Salimbhai Abdulgaffar Shaikh vs State Of Gujarat on 4 July, 2003

Equivalent citations: (2003)3GLR1899

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Bench: C.K. Buch

JUDGMENT

C.K. Buch, J.

Rule, Mr. A. D. Oza learned Public Prosecutor waives Rule on behalf of the respondent-Government in all matters.

1. All these Misc. Cri. Applications have been moved by the accused persons for bail in connection with the F.I.R. being CR-I No. 9 of 2002 came to be registered with Godhra Railway Police Station for various offences punishable under Sections 143, 147, 148, 149, 337, 338, 328, 438, 320, 307, 120B and 153A of Indian Penal Code read with Sections 141 and 150 and 152 of the Indian Railways Act read with Sections 3 and 4 of the Prevention of Damages of Public Property Act and also under Section 135 of the Bombay Police Act. On completion of the investigation qua the present petitioners and some other accused persons arrested in later point of time, have been charge sheeted and after filing of the charge sheet the learned J.M.F.C. (Railways) at Godhra committed the case against the accused so charge-sheeted to the Court of Sessions, Panchmahals at Godhra and a Case being Sessions Case No. 172 of 2002 came to be registered with the Sessions Court, Panchmahals at Godhra on 22-2-2002. A report under Section 172(2) of the Criminal Procedure Code (hereinafter referred to as "the Code") was submitted against, in all, 57 accused persons including the present six petitioners for the offences referred to in the abovesaid F.I.R.

2. On 20-9-2002, seven other accused persons in respect of the above said F.I.R. have been charge-sheeted, and thereafter, investigating agency charge-sheeted 3 other accused in respect of the abovesaid F.I.R. and crime being CR-I No. 9 of 2002 and all these accused persons were committed to the Court of Sessions.

3. Petitioners of Misc. Criminal Application Nos. 606, 857, 864 and 1031 of 2003 were initially arrested for distinct offences punishable under the Indian Penal Code in connection with the incident occurred within the limits of Godhra Town Police Station. On 28-2-2002, one of the petitioners Abdulrehman Yusuf Andhia was also arrested in connection with the incident occurred in Godhra Town on 27-2-2002, the day on which said incident occurred.

4. For the incident occurred and the offences committed within the limits of Godhra Town Police Station, one F.I.R. was lodged and the offence was registered being CR No-I-66 of 2002 with Godhra Town Police Station.

5. The petitioners of Misc. Cri. Application Nos. 606, 857, 864 and 1031 all of 2003 were in judicial custody in connection with CR No. I-66 of 2002 registered with Godhra Town Police Station till 11th March 2002. An appliction for transfer warrant was made to the learned J.M.F.C. (Railways) at Godhra for custody of the accused persons mentioned in the said application including the petitioners of the above-mentioned Misc. Cri. Applications, from Sabarmati jail to police custody, in connection with the offences registered pursuant to CR No. I-9 of 2002 of Godhra Railway Police Station. Formal orders of issuance of transfer warrant came to be passed on 12-3-2002 and on 14-3-2002 several accused persons including the petitioners of the above mentioned four Misc. Cri. Applications were arrested in connection with the offences registered with Godhra Railway Police Station at Godhra in CR No. I-9 of 2002. All of them were remanded to police custody upto 30-3-2002. Meanwhile, the investigating agency had submitted a report to the learned J.M.F.C. (Railways) at Godhra to add the provisions (offences) punishable under the Prevention of Terrorism Ordinance of 2001 (hereinafter referred to as P.O.T.O.) qua CR. No. I-9 of 2002. However, again the investigating agency prayed for dropping/differing provisions relating to offences punishable under P.O.T.O. with a liberty to invoke the same on the strength of availability of evidence. After the Prevention of Terrorism Ordinance became "an Act, it is known as Prevention of Terrorism Act, (which is hereinaftrer referred to as P.O.T.A.).

