments, can also be gauged by understanding the meaning of ***terrorist gang***. Section 2 (l) defines ***terrorist gang*** to mean any *association*, **other than**

terrorist organization, whether *systematic* or otherwise, which is concerned with, or involved in, *terrorist act*. What Section 2(l) provides is that any *organization*, other than *terrorist organization*, which is connected with, or involved in, *terrorist act*, in a *systematic* manner or otherwise, would be regarded as ***terrorist gang***.

89. The intent behind introducing such a definition for ***terrorist gang***, on a bare reading, is, perhaps, to stop those technical pleas, which may be raised with respect to previous formal declaration as is required under Section 3 of the UA (P) Act or under Section 35 of the UA (P) Act, be it the amendments made in the year 2004 or amendments made in the year 2008, for offences relating to an

70

unlawful assembly or a *terrorist organization*. The terms like ***any association***, ***other than terrorist organisation***, in Section 2 (l), convey a meaning that even though there exists an *association* of individuals and even though such an *association* is not a *terrorist organization*, mentioned in the Schedule to the UA (P) Act, such an *association* may nevertheless be treated as ***terrorist gang*** if the *association* is concerned with, or involved in, *terrorist act* irrespective of the fact whether the *association* is *systematic* in its functioning or *otherwise*. When we speak of an '*organization*', the term conveys a unit of people, *systematic*ally structured and managed, to meet a need or to pursue collective goals on a continuing basis. *Organization*s have a management structure that determines relationship between functions and positions and an *organization*, therefore, includes roles, responsibilities and authorities assigned to carry out defined tasks. It is for this particular reason that the UA (P) Act, as amended in 2004 and retained in 2008, provides that the power to declare an *organization* as a *terrorist organization* is vested only in the Central Government and it can be done after conducting an exercise into the activities of an *organization*.

90. The term, *systematic or otherwise*, has been deliberately used in Section 2 (l) in order to ensure that even when the structure of an *association* is organized or *systematic*, it would not be permitted to take a plea that since the *association* is *systematic*, it is, in fact, an *organization* and since such an *organization*, having not been mentioned in the Schedule to the UA (P) Act, a membership of such an *organization* cannot amount to an offence punishable under Section 20 of the UA (P) Act, for, **we have pointed out that**

71

***systematic* or *otherwise*, so long as an *association* is concerned with, or involved in, *terrorist act*, it would be a *terrorist gang* within the meaning of Section 2(l)**. A situation may arise, where evidence is found regarding a *conspiracy*, among several persons, to commit *terrorist act* and such a *conspiracy* is not entered into for an isolated event, but for a long period of time. In such circumstances,

if such an *association* or a group of individuals is not a scheduled *terrorist organization*, it would become difficult to prosecute the members of such an *association*. No wonder, therefore, that the concept of *terrorist gang* has been introduced by Section 2(l) as a broad based definition **so as to make membership of even a *terrorist gang* punishable under Section 20 of the UA(P) Act**.

91. Thus, the legislature appears to have deliberately diluted the form and type of *association* and has concentrated more on the ultimate object of the *association*, i.e., an *association*, which is *concerned* with, or *involved* in, *terrorist act.* Section 20 of the UA (P) Act, as amended in the year 2004 and retained in the Act of 2008, provides punishment for being a member of such a *terrorist gang*.

92. It would not be out of place to mention here that the term '*member',* when used in the context of an individual, in a group, conveys several meaning like, comrade, confederate, constituent, cooperator, co-partner, team-mate, etc. When the term '*member'* is used with reference to a criminal gang, it would mean that the individual forms part of a combination, alliance, network, conspiracy or understanding, amongst certain individuals, with an established hierarchy, which engages itself in a course or pattern of criminal activity.

72

93. On the basis of above discussions, it can be held that for holding a person a *terrorist* or to hold a person a member of *terrorist gang*, there is no requirement of any formal declaration either under Section 3 or under Section 35 of the UA(P) Act. A declaration, under Section 3 or under Section 35 of the UA(P) Act, as it stands today, is necessary only for *terrorist organizations* and *unlawful associations*.

94. Though it was only by the Gazette notification, dated 09.07.2009, issued by the Government of India, Ministry of Home Affairs, in exercise of its powers under Section 3 of the Unlawful Activities (Prevention) Act, 1967, DHD(J), along with its factions, wings and front *organization*s, came to be declared as '*unlawful organization*' but such a declaration conveys only one meaning that if, after the declaration, any person continues to be a member of such *association*, he would attract penal provisions under Section 10 of the UA(P) Act. Such a declaration cannot be the basis of an argument that since the acts of an accused person were committed at a time, when DHD (J) was not an *unlawful association*, he cannot be prosecuted under the UA(P) Act. If the materials on record justify that an accused person had committed any *terrorist act* or he had raised, provided or collected *funds* for *terrorist gangs* or that he was a member of a *terrorist gang*, he can still be prosecuted for the offences under Sections 16, 17 and 20 of the UA(P) Act respectively.

95. It may be noted that when we speak of a *terrorist gang*,

commission of a particular *terrorist act* does not appear to be *sine qua non* as the definition speaks. One of the terms, which Section 2 (l) uses, is '*any association', which is concerned with, or involved in,*
73
terrorist act. Thus, proof that the *association* concerns itself with a *terrorist act* is sufficient to pin down the members thereof.

96. The term '*concern*', used in the definition of *terrorist gang*, in the context of the scheme of the UA (P) Act, means harbouring an intention and making preparation to commit *terrorist act*. It does not appear that *terrorist act* should, in fact, be committed in order to award punishment for being a member of the *association* or else, the very scheme of the UA (P) Act, for averting *terrorist act*s by *terrorist gang* would stand defeated.

97. Hence, it is only an examination of materials, pertaining to the period prior to 31-12-08, collected during investigation, which would reveal whether DHD (J) was involved in *terrorist act* and whether it can be termed as a *terrorist gang* or not.

e. EFFECT OF AMENDMENTS

98. One of the important questions raised by Mr. Mishra is whether for the acts, committed by DHD (J), the changes brought by the Act of 2008 can be made applicable. An answer to this question will also decide whether the proviso to Section 43 D (5) can be invoked for the acts committed prior to 31-12-2008, the date when the Act of 2008 came into force.

99. So far as the change in law is concerned, Section 6 of the General Clauses Act provides as follows:

"6. Effect of repeal. — Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not —
74
(b) affect the previous operation of any enactment so repealed or anything duly done or ***suffered thereunder****; or*
(c) affect any right, privilege, obligation or ***liability acquired****, accrued or* ***incurred*** *under any enactment so repealed; or*
(d) ***affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed***; or
(***e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid***;
and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

100. Section 6 of the General Clauses Act clearly provides that if,

before the repeal of a law, the acts alleged constituted an offence, neither an investigation nor a trial would be termed as bad in law. Mr. Mishra has not fortified his arguments with any precedent or any other law, which could show that materials, collected before 31-12-08, cannot be acted upon even if they constituted an offence under the UA (P) Act as stood amended in the year 2004.

101. Hence, if the discussions of materials, collected during investigation, make out a case that the DHD (J) was a *terrorist gang* and was also involved in *terrorist act*ivities prior to 31-12-08 and the appellant played a pivotal role in such activities, the arguments, made on behalf of the appellant, would fail.

102. Having answered some of legal aspects of the arguments advanced by Mr. Mishra, it would be, now, proper to ascertain, from

the materials collected during investigation, about the activities of DHD (J), prior to 31-12-2008 and post 31-12-2008, and the role of the appellant in such activities. A re-visit to the Criminal Appeal No. 25/2010 is, therefore, necessitated.

GENERAL OBSERVATION ON THE MATERIALS GATHERED DURING INVESTIGATION

103. So far as the activities of DHD (J) are concerned, some of the alleged facts, recorded in Criminal Appeal No. 25/2010, based on materials, as set out in the *charge-sheet*, are as follows:

"17.2 Pranab Nunisa, who rose to become the Commander-in-Chief of DHD, and the head of the outfit's armed wing, the Dima National Army, took over the command of DHD by ousting its President accused Jewel Garlosa on charges of anti-DHD activity. DHD, headed by Nunisa, forged a cease-fire with the Government in the year 2003 and surrendered. Jewel Garlosa, however, had gone ahead and formed a separate outfit on ***31 March, 2003****, which, according to him, was the official DHD. Militants belonging to Hmar People's Convention Democrats (HPCD) abducted 23 Dimasa tribal men from two villages within Sonai Police Station lim itsin Cachar district after torching about 450 dwellings on 31 March 2003 and later killed all of them. Among those killed, 17 men had families and these 17 widows called themselves Black Widows and vouched to take revenge on the Hmars.* ***DHD (Jewel Garlosa) faction also adopted the name Black Widows and stepped up their acts of violence and terror mainly in Cachar, N.C. Hills and Nagaon districts of Assam. It has also a strong presence in the Dimasa dominated Dhansiri area of Karbi Anglong district****.*

17.3 DHD(J) is also reported to have linkages with the National Socialist Council of Nagaland - Isac- Muivah (NSCM - IM) and the National Democratic Front of Bodoland (NDFB), two of the

most dreaded militant groups currently active in the North-East.

17.4 ***The main activity of the DHD (J) after 2006 was to siphon off Government funds through extortion and with the help of elected members of the Council, Contractors and Government servants in order to finance their subversive activities mainly targeted at major infrastructure projects in that area. Two Government projects badly affected by the acts of terror and violence by DHD (J) are the 'East West Corridor Project' and the Broad Gauge Conversion Project between Lumding and Silchar, DHD (J) has also indulged in several attacks on the security forces - notable ones are the ambush on the Central Reserve Police Force (CRPF) personnel in which seven men were killed and the ambush on the Assam police party in which six men lost their lives. In the past two years, DHD (J) have laid three major ambushes on the security forces besides other killings.*** *The violence levels by the group have increased significantly after 2006. It was revealed in investigation that some of the weapons were obtained from DHD (J). Thus it is evident that the DHD(J) has been indulging in terrorist acts within the meaning of Section 15 of the U.A. (P) Act. 1967.*

17.7 It is further revealed that the elections to NCHAC was last held in 2007 and Autonomous State Demand Committee (ASDC) party was elected to power in alliance with the BJP, ASDC and BJP alliance won 21 seats and Independents won 4 seats. ASDC had the tacit support of DHD (J). Shri Dipolal Hojai became the CEM. Dipolal Hojai was not able to fulfill the demands of the DHD(J) regarding supply of funds for procurement of Arms and for carrying out the terror activities which was not liked by the DHD(J) leadership.

