

A NATIONAL INVESTIGATION AGENCY

v.

ZAHOOR AHMAD SHAH WATALI

(Criminal Appeal No.578 of 2019)

B APRIL 02, 2019

**[A. M. KHANWILKAR AND AJAY RASTOGI, JJ.]**

- Unlawful Activities (Prevention) Act, 1967 – Chapters IV & VI – ss.13, 16, 17, 18, 20 and 38-40 – Respondent was named as Accused No.10 in the FIR registered for offences punishable u/ss.120B, 121 and 121A of IPC and ss.13,16,17,18,20 and 38-40 of the 1967 Act – Respondent filed application for bail before the District and Sessions Judge, Special Court (NIA), New Delhi – Rejected – Order reversed by the High Court – On appeal, held: Elaborate examination or dissection of the evidence is not required*
- D to be done at the stage of considering the prayer for bail – Court is merely expected to record finding on the basis of broad probabilities regarding involvement of the accused in the commission of the stated offence or otherwise – High Court ventured into examining the merits and demerits of the evidence –*
- E Question of discarding the document at this stage, on the ground of being inadmissible in evidence, is not permissible – Issue of admissibility of the document/evidence would be a matter for trial – Taking into account the totality of the report made u/s.173 of CrPC, the accompanying documents and the evidence already presented to the Court, including the redacted statements of the protected*
- F witnesses recorded u/s.164 of CrPC there are reasonable grounds to believe that the accusations made against the respondent are prima facie true – Role attributed to the respondent is that of being part of the larger conspiracy and to act as fund raiser and finance conduit – High Court erroneously proceeded on the premise that the charge-sheet makes no reference to any other criminal case against the respondent – High Court adopted an inappropriate approach whilst considering the prayer for grant of bail – Order passed by the High Court granting bail to the respondent, reversed – Order passed by the Designated Court rejecting the application for grant of bail made by the respondent, affirmed – Penal Code,*
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1860 – ss.120B, 121 and 121A – Narcotic Drugs and Psychotropic Substances Act, 1985 – Terrorist and Disruptive Activities (Prevention) Act, 1985 – Maharashtra Control of Organised Crime Act, 1999 – Code of Criminal Procedure, 1973 – ss.161, 164 and 173, 207 – Evidence Act, 1872 – s.34 – Bail . A

*Unlawful Activities (Prevention) Act, 1967 – s.43D – Application of – Held: s.43D applies right from the stage of registration of FIR for offences under Chapters IV and VI of the 1967 Act until the conclusion of the trial thereof.* B

*Unlawful Activities (Prevention) Act, 1967 – Proviso to s.43D(5) – Purport of – Discussed.* C

*Bail – Grant of – Factors to be considered – Discussed.*  
*Words & Phrases – “prima facie true”, in context of 1967 Act – Meaning of – Unlawful Activities (Prevention) Act, 1967.*

**Allowing the appeal, the Court**

**HELD:** 1.1 Matters to be considered for deciding an application for bail (i) whether there is any *prima facie* or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail. When it comes to offences punishable under special enactments, such as the Unlawful Activities (Prevention) Act, 1967, something more is required to be kept in mind in view of the special provisions contained in Section 43D of the 1967 Act, inserted by Act 35 of 2008 w.e.f. 31<sup>st</sup> December, 2008. By virtue of the proviso to sub-section (5), it is the duty of the Court to be satisfied that there are reasonable grounds for believing that the accusation against the accused is *prima facie* true or otherwise. Under the special enactments such as Terrorist and Disruptive Activities (Prevention) Act, 1985 (TADA), Maharashtra Control of Organised Crime Act, 1999 (MCOCA) and the Narcotic Drugs

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- A and Psychotropic Substances Act, 1985, the Court is required to record its opinion that there are reasonable grounds for believing that the accused is “not guilty” of the alleged offence. There is degree of difference between the satisfaction to be recorded by the Court that there are reasonable grounds for believing that the accused is “not guilty” of such offence and the satisfaction to be recorded for the purposes of the 1967 Act that there are reasonable grounds for believing that the accusation against such person is *“prima facie”* true. [Paras 15, 17] [1087-E-G; 1088-A; F-G; 1089-A-B]
- B 1.2 By its very nature, the expression *“prima facie”* true would mean that the materials/evidence collated by the Investigating Agency in reference to the accusation against the concerned accused in the first information report, must prevail until contradicted and overcome or disproved by other evidence, and on the face of it, shows the complicity of such accused in the commission of the stated offence. It must be good and sufficient on its face to establish a given fact or the chain of facts constituting the stated offence, unless rebutted or contradicted. In one sense, the degree of satisfaction is lighter when the Court has to opine that the accusation is *“prima facie”* true, as compared to the opinion of accused “not guilty” of such offence as required under the other special enactments. In any case, the degree of satisfaction to be recorded by the Court for opining that there are reasonable grounds for believing that the accusation against the accused is *prima facie* true, is lighter than the degree of satisfaction to be recorded for considering a discharge application or framing of charges in relation to offences under the 1967 Act. The exercise to be undertaken by the Court at this stage- of giving reasons for grant or non-grant of bail- is markedly different from discussing merits or demerits of the evidence. The elaborate examination or dissection of the evidence is not required to be done at this stage. The Court is merely expected to record a finding on the basis of broad probabilities regarding the involvement of the accused in the commission of the stated offence or otherwise. The High Court ventured into an area of examining the merits and demerits of the evidence. The approach of the High Court in completely
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discarding the statements of the protected witnesses recorded under Section 164 of Cr.P.C., on the specious ground that the same was kept in a sealed cover and was not even perused by the Designated Court and also because reference to such statements having been recorded was not found in the charge-sheet already filed against the respondent is in complete disregard of the duty of the Court to record its opinion that the accusation made against the concerned accused is *prima facie* true or otherwise. That opinion must be reached by the Court not only in reference to the accusation in the FIR but also in reference to the contents of the case diary and including the charge-sheet (report under Section 173 of Cr.P.C.) and other material gathered by the Investigating Agency during investigation. The special provision, Section 43D of the 1967 Act, applies right from the stage of registration of FIR for offences under Chapters IV and VI of the 1967 Act until the conclusion of the trial thereof. Soon after the arrest of the accused on the basis of the FIR registered against him, but before filing of the charge-sheet by the Investigating Agency; after filing of the first charge-sheet and before the filing of the supplementary or final charge-sheet consequent to further investigation under Section 173(8) Cr.P.C., until framing of the charges or after framing of the charges by the Court and recording of evidence of key witnesses etc. However, once charges are framed, it would be safe to assume that a very strong suspicion was founded upon the materials before the Court, which prompted the Court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged against the accused, to justify the framing of charge. In that situation, the accused may have to undertake an arduous task to satisfy the court that despite the framing of charge, the materials presented along with the charge-sheet (report under Section 173 of Cr.P.C.), do not make out reasonable grounds for believing that the accusation against him is *prima facie* true. Similar opinion is required to be formed by the Court whilst considering the prayer for bail, made after filing of the first report made under Section 173 of the Code, as in the present case. For that, the totality of the material gathered by the Investigating Agency and presented along with

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- A the report and including the case diary, is required to be reckoned and not by analysing individual pieces of evidence or circumstance. In any case, the question of discarding the document at this stage, on the ground of being inadmissible in evidence, is not permissible. For, the issue of admissibility of the document/evidence would be a matter for trial. The Court must look at the contents of the document and take such document into account as it is. [Paras 17-19][1088-B-E; 1092-C-H; 1093-A-F]

- B 1.3 In terms of Section 43D, it is the bounden duty of the Court to peruse the case diary and/or the report made under Section 173 of the Code and all other relevant material/evidence produced by the Investigating Agency, for recording its opinion. The issue regarding admissibility of the statements and efficacy of the certificates given by the competent authority, appended to the redacted statements would be a matter for trial and subject to the evidence in reference to Section 463 of Cr.P.C. [Paras 21, 23][1101-E-; 1102-C]

- C 1.4 Taking into account the totality of the report made under Section 173 of the Code and the accompanying documents and the evidence/material already presented to the Court, including the redacted statements of the protected witnesses recorded under Section 164 of the Code, there are reasonable grounds to believe that the accusations made against the respondent are *prima facie* true. Further investigation is in progress. The material produced by the Investigating Agency thus far (pending further investigation) shows the linkage of the respondent (Accused No.10) with A-3, A-4, A-5 and A-6 and, likewise, linkages between the respondent (Accused No.10) and A-3 to A-12, as revealed from the CDR analysis. The Chart A shows the inter-linkages of the named accused inter se and Chart B showing the inter-linkages of the named accused with others and the frequency of their interaction on phone during the relevant period. The charge against respondent is not limited to Section 17 of the 1967 Act regarding raising funds for terrorist acts but also in reference to Sections 13, 16, 18, 20, 38, 39 and 40 of the 1967 Act. Section 13 is in Chapter II of the 1967 Act. The special provisions regarding bail under Section 43D(5), however, are attracted in respect of the offences punishable under

Chapters IV and VI, such as Sections 16, 17, 18, 20, 38, 39 and 40 of the 1967 Act. Sections 39 and 40 form part of Chapter VI, whereas other sections (except Section 13) form part of Chapter IV to which the subject bail provisions are applicable, mandating the recording of satisfaction by the Court that there are reasonable grounds for believing that the accusation against such person is *prima facie* true. The accusation against the respondent (Accused No.10) is that accused A-3 to A-10 are part of the All Parties Hurriyat Conference which calls itself a political front, whereas their agenda is to create an atmosphere conducive to the goal of cessation of J & K from the Union of India. The role attributed to the respondent (Accused No.10) is that of being part of the larger conspiracy and to act as a fund raiser and finance conduit. Ample material has been collected to show the linkages between the Hurriyat leaders of the J & K and terrorists/terrorist organizations and their continuous activities to wage war against Government of India. [Paras 24-28][1102-E-H; 1112-E-F; 1113-C-E]

1.5 The seizure memo described as document D-3/6, in respect of search and seizure of articles/documents seized from the premises of the respondent (Accused No.10) dated 3<sup>rd</sup> June, 2017, would unravel the activities of the respondent, including regarding his financial deals. Another crucial document described as D-3g/20 is a contact diary seized from the respondent vide Memo D-3, which contains the Pakistan National name and contact “TS 0092425765022...26A” whose name figures in document D-132(a)/23. The Code “0092” pertains to Pakistan. Another contact diary was seized from the respondent vide Memo D-3, which, at page D-3h/28 contains the same name and contact, namely, “TS 00923008459775/ 0092425765022”. The documents D-3j to D-3j/5 also indicate the involvement of the respondent in terrorist activities, including that three cases of TADA have been registered against him in the past and investigated and one case of J & K PSA, 1978. The High Court erroneously proceeded on the premise that the charge-sheet makes no reference to any other criminal case against the respondent. Additionally, the charge-sheet is accompanied with documents D-9b and D-9c, which are photographs of ex-militant

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- A A-3 holding AK-47, seen with other terrorists. These photographs were seized from the residence of the said ex-militant on 3<sup>rd</sup> June, 2017. The prosecution case is that the respondent (Accused No.10) was in constant touch with the said ex-militant A-3, as noticed from the inter-linkage chart. That fact is backed by the CDR analysis report, also part of the charge-sheet. The charge-sheet also contains document D-185/10, which is a contact list of accused A-5 retrieved through forensic analysis, having mobile numbers of persons associated with Hurriyat party; and of one 'MCP' who is none other than the First Secretary of Pakistan High Commission. His name also figures in document D-132(a)/23. The Designated Court, besides adverting to the aforementioned documents, also adverted to other documents and the statements of the prospective witnesses (Ws-1, 28, 29, 38, 39, 43, 44, 48 and 52). The High Court has not appreciated the said material which found favour with the Designated Court to record its opinion that there are reasonable grounds for believing that the accusation against the respondent is *prima facie* true. The High Court adopted a tenuous approach - by first discarding the document D-132(a) and then discarding the statement of witnesses recorded under Section 161 and also the statements recorded under Section 164, presented by the
- B Investigating Agency in a sealed cover. The High Court ought to have taken into account the totality of the materials/evidences which depicted the involvement of the respondent in the commission of the stated offences and being a member of a larger conspiracy, besides the offence under Section 17 for raising funds for terrorist activities. Proviso to Section 43D(5) of the 1967 Act mandates that the accused person involved in the commission of offence referable to Chapters IV and VI of the 1967 Act shall not be released on bail or on bond. However, the Court may release such accused on bail only if it is of the opinion, on perusal of the case diary and/or the report made under Section 173 of Cr.P.C.
- C that there are "no reasonable grounds" for believing that the accusation against such person is *prima facie* true. Conversely, if in the opinion of the Court, there are reasonable grounds for believing that the accusation against such person is *prima facie* true, the question of granting bail would not arise as the bar

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under the first part of the proviso of no bail in such cases would operate. The fact that there is a high burden on the accused in terms of the special provisions contained in Section 43D(5) to demonstrate that the prosecution has not been able to show that there exists reasonable grounds to show that the accusation against him is *prima facie* true, does not alter the legal position expounded in *K. Veeraswami*, to the effect that the charge-sheet need not contain detailed analysis of the evidence. It is for the Court considering the application for bail to assess the material/evidence presented by the Investigating Agency along with the report under Section 173 of Cr.P.C. in its entirety, to form its opinion as to whether there are reasonable grounds for believing that the accusation against the named accused is *prima facie* true or otherwise. [Paras 29-31][1121-F-H; 1122-A-H; 1123-B-F]

1.6 The Designated Court had rightly rejected the bail application after advertiring to the relevant material/evidence indicative of the fact that there are reasonable grounds for believing that the accusation against the respondent is *prima facie* true. The issue of admissibility and credibility of the material and evidence presented by the Investigating Officer would be a matter for trial. The High Court, in the present case, adopted an inappropriate approach whilst considering the prayer for grant of bail. The High Court ought to have taken into account the totality of the material and evidence on record as it is and ought not to have discarded it as being inadmissible. The High Court clearly overlooked the settled legal position that, at the stage of considering the prayer for bail, it is not necessary to weigh the material, but only form opinion on the basis of the material before it on broad probabilities. The Court is expected to apply its mind to ascertain whether the accusations against the accused are *prima facie* true. [Paras 33-35][1128-E-F; 1129-B; E-G]

1.7 The Designated Court rightly opined that there are reasonable grounds for believing that the accusation against the respondent is *prima facie* true. The order passed by the High Court granting bail to the respondent is reversed. In the present case, the respondent is not entitled to grant of bail in connection with the stated offences, particularly those falling under

A **Chapters IV and VI of the 1967 Act. The impugned judgment and order is set aside and, instead, the order passed by the Designated Court rejecting the application for grant of bail made by the respondent herein, is affirmed.** [Paras 36-38][1130-A-D]

*K. Veeraswami v. Union of India and Ors. (1991) 3 SCC*

B **655 : [1991] 3 SCR 189 – followed.**

*Salim Khan v. Sanjai Singh and Anr. (2002) 9 SCC 670; Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra and Anr. (2005) 5 SCC 294 : [2005] 3 SCR 345 – relied on.*

C *Hitendra Vishnu Thakur and Ors. v. State of Maharashtra and Ors. (1994) 4 SCC 602 : [1994] 1 Suppl. SCR 360 ; Niranjan Singh Karam Singh Punjabi, Advocate v. Jitendra Bhimraj Bijuaya and Ors. (1990) 4 SCC 76 : [1990] 3 SCR 633 ; Manohar Lal Sharma*

D *v. Union of India (2017) 11 SCC 783 ; Jayanta Kumar Ghosh and Ors. v. State of Assam and Anr. (2010) 6 Gauhati Law Reports 727 ; Davender Gupta v. National Investigating Agency (2014) SCC Online AP 192 ; Sanjay Chandra v. CBI AIR 2012 SC 830 : [2011] 13 SCR 309 ; Central Bureau of Investigation*

E *v. V. C. Shukla and Ors. (1998) 3 SCC 410 : [1998] 1 SCR 1153 ; Chenna Boyanna Krishna Yadav v. State of Maharashtra and Anr. (2007) 1 SCC 242 : [2006] 10 Suppl. SCR 381 ; State of U.P. through CBI v. Amarmani Tripathi (2005) 8 SCC 21 : [2005] 3 Suppl. SCR 454 ; Khoday Distilleries Ltd. and Ors. v. State of Karnataka and Ors. (1995) 1 SCC 574 : [1994] 4 Suppl. SCR 477 – referred to.*

#### Case Law Reference

G	[1994] 1 Suppl. SCR 360	referred to	Para 3
	[1990] 3 SCR 633	referred to	Para 3
	(2017) 11 SCC 783	referred to	Para 3
	(2010) 6 G. L. Reports 727	referred to	Para 3

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[1991] 3 SCR 189	followed	Para 8	A
[2011] 13 SCR 309	referred to	Para 12	
(2002) 9 SCC 670	relied on	Para 13	
[1998] 1 SCR 1153	referred to	Para 14	
[2005] 3 SCR 345	relied on	Para 14	B
[2006] 10 Suppl. SCR 381	referred to	Para 14	
[2005] 3 Suppl. SCR 454	referred to	Para 15	
[1975] 3 SCR 839	referred to	Para 23	
[1994] 4 Suppl. SCR 477	referred to	Para 34	C

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 578 of 2019

From the Judgment and Order dated 13.09.2018 by the High Court of Delhi at New Delhi in Criminal Appeal No. 768 of 2018. D

K.K. Venugopal, Attorney General, R. Balasubramanian, Ms. Suhasini Sen, Suchindran Bhaskar Narayan, Surinder Singh (Sr. P. P./ NIA), B. V. Balaran Das, Advs. for the Appellant.