6. The petitioner of Misc. Cri. Application No. 842 of 2003 came to be arrested on 27-4-2002 and has been charge-sheeted on 15-6-2002 and was committed to the Court of Session with a supplementary charge-sheet.

6.1. The petitioner of Misc. Cri. Application No. 863 of 2003 who was arrested for the offences registered with the Godhra Railway Police Station being CR No. I-9 of 2002 on 14-3-2002, was remanded to police custody and on completion of the investigation, has been charge-sheeted along with other accused persons of Sessions Case No. 172 of 2002.

6.2. Petitioners of Misc. Cri. Application Nos. 842 of 2003 and 863 of 2003 have been arrested in connection with the F.I.R. registered with Godhra Railway Police Station being CR No. I-9 of 2002. So, their case is not a case of formal arrest on the strength of transfer warrant obtained from the learned J.M.F.C. (Railways) at Godhra.

7. The bunch of all these 6 Misc. Cri. Applications are taken up for final hearing as the say of the petitioners are materially the same. The learned Counsel appearing for the petitioners and the learned Addl. A. G. Mr. Kamal Trivedi and learned Public Prosecutor Mr. A. D. Oza had jointly submitted that all these six applications may be heard jointly and they have no objection, if they are disposed of by a common order.

8. I have considered the legal as well as factual contentions raised by the petitioners and as it is possible to deal with and decide these petitions jointly, the same have been disposed of accordingly

by this common order.

9. In order to appreciate the say of the petitioners of each petition, it would be proper to mention few more facts of relevance, especially in the light of gravity of the allegations made by the State while resisting all these petitions.

Misc. Cri. Application No. 606 of 2003 :

10. The petitioner in this petition, was initially, arrested in pursuance of a complaint registered with Godhra Town Police Station being CR No-I-66 of 2002 and he was also arrested on the strength of transfer warrant in connection with CR No. I-9 of 2002 on 13/14-3-2002 and at present he is in Central Jail, Sabarmati, Ahmedabad. He is a resident of Khedi Falia of Godhra Town, surrounded by Railway Colony. The brother of the petitioner in this petition is working as Train Ticket Examiner and his father is a retired employee of Indian Railways. It is contended that the officers serving with the Indian Railways and of Railway Protection Force (R.P.F.) and Gujarat Railway Police are residing in the neighbourhood of the petitioner. He is running a business in the name and style of Awkar Dinning Hall-a partnership concern and he is also the proprietor of Gujarat Plastic Company which is manufacturing polyethylene bags.

10.1 It is not a matter of dispute that he is a resident of the area since more than 20 years and is a regular income-tax payer. By narrating the case of the prosecution in the charge-sheet as well as in the additional charge-sheet filed on 20-9-2002, the petitioner has contended that it is not even alleged that the petitioner had taken any active role in the ghastly incident. His name is not mentioned in any of the Acts of pulling the chain of the train or putting fire into it by putting rubblest (burning rags) or carrying any inflammable liquid like petrol or pouring any such inflammable in Coach No. S/6 and/or S/7 of Sabarmati Express.

10.2 In the statements of 100 witnesses recorded by the investigating agency, he has been implicated solely on the strength of statement of one Murlidhar Rochimal Mulchandani allegedly recorded on 20-2-2002. In Para 11 of the petition, the gist of statement of this witness has been mentioned. According to this witness, he and his friends had seen from the back portion of A cabin that one Habib Patel, Bilal Haji Khalata, Farooq Bhanna, Karim Badan Kamil, Salim Shaikh and others of Godhra town were attacking the Sabarmati Express Train with deadly weapons. This witness knows almost all Muslim leaders and persons of Godhra Town by their names. According to the petitioner, this witness is a Viswa Hindu Parishad (V.H.P.) worker and according to the prosecution, he had been to Godhra Railway Station platform with other co-workers of V.H.P. Janakbhai K. Dave, Gokulkumar @ Nitinkumar H. Pathak and Dilipkumar, Ujamsi Jasadia, Rajeshbhai Vithalbhai Darji etc. 10.3 Further statement of this witness Murlidhar Rochimal Mulchandani came to be recorded on 3-5-2002 wherein he had given the full names of other co-accused persons; but had not given the full name of petitioner. According to the petitioner, he is not Salim Shaikh, but his real name is Abdulsalim Abdulgaffur Shaikh. It is submitted that the statement of said Murlidhar is the only evidence and that too with some confusion about the correct name of the petitioner. Normally, it would not be possible for any Court to hold him guilty of the offences allegedly committed qua the passengers travelling in Sabarmati Express Train or committing destruction of the property of