17.8 Investigation further disclosed that on 26 November 2008 Niranjan Hojai, A-11 [Com-mander-in Chief of
77
DHD(J) called P.W. Shri Bijoy Sengyung on phone when the latter was at the residence of Shri Dipolal Hojai (the then CEM). Niranjan Hojai A-11 had earlier directed Shri Dipolal Hojai to convene a meeting of all the Executive Members of the Council. Accordingly Shri Dipolal Hojai convened the meeting of the members of the Council at his residence in the evening on 26 November 2008. It was at the meeting that the accused Niranjan Hojai called Executive Member Shri Bijoy Sengyung. Since the speaker phone of Bijoyendra Senguing was not good, he called on

the phone of PW Kulendra Daulagupu and went on the address the Executive Members on the speakerphone (of the mobile-phone of Shri Kulendra Daulagupu). He directed Shri Dipolal Hojai to resign from the position as CEM by the very next day. He nominated Mohit Hojai A-3 to be elected as the new CEM and also threatened Dipolal Hojai "if you don't listen, you will have the same fate as Pumendu Langthasa,". [Suspected DHD(J) militants killed former Chief Executive Member of the North Cachar Hills Autonomous Council, Pumendu Langthasa and former executive member of the Council, Nindu Langthasa at Langlai Hasnu village in the NC Hills district in June 2007]. *Both were candidates of the ruling Congress party for the ensuing Council election. The militant group has been waming and demanding an amount of Rs one crore from the victims for their safety for the elections. A few members of DHD(J) are facing trial in the said case of double - murder.] These directions were complied with without any protest. Shri Dipolal Hojai resigned his position as CEM citing health reasons on 27 November 2008. His resignation was accepted by the Government in the last week of December 2008."*
(Emphasis is added)

104. In order to ascertain whether the highly incriminating materials, as set forth in the *charge-sheet*, have any substance, an occasion also arose, in Criminal Appeal No 25/2010, to go through

78

the statements of the witnesses recorded during investigation. The relevant statements, so recorded, are reproduced hereinbelow for a better understanding of the case made out against the appellant, particularly, because Mr. D.K. Mishra, learned Senior counsel, appearing on behalf of the appellant, has taken us substantially through the materials, which have been collected by the NIA and form part of the *charge-sheet.* These materials read as under:

"113. PW 161, a former DHD(J) activists, states that he had joined DHD (J), in the year 1996, when Jewel Garlosa (A-5) was the Chairman of DHD(J) with Dilip Nunisa as its Vice-Chairman and Pranab Nunisa as its Commander-in-Chief This witness's statement is, in effect, thus: The administrative power of DHD(J) was in the hands of Jewel Garlosa, who used to organize procurement of weapons and training of members of DHD and, for weapons, he used to extort money from businessmen, contractors and Council Members. In 2003, DHD declared ceasefire and though Jewel Garlosa was a signatory to the ceasefire, he did not attend the first meeting of the Joint Monitoring Group, which was held

in March, 2003. Jewel Garlosa was a dominating character and did not listen to any one, he started staying with his own cadre with 10/12 men and fill arms, he did not join the Designated Camp, where the surrenderees were staying. Jewel Garlosa started recruitment of his own men; but when the DHD ceasefire group came to know that Jewel had started a new group, the worker of DHD ceasefire group went to Jewel Garlosa's camp, they found Jewel's group armed. Jewel's group had Rs. 26 lakhs in cash and other items. On coming to know that his secret had been revealed. Jewel ran away; but his cadre had taken training in Manipur with Kuki organization. Returning to Karbi Anglong,

Jewel started operating from the area, where his cadre stayed and that is how DHD(J) was born. Money collection was started and armed action took place. They, first, attacked three Dimasa Auto Drivers of Manipur. In 2005, Jewel did not have much strength; but in the last Council Election, in 2007, they killed two persons, who had gone for canvassing. In fact, on the same day. Jewel's group killed one Ajit Boro, at Kalachand, after taking out his eyes, when he was still alive. By the election time. Jewel had a cadre of 60 persons armed with weapons. After the election. Jewel announced, in the constituency, to vote for ASDC and BJP, and threatened voters not to vote for the Congress. Jewel Garlosa entered into an agreement with Mohit Hojai regarding providing of money after the latter wins election. Mohit Hojai was on ASDC ticket and the Deputy Commandant-in-Chief of Black Widow (Jewel's Group) is the cousin of Mohit Hojai. After election, Dipulal Hojai was made C.E.M and Mohit Hojai was EM along with other EMs. When Jewel's Group asked for money from Dipolal Hojai, Dipolal could not give the desired amount of money. That is why, Dipolal Hojai was removed and Mohit Hojai was made CEM in the year 2009.

114. P.W. Kulendra Daulagupu (whose statement appears at Document No. 168 and who was an Executive Member of the NCHAC from February, 2008, to November, 2009), has stated that in the month of November, 2008, the Executive Members of the NCHAC, who belong to ASDC and their alliance partner, held a tele-conference with Niranjan Hojai, Commander-in-Chief, DHD(J), at the official residence of the then CEM, Dipulal Hojai, which was attended by this witness too. In this conference,

according to this witness, he kept the speaker of his mobile phone on speaker mode so that the other Members could hear what .was being spoken in the conference; and that in this teleconference, Niranjan
80
Hojai asked Dipulal Hojai to resign from the post of the CEM, as he had failed to resolve many of the issues, and he (Niranjan Hojai) also asked those, who were attending the conference, to elect Mohit Hojai as the CEM and, on the following day, Dipulal Hojai resigned showing health problem and Mohit Hojai was elected as the CEM without any opposition. This witness has also given statement to the effect that he had gone, with accused Mohit Hojai, to Kualalampur, where they met Niranjan Hojai and that after Niranjan Hojai had talked to this witness, Mohit Hojai took Niranjan Hojai to his room for talking to Niranjan Hojai separately. This witness's statement shows, apart from everything else, not only a close connection, but also a deep association between Mohit Hojai and Niranjan Hojai (since absconder).
115. P.W. 162 too supports, in substance, the statements made by P.W. 161. Apart from giving history of various armed actions of DHD(J), this witness too has stated that it was Niranjan Hojai, who threatened and made Dipulal Hojai resign and he (Niranjan Hojai) made Mohit Hojai the CEM. Mohit Hojai and R.H. Khan (Liaison Officer of Autonomous Council) helped the DHD(J) by siphoning off the development fimd of the Council and they gave the fimd to the DHD(J), headed by Jewel Garlosa. Many contractors like Babulal Kemprai, Phojendra Hojai and others of Haflong were in collaboration with them. P.W. 162 further states that the DHD(J) group used to procure weapons from international market. With the help of this money, since Niranjan Hojai stays abroad quite frequently, Phojendra Hojai, a contractor, (i.e., the accused, who was on bail, when the N.I.A. had not taken over the case), does the works for Niranjan Hojai. Phojendra Hojai earlier was a labourer; but after aligning with Nuanjan Hojai, he became a wealthy man. One Executive Member, Bijoy, is in direct touch with Niranjan Hojai and during Council's sessions, he puts his mobile number on spoken mode and talks to Niranjan Hojai and he gives directions to the Council Members and gets
81
money transaction through Phojendra Hojai and Babulal Kemprai, the other accused (who was already on bail, when the N.I.A. took over the case). Partha Warisa (i.e. accused Ahsringdao Warisa, Appellant in Criminal Appeal No.

35/2010), is the middle man for all money transactions from companies and contractors and he did all these for Jewel Garlosa. In April, 2009, Rs. 1 Crore was seized by the police (i.e., the seizure, which gave rise to the present case). Before that also, some members were caught, while taking money for Niranjan Hojai for his DHD group. This one crore was also going to Niranjan Hojai with the help of R.H. Khan, who was the Chief Liaison Officer with Mohit Hojai. This witness has clarified that he knows Jewel Garlosa by face and also other persons, namely, Mohit Hojai, R.H. Khan, Phojendra Hojai, Babulal Kemprai, Partho (Ahshringdao) Warisa. This witness has also clarified that when Jewel Garlosa was underground, the others, namely, Mohit Hojai, R.H. Khan, Babulal Kemprai and Phojendra Hojai were often seen together in various functions.

116. Apart from what have been indicated above, we find, on perusal of the relevant case diary and the report, submitted under Section 173 Code of Criminal Procedure, that there are enough materials implicating among others, (i) Niranjan Hojai, Commander-in-Chief, DHD(J), presently an absconder, (ii) Jewel Garlosa, Chairman, DHD(J) and (iii) Mohit Hojai, who headed NCHAC as the CEM. The materials, so collected, and until shown otherwise, reveal, in tune with what the N.I.A. alleges, thus: Dipolal Hojai, the then elected Chief Executive Member (CEM), North Cachar Hills Autonomous Council (NCHAC), resigned from the post of CEM, N.C. Hills, to make way for Mohit Hojai. Dipulal Hojai's statement, recorded, under Section 164 Code of Criminal Procedure, in this regard, is of great importance, which clearly reveals that the DHD(J) was indulging in terrorist acts. In fact, the statement of Kulendra Daulagupu, recorded under Section 164 Code of Criminal Procedure, shows that the members of the NCHAC had a

telephonic conference with Niranjan Hojai, Commander-in-Chief, DHD(J) and in the said conference, Niranjan Hojai asked Dipulal Hojai, the then CEM, NCHAC, to elect Mohit Hojai, as the CEM, because Dipulal Hojai had failed, as CEM, to resolve many issues. Following the direction, so received in the said telephone conference, Dipulal Hojai resigned pretending his resignation to be on health ground and Mohit Hojai got elected as the CEM without any opposition.

117. Coupled with the above, from the confessional statement of the co-accused, Subrata Thaosen alias Paiprang Demasa, recorded under Section 164 of the Code of Criminal Procedure, what transpires is that he joined DHD(J) in June, 2005 and since then, he has been working as the said outfit's Publicity

Secretary having acquired requisite training from the said organisation. According to this accused, he knew that Rs. 1,50,35,000/- had come to the hands of the said organisation by way of tax and, out of tiiis fimd, he sent Rs. 75,00,000/-to some of his associates and, further, as much as Rs. 4.5 crores was obtained by their organisation from a merchant by kidnapping him and keeping him in jungle for about 15 days. The confession of this accused also shows that an amount of Rs. 10,00,000/- was paid to another banned outfit, namely, NSCN(IM), and tiiat a part of the sum has also been spent for providing medicine to the members of their own cadre. According to this accused person's confessional statement, other outfits, who are involved in the acts of terrorism, have given shelter to the members of the DHD (J) and also worked with them. This accused has confessed that Ex-CEM (former Chief Executive Member) in NCHAC, Pumendu Langthasa, and Ex-Executive Member, Ajit Bodo, Dy. Chairman, NCHAC, were among the members, who have been killed by the members of the DHD(J), on the instructions of, amongst others, Niranjan Hojai, Commander-in-Chief of DHD(J). The reason for killing is that in terms of the assurance given, agreed number of seats, in the said Council, had not been given to the over ground associates of the DHD(J). This accused confesses that arms

and ammunitions, which are used by this outfit, are supplied by Lallian Mizo, a smuggler of arms. This accused also described various other incidents of killings, and arson and getting news publisized through television.