Shekhar Naphade, R. A. Jan, Sr. Advs., Shariq J. Reyaz, Abhikalp Pratap Singh, Ms. S. Lakshmi Iyer, Shakil Ahmed Syed, Advs. for the Respondent. E

The Judgment of the Court was delivered by

**A. M. KHANWILKAR, J.** 1. Leave granted.

2. The respondent is named as Accused No.10 in the First Information Report dated 30<sup>th</sup> May, 2017, registered by the Officer-in-charge of Police Station, NIA, Delhi, for offences punishable under Sections 120B, 121 and 121A of the Indian Penal Code (“IPC”) and Sections 13,16,17,18,20,38,39 and 40 of the Unlawful Activities (Prevention) Act, 1967, (for short “**the 1967 Act**”). The respondent (Accused No.10) filed an application for bail before the District and Sessions Judge, Special Court (NIA), New Delhi, which came to be rejected on 8<sup>th</sup> June, 2018. That order has been reversed by the High Court of Delhi at New Delhi in Criminal Appeal No.768/2018 vide order dated 13<sup>th</sup> September, 2018. The High Court directed release of the respondent on bail subject F G H

- A to certain conditions. That decision is the subject matter of this appeal filed by the prosecuting agency - the appellant herein.
3. The Designated Court opined that there are serious allegations against the respondent Zahoor Ahmad Shah Watali (Accused No.10) of being involved in unlawful acts and terror funding in conspiracy with
- B other accused persons; he had acted as a conduit for transfer of funds received from terrorist Accused No.1 Hafiz Muhammad Saeed, ISI, Pakistan High Commission, New Delhi and also from a source in Dubai, to Hurriyat leaders/secessionists/terrorists; and had helped them in waging war against the Government of India by repeated attacks on security forces and Government establishments and by damaging public
- C property including by burning schools etc. It then noted that the accusation against the respondent (Accused No.10) was of being a part of a larger conspiracy to systematically upturn the establishment to cause secession of J & K from the Union of India. Keeping in mind the special provisions in Section 43D of the 1967 Act and the exposition in
- D *Hitendra Vishnu Thakur and Ors. Vs. State of Maharashtra and Ors.,<sup>1</sup> Niranjan Singh Karam Singh Punjabi, Advocate Vs. Jitendra Bhimraj Bijuaya and Ors.<sup>2</sup>, Manohar Lal Sharma Vs. Union of India<sup>3</sup> and Jayanta Kumar Ghosh and Ors. Vs. State of Assam and Anr.<sup>4</sup>*, it proceeded to analyse the material on record and observed thus:
- E “7.5 Let me now see whether on the basis of the material on record, allegations against the accused are prima facie made out or not. Mindful of the fact that this is not the stage to examine and analyze the evidence placed on record in detail, let me refer to the same. Allegation against the accused that certain businesses of his, were just a front/ sham for routing of funds received from abroad/ terrorist A-1/ High Commission, Pakistan/ Dubai/other sources and that there were, unaccounted financial transactions, is prima facie borne out from statement of the witnesses PW1, PW28 and PW29 and documents including D-202 & D-214. It has also come in the statements of PW38 & PW39, who prepared
- F balance sheets of accused’s firms/companies namely Trison Farms and Constructions Pvt. Limited, M/s Trison International, M/s Yasir Enterprises, M/s 3Y, M/s Kashmir Veneer Industries & M/s Three
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<sup>1</sup> (1994) 4 SCC 602

<sup>2</sup> (1990) 4 SCC 76

<sup>3</sup> (2017) 11 SCC 783

H <sup>4</sup> (2010) 6 Gauhati Law Reports 727

Star, that the accused never produced any supporting documents with respect to remittances received from NZ-International Dubai-FZC, owned by him; and that he did not even inform about the actual execution of business despite asking of PW39. The fact that the balance sheets of M/s Trison International, M/s 3Y were forcefully got signed from the protected witness PW43 without providing him any document, has come in his statement. It has also come in the statement of PW44 that the audit report of the aforesaid companies were got signed from him without producing books for verification.”

Again in paragraph 7.8 to 7.10 the Court observed:

“7.8 The fact that the accused received money from abroad / A-1, chief of proscribed (terrorist) organization, HCP (High Commission, Pakistan) and others and was passing on the said funds to Hurriyat leaders, is prima facie borne out from D-152 read with statement of PW29 and D-154 (Expert’s Report), as per which the signatures of the accused on D-152 were compared with his admitted handwriting and were verified and found to be similar. In view of the same, the Ld. Defence counsel’s argument that the said document/ D-152 cannot be looked into at all even to form prima facie opinion, cannot be accepted. Thus, the judgment of Hon’ble Supreme court in **Manohar Lal Sharma’s Case** E (Supra), relied upon Ld. Defence counsel is also of no assistance to the accused.

7.9 Further, the association/proximity of Altaf Ahmad Shah @ Fantoosh (A-4), Farooq Ahmad Dar @ Bitta Karate (A-6) with accused, is also prima facie borne out from the statement of protected witness PW48. Accused’s links with people who have role in governance of Pakistan and with Hurriyat leaders has also prima facie come on record vide statement of PW52, documents D-3, D-4 (e) etc. and other material on record.

7.10 In view of the above facts and circumstances, the statements G of witnesses/material/documents and other material placed on record by NIA, offences as alleged against the accused are prima facie made out. Therefore, in view of the bar under proviso to

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- A Section 43D(5) UA(P) Act, **the accused's prayer for bail cannot be granted.**"

Further the Court observed:

- B "8.1.1 Ld. Special PP, NIA also submitted that the applicant/ accused is an influential person/ business man and has a great clout in the valley, as has come in the statement of PW48. All the witnesses are known to the applicant/ accused. There is every likelihood of the applicant/accused influencing/ intimidating witnesses/ tempering with evidence, in the event of his release even on interim bail."

- C 4. The respondent had also prayed for grant of bail on health grounds, which plea was duly considered and rejected in the following words:

- D "8.2 I have duly considered the submissions made by both the sides. Perusal of the record reveals that as and when requested by the accused, he was provided medical treatment from time to time. Pursuant to the directions of this court, the accused was taken to the premier medical institute of India/AIIMS for necessary medical examination. This was besides being provided appropriate medical attention to Jail hospital and in-patient treatment at Dr. RML hospital from 01.09.2017 to 05.09.2017. As per medical status report dated 26.09.2017, the accused was extensively evaluated at Dr. RML Hospital for chest pain and cause of cardiac disease was ruled out. Even subsequently, the accused was reviewed at Central Jail Hospital and detailed blood investigation was carried out and medication was provided. On his complaint of anxiety,

- E severe low back pain and bleeding per-rectum on 24.09.2017, the accused was admitted to M.I. Room, Dispensary, Central Jail No. 8/9 from 24.09.2017 to 26.09.2017. Vide subsequent report dated 11.10.2017, Medical Officer I/c, Central Jail Tihar, Dispensary 8/9, reported that the accused was getting treatment under regular follow up of Medicine Specialist, jail visiting SR surgery. It may further be mentioned that accused was constantly reviewed at short intervals and was provided all advised medication.

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8.3 It has also come in order sheet dated 03.01.2018 that as per medical report of accused received from AIIMS New Delhi, the accused was evaluated in seven speciality/ superspeciality OPDs but was not found to be suffering from any specific ailment except for his known history of Type 2 diabetes mellitus, hypertension & hypothyroidism for which requisite medications to be taken regularly, were already prescribed. The Colonoscopy test of the accused was scheduled for 15.01.2018. Medical status report of accused Zahoor Ahmad Shah Watali received from the Medical Officer Incharge, Central Jail Dispensary, Tihar, New Delhi, mentioned that the accused despite being counseled several times to continue his treatment at AIIMS Hospital, refused to visit AIIMS for treatment/further management.

9.0 From the above, it is evident that the applicant/ accused is being provided necessary medical attention/ treatment as and when prayed for, not only inside the jail but also at AIIMS and other Govt. Hospitals. **Thus, taking into account the law as laid down in Redual Hussain Khan's case (Supra), no ground for grant of interim bail on health grounds is made out.**

**9.1 However, Jail Superintendent is directed to provide proper medical care and treatment to the applicant/ accused, as requested/ called for.”**

5. The respondent carried the matter before the High Court by way of Criminal Appeal No.768 of 2018 under Section 21(1) read with Section 21(4) of the National Investigation Agency Act, 2008. The High Court noticed that after filing of the charge-sheet, accused Nos.11 and 12 had been granted regular bail, while accused Nos.1 and 2 had not been arrested. Rest of the accused, including the respondent (Accused No.10), were in judicial custody. The respondent (Accused No.10) was arrested on 17<sup>th</sup> August, 2017 and had been in judicial custody since then. His age, as indicated in the charge-sheet, was about 70 years. The High Court then adverted to paragraph 17.6.5 onwards of the charge-sheet [report under Section 173 of the Code of Criminal Procedure (Cr.P.C.)] and summarized the allegations against respondent (Accused No.10) as follows:

“18. Specific to the Appellant are the allegations made in Paragraph 17.6.5 of the charge-sheet which is subtitled ‘Hawala’.

- A This being the principal allegation against the Appellant, requires to be summarized as under:
- (i) The Appellant is one of the conduits to bring money from off-shore locations of India to fuel anti-India activities in Jammu and Kashmir. Reference is again made to the same incriminating document i.e. D No.132 (a).
- B (ii) A-10 was bringing money from off-shore locations to India “by layering it through the scores of firms and companies he has opened”. Reference is made to an NRE account of the Appellant at the J&K Bank where, from 2011 till 2013, he is said to have received Rs.93, 87, 639. 31 from ‘unknown sources’.
- C (iii) The Appellant was showing foreign remittances under ‘other income’ in his proprietorship M/s Trison International, Srinagar. Foreign remittances in the sum of Rs.2,26,87,639.31 were received by the Appellant in different accounts from 2011 to 2016. It is repeated that Rs.93,87,639.31 was received in his NRE account from 2011 to 2013.
- D (iv) It is stated that Rs.14 lacs were remitted in the account of a medical college in Jammu through NEFT on 9th April, 2013 against the fees deposited for his son (who incidentally is a medical doctor and through whom the present appeal has been filed). It is stated that Rs.60 lacs were remitted in the current account of the Appellant in J&K Bank. Rs.5 lacs were remitted in the account of M/s Trison Farms and Constructions Pvt. Limited (‘TFCPL’). It is stated that all these foreign remittances “are from unknown sources”.
- E (v) On 7th November, 2014, one Nawal Kishore Kapoor (who initially was a witness but has, since the filing of the charge-sheet, been arrayed as an accused himself), a resident of United Arab Emirates (‘UAE’) entered into an agreement with TFCPL, whose Managing Director (‘MD’) is the Appellant to take land measuring 20 kanals in Budgam in J&K on lease in consideration of a sum of Rs.6 crores as premium and Rs.1,000/- annual rent for an initial period of 40 years which could be extended through mutual agreement. In the said agreement, TFCPL was declared
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as the absolute owner of the land. Mr. Kapoor remitted a total sum of Rs.5.579 crores in 22 instalments between 2013 and 2016 to the Appellant.

(vi) During investigation it was revealed that no land exists in the name of TFCPL as per the balance sheet of that company. Further, it was ascertained that Rs.5,57,90,000 was mobilized by Mr. Kapoor from unknown sources and remitted to Appellant to lease a piece of land which does not even exist in the name of TFCPL and therefore the agreement itself lacks legal sanctity. According to the NIA, this “proves that the said agreement was a cover” created by the Appellant “to bring foreign remittances from unknown sources to India”. A

(vii) The Chartered Accountant ('CA') who signed the audited balance sheet of M/s Trison International., TFCPL and M/s Yasir Enterprises for various years between 2013-14 and 2015-16 “did so without seeing any supporting documents”. According to the NIA, the balance sheets of the above entities/companies were sent to the CA by Mustaq Mir, Cost Accountant and Shabir Mir, CA from Wizkid Office, Srinagar through email and he was asked to sign on them in Delhi without showing any documents. According to the NIA, this also clearly showed that the Appellant was remitting money received from unknown sources to India. B

(viii) TFCPL raised an unsecured loan of Rs.2,65,55,532/- from the Directors of the company, i.e. the Appellant, his wife, and his three sons in the Financial Year ('FY') 2010-11 in the form of both cash and cheque and this was used to repay the secured loan of Rs.2,94,53,353/- in the books of J&K Bank. The source of money with the Directors could not be explained satisfactorily by the Appellant. C

(ix) The seizure from the house of the Appellant of a list of ISI officials and a letter from Tariq Shafi, proprietor of Al Shafi Group addressed to the PHC recommending grant of visa to the Appellant “shows his proximity with Pakistani Establishment”. It is stated that the name of Tariq Shafi figures in the document of foreign contributions seized from the house of the Appellants cashier-cum-accountant Ghulam Mohd. Bhatt.” D

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- A        6. The High Court also adverted to the accusations against respondent (Accused No.10) in paragraphs 17.9 and 17.10 of the charge-sheet, to the effect that CDRs relied upon by the prosecution revealed that the accused persons were in contact “with each other, with some militants/OGWs (Over Ground Workers) and the hawala conduit” i.e. the respondent (Accused No.10) and the other accused, that the respondent (Accused No.10) was in constant contact on telephone with A-3, A-4, A-5 and A-6 and that A-3 to A-12 were in contact with each other, either directly or indirectly. In paragraph 17.10 of the charge-sheet, it is stated that respondent (Accused No.10) was a known hawala dealer and financer and a number of cases were registered against him, which were being investigated by the sister investigating agencies. The High Court, however, noted that the charge-sheet neither gave details of the other cases registered and being investigated against the respondent nor revealed the details thereof to the Court. The High Court also noted accusations against the respondent (Accused No.10) in paragraphs 18.10, 18.13 and 18.14, revealing the linkage between A-3 to A-10 and indicating clear meeting of minds of the said accused in hatching the conspiracy in support of A-1 and A-2 and other Hurriyat leaders and other terrorist organizations in J & K.
- B        7. After noting the relevant facts emanating from the charge-sheet filed against the respondent, the High Court adverted to the conclusions recorded by the Trial Court. It then proceeded to analyse the relevant provisions of the 1967 Act and the principle underlying the decisions of this Court concerning the Terrorist and Disruptive Activities (Prevention) Act, 1985 (“TADA”) and the Maharashtra Control of Organised Crime Act, 1999 (“MCOCA”), in light of the exposition in *Hitendra Vishnu Thakur* (supra) and *Niranjan Singh Karam Singh Punjabi* (supra), and posed a question to itself as to whether the material gathered by the NIA in the present case could have enabled the Trial Court to come to the conclusion that there were reasonable grounds for believing that the accusation against the respondent (Accused No.10) was *prima facie* true. After so noting, it observed that the statements of the proposed/prospective witnesses recorded under Section 161 Cr.P.C. did not constitute admissible evidence. Those could only be used to confront the witnesses who would subsequently appear at the trial. It noted that this crucial aspect had to be kept in view while referring to such statements at that stage. The
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High Court then noted that the Investigating Agency had recorded the statements of the witnesses under Section 164 of Cr.P.C. but had kept the same in a sealed cover enclosed to the charge-sheet. The High Court noted that the statements at serial Nos.277 and 278 were of protected witnesses "Charlie" and "Romeo" respectively, and those at serial Nos.279 to 284 were described as statements of protected witnesses "Romeo", "Alpha", "Gamma", "Pie", "Potter", "Harry" and "xxx". These statements were kept in a sealed cover and not supplied to the respondent (Accused No.10). Further, these statements were presumably not perused by the Designated Court. Notably, the application moved by the Investigating Agency under Section 44 of the 1967 Act to accord protection to those witnesses remained pending before the Designated Court. Here, it may be mentioned that during the pendency of the present appeal before this Court, the said application has been decided in favour of the Investigating Agency vide order dated 11<sup>th</sup> January, 2019 passed by the Designated Court. We shall refer to this a little later.