Indian Railways. It is categorically averred by the petitioner that this witness Murlidhar knows the petitioner well and is also aware about his full name since years. Accompanying co-workers/friends of this worker-Murlidhar also know the petitioner; whereas no other witnesses have disclosed the name of the petitioner in their statements nor have they assigned any role to the petitioner.

10.4 The petitioner had approached the Court of learned Addl. Sessions Judge, Panchmahals at Godhra for regular bail by filing Misc. Cri. Application No. 682 of 2002; but the learned Addl.Sessions Judge by his judgment and order dated 29-7-2002 rejected the bail plea.

10.5 Against the said decision the petitioner-accused had preferred a petitioner for bail before this Court being Misc. Cri. Application No. 7250 of 2002 but the same came to be withdrawn with a liberty to prefer fresh application for bail on account of filing of supplementary charge-sheet by the investigating agency in the month of September, 2002. Against the same, some other accused persons were also arrested by the police. Therefore, it would be appropriate to quote the order passed by this Court, while dealing with the abovesaid Misc. Cri. Application on 27-12-2002 along with the bail applications preferred by other accused persons for this very offence :

> "I have heard the counsel appearing for the petitioner and Senior Advocate Mr. P. M. Thakkar in Misc. Criminal Application Nos. 5439 of 2002 and 7259 of 2002. It is submitted that the investigating agency has submitted the further additional charge-sheet along with the papers of the further investigation carried out, and therefore, the petitioners are inclined to approach the Sessions Court afresh on merits without arguing this matter on merits. Therefore, they may be permitted to approach the Sessions Court for bail. It is also submitted that the concerned Sessions Judge should be directed to consider the bail plea afresh without being prejudiced by the present withdrawal and the earlier order passed in this respective matters. Considering the nature of the submissions made by the learned Counsel appearing for the petitioners and the learned Special Prosecutor Mr. J. M. Panchal, I am of the view that the petitioner should be granted permission to file a fresh bail application before the Sessions Court. If such bail applications are filed, then, the same should be heard and decided on merits in the light of the above observations. Directions accordingly.
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> It is clarified that this withdrawal also shall not cause any prejudice against the petitioners. If such bail application/s are preferred, then, the same should be heard and decided within four weeks from the date of filing of the concerned bail application. Copy of this order be kept in each of the matters. Direct Service permitted."

11. It is contended by the petitioner that in the additional charge-sheet filed by the prosecution, the names of the persons who allegedly took part in instigation and commission of the said crime are specifically mentioned with elaborate details. It is also alleged in the description and in the evidence collected by the prosecuting agency as to who acted as per the conspiracy and who instigated the mob at the railway track near A cabin, the name of the petitioner is not mentioned. Mr. P. M.