118. It has also surfaced from the said confession that the leaders of the NCHAC gave, in terms of their assurance, which they had given before the election of the said Council, rupees two crores. According to his confession, the DHD(J) campaigned, in the election, for its alliance partner, which is a national party, but not for another national political party and restrained voters, by threatening them not to cast votes, in favour of a particular political party, by telling them that they would face dire consequences if they voted for the said political party. The confession of this accused further shows that an understanding was reached before the last election with this outfit and a national political party that if their alliance came to power, Dipulal Hojai must be made the Chief Executive Member (CEM) of the NCHAC. His confession also reveals that the DHD(J) urged the labourers to stop work in a particular cement factory; but the labourers did not listen to them and that is why, there was mass killing of the labourers. The confession shows that DHD(J) indulges in collection of illegal

tax and one of the senior citizens of Haflong was kidnapped by the 'tax commander', because of the former's refusal to pay tax and was released on payment of ransom. From the confession of this accused, it also transpires that DHD(J) collects huge amount of money by unlawful means and the money, so procured, is utilized for, amongst others, purchase of arms and ammunitions and that the said group had also killed some of those labourers, who were involved in the project of conversion of extension of broad gauge line from Lumding to Badarpur.
119. Thus, on the basis of the materials on ground, and unless shown, otherwise, at the trial, there are reasonable grounds to believe that the DHD(J) runs, or attempts to run, almost a parallel Government, kills with impunity those, who do not abide by what is directed to be done, they indulge in
84
extortions, kidnappings, siphoning off the Government fund for the purchase of arms and ammunitions.
120. We may pause here to point out that we are alive to the position of law that the confession of one accused cannot be treated as substantive evidence against his co-accused. We are also conscious of the fact that keeping excluded the confession of a co-accused, when the evidence, adduced on record, otherwise, satisfy the Court of the guilt of the accused, the confession of the co-accused can be used as an aid for strengthening the conclusion, which the Court may have, independent of the confession of the co-accused, already reached. Whether the confessions, recorded in the present case, are voluntary or involuntary, is a question, which would be determined at the trial. What is, however, relevant and material is that the confessions, recorded in the present case, support the statements of the witnesses given to the effect that DHD(J) collects tax without being authorized by law; it is involved in running a racket of kidnapping, extortion and murder of those, who may not agree with the philosophy of, or carry on the directions of DHD(J). The DHD(J) is also involved in ethnic killing. The DHD(J) interferes with free and fair elections and force people, by threat and intimidation, to cast vote in favour of such a party, who may agree to support the cause of the DHD(J). Hence, the acts of DHD(J) amounts to terrorist acts within the meaning of Section 15 of the U.A. (P) Act." (Emphasis is added)

105. Having reproduced the statements of witnesses, the basis on which the *charge-sheet* has been laid against the appellant and other accused, the proper approach would be to divide the materials, so collected during investigation, into two segments, namely, **Part IEvents from 2004 to 31st December, 2008,** and **Part-II- Events**

after 1-1-2009.

85

106. The above distinction has been made in order to ascertain whether the events, occurring in Part I period, i.e., from 2004 to 2008, by themselves, constituted an offence under Chapter IV or VI or not. So far as the second part is concerned, it will have to be examined whether the offences are continuing in nature and, therefore, if any part of the offence, commencing in Part I period, stretches upto Part II period, whether the accused would be liable under the UA (P) Act.

PART I- EVENTS FROM 2004 TO 31ST DECEMBER 2008

ACTIVITIES OF DHD (J) IN PART I PERIOD

107. The accusations, in the *charge-sheet*, are adequately supported by statements of witnesses as contained in the case diary, for, the case diary reveals that during the part I period, the DHD (J) had allegedly done the following acts:

- **That DHD (J) is an *association* of armed miscreants, private contractors, public servants, arms dealer with accused Jewel Garlosa** and **Niranjan Hojai** as the masterminds of the *association*.
- **That the DHD (J) had linkage with NSCN (IM) and NDFB, the two scheduled terrorist *organization*s.**
- **DHD (J) targeted at major infrastructure projects in their area. Two Government projects were badly affected by the acts of terror and violence by DHD (J), the two projects being 'East West Corridor Project' and 'Broad Gauge Conversion Project between Lumding and Silchar'.**
- **DHD (J) killed some of those labourers, who were involved in the project of conversion of extension of broad gauge line from Lumding to Badarpur.**

86

- **DHD (J) indulged in collection of illegal tax by abduction. It also transpires from the materials that DHD (J) collects huge amount of money by unlawful means and the money, so procured, is utilized for, amongst others, purchase of arms and ammunitions.**
- **DHD(J) indulged in several attacks on the security forces, the notable ones being the ambush on the Central Reserve Police Force (CRPF) personnel, wherein seven men were killed, and the ambush on the Assam police party, wherein six men lost their lives.**
- **Direction given by Niranjan Hojai (A-11) to Shri Dipolal Hojai, CEM, NCHAC, to convene a meeting of all the**

Executive Members of the Council in the evening on 26 November 2008. It was at the meeting that accused Niranjan Hojai directed Shri Dipolal Hojai to resign from the position as CEM by the very next day. He nominated Mohit Hojai (A-3) to be elected as the new CEM and also threatened Dipolal Hojai by saying "if you don't listen, you will have the same fate as Pumendu Langthasa". Suspected DHD(J) militants had killed former Chief Executive Member of the North Cachar Hills Autonomous Council, Purnendu Langthasa, and former executive member of the Council, Nindu Langthasa, at Langlai Hasnu village, in the NC Hills district, in June 2007.

· · **Forcing Dipolal Hojai to step down from the post of CEM paved the way for Mohit Hojai to become CEM so that the siphoning of development funds can be done at the diktats of Niranjan Hojai and Jewel Garlosa.**

108. The facts, stated above, give rise to an impression, though *prima facie,* that there was an *association* of certain individuals comprising of armed miscreants, public servants and private contractors, they were involved in collecting funds by means of extortion, abduction, etc., siphoning of development funds and
87
utilizing all these funds, so collected, in making purchases of arms and ammunitions, apart from carrying out other subversive activities. The activities, pointed out above, raise inference, though *prima facie* in nature, that the DHD (J), as an *association*, went to the extent of manipulating the democratic election of Autonomous Council on gun point and dislodged a democratically elected CEM by issuing threat of murder. This apart, there are materials **giving rise to a *prima facie inference*** that the said *association* also, by their activities, affected infrastructural development, essential to the life of the community of the concerned area, and resorted to mass killing of labourers, who had not obeyed their diktats **and they were, in a way, running, or attempted to run, a parallel Government inasmuch as they were even collecting taxes without having any legal right or authority to do so** (taken from para 121 C.A 25/10) and thereby shaking the very foundation of the constitutional scheme of governance in India. The actions of its activists, such as, Niranjan Hojai, Mohit Hojai and Jewel Garlosa do amount to, unless can be shown otherwise, at the trial, the offence of waging war against the State within the meaning of Section 121 IPC and is punishable by death or imprisonment for life in terms of the penal provisions of Sections 121 of IPC.

109. No wonder, therefore, that this Court in the appellant's earlier appeal, namely, Criminal Appeal No.25/2010, observed, at para 121, as under:

"121. Thus, until shown, otherwise, at the trial, the acts of the DHD(J) and its members must be inferred to amount to 'terrorist acts' within the meaning of Section 15 of the UA(P) Act, particularly, ***because their acts are calculated, as the***
88
materials in the case diary reflect, to threaten the unity, integrity, security and sovereignty of India and they strike terror in the people, in general, and, at times, even in a given section of the people, such as, the labourers, by use of criminal force. Obviously, those, who help and aid the terrorist acts of the DHD(J) and its members, would be abettors of such offence(s). As the DHD(J) runs, or attempts to run, almost a parallel Government, thereby shaking the very foundation of the constitutional scheme of governance, in India, its actions and the actions of its activists, such as, Niranjan Hojai, Mohit Hojai and Jewel Garlosa do amount to, unless can be shown otherwise, at the trial, the offence of waging war against the State within the meaning of Section 121 IPC *and is punishable by death or imprisonment for life in terms of the penal provisions of Sections 121 of IPC and,* ***those, who help the DHD(J) and/or its activists in carrying out the activities of the DHD(J), would be, if not members of the DHD(J), be responsible as abettors of the offence of waging war against the State*** *and their acts of abetment too would be punishable to the same extent as do the acts of the chief perpetrators of such offences. This apart, whoever commit a terrorist act is punishable by Section 16 of the UA(P) Act, which falls under Chapter IV thereof. A person, who commits a terrorist act, cannot be allowed to go on bail, because of the proviso to Section 43D(5)."*
(Emphasis is added)

110. It is, thus, seen that even for the Part I period, there are sufficient materials to hold that DHD (J) was involved in *terrorist acts*, as defined under Section 15 of the UA (P) Act, as the same stood in the year 2004. There are also sufficient materials to draw a *prima facie* inference that the DHD (J) is an *association* of armed miscreants, public servants, private contractors and they worked in tandem with each other to commit *terrorist act*ivities for a considerable period of time.

89

WHETHER MATERIALS RAISE PRIMA FACIE AN INFERENCE THAT DHD(J) IS A TERRORIST GANG

111. Reminding ourselves, at this juncture of the concept of *terrorist gang*, as defined in Section 2(l) of the UA(P) Act, it, in the present case, appears, on the strength of materials as observed above, that a strong *prima facie* case is made out raising an inference that DHD

(J) was a *terrorist gang* and accused Jewel Garlosa, with his group of 60 armed men, Mohit Hojai and Niranjan Hojai were the prominent members of this *gang*. The materials also raise an inference, as mentioned above, and until shown otherwise at the trial, that DHD (J), as a *terrorist gang*, had committed *terrorist acts* by resorting to abduction for ransom, illegal collection of tax, ethnic killing, destruction of government property, ambushing security forces, forcing the elected CEM to resign and thereby subvert the constitutional scheme of governance and so on.