8. Reverting to the judgment of the High Court, it opined that the said statements under Section 164 of Cr.P.C. could not be considered, as copies thereof had not been provided to the respondent. It then proceeded to hold that Section 44 of the 1967 Act merely permitted the identity and address of such witnesses to be kept secret by the Court. It held that it was not possible to read Section 17 of the NIA or Section 44 of the 1967 Act as an exception to Section 207 read with Section 173 Cr.P.C., which mandates that the accused shall be supplied copies of the police report and other documents relied upon by the prosecution in the charge-sheet, without delay and free of cost. It then proceeded to analyse the interplay between Sections 207, 161, 164 and 173 of Cr.P.C. and opined that even in respect of statements recorded under Section 161 of Cr.P.C., there was no wholesale exclusion of the entire document from being provided to the accused. What was permitted was the redaction of such portion of the document which could reveal the identity and address of the maker of the statement. Be it noted that the High Court did not think it necessary to direct the Designated Court to first decide the application filed by the Investigating Agency under Section 44 of the 1967 Act before proceeding with the hearing of the appeal filed by the respondent. Instead, the High Court preferred to exclude those statements kept in a sealed cover from consideration. The High Court

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- A did not advert to Section 48 of the 1967 Act, which makes it amply clear that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than the said Act etc. The High Court then went on to observe that the charge-sheet made no reference to the statements recorded under Section 164 of the witnesses in respect of whom protection was sought by the Investigating Agency. The High Court distinguished the decision of this Court in *K. Veeraswami Vs. Union of India and Ors.*<sup>5</sup> pressed into service by the Investigating Agency to buttress its submission that it is not necessary that the charge-sheet must contain detailed analysis of the evidence, and that the Trial Court ought to consider not only the narration in the charge-sheet but also all documents accompanying thereto. The High Court, however, opined that in the context of the relatively high burden placed on the accused in terms of the proviso to Section 43D(5) of the 1967 Act, of having to demonstrate that the prosecution had not been able to show that there existed reasonable grounds to show that the accusation against him was *prima facie* true, the absence of any reference in the charge-sheet to the statements under Section 164 Cr.P.C., which are of a higher probative value than the statements under Section 161 Cr.P.C., was significant. It thus observed that such statements could not be kept back from the accused. Resultantly, the statements of the protected witnesses recorded under Section 164 Cr.P.C. were kept out of consideration by the High Court, with liberty to the parties to independently make submissions before the Trial Court at the appropriate stage.

- F 9. The High Court then straightaway proceeded to analyse the efficacy of document D-132(a) forming part of the charge-sheet. In light of the statement of Ghulam Mohammad Bhatt from whom the same was recovered, it noted in paragraph 61 of the impugned judgment that it was unlikely that the document D-132(a) was recovered from the residence of Ghulam Mohammad Bhatt till 16<sup>th</sup> August, 2017, and thereafter proceeded to observe thus:

- G “62. While the genuineness and the evidentiary value of Document 132 (a) is yet to be established by the NIA at the trial, since this one document is being relied upon by the NIA as being central to its case against the Appellant, it is but inevitable that the trial Court and now this Court has to discuss it in some detail for

the purpose of deciding whether the Appellant can be released on A  
bail.

63. The question that arises is whether there is anything to show with reference to each of the dates mentioned in the above Document No. 132 (a) that the figures shown against the entry on each date (purporting to be specific amounts of money) was in fact received by the Appellant in his personal accounts or in the accounts of any of his entities. Although the case of the NIA is that the money has been received, there is no document or statement, which forms part of the charge sheet, which in fact indicates this. B

64. The above document is also relied upon by the NIA as providing proof of the linkages of the Appellant to A-1, through the entry dated 3rd May, 2015 and with the Pakistan High Commission (PHC) through the entries dated 15th and 20th October, 2016. Yet none from the PHC has been named, much less statement of such a person been recorded to confirm that those figures represented money that was received from the PHC. C

65. The case of the NIA in the charge sheet is that the same document is also proof of the fact that the monies so received were passed on to the Hurriyat leaders. Reference is made to the fourth column of the above document where the names of some of the Hurriyat leaders are mentioned. However, there is nothing to show that the money was received by the Appellant and then transmitted by him to any of the named Hurriyat leaders. Nor have any of the ‘prospective witnesses’ including Mr Bhatt made any statement to that effect. D

66. Mr. Luthra urged that the signature of the Appellant in the right hand bottom corner of the document has been confirmed by the handwriting expert to match the specimen signature of the Appellant. In reply it was pointed out by Mr. Vikas Pahwa, learned Senior counsel for the Appellant, that the mere fact that the Appellant’s signature appeared on the document did not mean that he had in fact signed the document in acceptance of the truth of its contents. According to him, it is too early to speculate whether E

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- A the Appellant when he signed the paper, if at all, put his signature on a blank green legal size paper which may have then been used for legal purposes for an affidavit etc.
- B 67. It is indeed too early in the case to speculate whether the Appellant in fact signed the document after it was typed out and whether his signature amounts to accepting the truth of its contents or for that matter whether the contents of the document in question constitute conclusive proof of what the NIA alleges the document to be.
- C 68. In the circumstances, the Court is not satisfied that a sheet of paper containing typed entries and in loose form, not shown to form part of the books of accounts regularly maintained by the Appellant or his business entities, can constitute material to even ‘prima facie’ connect the Appellant with the crime with which he is sought to be charged. The conclusion of the trial Court that this document shows the connection of the Appellant with the other accused as regards terrorist funding does not logically or legally flow from a plain reading of the document.”
- D 10. The High Court then adverted to the other documents. It analysed the concerned documents and concluded that the entire bunch of documents did not reveal that the trading activities undertaken by the
- E respondent were geared towards funding of terrorist activities, as alleged in the charge-sheet. It may be apposite to reproduce the relevant extract from the impugned judgment in this regard, which reads thus:
- F “69. Mr. Luthra then referred to the statements of Mustaq Ahmad Mir and Shabbir Ahmad Mir, the reply of Mr Mustaq Ahmad Mir (Ex.D-214), the CFSL report dated 6th November, 2017 (document D-154); the seizure memo dated 3rd June, 2017 (document D-3) regarding the recovery being made from the residence of the Appellant; the seizure memo of the same date of the recoveries from the office of the TFCPL (document D-4); and the bunch of papers seized from the Appellant [D-4(e)] referred to by the trial Court.
- G 70. Beginning with the last referred document, [D-4(e)], it is actually a bunch of documents, the first of which is a letter dated
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28th June, 2016, written by the Prime Minister of Pakistan Mr Mohammad Nawaz Sharif to the Appellant thanking him for the bouquet sent to him with wishes for his good health and well being.

71. Then there is a letter dated 20th November, 2007 from the President of the Azad Jammu and Kashmir, Chambers of Commerce and Industry, addressed to the Appellant, appointing the Appellant as an Honorary Trade Consultant at Srinagar. It notes that Pakistan and India had initiated/undertaken a number of Kashmir related CBMs (confidence building measures) in the recent past to provide respite to the Kashmiris on both sides of the LoC (Line of Control):

‘1. Pakistan and India have initiated/undertaken a number of Kashmir related CBMs in recent past to provide respite to the Kashmiris on both sides of the LoC. One such CBM which is under active consideration is commencement of trade between both parts of Kashmir. Necessary modalities including the items to be traded are being worked out.’

72. The other documents reflect the correspondence carried out in the regular course of business between the Appellant’s business entities and other entities including the Al-Shafi Group of companies, headquartered at Lahore. A business invitation was extended to the Appellant on 7th February, 2014 by Mohd. Tariq Shafi, the director of Al-Shafi Group of companies to visit them for business negotiations. There is a letter of the same date addressed by Mr. Mohd. Tariq Shafi to the PHC in New Delhi for grant of Pakistan Business Visa to the Appellant.

73. It must be noticed at this stage that the NIA does not dispute that the Appellant is a leading businessman in Kashmir. He runs a conglomerate of business entities and has been active in the context of the Indo-Pakistan trade. Nothing has been shown to this Court from the entire bunch of documents which would suggest that these trade activities were geared toward funding of terrorist activities, as alleged in the charge-sheet.”

11. The High Court then adverted to the statements of Mustaq Ahmad Mir and Shabbir Ahmad Mir and noted that the same had no

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- A evidentiary value since they were merely statements under Section 161 Cr.P.C. and even if taken at their face value, they would only indicate that some of the entries in the accounts and, in particular, the source of credit entries were not explained properly. Further, the accounts of the entities of the respondent were regularly audited and it was not possible to *prima facie* conclude that these unknown sources were, in fact,
- B connected to the other accused and that remittances were received from Pakistan or UAE for terrorist activities. The Court noted that there must be something more substantial than mere audited accounts that may have entries that require explanation to the Income Tax Authorities. As a result, the High Court concluded that the documents relied upon by the
- C Investigating Agency did not persuade the Court to *prima facie* conclude that the respondent received money from A-1 or Pakistan High Commission or others and was passing on the said funds to the Hurriyat leaders for funding terrorist activities and stone-pelting. The High Court also adverted to the statement of the ‘protected witness’ W-48 about the proximity of the respondent (Accused No.10) with A-4 and A-6 and opined that the same could not be construed as material that would enable the prosecution to show that accusation against the respondent about his funding terrorist activities was *prima facie* true. Lastly, the High Court dealt with transaction of lease involving Naval Kishore Kapoor and noted thus:
- E “77. Turning to the transaction of lease involving Mr. Naval Kishore Kapoor, it is explained on behalf of the Appellant that only individuals domiciled in Kashmir can hold properties there. There was no declaration of ‘ownership’ of lands by the companies and in any event it was a lease. The lease itself has not been shown to be a sham transaction. As regards the NRE account, it is pointed out that it has since been closed and the fine amount was also paid. As regards the CDRs, it is pointed out that there may have been exchange of calls between the Appellant and A-6 but not between the Appellant and A-3, A-4 or A-5. This cannot at this stage be said to constitute material to show that the accusation of a criminal conspiracy between the Appellant and A-6 for commission of terrorist offences is *prima facie* true. It also emerged during the course of the hearing of this appeal that neither the APHC nor any of its 26 constituent organisations are ‘banned’ organisations within the meaning of the UAPA.”
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12. Having said thus, the High Court proceeded to conclude that the order passed by the Designated Court was cryptic and unsustainable both on facts and in law. It then went on to observe that there was nothing on record to indicate the previous criminal involvement of the respondent in any offence or the possibility of the respondent fleeing from justice, if released on bail. Further, the respondent who was a septuagenarian and was suffering from various medical ailments, was in judicial custody for more than a year and had not tampered with the evidence or interfered with any of the ‘prospective/protected’ witnesses. The High Court then went on to rely on the dictum in *Davender Gupta Vs. National Investigating Agency*<sup>6</sup> and *Sanjay Chandra Vs. CBI*<sup>7</sup>. Finally, the High Court directed the release of respondent on bail and issued directions in that regard subject to conditions stated in the concluding part of the impugned judgment which reads thus:

**“Conclusion**

82. The impugned order dated 8th June, 2018 of the trial Court is accordingly set aside. The Appellant is directed to be released on bail subject to his furnishing a personal bond in the sum of Rs.2 lakhs with two sureties of like amount to the satisfaction of the trial Court, and further subject to the following conditions:

(i) The Appellant shall report to the IO in charge of the case as and when required. He shall provide to the IO as well as the trial Court the mobile phone on which he can be contacted and his current address where he will be available. He will keep both the IO and the trial Court informed promptly if there is any change in either.

(ii) He will not influence or intimidate the proposed/prospective Crl.A.768/2018 Page 40 of 40 prosecution witnesses or tamper with the evidence of the prosecution in any manner.

(iii) The Appellant will surrender his passport before the trial Court at the time of execution of the bail bonds. He will not

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<sup>6</sup> (2014) SCC Online AP 192

<sup>7</sup> AIR 2012 SC 830

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- A travel out of the country without prior permission of the trial Court.
- (iv) If there is any breach of the above conditions, it will be open to the NIA to apply to the trial Court for cancellation of bail.
- B 83. It is clarified that the observations of this Court in this order both on facts and law are based on the materials forming part of the charge sheet and are *prima facie* in nature and for the limited purpose of considering the case of the Appellant for grant of bail. They are not intended to influence the decisions of the trial Court at any stage of the case hereafter.
- C 84. The appeal is allowed in the above terms.”
- D 13. The view so taken by the High Court has been assailed by the Investigating Agency – the appellant herein, on diverse counts. According to the appellant, the High Court has virtually conducted a mini trial and even questioned the genuineness of the documents relied upon by the Investigating Agency. In that, the High Court adopted a curious approach in finding fault with the Investigating Agency for not naming any official from the High Commission of Pakistan as accused or recording their statements as witnesses, for inexplicable reasons. In
- E so observing, the High Court clearly overlooked the fact that the officials of the High Commission are accorded diplomatic immunity. Not only that, while considering the statements of witnesses recorded under Section 161 of Cr.P.C., the High Court went on to observe that the same were inadmissible in evidence and discarded it from consideration for forming opinion as to whether the accusations against the respondent
- F (Accused No.10) were *prima facie* true. The Court, however, was obliged to consider all the statements recorded under Section 161 of Cr.P.C. in light of the exposition in *Salim Khan Vs. Sanjai Singh and Anr.*<sup>8</sup> Similarly, the statements recorded under Section 164, which were produced in a sealed cover, had been completely discarded. The
- G approach of the High Court, to say the least, contends the learned Attorney General, was tenuous and not permissible at the stage of consideration of prayer for bail. The analysis done by the High Court is

bordering on being perverse as it has virtually conducted a mini trial at the stage of consideration of the prayer for bail. According to the appellant, the charge-sheet filed against the respondent was accompanied by documentary evidence, statements of prospective witnesses and other evidence which indicated complicity of the respondent and reinforced the aspect that the accusations made against him were *prima facie* true. It is submitted that at the stage of consideration of bail, the totality of the evidence available against the respondent must be reckoned and ought to be taken into account as it is, without anything more. The question of admissibility of such evidence would be a matter for trial. The sufficiency or insufficiency of the evidence cannot be the basis to answer the prayer for grant of bail. It is contended that after considering the statements of protected witnesses recorded under Section 164 of the Code, the same reinforces the accusations made against the respondent (Accused No.10) as being *prima facie* true. Accordingly, it is submitted that the High Court order be set aside and the application for bail preferred by the respondent (Accused No.10) be rejected.

14. Learned counsel for the respondent, on the other hand, submits that the High Court justly came to hold that no evidence was forthcoming to indicate the complicity of the respondent in the commission of the alleged offences and that the documents and evidence relied upon by the Investigating Agency were not enough to sustain the accusations, much less as being *prima facie* true. It is submitted that the accusations made against the respondent in the charge-sheet do not fall under Chapters IV and VI of the 1967 Act. Further, the pivotal document D-132(a) was not sufficient to fasten any criminal liability upon the respondent. As a matter of fact, the said document is a loose sheet of paper and cannot be looked at in view of the mandate of Section 34 of the Evidence Act. To buttress this submission, reliance has been placed on *Central Bureau of Investigation Vs. V.C. Shukla and Ors.*<sup>9</sup> In any case, the said document itself cannot and does not *prima facie* suggest that the funds, as shown, were received and disbursed in the manner described in the document. Further, there is no independent corroboration forthcoming much less to establish the complicity of the respondent in attracting the

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<sup>9</sup> (1998) 3 SCC 410

- A imperatives of Section 17 of 1967 Act. It is submitted that even if the contents of the said document were taken as it is, with the exception of accused No.4 (Altaf Ahmad Shah @ Fantoosh), no other person to whom the amount was paid or from whom the amount was received, has been arrayed as an accused in the charge-sheet. The statements of witnesses recorded under Section 161 or Section 164 of Cr.P.C. do not mention anything about the involvement of the respondent in commission of the stated offences. The statements of the co-accused cannot be considered as admissions, much less used against the respondent. Further, there was no evidence to indicate the involvement of the respondent in the larger conspiracy much less regarding terrorist activity. It is submitted
- B that the High Court was justified in analysing the materials on record to satisfy itself as to whether the accusations made against the respondent were *prima facie* true. That enquiry was permissible in terms of the exposition in *Ranjitsing Brahmajeetsing Sharma Vs. State of Maharashtra and Anr.*<sup>10</sup> and *Chenna Boyanna Krishna Yadav Vs. State of Maharashtra and Anr.*<sup>11</sup> According to the respondent, no fault can be found with the High Court and the view taken by the High Court, being a possible view, did not require any interference in exercise of the power under Article 136 of the Constitution of India. It is finally submitted that this Court, if it so desires, may impose additional conditions whilst upholding the order of bail passed by the High Court.
- C 15. Before we proceed to analyse the rival submissions, it is apposite to restate the settled legal position about matters to be considered for deciding an application for bail, to wit, (i) whether there is any *prima facie* or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail. (*State of U.P. through CBI Vs. Amarmani Tripathi*<sup>12</sup>).
- D 16. When it comes to offences punishable under special enactments, such as the 1967 Act, something more is required to be kept

<sup>10</sup> (2005) 5 SCC 294

<sup>11</sup> (2007) 1 SCC 242

<sup>12</sup> (2005) 8 SCC 21 (para 18)

in mind in view of the special provisions contained in Section 43D of the 1967 Act, inserted by Act 35 of 2008 w.e.f. 31<sup>st</sup> December, 2008. Sub-sections (5), (6) and (7) thereof read thus:

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

(5) Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release:

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

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

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

17. By virtue of the proviso to sub-section (5), it is the duty of the Court to be satisfied that there are reasonable grounds for believing that the accusation against the accused is *prima facie* true or otherwise. Our attention was invited to the decisions of this Court, which has had an occasion to deal with similar special provisions in TADA and MCOCA. The principle underlying those decisions may have some bearing while considering the prayer for bail in relation to offences under the 1967 Act as well. Notably, under the special enactments such as TADA, MCOCA and the Narcotic Drugs and Psychotropic Substances Act, 1985, the

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- A Court is required to record its opinion that there are reasonable grounds for believing that the accused is “not guilty” of the alleged offence. There is degree of difference between the satisfaction to be recorded by the Court that there are reasonable grounds for believing that the accused is “not guilty” of such offence and the satisfaction to be recorded for the purposes of the 1967 Act that there are reasonable grounds for believing that the accusation against such person is *“prima facie”* true. By its very nature, the expression *“prima facie”* true would mean that the materials/evidence collated by the Investigating Agency in reference to the accusation against the concerned accused in the first information report, must prevail until contradicted and overcome or disproved by other evidence, and on the face of it, shows the complicity of such accused in the commission of the stated offence. It must be good and sufficient on its face to establish a given fact or the chain of facts constituting the stated offence, unless rebutted or contradicted. In one sense, the degree of satisfaction is lighter when the Court has to opine that the accusation is *“prima facie”* true, as compared to the opinion of accused “not guilty” of such offence as required under the other special enactments. In any case, the degree of satisfaction to be recorded by the Court for opining that there are reasonable grounds for believing that the accusation against the accused is *prima facie* true, is lighter than the degree of satisfaction to be recorded for considering a discharge application or framing of charges in relation to offences under the 1967 Act. Nevertheless, we may take guidance from the exposition in the case of **Ranjitsing Brahmajeetsing Sharma** (supra), wherein a three-Judge Bench of this Court was called upon to consider the scope of power of the Court to grant bail. In paragraphs 36 to 38, the Court observed thus:
  - F “36. Does this statute require that before a person is released on bail, the court, albeit *prima facie*, must come to the conclusion that he is not guilty of such offence? Is it necessary for the court to record such a finding? Would there be any machinery available to the court to ascertain that once the accused is enlarged on bail, he would not commit any offence whatsoever?
  - G 37. Such findings are required to be recorded only for the purpose of arriving at an objective finding on the basis of materials on record only for grant of bail and for no other purpose.
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38. We are furthermore of the opinion that the restrictions on the power of the court to grant bail should not be pushed too far. If the court, having regard to the materials brought on record, is satisfied that in all probability he may not be ultimately convicted, an order granting bail may be passed. The satisfaction of the court as regards his likelihood of not committing an offence while on bail must be construed to mean an offence under the Act and not any offence whatsoever be it a minor or major offence. ... What would further be necessary on the part of the court is to see the culpability of the accused and his involvement in the commission of an organised crime either directly or indirectly. The court at the time of considering the application for grant of bail shall consider the question from the angle as to whether he was possessed of the requisite mens rea....”

And again in paragraphs 44 to 48, the Court observed:

“44. The wording of Section 21(4), in our opinion, does not lead to the conclusion that the court must arrive at a positive finding that the applicant for bail has not committed an offence under the Act. If such a construction is placed, the court intending to grant bail must arrive at a finding that the applicant has not committed such an offence. In such an event, it will be impossible for the prosecution to obtain a judgment of conviction of the applicant. Such cannot be the intention of the legislature. Section 21(4) of MCOCA, therefore, must be construed reasonably. It must be so construed that the court is able to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial. Similarly, the court will be required to record a finding as to the possibility of his committing a crime after grant of bail. However, such an offence in futuro must be an offence under the Act and not any other offence. Since it is difficult to predict the future conduct of an accused, the court must necessarily consider this aspect of the matter having regard to the antecedents of the accused, his propensities and the nature and manner in which he is alleged to have committed the offence.

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- A      45. It is, furthermore, trite that for the purpose of considering an application for grant of bail, although detailed reasons are not necessary to be assigned, the order granting bail must demonstrate application of mind at least in serious cases as to why the applicant has been granted or denied the privilege of bail.
- B      46. The duty of the court at this stage is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. However, while dealing with a special statute like MCOCA having regard to the provisions contained in sub-section (4) of Section 21 of the Act, the court may have to probe into the matter deeper so as to enable it to arrive at a finding that the materials collected against the accused during the investigation may not justify a judgment of conviction. The findings recorded by the court while granting or refusing bail undoubtedly would be tentative in nature, which may not have any bearing on the merit of the case and the trial court would, thus, be free to decide the case on the basis of evidence adduced at the trial, without in any manner being prejudiced thereby.
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- E      ‘18. We agree that a conclusive finding in regard to the points urged by both the sides is not expected of the court considering a bail application. Still one should not forget, as observed by this Court in the case *Puran v. Rambilas*<sup>13</sup> : (SCC p. 344, para 8)
- F      ‘Giving reasons is different from discussing merits or demerits. At the stage of granting bail a detailed examination of evidence and elaborate documentation of the merits of the case has not to be undertaken. ... That did not mean that whilst granting bail some reasons for prima facie concluding why bail was being granted did not have to be indicated.’
- G      We respectfully agree with the above dictum of this Court. We also feel that such expression of prima facie reasons for granting bail is a requirement of law in cases where such

H      <sup>13</sup> (2004) 7 SCC 528

<sup>14</sup> (2001) 6 SCC 338

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

48. In *Jayendra Saraswathi Swamigal v. State of T.N.*<sup>15</sup> this Court observed: (SCC pp. 21-22, para 16)

'16. ... The considerations which normally weigh with the court in granting bail in non-bailable offences have been explained by this Court in *State v. Capt. Jagjit Singh*<sup>16</sup> and *Gurcharan Singh v. State (Delhi Admn.)*<sup>17</sup> and basically they are — the

<sup>15</sup> (2005) 2 SCC 13

<sup>16</sup> (1962) 3 SCR 622

<sup>17</sup> (1978) 1 SCC 118

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- A nature and seriousness of the offence; the character of the evidence; circumstances which are peculiar to the accused; a reasonable possibility of the presence of the accused not being secured at the trial; reasonable apprehension of witnesses being tampered with; the larger interest of the public or the State and other similar factors which may be relevant in the facts and circumstances of the case.’ “
- B
- C 18. A priori, the exercise to be undertaken by the Court at this stage - of giving reasons for grant or non-grant of bail - is markedly different from discussing merits or demerits of the evidence. The elaborate examination or dissection of the evidence is not required to be done at this stage. The Court is merely expected to record a finding on the basis of broad probabilities regarding the involvement of the accused in the commission of the stated offence or otherwise. From the analysis of the impugned judgment, it appears to us that the High Court has ventured into an area of examining the merits and demerits of the
- D evidence. For, it noted that the evidence in the form of statements of witnesses under Section 161 are not admissible. Further, the documents pressed into service by the Investigating Agency were not admissible in evidence. It also noted that it was unlikely that the document had been recovered from the residence of Ghulam Mohammad Bhatt till 16<sup>th</sup>
- E August, 2017 (paragraph 61 of the impugned judgment). Similarly, the approach of the High Court in completely discarding the statements of the protected witnesses recorded under Section 164 of Cr.P.C., on the specious ground that the same was kept in a sealed cover and was not even perused by the Designated Court and also because reference to such statements having been recorded was not found in the charge-sheet already filed against the respondent is, in our opinion, in complete disregard of the duty of the Court to record its opinion that the accusation made against the concerned accused is *prima facie* true or otherwise. That opinion must be reached by the Court not only in reference to the accusation in the FIR but also in reference to the contents of the case diary and including the charge-sheet (report under Section 173 of Cr.P.C.) and other material gathered by the Investigating Agency during investigation. Be it noted that the special provision, Section 43D of the 1967 Act, applies right from the stage of registration of FIR for offences under Chapters IV and VI of the 1967 Act until the conclusion of the trial thereof. To wit, soon after the arrest of the
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accused on the basis of the FIR registered against him, but before filing of the charge-sheet by the Investigating Agency; after filing of the first charge-sheet and before the filing of the supplementary or final charge-sheet consequent to further investigation under Section 173(8) Cr.P.C., until framing of the charges or after framing of the charges by the Court and recording of evidence of key witnesses etc. However, once charges are framed, it would be safe to assume that a very strong suspicion was founded upon the materials before the Court, which prompted the Court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged against the accused, to justify the framing of charge. In that situation, the accused may have to undertake an arduous task to satisfy the court that despite the framing of charge, the materials presented along with the charge-sheet (report under Section 173 of Cr.P.C.), do not make out reasonable grounds for believing that the accusation against him is *prima facie* true. Similar opinion is required to be formed by the Court whilst considering the prayer for bail, made after filing of the first report made under Section 173 of the Code, as in the present case.

19. For that, the totality of the material gathered by the Investigating Agency and presented along with the report and including the case diary, is required to be reckoned and not by analysing individual pieces of evidence or circumstance. In any case, the question of discarding the document at this stage, on the ground of being inadmissible in evidence, is not permissible. For, the issue of admissibility of the document/evidence would be a matter for trial. The Court must look at the contents of the document and take such document into account as it is.

20. The question is whether there are reasonable grounds for believing that the accusations made against the respondent (Accused No.10) are *prima facie* true. That will have to be answered keeping in mind the totality of materials including the one presented along with the police report. Be it noted that the prosecution is relying on several documents forming part of the first charge-sheet (pending further investigation) filed against the respondent (Accused No.10) allegedly showing his involvement in the commission of the stated offences. Reference has been made to some of the crucial documents mentioned in the chart handed over to the Court by the appellant. The same, *inter alia*, read thus:

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NIA CASE NO.RC-10/2017/NIA/DLI  
TERROR FUNDING IN JAMMU & KASHMIR

<b>EVIDENCES FILED WITH CHARGE-SHEET (Excluding Supplementary Charge sheet)</b> Against Accused Zahoor Ahmed Shah Watali (A-10)		
B	<b>Exhibit</b>	<b>Details of Documents</b>
C	<b>D-1</b>	Order no.11011/26/2017-IS.IV, dated 30.05.2017 of Sh. N.S. Bisht, Under Secretary, GOI, MHA, New Delhi.
D	<b>D-2</b>	FIR No.RC-10/2017/NIA/DLI dated 30.05.2017, PS NIA New Delhi.
E	<b>D-3</b>	Seizure memo dated 03.06.2017 in respect of search and recovery of articles/documents seized from the premises of accused Zahoor Ahmed Shah Watali ( <b>A-10</b> ).
F	<b>D-3a</b>	Income Tax Returns of Three Star Enterprises seized from the premises of accused Zahoor Ahmed Shah Watali ( <b>A-10</b> ) dated 03.06.2017.
G	<b>D-3b</b>	Income Tax Returns of Trisons Farms and Construction Pvt. Ltd. seized from the premises of accused Zahoor Ahmed Shah Watali ( <b>A-10</b> ) dated 03.06.2017.
H	<b>D-3c</b>	Acknowledgment ITR-4 of Yamin Zahoor Shah seized from the premises of accused Zahoor Ahmed Shah Watali ( <b>A-10</b> ) dated 03.06.2017.
I	<b>D-3d</b>	Acknowledgment ITR-4 of Yawar Zahoor Shah seized from the premises of accused Zahoor Ahmed Shah Watali ( <b>A-10</b> ) dated 03.06.2017.
J	<b>D-3e</b>	Income Tax Returns of M/s Three Y seized from the premises of accused Zahoor Ahmed Shah Watali ( <b>A-10</b> ) dated 03.06.2017.
K	<b>D-3f</b>	Income Tax Returns in respect of Yasir Enterprises seized from the premises of accused Zahoor Ahmed Shah Watali ( <b>A-10</b> ) dated 03.06.2017.
L	<b>D-3g</b>	One blue colour small pocket diary seized from the premises of accused Zahoor Ahmed Shah Watali ( <b>A-10</b> ) dated 03.06.2017.
M	<b>D-3h</b>	One blue booklet containing I.D.D Codes and Phone numbers seized from the premises of accused Zahoor Ahmed Shah Watali ( <b>A-10</b> ) dated 03.06.2017.
N	<b>D-3i</b>	A bunch of papers related to Pakistan Steel Mill Corp. Ltd. seized from the premises of accused Zahoor Ahmed Shah Watali ( <b>A-10</b> ) dated 03.06.2017.
O	<b>D-3j</b>	A bunch of papers containing Court documents related to Zahoor Ahmed Shah Watali seized from the premises of accused Zahoor Ahmed Shah Watali ( <b>A-10</b> ) dated 03.06.2017.

<b>D-3k</b>	A bunch of papers containing Misc. documents related to Zahoor Ahmed Shah seized from the premises of accused Zahoor Ahmed Shah Watali ( <b>A-10</b> ) dated 03.06.2017.	A
<b>D-3l</b>	A bunch of papers containing various letter heads related to Zahoor Ahmed seized from the premises of accused Zahoor Ahmed Shah Watali ( <b>A-10</b> ) dated 03.06.2017.	B
<b>D-4</b>	Production cum Seizure Memo dated 03.06.2017 regarding the seizure of documents/articles from the office of accused Zahoor Ahmed Shah Watali ( <b>A-10</b> ) i.e. Trison Farms and Construction Pvt. Ltd.	C
<b>D-4a</b>	Copies of documents related to N.Z. International, Yasir Enterprises, Trison Farms & Construction, Trison International, Trison Power Pvt. Ltd., M/s 3Y, Kashmir Veneer Industry along with Passport details of Zahoor Ahmad Shah Watali ( <b>A-10</b> ) and his family members seized from the office of accused Zahoor Ahmad Shah Watali i.e. Trison Farms and Construction Pvt. Ltd.	D
<b>D-4b</b>	Copy of order number DMS/PSA/37/2011 dated 28.09.2011 issued by District Magistrate Srinagar regarding detention of one Tariq Ahmad Khan @ SanjMolvi seized from the office of accused Zahoor Ahmed Shah Watali ( <b>A-10</b> ) i.e. Trison Farms and Construction Pvt. Ltd.	E
<b>D-6c</b>	One blue Colour Diary "Evergreen Traders" seized from the premises of accused Altaf Ahmad Shah @ Fantoosh ( <b>A-4</b> ) on 03.06.17.	F
<b>D-6e</b>	A press Note containing anti India talks seized from the premises of accused Altaf Ahmad Shah @ Fantoosh ( <b>A-4</b> ) on 03.06.17.	G
<b>D-6f</b>	A program issued on 04.08.2016 under the signature of Syed Ali Shah Geelani, Chairman, All Party Hurriyat Conference seized from the premises of accused Altaf Ahmad Shah @ Fantoosh ( <b>A-4</b> ) on 03.06.17.	H
<b>D-6g</b>	One paper containing details of amount received from chairman and others showing an amount of Rs.1,15,45,000/- seized from the premises of accused Altaf Ahmad Shah @ Fantoosh ( <b>A-4</b> ) on 03.06.17.	
<b>D-7a</b>	Two letters dated 10.03.2006 and 17.03.2006) written by the Area Commander of Hizbul Mujahideen (HM) to accused Nayeem Khan (A-5) seized from the house of accused nayeem Khan dated 03.06.2017.	
<b>D-7b</b>	Letter heads of proscribed terrorist organization Lashkar e Toiba (LeT), Jammu & Kashmir seized from the house of accused Nayeem Khan (A-5) dated 03.06.2017.	
<b>D-7c</b>	Letter written to Pakistan Embassy by accused Nayeem Khan (A-5) for recommending Visa to visit Pakistan seized from the house of accused Nayeem Khan dated 03.06.2017.	

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	<b>D-7d</b>	Letter heads of National Front containing pro Pak and anti-India talks in urdu seized from the house of accused Nayeem Khan ( <b>A-5</b> ) dated 03.06.2017.
B	<b>D-7e</b>	One letter head of Mujahidin Jammu & Kashmir seized from the house of accused Nayeem Khan ( <b>A-5</b> ) dated 03.06.2017.
C	<b>D-7g</b>	A bunch of hand written and printed papers containing recommendation Letters written to Pakistan Embassy for Visa for students etc. seized from the house of accused Nayeem Khan ( <b>A-5</b> ) dated 03.06.2017.
	<b>D-9a</b>	Hand written (Urdu) letters from LeT on the letter head titled as "Lashkar-e-Tuibah Jammu Kashmir Head Office Muzafarabad." seized from the house of accused Shahid-ul-Islam @AftabHilali Shah ( <b>A-3</b> ) on 03.06.2017.
D	<b>D-9b</b>	A photograph of Aftab Hilali Shah @ Shahid-ul-Islam holding AK-47 with other cadres seized from the residence of AftabHilali Shah @ Shahid-Ul-Islam ( <b>A-3</b> ) on 03.06.2017.
E	<b>D-9c</b>	Phograph of Aftab Hilali Shah @ Shahid-ul-Islam ( <b>A-3</b> ) with Proscribed terrorist organization Hizbul Mujahiddin Chief Syed Salahuddin ( <b>A-2</b> ) seized from the residence of AftabHilali Shah @ Shahid-Ul-Islam ( <b>A-3</b> ) on 03.06.2017.
	<b>D-9d</b>	04 hand written loose papers seized from the residence of AftabHilali Shah @ Shahid-Ul-Islam ( <b>A-3</b> ) on 03.06.2017.
F	<b>D-9e</b>	One letter head in respect of All Parties Hurriyat Conference addressed to Deputy High Commissioner, High Commission of Pakistan New Delhi from Media advisor APHC, Advocate Shahidul Islam for issuing the Visa seized from the residence of Aftab Hilali Shah @ Shahid-Ul-Islam ( <b>A-3</b> ) on 03.06.2017.
G	<b>D-9g</b>	List of active militants (year 2016-17) of different outfits in the valley seized from the residence of Aftab Hilali Shah @ Shahid-Ul-Islam ( <b>A-3</b> ) on 03.06.2017.
	<b>D-11d</b>	The photocopy of the hand written letter written by Afzal Guru to SAS Geelani seized from the premises of Mohd. Akbar Khandey @ Ayaz Akbar ( <b>A-7</b> ) on 04.06.17.
	<b>D-19</b>	Letter no.22/NIA/CIV/CR/17/6547 dated 12.07.2017 from Sh. Kulbir Singh, AIG (CIV), PHQ, J&K Srinagar in reply NIA Letter No. RC-10/2017/NIA providing details pertaining to case RC-10/2017 to CIO NIA.
	<b>D-20</b>	Scrutiny report of Inspector Vinay Kumar related to 07 CDs received vide letter no. 22/NIA/CIV/CR/17/6547 dated 12.07.2017 from PHQ, J&K Srinagar along with photo album.