Thakkar learned Senior Counsel has also placed reliance on this part of the evidence collected by the prosecution and has submitted that the petitioner has been falsely implicated in the alleged offence solely on the strength of the statement of Murlidhar Rochimal Mulchandani. It is also the case of the petitioner that this prosecution witness Murlidhar is a communal-minded person, and in the past, he was found involved in the communal riots and was an accused in the case of murder of one Abdulrahim during the communal riots of 1992. He was the complainant in one criminal case filed against the persons belonging to minority community for the offence punishable under Sections 307 and 504 of I.P.C. read with Section 114 I.P.C. and under Section 11(l)(c) of Cruelty to Animal Act, 1960. It is pointed out by Mr. Thakkar from the memo of petition that the petitioner was also implicated in the offence alleged to have taken place as aftermath of Godhra Railway incident (i.e. present CR No. I-9 of 2003) and he has been acquitted along with all other accused by judgment and order dated 16-8-2002 in connection with CR. No. I-66 of 2002 registered with Godhra Town Police Station tried by the learned Sessions Judge in Sessions Case No. 133 of 2002. In the same way, he has been dragged into the crime registered as CR No. I-9 of 2002. Mistaken identity is also one of the grounds pleaded by the learned Counsel for the petitioner and it is submitted that the petitioner, has been wrongly arrested as he is not Salim Shaikh who was located by Murlidhar R. Mulchandani at the scene of offence. Absence of identification parade is a material lacuna in the investigation. It is also one of the grounds that the statement of D.S.P. Raju Bhargav has been recorded who had rushed to the scene of offence immediately and he has not identified the petitioner-accused as a person present at the scene of offence; otherwise the petitioner being a well-known industrialist and a businessman of Godhra town, Shri Bhargav would have identified him. The presence of the petitioner at the scene of offence is highly improbable. The distance between two places viz. A cabin of Godhra Railway Station and the area of Godhra Town where the incident of 27th occurred and the background of time of commission of both these offences, clearly favours the petitioner. So, it is submitted that on facts, there is no scope for any Court to link the present accused with the ghastly crime committed against the passengers of Coach No. S/6 and/or S/7 of Sabarmati Express or the properties of Indian Railways. It is submitted that there are number of reasons under which prima facie satisfaction can be recorded to the effect that there are grounds for believing that the petitioner is not guilty of committing such offence i.e. the offence punishable under P.O.T.O. Misc. Cri. Application No. 842 of 2003 :

12. It is contended that the petitioner in this petition has been falsely implicated by the police in the present case by alleging artificial and wooden evidence. According to the petitioner, he falls in the category/privilege under Section 437 Code as he is infirm and is totally blind since 1977. The learned Sessions Judge while rejecting his bail plea has not given any weightage to the certificate issued on 10-10-1997 whereby it has been certified by the doctor that he has "visual impairment about 100%".

12.1 According to Mr. A. A. Saiyed learned Counsel for the petitioner, there is no evidence alleged to have been collected whereby it can be interred that present petitioner is directly or indirectly involved in the offence in question. The petitioner is implicated on the statements of police constables Somabhai and Vinubhai which were recorded after several days of the incident. It was possible for the learned Sessions Judge to hold that there is no convincing legal evidence against the petitioner and there are no grounds on which the present petitioner can be held guilty of the offence. At the same time, there is convincing prima facie evidence in the papers of investigation whereby it

can be inferred that the petitioner had played any role in the entire or any part of the incident or he has taken any part in committing the offence by instigating the mob or joining the mob or by irritating the police persons. According to Mr. Saiyed, the investigating agency was requested with a written application by the father of the present petitioner that the petitioner is his son and he is blind, and therefore, the police machinery should be polite towards him. Undisputedly, the petitioner has been arrested on 27-4-2002. It is argued that none of the eye-witnesses to the incident has implicated present petitioner in the offence, though persons from Railway Police, R.P.F. and several members of Indian Railways were present. According to the petitioner, one inspector of C.I.D. (Crime) of district Godhra has created evidence against the petitioner, and therefore, he should be enlarged on bail and the medical certificate obtained by the investigating agency contrary to the certificate issued by the Civil Surgeon should be ignored and the infirmity/blindness certified by the Civil Surgeon, Godhra in the year 1997 for all purpose should be taken into account while exercising discretionary powers vested with this Court.