112. In the face of materials collected by the Investigating Agency for the period upto 31-12-08, it would be wrong to accept the argument, offered on behalf of the appellant, that there are no materials for holding, on a *prima facie* basis, that the DHD (J) had committed any *terrorist act* prior to 31-12-08 and, hence, Section 16 and/or Section 20 of the UA (P) Act, as stood amended in the year 2004, would not be attracted.

113. Once it is found that there are materials to raise an inference, *albeit prima facie*, that DHD (J) was a *terrorist gang* within the meaning of Section 2 (l) and that they were also involved in *terrorist acts*, as defined under Section 15 of the Act of 2004, any person, who is found to have been associated with DHD (J), either by way of

raising funds or by entering into conspiracy in order to further the activities of DHD (J), as a *terrorist gang*, would come under the net of Section 17, 18 and 20 of the UA (P) Act as the same stood amended in the year 2004.

ROLE OF THE PRESENT APPELLANT

(i) Embezzlement of public money

114. Let us, now, examine and determine the nature of materials, available against the appellant, for the Part I period from 2004 to 31-12-2008, in order to ascertain the nature of his *association*, if any, with the DHD (J). The arguments, made in this context, can be well appreciated in the light of the facts, as recorded in Criminal Appeal No. 25/2010, based on the materials in the case diary.

115. The relevant extracts from Criminal Appeal No. 25/2010, pertaining to the appellant as derived from the case diary, are quoted below:

"123. Bearing in mind the activities of DHD(J) and the materials, collected during investigation, as have been discussed above, when we tum to the materials on record as against accused ***Redaul Hussain Khan****, we notice that in tune with each other, P.Ws. 80, 81 and 82, who work as Supervisors of ICDA Projects, have stated that their duty, as Supervisor, includes distribution of food items to the Anganwadi Centres under their respective supervision. The procedure, earlier followed for the supply, was that on receipt*

of food items from the department, they used to distribute the same to the Anganwadi Work Centres and, the recipients thereof used to, in turn, sign the challans in token of having received the items. All these witnesses also state that since the beginning of 2007, the usual procedure was not being followed as the Deputy Director, Md. R.H. Khan, had specially told them not to fill up the quantities of the food items given to the Anganwadi Centres and R.H. Khan obtained their signatures on the blank challans and, during the said period, no one, in the office, had the courage to refuse any orders of Md. R.H. Khan.

91

124. Coming to the statement of P.W. 101, who is an UDA in the Department of Social Welfare, we notice that according to his statement, during 2007-09, he was allotted accounting work in respect of Jatinga valley ICDS Project and though his duties did not include receiving supplies, Md. R.H. Khan, on many occasions, had directed him to process the bills/challans in respect of the supplies received and even without receiving the articles or checking the same, he had to process the bills as none in the office could say no to R.H. Khan. Referring to certain vouchers and receipts, this witness has also stated that the vouchers, along with the concerned receipts, were given to him by Md. R.H. Khan, who asked him to write the certificate of receipt of the articles and to pass the bills for payments. This witness has reiterated that he had to comply with the instructions of R.H. Khan as neither he nor any of his colleagues could dare to say no to Md. R.H. Khan.

125. P.W. 155 is a Financial Advisor, in the Department of Social Welfare, Hill Areas, etc.. Departments, Assam, whose main duty is to advise Government Department on their financial aspects so as to maintain financial discipline in the functioning of the Departments. This witness has stated that as per the Assam Finance Rules, it is the fundamental rule that no work shall be commenced unless a detailed design and estimate have been sanctioned, allotment of fund have been made and orders for its commencement is issued by the competent authority. This witness has also stated that since there is no separate Financial Rules for N.C. Hills Council, the Assam Finance Rules also apply to N.C. Hills Council.

126. P.W. 158 is the UDA-cum-Accountant and he has stated that in March, 2007, he was posted in Mahur ICDS and R.H. Khan, the then Dy. Director Social Welfare, used to ask him to put his signature as recipient of materials/articles on the challans of different suppliers and he had to do so at the behest of the then Dy. Director, Md. R.H. Khan, without

receiving any article/material and, similarly, between December, 2007, and March, 2008, he has put his signatures, as a recipient of articles/materials, on the challans of different suppliers without receiving any article/material. P.W. 158 has also stated that Md. R.H. Khan, sometimes, threatened him that if he refused to sign those challans then, he would have to face dire consequences and may even be released from the district. P.W. 158 has further stated that R.H. Khan and other activists of tribal groups always threatened him and that he
92
had to spend sleepless nights due to tension so created by R.H. Khan and his men.

127. As regards R.H. Khan, P.W. 161 (whose statement we have already considered above about the activities of DHD(J), Niranjan Hojai, Jewel Garlosa, Mohit Hojai and others), has stated that Mohit Hojai used R.H. Khan as the Liaison Officer for the Council, all Assam State Govt, funds were siphoned off with the help of R.H. Khan and it used to go to Mohit Hojai and that Niranjan Hojai and one Daniel of DHD (J) group used to be in direct touch with Mohit Hojai over phone and used to demand money through Mohit Hojai.

128. Regarding RH Khan, PW 164, who used to be a Member of Rajya Sabha, from April 1996 to 2002, has this to say, "There is a person called R.H. Khan, who is the Deputy Director of the Social Welfare Department, for the past ten years and is also the in-charge CDPO of four divisions. He is the liaison officer for the Council. He is entrusted with the responsibility to ensure that funds are allotted as per the budget and released in time. He is into a lot of embezzlement and is the favorite man for Mohit Hojai.

*129. P.W. 169 has stated, as regards RH Khan, thus, "**One R.H. Khan was made the Liaison Officer by A.K. Barua (Principal Secretary). A.K. Barua made an official note certifying his good work, good character, etc., in order to justify the making of R.H. Khan as the liaison officer. R.H. Khan was the Liaison Officer for all departments, although he was a Dy. Director of Social Welfare. He used to manipulate budget allotments and, sometime, diverted funds from P.W.D. to other departments at the time of allocation**."*

*130. Broadly in tune with other witnesses, P.W. 173, has stated, "**In the Council, the CEM has got finance portfolio. R.H. Khan was made the liaison officer He is the person, who arranges for allotment of budget funds from Dispur (i.e., the Capital). He pays a percentage. Funds are released by the CEM through the Principal Secretary.***

The Principal Secy, and Khan (Dy. Dir. Social Welfare) released funds only to those departments, which were
93
capable of paying money. Sometimes, tendering is done; but on a many times, work is directly allotted on the recommendation of the CEM. There is a lot of bungling in all the departments. Only 20% of the work is done.
131. Regarding the role of R.H. Khan, Dipolal Hojai (who had to resign from the office of the CEM to make way for Mohit Hojai as the CEM), has stated that ***R.H. Khan is like the king of N.C. Hills and he (Dipolal Hojai), on coming to know as the CEM, thought of getting rid of R.H. Khan, but Mohit Hojai said that since he was the EM of the Social Welfare Department, he wants to try out R.H. Khan for three months and that the Goverrror, Shri Ajay Singh, called him (Dipolal Hojai) and told him that R.H. Khan should be made the Nodal Officer or the Liaison Officer and that R.H. Khan was an efficient officer and it is only he, who can get funds from the State and the Centre****. It is in the statement of Dipolal Hojai that though he still resisted and made an AEE of Agriculture Department, by the name of Hazarika, as the nodal officer, Hazarika could not get any funds at all and in a desperate move, he made R.H. Khan as the Liaison Officer after discussing with senior members of the Council, namely, Prakanta Warisa and Mohit Hojai, and they too said that only R.H. Khan can manage funds for the Council. Dipolal Hojai has further stated that R.H. Khan was the favourite of the Governor and as the nodal officer, he used to move, in a helicopter, to N.C. Hills*.
132. Close on the heels of the other witnesses and concerning Mohit Hojai, Niranjan Hojai, R.H. Khan and the appellant, Jayanta Ghosh, and Phojendra (who was caught with rupees one crore, in cash, and weapon), P.W. 170 has stated that Mohit Hojai was very close to Niranjan Hojai and provided large sums of money to him for procurement of arms, he siphoned away money with the help of R.H. Khan, Phojendra Hojai and others, and that one of the main contractors, vibo provided money, was Dhrubo Ghosh (i.e., the Appellant in Criminal Appeal No. 12/2010) and the amount of Rs. 1 crore, which was seized by police and gave rise to the present case, was actually being carried for DHD(J) out of the development funds, which were diverted by R.H. Khan and Mohit Hojai.
*133. P.W. 178, who has been the Executive Member of the Council and was Chairman of the Council, has stated, as regards R.H. Khan, thus, "****R.H. Khan was a key member of die Council. All the budget of NC Hills and release of***

funds were being organized by R.H. Khan. He was the liaison officer of the Council. He used to give a 10% cut for any budget allotment and allotment of additional funds for the Council. Among the contractors, Pabitra
94
Nunisa, Dhrubo Ghosh (i.e., the Appellant in Criminal Appeal No. 12/2010) and Turdad Ali and Phojendra Hojai were the main contractors*."*
(Emphasis is
added)

116. The statement of witnesses, as reproduced above, *prima facie* reveal that vital documents, with respect to supply of food items meant for Anganwadi Centres, were forged in order to show that food items, as per relevant developmental schemes, had been supplied, though, in reality, no such supplies were ever made. The statement of witnesses reveal, though *prima facie,* that it was under the directions of appellant that bogus documents were created and threats were also issued to those, who refused the follow the directions of the appellant in his various modes of embezzlement of funds.

117. The case diary reflects, until shown otherwise, that the appellant herein had substantial control on the finance of the Social Welfare Department, under the NCHAC, and he had made payments to suppliers without receiving materials for which orders were placed. The perusal of the case diary also reflects, until shown otherwise, that the appellant herein, namely, Redaul Hussain Khan, by posing threats, made his office staffs cooperate with him in clearing the bills without receiving the supply of the materials.

118. Having ascertained, on a *prima facie* basis, that there are sufficient materials against the appellant for misappropriation of development funds, it, now, needs to be seen, in response to the arguments, made on his behalf, as to whether the appellant had any
95
association with DHD (J) and if there existed a relationship between the appellant and the DHD (J) and, if so, what was the nature of that relationship.

(ii) ASSOCIATION OF THE APPELLANT WITH DHD (J)

119. The embezzlement of public money may not, by itself, be an offence of funding a terrorist act or conspiracy, etc., unless there be further materials to show that such embezzlement was done with an intent or knowledge that the money would be used for *terrorist act*s.