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<b>D-42</b>	Letter dated 27.06.2017 from TV Today Network Ltd. India Today Group Mediaplex, Film City, Sector 16A, Noida to CIO, NIA forwarding exact, true and correct copy of India Television's raw footage.	A
<b>D-43</b>	Letter no. RC-10/2017/NIA/DLI/7831 dated 14.06.2017 to DG, BSF, Lodhi Road, New Delhi for providing details of stone-pelting, burning of schools & college buildings and damage to Govt. property as reported in Kashmir Valley since July, 2016.	B
<b>D-44</b>	Letter no. 26/Kmr/Ops(B)W/BSF/17/18758 dated 2/3 August 2017 from Director General, BSF (Ops Directorate), New Delhi to CIO, NIA details of stone-pelting, burning of schools & college buildings and damage to Govt. property as reported in Kashmir Valley since July, 2016.	C
<b>D-63</b>	Letter dated 28.08.2017 from Nodal Officer Vodafone, New Delhi to CIO NIA forwarding certified copies of CDR, CAF and 65B Certificate in respect of mobile Nos. 9796158864 & 9811813796.	D
<b>D-65</b>	Letter dated 01.12.2017 from Nodal Officer, Reliance Jio Infocomm. Ltd., Delhi to CIO, NIA forwarding certified copies of CDR, CAF and 65B Certificate in respect of mobile nos. 7006046476, 7006208314 & 7889521803.	E
<b>D-70</b>	The transcripts of the audio-video of sting operation by the reporters of India Today related to accused Mohd. Nayem Khan ( <i>A-5</i> ).	F
<b>D-71</b>	The transcripts of the audio-video of sting operation by the reporters of India Today related to accused Farooq Ahmad Dar @ Bitta Karate ( <i>A-6</i> ).	G
<b>D-75</b>	Letter No. 22/NIA-III/CIV/CR/17/10275-76 dated 23.09.2017 from Sh. Kulbir Singh AIG (CIV), J&K PHQ, Srinagar to CIO NIA forwarding details of accused persons of the case.	H
<b>D-127</b>	Letter No. I&O/IMS/T-ACT/3/2015 NIA/10011 dated 03.08.2017 from Sh. Vishwas Kumar Singh, ( <i>W-196</i> ), ASP, I&O, NIA New Delhi to CIO, NIA.	
<b>D-130</b>	Seizure memo dated 16.08.2017 in respect of search and seizure of articles/documents found from the premises of Ghulam Mohd. Rather@Gulla ( <i>W-29</i> ).	
<b>D-132</b>	Seizure memo dated 16.08.2017 in respect of search and seizure of articles/documents found from the premises of Ghulam Mohd. Bhatt ( <i>W-29</i> ).	
<b>D-132a</b>	Various miscellaneous papers related financial transactions seized from the premises of Ghulam Mohd. Bhatt ( <i>W-29</i> ) on 16.08.2017.	

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<b>D-132b</b>	One small diary title Arun (11) Notes Pad seized from the premises of Ghulam Mohd. Bhatt ( <i>W-29</i> ) on 16.08.2017.
<b>D-132c</b>	One green colour diary of 2009 seized from the premises of Ghulam Mohd. Bhatt ( <i>W-29</i> ) on 16.08.2017.

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<b>D-132e</b>	One brown colour diary of 2010 seized from the premises of Ghulam Mohd. Bhatt ( <i>W-29</i> ) on 16.08.2017.
<b>D-132f</b>	One dark brown colour diary mark Frankford (A division of Ultramark group) seized from the premises of Ghulam Mohd. Bhatt ( <i>W-29</i> ) on 16.08.2017.

C

<b>D-133</b>	Seizure memo dated 16.08.2017 in respect of search and seizure of articles/documents found from the premises of Ghulam Mohd. Bhatt (@Mohd. Akbar ( <i>W-29</i> )).
<b>D-135</b>	Seizure memo dated 16.08.2017 in respect of search and seizure of articles/documents found from the premises of Dr. Peerzada Kaiser Habeeb Hakeem.

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<b>D-135a</b>	One transparent file folder of Trison International group of companies seized from the premises of Dr. Peerzada Kaiser Habeeb Hakeem on 16.08.2017.
<b>D-135b</b>	One orange colour file folder of account statement of M/s Three Star Enterprises for the year of 2005-06 seized from the premises of Dr. Peerzada Kaiser Habeeb Hakeem on 16.08.2017.

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<b>D-135c</b>	One Khaki colour folder of Johar Enterprises stamp paper file no.47/P seized from the premises of Dr. Peerzada Kaiser Habeeb Hakeem on 16.08.2017.
<b>D-137</b>	Seizure memo dated 26.08.2017 in respect of search and seizure of articles/documents found from the office of Zahoor Ahmad Shah Watali ( <i>A-10</i> ) i.e. Trison Farms and Construction Pvt. Ltd.

F

<b>D-137a</b>	One ledger and cash book of Trison Farms and construction Pvt. Ltd. Baba Dharam Das Complex, Khayam Srinagar for the year 2010-11 seized from the office of Trison farms and construction private Limited on 26.08.2017.
<b>D-137b</b>	One ledger and cash book of M/S Yasir Enterprises, Baghat Barzullah, Sanat Nagar, Srinagar for the year of 2010-11 seized from the office of Trison farms and construction private Limited on 26.08.2017.

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<b>D-137c</b>	One ledger and cash book of M/S Three Y, Sanat Nagar, Srinagar for the year 2010-11 seized from the office of Trison farms and construction private Limited on 26.08.2017.
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<b>D-137b</b>	One ledger and cash book of M/S Yasir Enterprises, Baghat Barzullah, Sanat Nagar, Srinagar for the year of 2010-11 seized from the office of Trison farms and construction private Limited on 26.08.2017.
<b>D-137c</b>	One ledger and cash book of M/S Three Y, Sanat Nagar, Srinagar for the year 2010-11 seized from the office of Trison farms and construction private Limited on 26.08.2017.
<b>D-137d</b>	One ledger and cash book of M/S Tirson International for the year 2010-11 seized from the office of Trison farms and construction private Limited on 26.08.2017.
<b>D-137f</b>	A bunch of documents related to Enforcement Directorate seized from the office of Trison farms and construction private Limited on 26.08.2017.
<b>D-154</b>	Letter report no. CFSL-2017/D-993/3953 dated 06.11.2017 from CFSL, (CBI), Lodhi Road, New Delhi to CIO NIA containing handwriting examination report alongwith original seizure seized from the house of Ghulam Mohd. Bhat r/o Tarahama.
<b>D-167</b>	Memorandum for specimen voice sample in respect of accused Mohd. Nayem Khan ( <b>A-5</b> ) dated 31.07.2017.
<b>D-168</b>	Memorandum for specimen voice sample in respect of accused Farooq Ahmed Dar @Bitta Karate ( <b>A-6</b> ) dated 31.07.2017.
<b>D-169</b>	Letter No. I&O/IMS/DE/33/2017/NIA dated 29.11.2017 from Inspector, IMS, NIA New Delhi to CIO NIA alongwith transcripts of conversation and videos.
<b>D-183</b>	Technical analysis report in respect of accused Farooq Ahmad Dar @ Bitta Karate ( <b>A-6</b> ) forwarded vide Inter office note No.RC-10/2017/NIA/DLI/reports/1351 dated 10.12.2017.
<b>D-184</b>	Report on Protest calendar taken out from the open source alongwith source path forwarded vide Inter office note No.RC-10/2017/NIA/DLI/reports/1351 dated 10.12.2017.
<b>D-197</b>	Letter No.D.III.a/2017-Ops (NIA) dated 25.07.2017 from 2 I/C (Ops/Int.), Office of Inspector General CRPF, Brein Nishat, Srinagar, J&K to CIONIA.
<b>D-204</b>	Original agreement documents between M/s Trison Farms and Mr. Nawal Kishore Kapoor dated 07.11.2014.
<b>D-205</b>	Notice under section 43 (F) UA(P) Act dated 30.11.2017 to Nawal Kishore Kapoor ( <b>W-28</b> ) for furnishing information/document from Insp T TBhutia, NIA, New Delhi.
<b>D-206</b>	Reply dated 4.12.2017 of Notice under section 43(f) of UA(P) Act dated 30.11.2017 from Nawal Kishore Kapoor ( <b>W-28</b> ).

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A	<b>D-207</b>	Notice to witness under Section Cr.P.C.& 43 (F) of UA (P) Act dated 07.11.2017 to CVO, SBI, Mumbai to provide bank account details of account no.274724019 of Nawal Kishore Kapoor ( <i>W-28</i> ) from Sh Jyotiraditya, DC.
B	<b>D-208</b>	Letter No. Gen/2017-18/46 dated 18.11.2017 from Asst. General Manager, SBI NRI Branch, Jalandhar, Punjab forwarding certified copies of account opening form and account statement of account number 20074724019 of Nawal Kishore Kapoor ( <i>W-28</i> ).
C	<b>D-211</b>	Letter No. F.No. ITO/W-3(4) Antg/2017-18/3540 dated 20.10.2017/11.12.2017 from Income Tax Officer, Anantnag containing income tax return details for last six years in respect of accused Zahoor Ahmad Shah Watali (A-10).
D	<b>D-212</b>	Production cum receipt memo dated 17.11.2017 related to documents produced by Naval Kishore Kapoor (W-28) along with documents.
E	<b>D-220</b>	Production cum Receipt Memo dated 14.12.2017 related to production of copy of text audit reports and audit financial statements of Ms. Trison Farms and Construction Pvt. Ltd. Etc. along with received documents.
F	<b>D-222</b>	Inter office Note No.I&O/IMS/DE/33/2017/NIA/722 dated 17.01.2017 from Inspector S.K. Tyagi, IMS to CIO NIA forwarding 03 video clips Identifying the voice of Hafiz Saeed along certificate 65 B of IEA.
G	<b>D-224</b>	Letter No.F. No. T-3/1/FE/SRZO/2013 dated 12.12.17 from Sh. Sharad Kumar, (W-1) Assistant Director, Directorate of Enforcement, Government of India, Durani House Rajbagh, Srinagar to Sh. Ajeeet Singh, SP NIA (W-229) forwarding alongwith enclosures therein proceedings against accused Zahoor Ahmed Shah Watali (A-10) under the FEMA Act.
H	<b>D-248</b>	Letter No. RC-10/2017/NIA/DLI/354 dated 11.01.2018 from Sh. Rajesh Kumar, Inspector NIA (W-209) to CIO forwarding of report on international linkage, India Hit report and report on Pakistani based Hurriyat representative along with 65-B Certificate.
	<b>D-252</b>	No. RC-10/2017/NIA/DLI/646 dated 15.01.2018 received from SI Sangram Singh, NIA (W-220) pertaining to transcripts of downloaded videos.
	<b>D-256</b>	Letter No. RC-10/2017/NIA/DLI/5706 dated 26.12.2017 to GM (CM), Nodal Officer, BSNL, 4th Floor, Telephone Exchange, Trikuta Nagar, Near RBI Jammu, J&K from CIO NIA to provide CDRs, CAF and 65 Certificate of mobile nos. mentioned in the letter.
	<b>D-257</b>	Certified copies of CDRs, CAF and Form 65 B of mobile numbers 9419011561, 9419504376, 9419075468, 9419547999, 9419006355, 9419008421, 9419001097 & 9469037774 (BSNL J&K) received from BSNL, J&K.
	<b>D-259</b>	Letter of Nodal Officer Bharti Airtel Ltd. Forwarding certified copies of CDR, CAF of mobile numbers 9596070530, 9906519595, 8494071470 & 8491001561 alongwith certificate u/s 65B of Indian Evidence Act.”

21. During the hearing, emphasis was placed by the learned Attorney General on documents D-132, D-132(a)/23, D-3/6, D-3g/20, D-3h/28, D-3j to D-3j/5, D-9b, D-9c, D-154 and D-185/10. Besides these documents, our attention was also invited to the statements of Ghulam Mohammad Bhatt (W-29) dated 30<sup>th</sup> August, 2017, and 23<sup>rd</sup> November, 2017, as well as the redacted statements of protected witnesses ("Charlie", "Romeo", "Alpha", "Gamma", "Pie", "Potter", "Harry" and "xxx") recorded under Section 164, which have now been taken on record by the Designated Court in terms of order dated 11<sup>th</sup> January, 2019. Notably, the order passed by the Designated Court permitting redaction of those statements has not been assailed by the respondent. In our opinion, the High Court, having noticed that the Designated Court had not looked at the stated statements presented in a sealed cover, coupled with the fact that the application under Section 44 filed by the Investigating Agency was pending before the Designated Court, and before finally answering the prayer for grant of bail, should have directed the Designated Court to first decide the said application and if allowed, consider the redacted statements, to form its opinion as to whether there are reasonable grounds for believing that the accusation made against the respondent is *prima facie* true or otherwise. For, in terms of Section 43D, it is the bounden duty of the Court to peruse the case diary and/or the report made under Section 173 of the Code and all other relevant material/evidence produced by the Investigating Agency, for recording its opinion. We could have relegated the parties before the High Court but the counsel appearing for the respondent, on instructions, stated that the respondent would prefer to await the decision of the Designated Court and, depending on the outcome of the application under Section 44 of the Act, would contest the proceedings before this Court itself. Accordingly, at the request of the respondent, we kept the present appeal pending. Since the Designated Court has finally disposed of the application preferred by the Investigating Agency vide order dated 11<sup>th</sup> January, 2019, the correctness whereof has not been challenged by the respondent, the redacted statements of the concerned protected witnesses have been taken on record.

22. Accordingly, we have analysed the matter not only in light of the accusations in the FIR and the charge-sheet or the police report made under Section 173, but also the documentary evidence and statements of the prospective witnesses recorded under Sections 161

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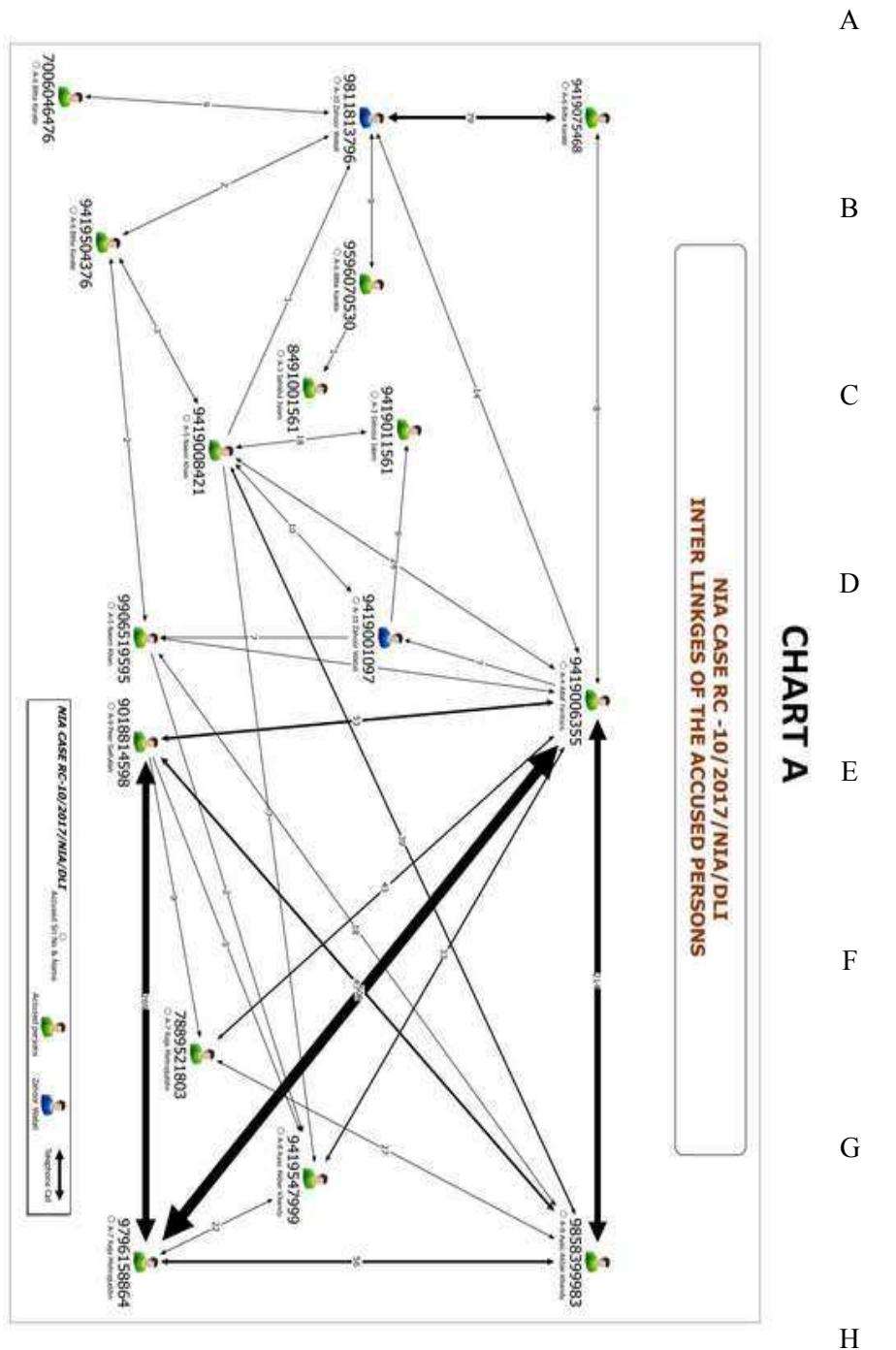
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- A and 164, including the redacted statements of the protected witnesses, for considering the prayer for bail.