Misc. Cri, Application No. 857 of 2003 :

13. The petitioner in this petition is an Advocate aged about 45 years and it is contended that he is a permanent resident of Godhra town. After the arrest and filing of the charge-sheet by the investigating agency, the petitioner herein preferred application for bail in Sessions Case No. 172 of 2002 which came to be rejected on 24-9-2002 by the learned Addl. Sessions Judge. Thereafter, the petitioner had approached this Court by filing Misc. Cri. Application No. 741 of 2002; but the same came to be withdrawn with permission to prefer fresh application for bail in view of the fact that the investigating agency has submitted supplementary charge-sheet along with papers of further investigation. The petitioner was granted permission to approach the Sessions Court with fresh bail application vide order dated 27-12-2002 by this Court. The common order dated 27-12-2002 passed in such other matters, is already reproduced in Para 10.5 of this judgment. The petitioner, thereafter, approached the learned Sessions Judge, Godhra vide application Exh. 150 for bail and ultimately the learned Sessions Judge rejected the bail plea of the petitioner, by his order dated 30-1-2003.

13.1 It is contended by the petitioner that on the strength of the information i.e. F.I.R. the police started investigation on 27-2-2002. The police also recorded the statements of various persons including the statement of one Rajeshkumar Vithalbhai Darji. This witness is the ex-President of Godhra Nagarpalika. According to his statement, he is a worker of V.H.P. and he had been to the Godhra Railway Station to welcome 'Kar Sevaks' who were returning from Ayodhya by Sabarmati Express train, with tea and breakfast etc. He has also named some of his V.H.P. member-friends and Kar Sevaks from Ahmedabad. This witness has implicated the present petitioner in the offence. While narrating the incident, he has stated that none of the witnesses has given the name of the present petitioner as person present amongst the crowd and committing the offence during the incident in question, in the statement recorded on 27-2-2002 i.e. the date of the incident. The petitioner has produced statement of Rajeshkumar Darji recorded on 27-2-2002 vide Annexure-B. It is submitted that an attempt of implicating the present petitioner being member of the Muslim community and President of Godhra Nagarpalika was made from 28-2-2002. The prosecution mainly relied upon the statement of Murlidhar R. Mulchandani of 28-2-2002. He had given the

name of about 9 persons including the name of one Kalota. But he has not given the full name of the accused-Kalota. It is submitted by Mr, Anandjiwala learned Counsel for the petitioner that Kalota is the surname. Neither the name of the present petitioner-accused nor his father's name has been referred to by this witness Murlidhar R. Mulchandani.

13.2 Thereafter, on 3-5-2002, further statement of this witness came to be recorded; but he has not given the full name of the present petitioner. It is argued that had that person was with the present petitioner, who is a practicing Advocate as well as President of Godhra Nagarpalika and known to almost everybody, this witness Murlidhar Mulchandani would have given the name specifically or with some identification marks. The petitioner has produced the copy of the electoral rolls of Godhra town and there are many persons having the surname of Kalota residing in Godhra town. It is the say of the petitioner that it is a case of false implication and/or mistaken identity, mainly relying upon the statements of police personnel which came to be recorded, for the first time, after a lapse of 8 days, falsely implicated the present petitioner in the crime by showing his presence on the spot of the incident. The learned Sessions Judge while dealing with the bail plea has observed that some witnesses have implicated number of accused persons without assigning details of the role played by them. Mr. Anandjiwala has relied upon the observations made by the learned Sessions Judge. Undisputedly, even as per the say of the prosecution, D.S.P. Shri Raju Bhargav had rushed to the spot of the incident in a couple of minutes; but his statement has been recorded by the investigating officer on 23-3-2003. In his statement, D.S.P. Raju Bhargav, has stated that at about 8-35 a.m. he was arranging for further additional service of Fire Brigade personnel from Kalol and Lunawada and at that time at about 8-35 a.m. near the garnalla of Single Falia, he met Mohmed Hussein Kalota and Bilal Haji and all these 3 persons met and on seeing the white cap and beard of Bilal Haji, the Kar Sevaks excited believing him to be a Muslim, and therefore, D.S.P. requested both these persons to leave the place and had requested Mr. Kalota - the present petitioner to take said Bilal from the place, and therefore, Kalota took Bilal away from the place. It is submitted by Mr. Anandjiwala that the origin of the incident, if considered and the tact that present petitioner was to leave to Gandhinagar along with his Secretary in connection with some administrative work of Godhra Nagarpalika, he ought not to have been even arrested for the alleged offences committed by the unruly mob.