120. On the basis of the statements of witnesses, as reproduced above, firstly, on the point of agreement between Mohit Hojai and Jewel Garlosa, another mastermind, to provide 2 crores if the former wins election and, secondly, the visit to Kualalampur to meet Nranjan Hojai, an inference can be drawn that apart from everything

else, there existed, not only a close connection, but also a deep *association* among Mohit Hojai, Niranjan Hojai and Jewel Garlosa.

121. Now, in order to honour the agreement to provide Rs 2 crore to DHD (J), Mohit Hojai, as the materials and the case diary *prima facie* reveal, was in need of a man, who could raise such an amount for him. Mohit Hojai, thus, made the appellant as Liaison Officer for the Council and all Government funds were siphoned off with the help of appellant. The funds used to go to Mohit Hojai. Niranjan Hojai, Commander-in-Chief of DHD(J), and one Daniel of DHD (J) group used to be in direct touch with Mohit Hojai over phone and used to demand money through Mohit Hojai. The statements of witnesses, particularly, PWs 161 and 162, also reveal that many contractors like Babulal Kemprai, Phojendra Hojai and others of Haflong were in
96
collaboration with them. P.W. 162 further states that the DHD(J) group used to procure weapons from international market with the help of this money. According to PW 164, the appellant had had been the Deputy Director of the Social Welfare Department for the **past ten years** and is also the in-charge CDPO of four divisions, he is the *liaison officer* for the Council, he is entrusted with the responsibility to ensure that funds are allotted as per the budget and released in time and he is into a lot of embezzlement and is the favorite man for Mohit Hojai.

122. The striking features, as reflected from the statements of witnesses, are the *association* of the appellant with Mohit Hojai, the funds siphoned off by him, eventually, went to DHD (J) and this was not on a single isolated occasion; rather, an *association* spanning over a considerable period of time. The arguments, on lack of *association* of the appellant with DHD (J), could have been termed forceful, had the embezzlement of fund and its diversion to a *terrorist gang* been a one time episode; but there is no basis for the argument that the appellant never knew as to why the funds were being embezzled and carried to DHD (J). On the contrary, the appellant, as the case diary reveals, was made Liaison Officer, at the behest of Mohit Hojai, another associate of DHD (J), only for the former's ability to arrange development funds for NCHAC. The activities of DHD (J) would have crippled, but for the funds and, hence, the appellant, who continued his *association* with DHD (J), a *terrorist gang*, continued to embezzle funds and continued to siphon off those funds to DHD (J) for a considerable period of time and all these factors give rise to the inference, though *prima facie*, that the
97
appellant was an indispensable associate of the DHD (J), a *terrorist gang*.

123. When the facts are applied to the definitions for the offences under Section 17 and under Section 18 of the UA (P) Act, 2004,

which stand discussed hereinbefore, it would be seen that the materials are sufficient to draw an inference that the charges under Section 17 and under Section 18 of UA (P) Act, as the same stood in the year 2004, are not without any basis.

124. Though the facts, when unfolded at the trial, may prove otherwise; but, as of now, in the background of the above allegations, levelled against the appellant and other accused, it would not be appropriate for us to sustain the appellant's contention that there is no merit in the case, against the present appellant, which the NIA has projected in their *charge-sheet.* The materials justify that the appellant can reasonably believed to be, *prima facie*, a member of DHD (J), a *terrorist gang,* apart from active conspirator in the activities of DHD (J) by raising funds for them. All these activities, which were prior to 31-12-2008, are well covered by Sections 17, 18 and Section 20 of the Act of 2004.

125. One of the fallouts of the arguments made by Mr. Mishra, is on the applicability of the proviso to Section 43 D (5), which came into force on 31-12-08, for those acts, which were committed prior to 31-12-2008. In other words, the question, which, though not raised, confronts the Court is: How far the proviso to Section 43D(5) of the UA(P) Act would be applicable to those offences committed under the UA(P) Act prior to 31.12.2008, i.e., the date on which the UA(P) Act 98
went, as discussed above, various amendments and the proviso to Section 43D(5) came into force?

126. Insertion of Section 43 D (5) was one of the important changes, which has been brought in the UA(P) Act by the Act of 2008.

127. Since the proviso to Section 43 D (5) of the UA (P) Act restricts the right of an accused to go on bail if there are reasonable grounds to believe that the allegations against him are *prima facie* true, a question arises as to what affect the proviso to Section 43D(5) would have on the bail of a person, accused of committing an offence under the UA (P) Act, as the same stood prior to 31-12-2008, but arrested after the amendments, in the year 2008, came into force with the proviso to Section 43D(5).

WHETHER ARTICLE 20 (1) APPLIES TO PROCEDURAL LAW

128. While considering the above aspect of the matter, a need arises to understand the scope of the bar under Article 20 (1) of the Constitution, which reads:

"20. (1) No person shall be convicted of any offence except for violation of a ***law in force*** *at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence."*

129. The embargo, under Article 20 (1), applies under the following two circumstances, namely:

(i) Conviction for acts or omissions, which were not offences at the time, when committed;
(ii) Imposing a penalty higher than the penalty attracted at the time, when the offence was committed.
99
130. The term "*law in force*", appearing in Article 20 (1), means '*law*' with respect to the *offence* for which conviction is awarded and also the 'law' with respect to *penalty*.
131. Thus, if on a particular date, there existed no law to regulate an act or omission committed by a person; but, by a subsequent law, the same act and/or omission is made punishable, the person cannot be convicted for the past acts or omissions on the basis of new law.
132. At the same time, if an act or omission imposes penalty, which is enhanced during the pendency of a trial, then, such enhanced penalty cannot be imposed, because of the embargo placed by Article 20 (1).
133. The legal position, as to whether the Article 20 (1) applies to procedural law, would be clear by the following observations, made in the case of **Rao Shiv Bahadur Singh And Another vs The State Of Vindhya Pradesh (AIR 1953 SC 394)**:
"It is necessary to notice that what is prohibited under Article 20 (1) of the Constitution is only conviction or sentence under an ex post facto law and not the trial thereof. ***Such trial under a procedure different from what obtained at the time of the commission of the offence or by a court different from that which had competence at the time cannot ipso facto be held to be unconstitutional. A person, accused of the commission of an offence, has no fundamental right to trial by a particular court or by a particular procedure, except in so far as any constitutional objection, by way of discrimination or the violation of any other fundamental right, may be involved***". (Emphasis is added)
100
DETERMINING FACTORS TO IDENTIFY WHETHER A STATUTE IS PROSPECTIVE OR RETROSPECTIVE
134. In order to have a better understanding of the determining factors, which draw the line between *procedural law* and a *substantive law,* it would be apposite, at this stage, to refer to the case of **Hitendra Vishnu Thakur vs State of Maharashtra reported in (1994) 4 SCC 602,** wherein a question arose on the effect of the amendments to the pending cases. The relevant observations are reproduced below:
24. We have already noticed that Clause (b) of Sub-section (4) of Section 20 was amended by the Amendment Act No. 43 of 1993 with effect from 22nd May 1993. Besides, reducing the

maximum period during which an accused under TADA could be kept in custody pending investigation from one year to 180 days, the Amendment Act also introduced Clause (bb) to Subsection (4) of Section 20 enabling the prosecution to seek extension of time for completion of the investigation. Does the Amendment Act No. 43 of 1993 have retrospective operation and does the amendment apply to the cases which were pending investigation on the date when the Amendment Act came into force? There may be cases where on 22nd May 1993, the period of 180 days had already expired but the period of one year not yet over. In such a case, the argument of learned Counsel for the appellant is that the Act operates retrospectively and applies to pending cases and therefore the accused should be forthwith released on bail if he is willing to be so released and is prepared to furnish the bail bonds as directed by the court, an argument which is seriously contested by the respondents.

25. The Designated Court has held that the amendment would operate retrospectively and would apply to the pending cases in which investigation was not complete on the date on which the Amendment Act came into force and the challan had not till then been filed in the court. From the law settled by this Court in various cases, the illustrative though not exhaustive, principles which emerge with regard to the ambit and scope of an Amending Act and its retrospective operation may be culled out as follows:

(i) A statute which affects substantive rights is presumed to be prospective in operation, unless made retrospective, either

101

expressly or by necessary intendment, whereas a Statute which merely affects procedure, unless such a construction is texturally impossible, is presumed to be retrospective in its application, should not be given an extended meaning, and should be strictly confined to its clearly defined limits.

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal, even though remedial, is substantive in nature.

(iii) ***Every litigant has a vested right in substantive law, but no such right exists in procedural law****.*

(iv) ***A procedural Statute should not generally speaking be applied retrospectively, where the result would be to create new disabilities or obligations, or to impose new duties in respect of transactions already accomplished****.*

(v) A Statute which not only changes the procedure but also creates a new rights and liabilities, shall be construed to be prospective in operation, unless otherwise provided, either

expressly or by necessary implication.
27. *In fairness to the learned Additional Solicitor General Mr Tulsi, it may be stated that* ***he did not controvert the legal position (both in his oral submissions and written arguments) that Amendment Act 43 of 1993 regulating the period of compulsory detention and the procedure for grant of bail, being procedural in nature, would operate retrospectively***.
(Emphasis is added)
135. The basic *ratio*, laid down in the case of **Hitendra Vishnu Thakur** (supra), is that the answer, as to the *prospectivity* or *retrospectivity* of a law, lies in the reading of the Statute itself. Ordinarily, a statute, which affects *substantive rights*, applies prospectively; whereas, the statute, which merely lays down a procedure, different from the earlier one, applies retrospectively unless such a construction is rendered impossible by a reading of the Statute. At the same time if, by a change in procedure, a new *legal disability* is created, which, otherwise, did not exist prior to the amendments, the amendment cannot be applied retrospectively. Legal disability, to be briefly stated, means lack of *legal*
102
capacity or *qualification*. Thus, if, by a change in law, the right to apply for bail, which existed prior to amendments, is denied, it may, perhaps, be a ground to agitate that the amendments create a legal disability, **but if additional conditions are imposed on granting of bail, it would not be possible to contend that the change, in the procedure, has created a legal disability or has imposed new obligations**. **This is, precisely, what the case at hand is inasmuch as the proviso to Section 43D(5) merely creates additional conditions in respect of grant of bail and does not take away a right, which, otherwise, existed.**
WHETHER PROVISO TO SECTION 43 D (5) IS A MATTER OF PROCEDURAL LAW IF SO, WHETHER IT HAS RETROSPECTIVE OPERATION
136. Considering the fact that it is the proviso to Section 43D(5) of the UA(P) Act, introduced with effect from 31.12.2008, which puts severe restrictions on the Special Court's power to grant bail, it is imperative to take note of what the proviso to Section 43D(5) conveys, in order to ascertain whether it is *procedural law* or *substantive law.* For the sake of clarity, Sub-Section (5) of Section 43D, which is of utmost importance and which has been noticed by making amendment of the Act of 2008 with effect from 31.12.2008, is reproduced below:
"(5) Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapter 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
103
perusal of the case diary or the report made under Section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true.*"*
(Emphasis is added)

137. A bare reading of Sub-Section (5) of Section 43D shows that apart from the fact that Sub-Section (5) bars a Special Court from releasing an accused on bail without affording the Public Prosecutor an opportunity of being heard on the application seeking release of an accused on bail, the proviso to Sub-Section (5) of Section 43D puts a complete embargo on the powers of the Special Court to release an accused on bail by laying down that if the Court, on perusal of the case diary or the report made under Section 173 of the Code of Criminal Procedure, is of the opinion that there are reasonable grounds for believing that the accusation, against such person, as regards commission of offence or offences under Chapter IV and/or Chapter VI of the Act of 2008, is *prima facie* true, such an accused person shall not be released on bail or on his own bond.