23. As regards the redacted statements, objection of the respondent was that the certificate given by the competent authority is not in conformity with the certificate required to be given in terms of
- B Section 164(4) of Cr.P.C. This objection has been justly countered by the learned Attorney General with the argument that the objection borders on the issue of admissibility of the said statements. We find force in the submission that the issue regarding admissibility of the statements and efficacy of the certificates given by the competent authority, appended to the redacted statements would be a matter for trial and subject to the evidence in reference to Section 463 of Cr.P.C. and cannot be overlooked at this stage. Viewed thus, the exposition in the case of **Ramchandra Keshav Adke (dead) by LRs. and Ors. Vs. Govind Joti Chavare and Ors.**<sup>18</sup>, in paragraph 25 of the reported judgment will be of no avail to the respondent.
- D 24. After having analyzed the documents and the statements forming part of the charge-sheet as well as the redacted statements now taken on record, we disagree with the conclusion recorded by the High Court. In our opinion, taking into account the totality of the report made under Section 173 of the Code and the accompanying documents
- E and the evidence/material already presented to the Court, including the redacted statements of the protected witnesses recorded under Section 164 of the Code, there are reasonable grounds to believe that the accusations made against the respondent are *prima facie* true. Be it noted, further investigation is in progress. We may observe that since the prayer for bail is to be rejected, it may not be appropriate for us to dilate on matters which may eventually prejudice the respondent (Accused No.10) in any manner in the course of the trial. Suffice it to observe that the material produced by the Investigating Agency thus far (pending further investigation) shows the linkage of the respondent (Accused No.10) with A-3, A-4, A-5 and A-6 and, likewise, linkages
- F between the respondent (Accused No.10) and A-3 to A-12, as revealed from the CDR analysis. The **Chart A** showing the inter-linkages of the named accused inter se and **Chart B** showing the inter-linkages of the named accused with others and the frequency of their interaction on phone during the relevant period are as under:
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H <sup>18</sup>(1975) 1 SCC 559 = AIR 1975 SC 915





25. The summing up of the outcome of the investigation done until filing of the first report is noted in paragraph 17.10, which reads thus:

**“17.10 SUMMING UP:**

Hence, as has been discussed above, the investigation has established that:-

1. The terrorist and Hurriyat leaders have a close nexus with the active militants, OGWs and stone-pelters in Kashmir Valley. They are closely coordinating with each other and have formed a terrorist gang to achieve their common goal of secession from the Union of India by way of an armed rebellion.
2. To fuel the secessionist activities, Pakistan is providing funds to the Hurriyat leaders and the same are channelized through Hawala, LoC trade and other means. Sometimes, the funds are provided directly by Pakistan High Commission in India.
3. Hurriyat has convenor/representative(s) in Pakistan who liaise with Pakistan agencies and also with the Kashmir Cell of the ISI, the United Jehad Council and the Jamaat-Ud-Dawah.
4. The benefits drawn out of the LoC trade are reaching the Hurriyat leaders for fuelling the unrest in the Valley.
5. Funds are raised locally by way of collecting donations from the common people in the name of Zakat and Betul Maal.
6. The Hurriyat leaders are working in a systematic and organized manner as per the instructions of their Pakistani handlers by setting up a network of their cadres at village level, block level and District level.
7. The High Commission of Pakistan organizes functions and meetings in New Delhi, to which the Hurriyat leaders from Kashmir are invited and they are given instructions and funds so that the unrest in the Valley can be fuelled in an organized manner.
8. The Hurriyat leaders are raising funds from the Pakistani establishments/agencies in the name of helping the youth injured/killed during the action of security forces.

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- A      9. The families of the active militants and killed militants are supported by the Hurriyat leaders financially, socially as well as by arranging for the higher education of their wards in Pakistan.
- B      10. The Hurriyat leaders attend the funeral of killed militants, eulogise them as ‘martyrs’, hail their anti-India activities as ‘gallant’ and deliver speeches against the Government of India and motivate the youth of Kashmir to join militancy for the so-called freedom of Kashmir by way of an armed struggle. They misguide the common man by spreading false propaganda against the Government of India.
- C      11. To further this conspiracy, the Hurriyat leaders, the terrorists/ terror organizations and stone-pelters are working in tandem and they are getting financial and logistic support from Pakistan.”
- D      26. The accusation and charge against the accused, including the respondent, is in paragraph 18 of the report which reads thus:

**“18. CHARGE:**

- E      **18.1** In the instant case, there is sufficient evidence in the form of incriminating documents, statements of witnesses and digital evidence that establishes beyond any reasonable doubt that the accused persons i.e. the Hurriyat leaders, terrorists and stone-pelters have been orchestrating violence and unrest in Jammu & Kashmir as a part of well-planned conspiracy under the overall patronage and financial support of Pakistani Establishment and agencies and that all the accused persons were acting in pursuance of their common goal i.e. to achieve secession of the State of Jammu & Kashmir from the Union of India by waging a war against the Government of India.
- G      **18.2** The documentary evidences seized during various searches such as letters of the banned terrorist organizations seeking financial assistance from the Hurriyat leaders, blank letterheads of terror organisations, conversations between Hafiz Saeed @ Burhan Wani, Hafiz Saeed and Asiya Andrabi, support extended

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by Hafiz Saeed and Syed Salahuddin to the protest calendars issued by the Hurriyat leaders, all these show that Hurriyat and terror organizations are working hand in glove. Their common objective is to attain secession of Jammu & Kashmir from the Union of India and to achieve this objective, they have established a network of cadres throughout Kashmir Valley who motivate and incite the youth to attack all symbols of Indian authority, especially Indian security forces who have been deployed there for the maintenance of law and order. To achieve their objective, they are mobilizing funds from all possible sources.

*They are getting funds from Pakistani Establishment through the Pakistan High Commission; the funds are being remitted to India from offshore locations through hawala and accused A-10 Zahoor Ahmad Shah Watali is an important conduit for the same.* They are raising funds through local donations such as Zakaat & Betulmaal, etc. They are generating funds by resorting to illegalities and irregularities such as under-invoicing and cash-dealings in LoC barter trade. All this money is used to fund stone-pelting, to support the families of killed and active militants and to help pellet victims and to fuel terrorism in Jammu & Kashmir with the ultimate objective of breaking Jammu & Kashmir away from the Union of India.

**18.3** They are all working in sync to achieve their greater goal. The nexus between the Pakistani agencies, Hurriyat leaders and terror organizations is amply substantiated by the chats retrieved from their email accounts, WhatsApp, Facebook profiles and Websites and also from the statements of the protected witnesses. *Their nexus with hawala conduit, Zahoor Watali is also substantiated by the documentary and digital evidence.*

**18.4** Though the Constitution of Jammu & Kashmir, 1957, declares the State of Jammu & Kashmir to be an integral part of India, and the said pronouncement is irrevocable, the accused persons have been incessantly engaged in violence and carrying out subversive and secessionist activities in Jammu & Kashmir by waging a war against the Government of India.

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- A **18.5** Hence, as discussed in the foregoing paras, the evidence collected during investigation, *prima facie*, establishes a case against all the accused persons for conspiring to wage war against the Government of India by way of establishing a network of cadres of banned terrorist organizations LeT & HM as well as cadres in the garb of so-called political front viz., the All Parties Hurriyat Conference.
- B **18.6** *The scrutiny of the documents and the recovery from the digital devices have provided a large data of incriminating material in which the above accused A-3 to A-12 are a part of a gang who with the help of A-1 & A-2 and others collaborate and coordinate with each other to form strategies and action plan to launch massive violent protests, hartaals, bandhs, strikes, processions, demonstrations during which stone pelting is organised on security forces and government establishments.* These documents and digital evidences clearly indicates an action plan to instigate general public to observe strikes, hold anti-India protests through press releases, social media and use of Immams and mosques. The recovery of protest calendars from A-4 and the direct impact of such orchestrated protests have led to enormous loss of life and property which have been explained in detail.
- C **18.7** *The investigation have revealed linkage of A-1 and A-2 with A-3 to A-12 in a web of directions being passed through e-mails, SMSs, WhatsApp, videos and other means of communication to form a clear nexus between the above accused and the leaders of Hurriyat Conference.* The recovery of a number of incriminating videos in which the separatists leaders and accused are exhorting the general public, sympathizing with the militants, seeking support and donations to carry out militant activities and instigating general public, especially youth to raise a revolt and launch violence against security forces and wage a war against Government of India, is clearly established.
- D **18.8** The secessionists, especially the leaders of the Hurriyat Conference and the accused are a part of the terrorist designs to raise funds to propagate their ideology and agenda of
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secessionism and subversive activities prejudicial to the law of the land. The investigations have clearly brought out that the Hurriyat has formed a well-developed network of cadres with district presidents, block level leaders and workers who collect donations from public, businessmen, apple growers and draw gains from profits of unregulated LoC trade. *The money is routed through a complex system of hawala transfers and cash couriers using conduits such as A-10 who gathers money from Pakistan High Commission in New Delhi and through fake and bogus companies floated in UAE and other countries and delivers the funds to the Hurriyat leadership for subversive activities.* A

The documents recovered and statements of witnesses to that effect also clearly establish the mechanism of funding and complicity of the accused in generating funds for its further use in organizing violent protests, assistance to the militants and creating an atmosphere of terror, chaos and uncertainty. D

**18.9** During the investigation about the past conduct of the accused, it is ascertained that as A-1 is a designated terrorist being the head of proscribed terror organisation Lashker-e-Toiba, A-2 is the head of proscribed organisation Hizb-Ul-Mujahideen. A-3, A-4, A-5, A-6, A-8, A-9 are former militants with various cases of terrorism against them and have been detained under the Public Safety Act on numerous occasions. *A-10 is a known hawala dealer and financer and has a number of cases against him which are being investigated by sister investigation agencies.* E

**18.10** *The CDR Linkages and technical analysis of social media clearly establish that the accused A-3 to A-10 are in constant communication with each other and there is a clear meeting of minds of the above accused in hatching the conspiracy with the support of A-1 and A-2 as well as other secessionist leaders of the Hurriyat Conference and other proscribed terrorist organizations of Jammu & Kashmir.* F

**18.11** This case is a terror conspiracy case in which the terrorist act is not a single act of terror like an incident or series of G

- A incidents. It is a terrorist act as defined under UA (P) Act-1967 wherein the intention is to threaten the unity, integrity and sovereignty of India by striking terror in the people or any section of people in India by overawing by means of criminal force or show of criminal force causing death of any public functionary or attempts to cause death of any public functionary. The terrorist gang of the accused above, have also committed terrorist act as they have disrupted the essential services and daily life of the citizenry of Jammu & Kashmir and have caused damage and destruction of property in India intended to be used in connection with any other purpose of the Government of India, any State Government or any of their agencies.

**18.12** The analysis of documentary evidences seized during the searches, the statement of witnesses and the incriminating material recovered from the digital media seized from the accused clearly bring out the fact that with the active support and connivance of Pakistani establishments, Pakistani agencies, terrorist groups operating from Pakistani soil, the above accused have hatched a criminal conspiracy to engage in violence and carry out subversive and secessionist activities in Jammu & Kashmir and to achieve their objectives, have established a network of cadres who are funded through Pakistani agencies via hawala dealers, local conduits and also by raising funds through local donations and by generating illegal profits through the barter LoC trade. The accused have used these funds for organised stone pelting through a set charter of protests and demonstrations which are issued in the form of "protest calendars" on regular basis resulting in an atmosphere of chaos, terror, uncertainty and fear in the State of Jammu & Kashmir. The main aim and objective of this entire conspiracy is to secede the State of Jammu & Kashmir, which is an integral part of India, from the Union of India and wage war against the Government of India to meet the objectives.

**18.13** Hence, the accused persons are liable for prosecution under the following sections of law:-

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NATIONAL INVESTIGATION AGENCY v. ZAHOOR AHMAD SHAH WATALI [A. M. KHANWILKAR, J.] 1111

<b>Accused</b>	<b>Name of Accused</b>	<b>Liable for prosecution under sections of law</b>	
A-1	Hafiz Muhammad Saeed	section 120B, 121, 121A & 124A of IPC, section 13, 16, 17, 18, 20, 38, 39 & 40 of Unlawful Activities (Prevention) Act, 1967.	A
A-2	Mohd. Yusuf Shah @ Syed Salahuddin	section 120B, 121, 121A & 124A of IPC, section 13, 16, 17, 18, 20, 38, 39 & 40 of Unlawful Activities (Prevention) Act, 1967.	B
A-3	Aftab Ahmad Shah @ Aftab Hilali Shah @ Shahid-ul-Islam	section 120B, 121, 121A & 124A of IPC, section 13, 16, 17, 18, 20, 39 & 40 of Unlawful Activities (Prevention) Act, 1967.	C
A-4	Altaf Ahmad Shah @ Fantoosh	section 120B, 121, 121A & 124A of IPC, section 13, 16, 17, 18, 20, 39 & 40 of Unlawful Activities (Prevention) Act, 1967.	D
A-5	Nayeem Ahmad Khan	section 120B, 121, 121A & 124A of IPC, section 13, 16, 17, 18, 20, 39 & 40 of Unlawful Activities (Prevention) Act, 1967.	E
A-6	Farooq Ahmad Dar @ Bitta Karate	section 120B, 121, 121A & 124A of IPC, section 13, 16, 17, 18, 20, 39 & 40 of Unlawful Activities (Prevention) Act, 1967.	F
A-7	Md. Akbar Khanday	section 120B, 121, 121A & 124A of IPC, section 13, 16, 17, 18, 20, 39 & 40 of Unlawful Activities (Prevention) Act, 1967.	G
A-8	Raja Mehrajuddin Kalwal	section 120B, 121, 121A & 124A of IPC, section 13, 16, 17, 18, 20, 39 & 40 of Unlawful Activities (Prevention) Act, 1967.	H
A-9	Bashir Ahmad Bhat @ Peer Saifullah	section 120B, 121, 121A & 124A of IPC, section 13, 16, 17, 18, 20, 39 & 40 of Unlawful Activities (Prevention) Act, 1967.	
A-10	Zahoor Ahmad Shah Watali	section 120B, 121, 121A & 124A of IPC, section 13, 16, 17, 18, 20, 39 & 40 of Unlawful Activities(Prevention) Act, 1967.	
A-11	Kamran Yusuf	section 120B, 121 & 121A of IPC, section 13, 16, 18 & 20 of Unlawful Activities (Prevention) Act, 1967.	
A-12	Javed Ahmad Bhat	section 120B, 121 & 121A of IPC, section 13, 16, 18 & 20 of Unlawful Activities (Prevention) Act, 1967.	

- A **18.14** The sanction for prosecution under section 45(1)(i)(ii) of the UA (P) Act in respect of the accused persons for the offences under section 13, 16, 17, 18, 20, 38, 39 and 40 of the UA (P) Act and under section 196 CrPC for the offences under section 121, 121A and 124A of IPC has been accorded by the Ministry of Home Affairs, Government of India vide order No.11011/26/2017/IS-IV dated 16<sup>th</sup> January, 2018. The sanction for prosecution under section 188 CrPC has also been accorded by Government of India vide order No.11011/26/2017/IS-IV dated 16<sup>th</sup> January, 2018 for the offences committed outside of India.
- B **18.15** It is therefore, prayed that, the Hon'ble Court may please take cognizance of the offences under sections 120B, 121, 121A & 124A of the IPC, sections 13, 16, 17, 18, 20, 38, 39 & 40 of the Unlawful Activities (Prevention) Act, 1967 in respect of the accused A-1 to A-12 (As per the mentioned in para 18.13), issue process to the accused persons and try the aforesaid accused persons and punish them in accordance with law.”