13.3. Mr. Anandjiwala has tried to submit that after knowing about occurrence of some untoward incident at Godhra Railway Station, the petitioner had attempted to contact D.S.P. Mr. Bhargav but as the D.S.P. had already left from his residence for the spot of the incident, the petitioner had gone there at a later point of time and met the D.S.P. Political rivalry has played a vital role in the false implication of the present petitioner in the serious ghastly crime; otherwise, no independent witnesses whose statements were recorded on 27-2-2002 would have given the name of the present petitioner as an accused and the role played by him during the incident. The statement of Rajeshkumar Vithalbhai Darji was recorded on 27-2-2002, copy of which is produced at Annexure-D wherein he has referred to the name of number of witnesses allegedly present with him on the platform of Godhra Railway Station, where the first event occurred. It is also mentioned in the statement that after the arrival of police and R.P.F. personnel, there was lathi-charge and police firing and some of the persons running away towards Single Falia were arrested. According to the prosecution, after arrival of fire brigade personnel and the rescue operations were going on, another

crowd of about 2,500-3,000 persons belonging to minority came to the spot of the incident near A cabin and with a view to get the arrested persons released from police custody, they pelted stones against the police and the police lathi-charged and fired the crowd. This witness has not named the petitioner as person present either in the crowd or in the company of D.S.P. Mr. Raju Bhargav. In the further statement of this witness recorded on 3-5-2002 also he has not referred the name of the present petitioner specifically. It is submitted by Mr. Anandjiwala that even as per the statement of Murlidhar R. Mulchandani recorded on 28-2-2002 he had seen all the 7 (seven) persons named in the statement with deadly weapons damaging the coaches of train near A cabin of Godhra Railway Station. But this statement is without any corroboration. On the contrary, D.S.P. Mr. Bhargav has not assigned any role to the present petitioner and the role allegedly played by the present petitioner which is narrated by the other witness viz. mobile police jeep driver-Mangalji Ramjibhai, is totally different. It is submitted that witness Murlidhar R. Mulchandani having inimical terms and political rivalry, with the present petitioner, has attempted to implicate the present petitioner in the serious crime and no Court of prudence would hold the present petitioner guilty of any offence allegedly occurred near the A cabin of Godhra Railway Station or on the platform of Godhra Railway Station when the railway coaches were allegedly set on fire or when the big crowd had attempted to snatch away the persons who were already arrested by the police and R.P.F. personnel after the incident, when the rescue operations were going on.

Misc. Cri. Application No. 863 of 2003 :