138. Thus, if the Special Court, on perusal of the case diary, forms an opinion that there are reasonable grounds for believing that the accusation, against an accused person, of the commission of offence or offences, under Chapter IV and/or Chapter VI, is *prima facie* true, it will not remain within the powers of the Court to grant bail in such a case.

139. The above position of law is further made clear by Sub-Section (6) of Section 43D, which lays down that the restrictions, on granting of bail specified in sub-Section (5), are '*in addition to the*
104
restrictions under the Code of Criminal Procedure or any other law for the time being in force on grating of bail'.

140. The logical conclusion would, therefore, be that in a case, investigated by the NIA, when the Special Court forms an opinion that there are reasonable grounds for believing that the accused has committed an offence punishable with death or imprisonment for life, the Special Court would have no jurisdiction to grant bail to such an accused except as may be provided by law. In addition thereto, the Special Court shall also not be able to release an accused on bail if the Court, on perusal of the case diary or the report made under Section 173 of the Code of Criminal Procedure, is of the opinion that there are reasonable grounds for believing that the accusation, against such person, as regards commission of

offence or offences, under Chapter IV and/or Chapter VI of the Act of 2008, is *prima facie* true.

141. Dealing with the concept of the proviso to Section 43D(5), the Division Bench, in **Jayanta Kumar Ghosh** (supra), observed and held as to what the expression *prima facie* and the expression *true*, which appear in the proviso to Section 43D(5), convey. The relevant observations, made this regard, read as under:

"63. Before proceeding further, it is also, to our mind, necessary to ascertain as to what the scope of the proviso to Section 43-D(5) is and when would this proviso be attracted. While dealing with this aspect of the appeal, it is necessary to bear in mind that the proviso to Section 43-D(5) states that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under Section 173 of the Code, is of the opinion that there are reasonable grounds for believing that the accusation against such person is 'prima facie true'. The expression, 'prima facie
105
true' is an expression, which does not, ordinarily, appear in penal statutes.

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

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

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

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

could be arrived at on that evidence."

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

106

69. From the meaning, attributed to the word, 'prima facie', by various dictionaries, as indicated above, and the observations, made by the Supreme Court, in its decisions, in The Management of the Bangalore Woollen Cotton and Silk Mills (supra), what clearly follows is that prima facie is a Latin word, which means, 'At first sight or glance or on its face' and, in common law, it is referred to as 'the first piece of evidence of fact', i.e., considered true unless revoked or contradicted.

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

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

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

73. Thus, ***the expression, 'prima facie true', would mean that the court shall undertake an exercise to determine as to whether the accusations, made against the accused, are inherently improbable and/or wholly unbelievable. Ordinarily, while considering a complaint, made against an accused, the court assumes the contents of the complaint to be true and correct and, then, proceed to decide as to whether the allegations, made in the complaint, make out a case of commission of offence by the accused or not. No exercise is required to be undertaken by the court to determine the truthfulness or veracity of the accusations. However, when the word, 'prima facie', is coupled with the word, 'true', it implies that the court has to undertake an exercise of crosschecking the truthfulness of the allegations, made in the complaint, on the basis of the materials on record. If the court finds, on such analysis, that the accusations made***

107

are inherently improbable, or wholly unbelievable, it may

be difficult to say that a case, which is prima facie true, has been made out.

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

75. In the case of State of ***Gujrat vs Gadhvi Rambhai Nathabai,*** *reported in* ***(1994)5 SCC 111****, the Supreme Court while dealing with the principles governing the granting of bail under the TADA, observed :*

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

108

76. In short, thus, on a bare reading of the materials, as may have been collected during investigation, if the Special Court finds that the materials, so collected, are sufficient to form, when assumed to be true, an opinion that there are reasonable grounds to believe that the accusations, made against the accused, are prima facie true, the Special Court will be disempowered from releasing the accused on bail. At the stage of bail, no minute scrutiny or microscopic disSection of the materials, collected during investigation, shall be undertaken by the Special Court. Credibility or otherwise of the materials collected would not be the subject-matter of scrutiny. What, at

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

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

109

grounds to believe that the accusations, made against the accused, are prima facie true*.*

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

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

a mere formation of opinion by the court on the basis of the materials placed before it. The formation of opinion cannot be irrational or arbitrary. Such formation of opinion cannot be based on surmises and conjectures; but must rest on the materials collected against the accused. Since the presumption of innocence runs in favour of the accused, it logically follows that if there are, in given circumstances, grounds for believing that the case, against the accused, is true, a case of commission of offence under Chapter IV or Chapter VI of the UA(P) Act, 1967, can be said to have been made out and when such a case is made out, it would be tantamount to saying that reasonable grounds exist for opining that the accusations are prima facie true. In such a case, the bar, imposed by
110
the proviso to Section 43-D(5) on the court's power to grant bail, gets attracted.

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

81. There are no corresponding provisions, in the NIA Act, as were present in Section 20(8) and Section 20(9) of the TADA Act. Notwithstanding, however, the fact that the provisions (as contained in sub-Section (8) and/or sub-Section (9) of Section 20 of the TADA Act) no longer find place in the NIA Act, ***the fact remains that even under the scheme of the NIA Act, the Special Court, as already discussed above, is a 'Court' other than the High Court and Court of Session. In such circumstances, the limitations, imposed by Clauses (i) and (ii) of sub-Section (1) of Section 437 CrPC, are applicable to the Special Court too. In addition thereto, when a case falls within the ambit of the proviso to Section 43-D(5), there would be an additional bar, on the part of the Special Court, to release an accused on bail, the bar being that the Special Court shall not release the accused on bail or on his own bond if the Court, on perusal of the***

case diary or the report made under Section 173 of the Code, is of the opinion that there are 'reasonable grounds' for believing that the accusation against such
111
person is prima facie true*."*
(Emphasis is added)

142. It has, thus, been held, in the case of **Jayanta Ghosh** (supra), that **it is only** if there are materials to justify the applicability of offences, under Chapter IV and/or Chapter VI, that the bar under Section 43 D (5) would be attracted as an additional bar on the jurisdiction of the Court to grant bail, apart from the other factors, which, ordinarily, govern the grant of bail even under Section 437 Cr.PC.

143. Now, so far as bail is concerned, dwelling on the concept of '*bail'* in Criminal Appeal No. 25/2010, this Court had made some observations, which being relevant in the present context, are reproduced below:

73. 'Bail' is a term, which has not been defined in the Code of Criminal Procedure. In fact, in none of the statutes, in force, the term 'bail' has been defined. Conceptually, 'bail' is understood as an assertion of a right of the accused to be freed against the State's act of imposing restraint. 'Bail', as a concept, finds place in the U.N. Declaration of Human Rights of 1948 and India, being a signatory thereto, 'bail' becomes an important facet of human rights. According to the dictionary meaning, 'bail' signifies security for the presence of a person against his release.

74. As regards the origin of the word, 'bail', there is no uniformly accepted view. According to some, the word, 'bail', is derived from a Latin term, Baiulare, which means to bear a burden. The other view, etymologically speaking, is that the word 'bail' is derived from a French word. Bailer, which means to give or to deliver.

75. At any rate, 'bail' is a conditional liberty. Liberty of a citizen is, undoubtedly, his basic right; but this liberty cannot, beyond a reasonable limit, override, or be allowed to prevail upon, the interest of the security of the State. ***A balance is, therefore, required to be maintained between personal liberty of an accused, on the one hand, and the right of the investigating agency, on the other, to investigate the case against the accused effectively. The investigation must, however, cast minimum interference with the***
112
personal liberty of the accused and the right of the investigating agency, to investigate the case, cannot be allowed to prevail upon the personal liberty of the

accused unless so sanctioned by law. Even, while seeking bail, an accused has to be presumed as innocent unless the law requires otherwise. Bail is not to be denied to an accused with the object of punishing him on the assumption of his guilt. Nevertheless, bail must be rejected if the law provides that the accused be not allowed to remain free, when the investigation into the crime, alleged to have been committed by him, remains under investigation. Restraint on personal liberty, or refusal to grant bail, must, however, be kept as little as possible.
(Emphasis is added)

144. The observations, reproduced above, would make it clear that detention of a person, accused of an offence, during investigation and/or trial, is not in the nature of punishment. If, during investigation of a case, the liberty of an accused is curtailed, the sole objective is to ensure, amongst others, *fair investigation* so as to have a *fair trial.* In serious offences, like the one, involved in this appeal, abundant caution is required to be taken, in order to ensure that allowing the accused to go on bail shall not prove disadvantageous to the investigating agency than the disadvantage, which is likely to be caused to the accused by detaining him in custody.

145. At the same time, if the question of '*bail*' arises after filing of *charge-sheet*, the Court has to ascertain, among others, whether the prosecution would be, in the face of incriminating materials collected against the accused, deprived of its right to substantiate the charges either because there is a possibility of abscondence of the accused or there is a possibility that the accused may, in view of the

113

punishment, which the offences involved attracts, threaten the witnesses to depose in his favour.

146. The proviso to Section 43 D (5), as would be seen, are neither intended to ensure conviction nor does it impair the right of the accused to be released on bail; rather, the object of the proviso to Section 43 D (5) is to ensure fair and thorough investigation in cases which, among others, involve complexities of conspiracy among large number of people, spanning over several territorial jurisdictions requiring extensive search operations and the nature of offences are such, which threaten not merely the security and sovereignty of the State, but also its unity and integrity.