(emphasis supplied in italics and bold)

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- E 27. The charge against respondent is not limited to Section 17 of the 1967 Act regarding raising funds for terrorist acts but also in reference to Sections 13,16,18,20,38,39 and 40 of the 1967 Act. Section 13 is in Chapter II of the 1967 Act. The special provisions regarding bail under Section 43D(5), however, are attracted in respect of the offences punishable under Chapters IV and VI, such as Sections 16,17,18,20,38,39 and 40 of the 1967 Act. Sections 39 and 40 form part of Chapter VI, whereas other sections (except Section 13) form part of Chapter IV to which the subject bail provisions are applicable, mandating the recording of satisfaction by the Court that there are reasonable grounds for believing that the accusation against such person is *prima facie* true.
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- G 28. Reverting to the documents on which emphasis has been placed, document D-132 is the Seizure Memo of properties seized from the premises of Ghulam Mohammad Bhatt (W-29), the then Munshi/ Accountant of the respondent (Accused No.10). Document D-132(a) is the green page document, seized during the search of the residence of said Ghulam Mohammad Bhatt, containing information about foreign contributions and expenditures of the respondent (Accused No.10) during 2015/2016. Whether this document is admissible in evidence would
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be a matter for trial. Be that as it may, besides the said document, the statement of Ghulam Mohammad Bhatt (W-29) has been recorded on 30<sup>th</sup> August, 2017 and 1<sup>st</sup> November, 2017. Whether the credibility of the said witness should be accepted cannot be put in issue at this stage. The statement does make reference to the diaries recovered from his residence showing transfer of substantial cash amounts to different parties, which he has explained by stating that cash transactions were looked after by the respondent (Accused No.10) himself. He had admitted the recovery of the green colour document from his residence, bearing signature of the respondent (Accused No.10) and mentioning about the cash amounts received and disbursed during the relevant period between 2015 and 2016. The accusation against the respondent (Accused No.10) is that accused A-3 to A-10 are part of the All Parties Hurriyat Conference which calls itself a political front, whereas their agenda is to create an atmosphere conducive to the goal of cessation of J & K from the Union of India. The role attributed to the respondent (Accused No.10) is that of being part of the larger conspiracy and to act as a fund raiser and finance conduit. Ample material has been collected to show the linkages between the Hurriyat leaders of the J & K and terrorists/terrorist organizations and their continuous activities to wage war against Government of India. Regarding the funding of terrorist activities in J & K and, in particular, the involvement of the respondent (Accused No.10), the charge-sheet mentions as under:

**“17.6 Funding of Secessionist and Terrorist Activities in Jammu & Kashmir:**

If publicity and propaganda is oxygen for the terror groups, terror financing is its life-blood. Terror financing provides funds for recruitment, operationalization of training and training camps, procurement of arms and ammunition, operational cost of planning and resources for terrorist acts, running of underground networks, well-planned stone pelting, school burnings, targeted attacks, provision of legal support for terrorists and over-ground workers facing judicial process, ex-gratia payment for militants killed in terrorist operations, regular payments to the families of terrorists and militants killed or convicted, funds for propaganda to clergy as well as relief measures for civilian population and also in case of natural disasters. The investigation in the case has revealed that the secessionists are mobilizing funds from all

A possible sources to fuel unrest and support the on-going secessionist and terrorist activities in Jammu & Kashmir.

**17.6.1 Funding from Pakistan:**

- i) The Hurriyat leaders are receiving funds from Pakistan through conduits and also from the Pakistan High Commission directly. *It was substantiated by an incriminating document seized from the house of Ghulam Mohd. Bhatt during search. Ghulam Mohd. Bhatt worked as the cashier-cum-accountant with accused A-10 Zahoor Ahmad Shah Watali, a known Hawala conduit. The document clearly shows that accused A-10 Zahoor Ahmad Shah Watali was receiving money from Accused A-1 Hafiz Saeed (Head of Jamaat-ud-Dawa), from the ISI, from the Pakistan High Commission at New Delhi and also from a source based in Dubai. Accused A-10 was remitting the same to the Hurriyat leaders, separatists and stone-pelters of Jammu & Kashmir. The said document has been maintained in regular course of his business and is signed by accused Zahoor Watali himself. This document clearly shows that Hurriyat leaders were receiving funds from Pakistan through the officials of Pakistan High Commission and through accused A-10 Zahoor Watali.*
- E *The signature of Accused A-10 Zahoor Watali has also been verified and as per the expert report, his signature on the questioned document matches with his specimen handwriting as well as his admitted handwriting.*
- ii) Further, the role of Pakistan in funding secessionist activities also surfaced in the scrutiny of the **un-edited version of the audio/video** furnished by the office of India Today T.V. News Channel wherein accused A-5 Nayeem Khan admits that the secessionists and terrorists of the Valley are receiving **financial support from Pakistan** and would have received approximately Rs.200 crores to organise anti-India protests and agitations after the killing of Burhan Wani, the Commander of the proscribed terror organisation Hizb-ul-Mujahiddin. He further speaks about funds reaching them from Saudi Arabia/Dubai through **Hawala** via Delhi (Balimaran/Chandni Chowk). He admits that S.A.S. Geelani (Chairman, APHC-G), Mirwaiz Umar Farooq (APHC-M) and Yasin Malik (JKLF) are receiving funds from

Pakistan. He further admits the pivotal role played by the **Pakistan High Commission** to convey and receive instructions from Pakistan. Nayeem Khan also stated that the accused **Hafiz Mohd Saeed** has supported S.A.S. Geelani, Chairman, APHC-G by paying at least 10-12 crores during anti-India agitation after killing of Burhan Wani. Accused Nayeem Khan further admitted that, if funded, he can fuel unrest in the Valley any time.

iii) Similarly, the scrutiny of the **audio/video** of the sting operation also reveals accused **A-6 Farooq Ahmad Dar Bitta Karate admitted that the funds are being sent by Pakistan to the secessionists and terrorists in the Kashmir Valley** including him for organizing forcible closures, anti-India protests and processions and stone-pelting on the security forces. He further claimed that he has his cadres in every part of Kashmir who can act on his call at any given point of time and fuel unrest in the Valley. When given an offer of financial support, accused Bitta Karate put forth a demand of Rs.70 crores for fuelling unrest upto six months.

The **voice samples** of Nayeem Khan and Farooq Ahmad Dar @ Bitta Karate have been forensically examined and the **CFSL report has confirmed the match with their voices.**

iv) Further, the investigation has revealed that the senior-most officials of the High Commission of Pakistan were in regular contact with the Hurriyat leaders. The High Commission of Pakistan in New Delhi used to organise functions and meetings in New Delhi, to which the Hurriyat leaders from Kashmir were invited and they were given instructions and funds on a regular basis.

*These funds were given to various allied groups of the APHC and investigation have revealed that a First Secretary level officer of Pakistan High Commission in New Delhi would act as a channel and A-10 Zahoor Ahmed Shah Watali would act as a courier to deliver the funds to the Hurriyat leadership. These funds as explained above were used to foment the secessionist and separatist activities and unrest in the valley in an organized manner.* One such invitation card from the Pakistan High Commission was seized from the house of A-6 Farooq Ahmad Dar @ Bitta Karate:-

- A                   On the occasion of the National Day  
                     Pakistan High Commissioner and  
                     Mrs. Salman Bashir  
                     Request the pleasure of the company of  
                     Mr. Farooq Ahmed Dar  
                     At a Reception
- B                   on Friday, 22 March 2013 from 1930 to 2100 hrs.
- |                                    |                          |
|------------------------------------|--------------------------|
| Venue:                             | R.S.V.P.                 |
| 2/50-G, Shantipath, Tel.           | 011-24121819             |
| Chanakyapuri, New Delhi            | Fax 011-26872339         |
| Dress:National/Lounge Suit/Uniform | E-mail:pakhcnd@gmail.com |
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(Please bring this card with you)

- D                   Investigation has also established that the accused A-4 was in direct contact with the High Commissioner of Pakistan in New Delhi and would apprise him about the situation in Jammu & Kashmir.

**17.6.2 Funding from Terrorist Organisations based in Pakistan:**

- E                   During the course of investigation, it is also ascertained that the separatists and secessionists of Jammu & Kashmir were also receiving money from the terrorists and terrorist organizations operating out of Pakistan/PoK. *The incriminating document seized from the house of Ghulam Mohd. Bhatt who worked as a cashier-cum-accountant with accused A-10 Zahoor Watali shows that Zahoor Watali received money from accused A-1 Hafiz Saeed, Head of JuD and Chief of proscribed terror organisation Lashkar-e-Toiba and remitted it to the Hurriyat leaders espousing the cause of secession of Jammu & Kashmir from the Union of India.*
- F                   *17.6.3 Local Donations/Zakat/Baitulmal:*

- G                   During the course of investigation, it is established that the Hurriyat has its network of cadres at districts and local levels. There are District Presidents and block level leaders who have the responsibility to raise the funds through donation during the religious festivals and month of Ramzan. In a well-established
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system, the receipt books are printed and funds are collected from shopkeepers, businessmen and residents of Kashmir. The money is also collected to become a member of the Tehreek-e-Hurriyat. Selected members are made as Rukuns and are tasked to propagate the separatist ideology of Hurriyat. These Rukuns act as foot soldiers and ensure that bandhs and hartaals are successful. They also lead the processions and participate in stone pelting.

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Investigation also established that various District Presidents collect Rs.5 to 10 Lac per district as Baitulmal. Funds are also collected from apple-growers and businessmen who are compelled to donate to Hurriyat central office. This money is used for administrative and operational purposes of organizing protests and strikes as well as for aid to militants and their families.

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The seizure of unaccounted receipts of an amount of Rs.1,15,45,000/- from accused A-4 Altaf Ahmad Shah Fantoosh also shows that money is being raised by way of donations. Similarly, records pertaining to the collection of funds were also seized from the house of accused A-8 Mehrajuddin Kalwal, who was also the District President of Tehreek-e-Hurriyat for Srinagar and Ganderbal.

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Further, during the course of investigation, it is also established that the Hurriyat leadership appeals to the public to contribute money generously by way of donations for their so-called freedom movement. This is clearly reflected in the **Website** of the Hurriyat Conference viz. [www.huriyatconference.com](http://www.huriyatconference.com), which shows a message from S.A.S. Geelani “**Help the families of martyrs and prisoners..... people should come forward for donations in the month of Ramadan as the number of people affected by this movement is large**”.

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This substantiates that Hurriyat is raising funds through **donations** and using the same to fuel secessionist activities and to support the families of killed and jailed terrorists.

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#### **17.6.4 LOC Trade:**

During the course of investigation, it has been established that the secessionist and separatist leaders are raising funds through LoC

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- A trade by way of directing the Kashmiri traders to do under-invoicing of the goods which were imported through LoC barter trade. They sell the goods to the traders in Delhi and a part of the profit of the same is shared with the Hurriyat leaders and other separatists, which in turn is used on anti-India propaganda, for mobilizing the public to organise protests and stone-pelting and to support families of killed/jailed militants. The hawala operators based in Srinagar, New Delhi and other parts of the country and abroad are being used to transfer the funds so generated. The investigation has revealed that the funds are generated by resorting to sale of third-party goods, under-weighing, under-invoicing, large-scale dealings in cash and committing irregularities in maintenance of records. This modus-operandi leads to generation of huge cash surpluses on the Indian side which are then channelized through several formal banking channels as well as cash couriers and hawala dealers to the separatists and secessionists active in Jammu & Kashmir.
- B Investigation has revealed that a significant number of traders engaged in cross LoC trade have relatives across the border who are closely associated with banned terrorist organizations, especially Hizb-Ul-Mujahideen. Investigation has also revealed that certain ex-militants and their family members are using proxy companies and are registered as traders. During the course of investigation, use of LoC trade route for smuggling of contraband and weapons has also come to light. A separate investigation is underway regarding the irregularities in the LoC trade.
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- F **17.6.5 Hawala:**
- G Apart from the above mentioned sources and channels, the secessionists depend heavily on the hawala network and conduits to bring money from off-shore locations to India to fuel-anti-India activities in Jammu & Kashmir.
- H *i) During the course of investigation, it was ascertained that accused A-10 Zahoor Ahmad Shah Watali is one such conduit. The seizure of the incriminating document from the house of his cashier-cum-accountant viz. Ghulam Mohd. Bhatt regarding the foreign contributions received by Zahoor Ahmad*

*Shah Watali from Pakistani establishment and terror organizations and their further remittance to the Hurriyat leaders and secessionists of Jammu & Kashmir clearly shows that he was an active channel to transmit funds from abroad to India to fuel secessionist activities and to wage a war against the Government of India.* A

*ii) During the course of investigation, it is revealed that accused A-10 Zahoor Ahmad Shah Watali was bringing money from off-shore locations to India by layering it through the scores of firms and companies he has opened. It was ascertained that Zahoor Ahmad Shah Watali has an NRE A/c No.0252040200000505 in J&K Bank and he received foreign remittances to the tune of Rs.93,87,639.31/- in this account from 2011 till 2013 from unknown sources.* B

*iii) During the course of investigation, it was also ascertained that the accused Zahoor Ahmad Shah Watali was showing foreign remittances under 'other income' in his proprietorship firm viz. Trison International, Srinagar. From the analysis of his bank accounts, it has been ascertained that foreign remittances to the tune of Rs.2,26,87,639.31 were received by the accused Zahoor Ahmad Shah Watali in different accounts from the year 2011 to 2016. An amount of Rs.93,87,639.31/- came in Zahoor Ahmad Shah Watali A/c No.NRE-0252040200000505 in J&K Bank from 2011 to 2013. An amount of Rs.14 lakh was remitted in the account of Acharya Shri Chander College of Medical Sciences (ASCOMs), Jammu account No.1213040100000229 on 09.04.2013 through NEFT against fee deposited for his son, viz., Yawar Zahoor Shah Watali. An amount of Rs.60 lakh was remitted in current account of accused Zahoor Ahmad Shah Watali in J&K Bank A/c No.CD4508. An amount of Rs.5 lakh was remitted in the account of Trison Farms & Constructions Pvt. Ltd. A/c OTN-10162. The investigation has revealed that all these foreign remittances are from unknown sources.* C D E F G

*iv) During the course of investigation, it was also revealed that on 07.11.2014, one Naval Kishore Kapoor, son of Om* H

- A *Prakash Kapoor, resident of P.O. Box-8669, Aman, U.A.E. entered into an agreement with Trison Farms and Constructions Pvt. Ltd. through its Managing Director Zahoor Ahmad Shah Watali to take a piece of land measuring 20 Kanals in Sozeith Goripora Nagbal, Budgam on lease in consideration of an amount of Rs.6 crore as premium and Rs.1000/- annual rent for an initial period of 40 years extendable as may be mutually agreed between the parties. In the agreement, M/s Trison Farms and Constructions Pvt. Ltd. was declared to be the absolute owner of the piece of land in question. Mr. Naval Kishore Kapoor remitted a total amount of Rs.5.579 crores in 22 instalments between 2013 and 2016 to the accused Zahoor Ahmad Shah Watali.*
- B *v) During the course of investigation, it was ascertained that no land exists in the name of M/s Trison Farms and Constructions Pvt. Ltd. as per the balance sheets of the said company. (AY 2011-12 to 2016-17). It was also ascertained that the large sum of money i.e. Rs.5,57,90,000 was mobilized by Naval Kishore Kapoor from unknown sources and remitted to the accused Zahoor Ahmad Shah Watali over a period of 2 years to lease a piece of land which is not even existing in the name of the company mentioned as first party in the agreement and the agreement itself lacks legal sanctity. This proves that the said agreement was a ‘cover’ created by the accused Zahoor Ahmad Shah Watali to bring foreign remittances from unknown sources to India.*
- C *vi) During the course of investigation, it is also ascertained that the Chartered Accountant, who signed the audited balance sheets of the firms belonging to the accused A-10 Zahoor Ahmad Shah Watali viz. M/s Trison International (2013-14 and 2015-16), Trison Farms & Constructions Pvt. Ltd. (2013-14 and 2015-16), M/s 3Y (2012-13, 2013-14 and 2015-16) and M/s Yasir Enterprises (2013-14 and 2015-16) did so without seeing any supporting documents. The balance sheets of these companies were sent to him by one Mustaq Mir, Cost Accountant and Shabir Mir, Chartered Accountant from Wizkid Office, Srinagar through email and he was asked to sign on them in Delhi without showing any documents.*
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*This clearly shows that Zahoor Watali was remitting money A received from unknown sources to India.*