147. It will be, thus, seen that during investigation and/or trial, the question as to whether '*bail'* should be granted or not are matters of *procedure* for determining the manner in which a *fair trial* should take place. The proviso to Section 43 D (5) only lays down the circumstances, when bail is to be refused. It does not provide for

refusing bail on the mere fact that an accusation for commission of an offence, under Chapter IV or VI, has been made. It is only when the accusations are found to be *prima facie* true that the bail has to be refused.

148. The justifiability of the embargo, created by proviso to section 43 D (5), was discussed in Criminal Appeal No. 25/2010 and the relevant portion is extracted as follows:

76. In Gurbaksh Singh Sibbia v. State of Punjab reported in (1980) 2 SCC 565, which Mr. Goswami relies upon, the Court has pointed out that grant of bail is the rule and refusal is the exception inasmuch as an accused person, who enjoys freedom,

114

is in a much better position to look after his case and to properly defend himself than if he were in custody. Presumed as an innocent person, as he must be, he is, according to what Gurbaksh Singh (supra), lays down, entitled to freedom and every opportunity to look after his own case. ***This, however, is the general principle, which may be subject to such restraint as may be deemed necessary to be imposed by the State, in this regard, by making a law. Such restrictions, on the liberty of the accused, must, of course, be narrowly construed. The present one is one of the cases, wherein, if true, the sovereignty and security of the State demand placing of such embargo on the freedom of the accused, as the law so permits, when offences are alleged to have been committed by him threatening the security and sovereignty of the State***.

(Emphasis is added)

149. The proviso to Section 43 D (5), which governs the circumstances, whereunder bail has to be granted, is a matter dealing with '*bail'* of the accused and is, therefore, a matter of *procedural law* and not *substantive law.*

150. Thus, since the proviso to Section 43 D (5) does not appear to create any legal disability or impose any obligation so far as the right to apply for bail is concerned, it cannot be said that the proviso to Section 43D(5) has created any disability or obligation so as to prevent its retrospective operation. If the materials, collected during investigation, justify granting of bail, there is no impediment in granting of bail despite existence of the proviso to Section 43D(5).

151. In the result, for an act or omission committed by a person, which fell under Chapter IV or Chapter VI of the UA(P) Act, as the same stood in the year 2004, his *bail* would nevertheless be

115

governed by proviso to Section 43 D (5) of the UA(P) Act, 2008, if the person happens to be arrested after 31.12.2008 and it would not be open to him to agitate that his right to go on bail has been taken

away by a subsequent law, for, Section 43D(5) embodies provisions with regard to, if we may reiterate, procedural and not substantive law.

152. It may also be pointed out here that if the offence is continuing in nature and some part of the offence was committed after 31-12-2008, when the Act of 2008 came into force, there would be no bar in denying *bail* to the accused, under the Act of 2008, by applying the proviso to Section 43 D (5) if the materials justify a *prima facie* inference that some part of the offence, under Chapter IV or VI, has been committed after coming into force of the Act of 2008. It would not be proper to accept the contention that the acts, committed after 31-12-2008, should be read in isolation to ascertain whether such acts, by themselves, constitute any offence under Chapter IV of the Act of 2008 or not. Such an argument would not lead to a rational interpretation of the effect of the amendments made in the year 2008, when the offences are continuing in nature and have continued to be committed even after coming into force of the Act of 2008.

153. Since we have found that even if no offence under chapter IV of the UA(P) Act were committed at the time of arrest of the appellant, the proviso to Section 43 D (5) would have still applied, it now needs to be seen whether the offences which are alleged to have commenced prior to 31-12-2008 continued even after 31-12-2008.

116

PART II PERIOD

154. Before entering into discussion on the activities of DHD (J) and the role played by the appellant, in the Part II period, it may be mentioned here that the segmentation of events into Part I and Part II periods should not be understood as an attempt to segregate the acts and/or omissions into two parts so as to read the events in isolation with each other. Such segregation would lead to confusion as if the acts and/or omissions are segregated into two different periods intervened by the amendments to the UA(P) Act in 2004 and 2008. The materials, collected for the Part II period, are to be read along with the materials, collected for the Part I period, because, admittedly, the investigation into the activities of DHD (J) and its associates, though began only in the year 2009, yet the same relates to a period commencing from a date long before coming into force of the Act of 2008, on 31-12-2008, till the arrest of the appellant in the year 2009.

155. It is not disputed that the investigation into the activities of DHD (J) commenced with the arrest of Phojendra Hojai and Babulal Kemprai, on 01.04.2009, i.e., after the Act of 2008 had come into force. The investigation, as has been discussed hereinbefore, has been conducted with respect to the activities of DHD (J) and the role played by the accused persons in the commission of such activities.

156. For the Part II period also, it would be proper to, first, discuss the materials, available in the case diary, on the activities of DHD (J) and, then, to concentrate on the role played by the appellant as an associate of DHD (J).

117

ACTIVITIES OF DHD (J) IN PART II PERIOD

157. The materials, as against DHD (J), in the Part II period, commencing from 1-1-2009, were also embodied in Criminal Appeal No. 25/2010 on the basis of the contents of *charge-sheet*, which is reproduced below:

17.10 It was revealed during investigation that on 30 March 2009 Mohit Hojai A-3 and Phojendra Hojai A-1 met at the residence of Mohit Hojai A-3 for giving money to DHD(J). In pursuance thereof, money was to be delivered on 31" March 2009. The Call data Report of the mobile phones of Mohit Hojai and Phojendra Hojai reveals frequent telephonic contact between Mohit Hojai A-3 and Phojendra Hojai A-1 in this regard. On the next day (31" March 2009) Phojendra Hojai A-1 received a call on his mobile phone. Niranjan Hojai A-11 of DHD(J), who. after introducing himself, asked him to follow the orders of Mohit Hojai A-3 told him that Rs. One crore was to be delivered to someone from DHD(J). The DHD(J) cadre would establish telephonic contact with Phojendra Hojai A-1 and he should get the money delivered as per the instructions of DHD(J) cadres. He further told him to get in touch with Babul Kemprai A-2 and that he should be ready to leave by 12 noon, the next day.

17.11 Investigation disclosed that on 1" April, 2009, Phojendra Hojai A-1 and Babul Kemprai A-2 carried Rs. One crore given by Mohit Hojai A-3 to Babul Kemprai A-2 and traveled in two different vehicles i.e. one Scorpio and one TATA SUMO and proceeded towards Shillong. During their journey, Niranjan Hojai A-11 and Mohit Hojai A-3 made end their movement.

17.12 It is also disclosed that while Phojendra Hojai A-1 was being brought to the police station, he also received many phone calls. One such call was that of Mohit Hojai A-3 who enquired about whether he was caught by the Police or whether he has delivered the money. Immediately after that Niranjan Hojai A-11 called him up and asked whether he had delivered the money. He also asked as to whom he had delivered the money and how many vehicles had come. He asked as to whether he was safe and whether the police had arrested him. There two calls were found recorded in the phone of Phojendra Hojai A-1. At the time of being taken for production at the Court, Phojendra Hojai A-1 and Babul Kemprai A-2 were surrounded by media personnel who questioned them on their involvement in the case. Both the

accused replied that the money was being sent by Mohit Hojai A-3 and they were carrying it to be delivered as per his instructions. The statements made to the pressmen by accused Phojendra Hojai A-1 and Babul Kemprai A-2 were aired in the local TV news channels the next day.

118

17.13 During investigation by Basistha Police it is revealed that after the arrest of Phojendra Hojai A-1 and Babul Kemprai A-2, Assam Police recorded the statements of the accused and the police personnel who were involved in the seizure of Rs. One crore. The two drivers of the vehicles were not arraigned as accused as they were not found involved and were therefore not arrested. The two pistols seized by the police were sent to the Armourer of Assam police for firearm examination and identification. Phojendra Hojai A-1 and Babul Kemprai A-2 were taken on police remand for interrogation. Later they were transferred to judicial custody and both of them were enlarged on bail by the Hon'ble Gauhati High Court. Assam Police also arrested Mohit Hojai A-3 and R.H. Khan A-4 on 31" May 2009 and searched their houses. From the House of R.H. Khan A-4, cash amounting to Rs 4 lakhs was recovered. ***This amount was a part of the huge amount of money siphoned by RH Khan as a part of the criminal conspiracy to supply funds for the DHD(J). Investigation revealed that Mohit Hojai A-3 was sending money to Niranjan Hojai A-11 of the DHD(J) and that the Rs 70 lakhs had been sent by Jayanta Kumar Ghosh A-12 and the rest Rs. 30 Lakhs by R.H. Khan A-4 who was the Deputy Director in the Social Welfare Department in NCHAC****. R.H. Khan A-4 was made the Liaison Officer of NCHAC in addition to his responsibility as Deputy Director, Social Welfare Department on the recommendations of Shri A.K. Barua, Principal Secretary (in additional charge) of NCHAC. As Liaison Officer, he used to get the funds budgeted for NCHAC released by the State Government and in pursuance to said criminal conspiracy, provided the funds to the DHD(J) by fraudulently channelizing the funds of NCHAC.*

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17.19 Investigation revealed that on the basis of information regarding the presence of Arms smugglers at Mizoram, a team of NIA went to Mizoram. Investigation in Mizoram disclosed that one Vanlalchhana of Mizoram A-8 was one of the Arms dealers involved in Arms smuggling from abroad and was likely to receive the money sent by Mohet Hojai A-3 on the 1 April 2009 for the delivery of Arms to DHD(J). Vanlalchhana A-8 had

deposited huge amount of money in his SBI account. Vanlalchhana A-8 was the person who had visited Singapore and Thailand and met Jewel Garlosa A-5 and Niranjan Hojai A-11 in connection with arms supply to DHD(J).
17.20 Vanlalchhana A-8 @ Vantea was arrested who disclosed during his examination that he had kept a consignment of weapons at a place called Saronveng in the house of Nampui. This consignment of weapons was meant to be delivered to the DHD(J), as per the disclosure of Vanlalchhana in presence of witnesses. On the basis of this disclosure, the following arms and equipments were recovered.
119

- *8 nos. of M-16 rifles made in Singapore.*
- *One 9 mm pistol Baretta.*
- *12 walkie talkie sets.*
- *12 walkie talkie chargers*
- *one telescope Bushnell.*

17.21 Vanlalchhana A-8 identified the photograph of Niranjan Hojai which was mixed with other photographs before the Executive Magistrate. Vanlalchhana A-8 said that he had sent arms at least ten times to the DHD(J). He also disclosed regarding his visit to Kolkata regarding conversion of Indian Rupees to Dollars on the instance of Niranjan Hojai A-11. He visited Kathmandu with another friend called Chhungup to hand over the dollars to Niranjan Hojai A-11 for the procurement of Arms. He converted amounts of more than 1 crore to dollars at least three times for Niranjan Hojai A-11 which was received by him at Kolkata after being siphoned away from the Council funds by Mohet Hojai A-3, RH Khan A-4 and others. Vanlalchhana revealed that he was getting Rs. 1 for every dollar which he got converted for Niranjan Hojai A-11. Vanlalchhana A-8 was also able to identify Jewel Garlosa A-5 from the photographs shown to him. This was done after mixing suspect photographs with the photographs of other persons from the same region and preparing an identification memo in front of an exective magistrate. The analysis of call data of Vanlalchhana revealed that one Mizo lady by name Malsawmkimi A-9 was helping him in converting Rupees to Dollars at Kolkata. The CDR also revealed that Vanlalchhana was in constant touch with accused George Lawmthang A-10 in Kolkata."
(Emphasis is added)

158. The above materials, collected during investigation, lead one to a conclusion, though *prima facie*, that transshipment of huge amount of funds was taking place even after the Act of 2008 had

come into force. The money was mustered by means of conspiracy, wherein public servants, such as, the appellant, and private contractors were involved. The statement of accused Vanlalchhana reveals that he was supposed to receive money from Mohit Hojai, on 01-04-2009, against supply of arms. In fact, arms and other equipments, meant for the activities of DHD (J), were allegedly recovered on the basis of the statement given by Vanlalchhana.
120
159. The above materials also reveal that the *association* of the persons, which had existed prior to the coming into force of the Act of 2008, continued even after the Act of 2008 came into force and the preparatory acts, like siphoning of funds and directing those funds to DHD (J) for making purchase of arms and ammunitions to commit *terrorist activities*, had not been discontinued, though the Act of 2008 had come into force. In fact, the case diary contains materials commencing from the time, when the Act of 2008 not come into force, but continued even after the Act of 2008 came into force. The *charge-sheet* was laid after the coming into force of Act of 2008, not exclusively for acts and/or omissions committed prior to the Act of 2008, but also for acts and/or omissions committed after coming into force of the Act of 2008.
160. Thus, the materials, collected for the part II period, show that the DHD (J) carried on its activities as a *terrorist gang.* It may be noted that no *terrorist act* might have been committed after 31-12-08, but that hardly creates a difference as to the culpability of DHD (J) in continuing its activities as a *terrorist gang*, because purchase of arms and ammunitions, particularly, *8 nos. of lethal M-16 rifles* are acts *preparatory* to the committing of *terrorist acts* sufficient to attract the penal provisions of Section 20 of the Act of 2004 and/or the Act of 2008.
ROLE OF THE APPELLANT IN THE PART II PERIOD
161. So far as the seizure of Rs. 1 crore, leading to arrest of the appellant, amongst others, is concerned, a reading of the statement of witnesses, in Criminal Appeal No. 25/2010, revealed that one of
121
the witnesses, PW 170, has stated that the amount of Rs. 1 crore, which was seized by police and gave rise to the present case, was actually being carried for DHD(J) out of the development funds, which were diverted by R.H. Khan, the appellant, and Mohit Hojai.
162. It is, therefore, found, on a *prima facie* basis, that the appellant continued to route funds to DHD (J) and, thus, his *association* with DHD (J), which had existed prior to 31-12-08, continued even after coming into force of the Act of 2008 and in the face of the materials, collected during investigation, it can be safely held that there are *reasonable grounds* to believe that the case, set up against the present appellant, is *prima facie* true disentitling

thereby the appellant from seeking bail and disempowering thereby the learned Special Court from granting bail to the appellant, because the case of the appellant, even in respect of the Part-II period, is well-covered by the proviso to Section 43D(5) of the UA(P) Act.

163. It may be reiterated here that it would not be proper to accept the contention that the acts committed after 31-12-2008 should be read in isolation to ascertain whether such acts, by themselves, constitute any offence under Chapter IV of the Act of 2008 or not. Such an argument would not lead to a rational interpretation of the effect of the amendments made in the year 2008; more so, when the offences are continuing in nature and have continued to be committed even after the coming into force of the Act of 2008.

164. As would be noticed from the elaborate discussions undertaken above, the rigors of the proviso to Section 43 D (5) have
122
not been applied only to the acts, committed prior to the coming into force of Act of 2008, but also to the acts, which had its antecedents prior to the coming of the force of Act of 2008 and continued till the arrest of the appellant in the year 2009. When the appellant was arrested, the proviso to Section 43 D (5) was in force. We have already held above that the proviso to Section 43 D (5) is a matter of procedural law and can be applied retrospectively; hence, there was no bar in invoking the restrictions on grant of bail, embodied in the proviso to Section 43 D (5).

165. In the result, the arguments of Mr. Mishra that on the face of materials, collected against the appellants, no offence, under Chapter IV of the Act, is made out cannot be sustained.

166. It would not be out of place to mention here that arguments of similar nature, as those made by Mr. Mishra, were also made before the Supreme Court, in the Special Leave Petition (Crl.) No. 7343 of 2009 with SLP (Crl.) No. 7399/2009, by the appellant of the present case, but the arguments were not accepted and the relevant portion of the judgment, reported in (**2010) 1 SCC 521**, read as under:

5. Mr. Pradip Ghosh, learned Senior Advocate, who appeared in support of the Special Leave Petition questioned the order of the High Court and also that of the learned Sessions Judge (Special Court) mainly on two grounds. Learned Counsel firstly urged that the allegations made against the petitioner in the First Information Report do not make out a case under Section 13 of the 1967 Act. He then submitted that as no case had been made out against the petitioner which would attract the provisions of Section 13 of the 1967 Act, the provisions of Section 17 also would not be attracted to the petitioner's case and accordingly, the provisions of Section 43D would have no

application as far as the petitioner was concerned.
6. Mr. Ghosh urged that in order to attract the provisions of Section 17 of the aforesaid Act it would be necessary for the
123
investigating agency to show that the petitioner had either collected funds for or provided funds to DHD(J) having knowledge that such funds were likely to be used by the said organization to commit a terrorist act.
7. Mr. Ghosh submitted that only on 9th July, 2009, long after the petitioner's arrest on 31st May, 2009, DHD(J) along with all its factions, wings and front organizations were declared to be an unlawful association. Mr. Ghosh submitted that at the point of time when the offence was alleged to have been committed by the petitioner, DHD(J) had not been so declared and it was not, therefore, possible for the petitioner to have knowledge that DHD(J) was indulging in "unlawful terrorist acts". According to Mr. Ghosh, if the provisions of Section 43D of the 1967 Act did not apply to the petitioner, the extension of the period of investigation beyond 90 days, as contemplated by Section 167(2) Cr.P.C. must be held to be illegal and the petitioner would, therefore, be entitled to the grant of statutory bail in accordance with the proviso to the said section.
8. Mr. Ghosh also urged that although, the two accused - (i) Phojendra Hojai and (ii) Babul Kemprai, who were intercepted and from whose possession a sum of Rs. 1 crore was recovered, were granted bail, the petitioner, from whose possession a sum of Rs. 4 lakhs was seized, had been denied bail despite the fact that there was no evidence whatsoever, to connect him in any way with any "terrorist act" or "unlawful activity", as defined under Section 2(1)(k) and (o) of the 1967 Act. Mr. Ghosh also contended that the money seized from his possession was in respect of a lease agreement entered into by his mother and he was holding the said money on her behalf.
9. Mr. Ghosh submitted that in the facts of the case, the petitioner was entitled to the privilege of bail during the pendency of the investigation.
10. Mr. Ghosh's submissions were adopted by Mr. Altaf Ahmed, learned Senior Advocate, appearing on behalf of the petitioner in SLP (Crl.) No. 7399/2009, Mohit Hojai.
11. The submissions made by Mr. Ghosh and Mr. Altaf Ahmed were strongly opposed by the learned Additional Solicitor General, Mr. H.P. Rawal, who contended that indulgence in terrorist acts by DHD(J) did not depend on whether it was declared as an "unlawful association" or not. Mr. Rawal submitted that it was the commission of such terrorist acts which resulted in the said

organization being declared as an "unlawful association" and the petitioner having abetted such activities, by virtue of the provisions of Section 15 of the 1967 Act, his case came squarely within the scope of Sections 13 and 17 of the said Act.

12. Mr. Rawal submitted that although Mr. Ghosh had referred to some newspaper reports indicating that there was a possibility of amnesty being granted to the members of DHD(J), the same was yet to materialize, and, on the other hand, it also indicated that the said

124

organization was indulging in terrorist activities. Accordingly, in view of the definition of "terrorist act" in Section 15 of the 1967 Act and the provisions of Sections 13 and 17 thereof, there was little doubt that even on the date when the petitioner was apprehended, DHD(J) was indulging in terrorist acts, although, it came to be declared as an "unlawful association*" sometime later. Mr. Rawal urged that having regard to the above, the Special Leave Petitions filed against the order of the High court refusing to grant bail were liable to be dismissed.*

13. We have carefully considered the submissions made on behalf of the respective parties and we are unable to agree with Mr. Ghosh that ***the provisions of the Unlawful Activities (Prevention) Act, 1967, would not be attracted to the facts of the case****. We are also unable to accept Mr. Ghosh's submissions that merely because DHD(J) had not been declared as an "unlawful association" when the petitioner was arrested, the said organization could not have indulged in terrorist acts or that the petitioner could not have had knowledge of such activities. Accordingly, Mr. Ghosh's submissions regarding the grant of statutory bail have to be rejected since, in our view, the learned Sessions Judge (Special Court) had the jurisdiction to extend the time for completion of the investigation.*

(Emphasis is added)

167. The observations of the Supreme Court, quoted above, cannot be disturbed by this Court.

168. In the result and for the reasons discussed above, we do not find that the appellant has been able to make out any case for interfering with the impugned order, whereby his prayer for allowing him to go on bail was declined. The appeal, therefore, fails and the same shall accordingly stand dismissed.

169. Before parting with this appeal, we make it clear that whatever views and opinions we have expressed with regard to the facts discernible from the relevant case diary and the records are tentative in nature and these are meant for the purpose of deciding

whether the respondent, at this stage, deserves to go on bail or not. Our views and opinions shall not be taken as final views and
125
opinions of this Court as regards the guilt or otherwise of the accused-respondent.

170. With the above observations and directions, this appeal shall stand disposed of.

JUDGE JUDGE

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126