*vii) The investigation has also revealed that in the FY 2010-11, a firm belonging to accused A-10 Zahoor Ahmad Shah Watali and his family members viz., Trison Farms and Constructions Pvt. Ltd. raised unsecured loan of Rs.2,65,55,532/- from the Directors of the company, i.e. the accused Zahoor Ahmad Shah Watali, his wife Sarwa Begum and his sons Yassir Gaffar Shah, Yawar Zahoor & Yamin Zahoor in the form of both cash and cheque and the same was used towards repayment of secured loan of Rs.2,94,53,353/- in the books of J&K Bank. The source of money with the Directors could not be explained satisfactorily by the accused Zahoor Ahmad Shah Watali.*

*viii) The seizure from the house of accused A-10 Zahoor Ahmad Shah Watali, of a list of ISI officials and a letter from Tariq Shafi, proprietor of AI Shafi group addressed to Pakistan High Commission recommending grant of visa to Zahoor Watali shows his proximity with Pakistani establishment. It is pertinent to mention here that the name of Tariq Shafi figures in the document of foreign contributions seized from the house of Zahoor Watali's cashier-cum-accountant viz., Ghulam Mohd. Bhatt.”*

(emphasis supplied in italics and bold)

29. In reference to these accusations, the entry in the diaries and the green-colour document, recovered from the residence of Ghulam Mohammad Bhatt, is significant. Further, the seizure memo described as document D-3/6, in respect of search and seizure of articles/documents seized from the premises of the respondent (Accused No.10) dated 3<sup>rd</sup> June, 2017, would unravel the activities of the respondent, including regarding his financial deals. Another crucial document described as D-3g/20 is a contact diary seized from the respondent vide Memo D-3, which contains the Pakistan National name and contact “Tariq Shafi 0092425765022...26A” whose name figures in document D-132(a)/23. The Code “0092” pertains to Pakistan. Another contact diary was seized from the respondent vide Memo D-3, which, at page

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- A D-3h/28 contains the same name and contact, namely, "Tariq Shafi 00923008459775/0092425765022". The documents D-3j to D-3j/5 also indicate the involvement of the respondent in terrorist activities, including that three cases of TADA have been registered against him in the past and investigated and one case of J & K PSA, 1978. The High Court erroneously proceeded on the premise that the charge-sheet makes no reference to any other criminal case against the respondent. Additionally, the charge-sheet is accompanied with documents D-9b and D-9c, which are photographs of ex-militant Aftab Hilali Shah @ Shahid-ul-Islam (**A-3**) holding AK-47, seen with other terrorists. These photographs were seized from the residence of the said ex-militant on
- B 3<sup>rd</sup> June, 2017. The prosecution case is that the respondent (Accused No.10) was in constant touch with the said ex-militant Aftab Hilali Shah @ Shahid-ul-Islam (**A-3**), as noticed from the inter-linkage chart depicted above. That fact is backed by the CDR analysis report, also part of the charge-sheet. The charge-sheet also contains document D-185/10, which is a contact list of accused Nayeem Khan (**A-5**) retrieved through forensic analysis, having mobile numbers of persons associated with Hurriyat party; and of one Mudasir Cheema Pak who is none other than the First Secretary of Pakistan High Commission. His name also figures in document D-132(a)/23. The Designated Court, besides adverting to the aforementioned documents, also adverted to
- C other documents and the statements of the prospective witnesses (Ws-1, 28, 29, 38, 39, 43, 44, 48 and 52). The High Court has not appreciated the said material which found favour with the Designated Court to record its opinion that there are reasonable grounds for believing that the accusation against the respondent is *prima facie* true. The view so expressed by the Designated Court commands to us. Suffice it to observe that the High Court adopted a tenuous approach - by first discarding the document D-132(a) and then discarding the statement of witnesses recorded under Section 161 and also the statements recorded under Section 164, presented by the Investigating Agency in a sealed cover. As aforesaid, the High Court ought to have
- D taken into account the totality of the materials/evidences which depicted the involvement of the respondent in the commission of the stated offences and being a member of a larger conspiracy, besides the offence under Section 17 for raising funds for terrorist activities.

30. In the case of ***Niranjan Singh Karam Singh Punjabi*** A (supra), the Court essentially considered the scope and ambit of the enquiry by the Trial Court at the stage of “discharge”. In that context, the Court made observations in paragraphs 6 and 8 of the said judgment which must be understood accordingly. In the present case, however, we are called upon to consider the prayer for bail in the context of the purport of the proviso to Section 43D(5) of the 1967 Act which mandates that the accused person involved in the commission of offence referable to Chapters IV and VI of the 1967 Act shall not be released on bail or on bond. However, the Court may release such accused on bail only if it is of the opinion, on perusal of the case diary and/or the report made under Section 173 of Cr.P.C. that there are “no reasonable grounds” for believing that the accusation against such person is *prima facie* true. Conversely, if in the opinion of the Court, there are reasonable grounds for believing that the accusation against such person is *prima facie* true, the question of granting bail would not arise as the bar under the first part of the proviso of no bail in such cases would operate.

31. The fact that there is a high burden on the accused in terms of the special provisions contained in Section 43D(5) to demonstrate that the prosecution has not been able to show that there exists reasonable grounds to show that the accusation against him is *prima facie* true, does not alter the legal position expounded in ***K. Veeraswami*** E (supra), to the effect that the charge-sheet need not contain detailed analysis of the evidence. It is for the Court considering the application for bail to assess the material/evidence presented by the Investigating Agency along with the report under Section 173 of Cr.P.C. in its entirety, to form its opinion as to whether there are reasonable grounds F for believing that the accusation against the named accused is *prima facie* true or otherwise.

32. In the case of ***Hitendra Vishnu Thakur*** (supra), the Court was called upon to consider the following questions as noted in the opening paragraph of the judgment, viz.: G

“In this batch of criminal appeals and special leave petitions (criminal) the three meaningful questions which require our consideration are: (1) When can the provisions of Section 3(1) of the Terrorist and Disruptive Activities (Prevention) Act, 1987

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- A (hereinafter referred to as the TADA) be attracted? (2) Is the 1993 Amendment, amending Section 167(2) of the Code of Criminal Procedure by modifying Section 20(4)(b) and adding a new provision as 20(4)(bb), applicable to the pending cases i.e. is it retrospective in operation? and (3) What is the true ambit and scope of Section 20(4) and Section 20(8) of TADA in the matter of grant of bail to an accused brought before the Designated Court and the factors which the Designated Court has to keep in view while dealing with an application for grant of bail under Section 20(4) and for grant of extension of time to the prosecution for further investigation under clause (bb) of Section 20(4) and incidentally whether the conditions contained in Section 20(8) TADA control the grant of bail under Section 20(4) of the Act also? We shall take up for consideration these questions in *seriatim*"
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The focus essentially was on matters relevant for consideration

- D of application for bail on the ground of default in filing the charge-sheet within the statutory period. Indeed, one of the questions was about the scope of the provisions relating to grant of bail in respect of offence punishable under special enactment TADA. That has been discussed in paragraphs 13 and 14 of the reported judgment, which reads thus:

- E "13. We would, therefore, at this stage like to administer a word of caution to the Designated Courts regarding invoking the provisions of TADA merely because the investigating officer at some stage of the investigation chooses to add an offence under same (*sic some*) provisions of TADA against an accused person, more often than not while opposing grant of bail, anticipatory or otherwise. The Designated Courts should always consider carefully the material available on the record and apply their mind to see whether the provisions of TADA are even *prima facie* attracted.
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- G 14. The Act provides for the constitution of one or more Designated Courts either by the Central Government or the State Government by notification in the Official Gazette to try specified cases or class or group of cases under the Act. The Act makes every offence punishable under the Act or any rule made thereunder to be a cognizable offence within the meaning of

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Section 2(c) of the CrPC. The Act vests jurisdiction in the Designated Court to try all such offences under the Act by giving precedence over the trial of any other case against an accused in any other court (not being a Designated Court) notwithstanding anything contained in the Code or any other law for the time being in force. The conferment of power on the Designated Courts to try the offences triable by them, punishable with imprisonment for a term not exceeding three years or with fine or with both, in a summary manner in accordance with the procedure prescribed in the CrPC notwithstanding anything contained in Section 260(1) or 262 CrPC by applying the provisions of Sections 263-265 of the Act is a marked departure. The right of appeal straight to the Supreme Court against any judgment, sentence or order not being an interlocutory order vide Section 19(1) of the Act demonstrates the seriousness with which Parliament has treated the offences under TADA. An onerous duty is therefore cast on the Designated Courts to take extra care to scrutinise the material on the record and apply their mind to the evidence and documents available with the investigating agency before charge-sheeting an accused for an offence under TADA. The stringent provisions of the Act coupled with the enhanced punishment prescribed for the offences under the Act make the task of the Designated Court even more onerous, because the graver the offence, greater should be the care taken to see that the offence must strictly fall within the four corners of the Act before a charge is framed against an accused person. Where the Designated Court without as much as even finding a *prima facie* case on the basis of the material on the record, proceeds to charge-sheet an accused under any of the provisions of TADA, merely on the statement of the investigating agency, it acts merely as a post office of the investigating agency and does more harm to meet the challenge arising out of the ‘terrorist’ activities rather than deterring terrorist activities. The remedy in such cases would be worse than the disease itself and the charge against the State of misusing the provisions of TADA would gain acceptability, which would be bad both for the criminal and the society. Therefore, it is the obligation of the investigating agency to *satisfy* the Designated Court from the material collected by it during the investigation, and not merely by

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- A the *opinion* formed by the investigating agency, that the activity of the ‘terrorist’ falls strictly within the parameters of the provisions of TADA before seeking to charge-sheet an accused under TADA. The Designated Court must record its satisfaction about the existence of a *prima facie* case on the basis of the material on the record before it proceeds to frame a charge-sheet against an accused for offences covered by TADA. Even after an accused has been charge-sheeted for an offence under TADA and the prosecution leads evidence in the case, it is an obligation of the Designated Court to take extra care to examine the evidence with a view to find out whether the provisions of the Act apply or not. The Designated Court is, therefore, expected to carefully examine the evidence and after analysing the same come to a firm conclusion that the evidence led by the prosecution has established that the case of the accused falls strictly within the four corners of the Act before recording a conviction against an accused under TADA.”
- D Again, in paragraph 22 of the said judgment, the Court observed thus:
- E “22. ....The two provisions operate in different and independent fields. The basis for grant of bail under Section 20(4), as already noticed, is entirely different from the grounds on which bail may be granted under Section 20(8) of the Act. It would be advantageous at this stage to notice the provisions of Section 20(8) and (9) of the Act.
- F ‘(8) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act or any rule made thereunder shall, if in custody, be released on bail or on his own bond unless—
- G     (a) the Public Prosecutor has been given an opportunity to oppose the application for such release, and
- H     (b) where the Public Prosecutor opposes the application, the court is satisfied 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.*

(9) The limitations on granting of bail specified in sub-section (8) are in addition to the limitations under the Code or any other law for the time being in force on granting of bail.'

As would be seen from the plain phraseology of sub-section (8) of Section 20, it commences with a non obstante clause and in its operation imposes a ban on release of a person accused of an offence punishable under TADA or any rule made thereunder on bail unless the twin conditions contained in clauses (a) and (b) thereof are satisfied. No bail can be granted under Section 20(8) unless the Designated Court is satisfied after notice to the public prosecutor that there are reasonable grounds for believing that the accused is not guilty of such an offence and that he is not likely to commit any offence while on bail. Sub-section (9) qualifies sub-section (8) to the extent that the two conditions contained in clauses (a) and (b) are *in addition* to the limitations prescribed under the Code of Criminal Procedure or any other law for the time being in force relating to the grant of bail. Strictly speaking Section 20(8) is not the source of power of the Designated Court to grant bail but it places further limitations on the exercise of its power to grant bail in cases under TADA, as is amply clear from the plain language of Section 20(9). The Constitution Bench in *Kartar Singh case*<sup>19</sup> while dealing with the ambit and scope of sub-sections (8) and (9) of Section 20 of the Act quoted with approval the following observations from *Usmanbhai case*<sup>20</sup>: (SCC p. 704, para 344)

'Though there is no express provision excluding the applicability of Section 439 of the Code similar to the one contained in Section 20(7) of the Act in relation to a case involving the arrest of any person on an accusation of having committed an offence punishable under the Act or any rule made thereunder, but that result must, by necessary implication, follow. It is true that the source of power of a Designated Court to grant bail is not Section 20(8) of the Act as it only places limitations on such power. This is made explicit by Section 20(9) which enacts that the limitations on granting of bail specified in Section 20(8) are 'in addition to the

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- A limitations under the Code or any other law for the time being in force'. But it does not necessarily follow that the power of a Designated Court to grant bail is relatable to Section 439 of the Code. It cannot be doubted that a Designated Court is 'a court other than the High Court or the Court of Session' within the meaning of Section 437 of the Code. The exercise of the power to grant bail by a Designated Court is not only subject to the limitations contained therein, but is also subject to the limitations placed by Section 20(8) of the Act.'
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and went on to add: (SCC p. 704, para 345)

- C 'Reverting to Section 20(8), if either of the two conditions mentioned therein is not satisfied, the ban operates and the accused person cannot be released on bail but of course it is subject to Section 167(2) as modified by Section 20(4) of the TADA Act in relation to a case under the provisions of TADA.'
- D Thus, the ambit and scope of Section 20(8) of TADA is no longer *res integra* and from the above discussion it follows that both the provisions i.e. Section 20(4) and 20(8) of TADA operate in different situations and are controlled and guided by different considerations."
- E 33. We fail to understand as to how this decision will be of any avail to the respondent. In our opinion, the Designated Court had rightly rejected the bail application after advertizing to the relevant material/ evidence indicative of the fact that there are reasonable grounds for believing that the accusation against the respondent is *prima facie* true.
- F 34. With reference to the document D-132(a), the High Court was impressed by the argument that the same would be inadmissible. To buttress that opinion of the High Court, the respondent would rely on the decision of this Court in *V.C. Shukla* (supra). Further, it was submitted that in light of Section 34 of the Evidence Act, the said document could not be admitted in evidence, since it was not an entry in the books of account regularly kept in the course of business. In any case, that document by itself would not be sufficient in the absence of any independent evidence. Learned Attorney General, relying on the underlying principle in *Khoday Distilleries Ltd. and Ors. Vs. State of Karnataka and Ors.*<sup>21</sup>, would contend that there cannot be business in crime and,
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<sup>21</sup> (1995) 1 SCC 574 (para 60)

as such, Section 34 of the Evidence Act will have no application. He further submits that the prosecution may use the facts noted in the said document and prove the same against the respondent by other evidence. This argument need not detain us. For, we find force in the argument of the learned Attorney General that the issue of admissibility and credibility of the material and evidence presented by the Investigating Officer would be a matter for trial. Furthermore, indubitably, the prosecution is not solely relying on the document D-132(a) recovered from the residence of Ghulam Mohammad Bhatt (W-29). There are also other incriminatory documents recovered from respondent (Accused No.10) himself during the search, including other independent evidence, which, indeed, will have to be proved during the trial.

35. The appellant has relied on the exposition in *Salim Khan* (supra), to contend that in cases where the High Court adopted a totally erroneous approach, as in the present case, discarding the crucial material/evidence which is referred to in the report under Section 173 Cr.P.C. and presented before the Designated Court, then the order granting bail by the High Court cannot be countenanced. The argument of the respondent is that the said decision would make no difference as it is concerning an application for cancellation of bail made by the informant. However, we find force in the argument of the appellant that the High Court, in the present case, adopted an inappropriate approach whilst considering the prayer for grant of bail. The High Court ought to have taken into account the totality of the material and evidence on record as it is and ought not to have discarded it as being inadmissible. The High Court clearly overlooked the settled legal position that, at the stage of considering the prayer for bail, it is not necessary to weigh the material, but only form opinion on the basis of the material before it on broad probabilities. The Court is expected to apply its mind to ascertain whether the accusations against the accused are *prima facie* true. Indeed, in the present case, we are not called upon to consider the prayer for cancellation of bail as such but to examine the correctness of the approach of the High Court in granting bail to the accused despite the materials and evidence indicating that accusations made against him are *prima facie* true.

36. In a decision of this Court in *Chenna Boyanna Krishna Yadav* (supra), to which reference has been made, the Court has re-stated the

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- A twin conditions to be considered by the Court before grant of bail in relation to MCOCA offences. We are of the view that in the present case, the Designated Court rightly opined that there are reasonable grounds for believing that the accusation against the respondent is *prima facie* true. As we are not inclined to accept the prayer for bail, in our opinion, it is not necessary to dilate on other aspects to obviate prolixity.
- B 37. A fortiori, we deem it proper to reverse the order passed by the High Court granting bail to the respondent. Instead, we agree with the conclusion recorded by the Designated Court that in the facts of the present case, the respondent is not entitled to grant of bail in connection with the stated offences, particularly those falling under Chapters IV and VI of the 1967 Act.
- C 38. Accordingly, this appeal succeeds. The impugned judgment and order is set aside and, instead, the order passed by the Designated Court rejecting the application for grant of bail made by the respondent herein, is affirmed.
- D 39. All pending applications are also disposed of.

Divya Pandey

Appeal allowed.