14. It is contended that the petitioner in this petition has been arrested on 14-3-2002. But he is innocent and he has been falsely implicated in the incident. According to him, he is a permanent resident of Idga Mohalla of Godhra town having his family settled in Godhra town and he is owning immovable property in Godhra in his own name. After his arrest, the investigating agency has filed charge-sheet on 22-5-2002 but there is no evidence connecting the present petitioner with the alleged crime. On the date on which the petitioner was arrested, the investigating agency was not having any clue as to the connection of the present petitioner-accused with the crime and the investigating agency was not even clear as to on what basis the present petitioner has been arrested. Though, the petitioner was remanded to police custody for 15 days, no identification parade was conducted. So, according to the petitioner there is no legal evidence as to his presence at the scene of offence. There is no recovery of either any weapon or muddamal from the petitioner-accused. It is averred that after filing of the charge-sheet, the investigating agency has recorded the statements of Ajaykumar Kanubhai Baria and Anwar Abdul Satar and their statements under Section 164 of the Code has been recorded by the J.M.F.C. The prosecution mainly relies upon the statement of one unnamed witness and the same has been kept in an unsealed envelope. But the present petitioner is not therefore, aware whether his name is referred to by that witness in that statement and the role assigned to him. The petitioner had applied for bail before the Court of Sessions and the same was rejected by the learned Addl. Sessions Judge, Panchmahals at Godhra. Said order of rejection of bail was challenged and fresh application for bail was preferred being Misc. Cri. Application No.7411 of 2002, but ultimately said application was withdrawn as the petitioner was directed to approach the Sessions Court afresh along with other accused persons who had preferred separate bail applications before the High Court. The order passed by this Court in these petitions has been referred to in Para 10.4 of this order.

14.1. Fresh application for bail preferred by the petitioner in the competent Sessions Court being Misc. Cri. Application No. 172 of 2002 has been rejected vide order dated 24-1-2003 passed by the learned Addl. Sessions Judge along with the bail applications of other accused persons being application Exh. 148. According to the charge-sheet filed by the investigating agency, present petitioner is original accused No. 29 in the original Sessions Case. It is submitted that considering the nature of general allegations, in absence of any prima facie evidence, about the involvement of the present petitioner and the length of the period for which the present petitioner accused is in judicial custody, the Court should exercise the discretion in favour of the present petitioner observing that there is no prima facie evidence to hold him guilty for the alleged offence, and therefore, he should be enlarged on bail.

Misc. Cri. Application No. 864 of 2003 :

15. The petitioner accused in this petition is doing business and is permanently residing at Maulana Azad Road, Godhra. According to him, he has been falsely implicated because of his relations with the President of Godhra Nagarpalika Shri Mohmedhusein Kalota. As. mentioned earlier, said Kalota is a practicing Advocate. It is contended that he is shown as accused No. 46 in the original Sessions Case. The petitioner was earlier arrested in connection with the offence registered with Godhra Town Police Station being CR. No. I-66 of 2002, and thereafter, he has been arrested by transfer warrant issued on 13-3-2002 and since 13-3-2002 he is in judicial custody in the present offence. He was also remanded to police custody for interrogation. It is the say of the petitioner that in this offence one witness viz. Rajeshkumar v. Darji has implicated him by naming him in the statement. The person who has identified Mr. Kalota the President of Godhra Nagarpalika, has also not named the present petitioner nor has he assigned any role to the present petitioner. There is no other evidence in the whole charge-sheet. It is submitted that the name of the present petitioner and one of the accused Harun Dava has been subsequently added. The petitioner has mentioned in Para 9 of the petition that he has been falsely implicated because the witness was the President of Godhra Nagarpalika and his election as President was challenged before the Court and the Court had directed for re-election accepting the plea raised before the Court. There was vote of no-confidence against the President and it was passed by 2/3rd majority. Thereafter, said Mohmedhusein Kalota, Advocate became the President of Godhra Nagarpalika. In the said procedure and election, the petitioner accused has supported said Mohmedhusein Kalota, and therefore, because of the enmity, the petitioner has been falsely implicated by this sole witness. It is argued that D.S.P. Mr. Raju Bhargav has referred the name of the present petitioner along with the other persons who were present on the spot. But this responsible officer has not assigned any role to the present petitioner and he has not attributed any overt offending act to the present petitioner. He has been acquitted by the Sessions Court in the Sessions Case No. 153 of 2002, which came to be registered on the strength of the above-mentioned CR-No. I-66 of 2002. It is submitted that the star-witness Murlidhar R. Mulchandani was also one of the witnesses examined by the prosecution during the said trial and his version has not been accepted. It is further submitted that while exercising discretionary jurisdiction the Court may not ignore one fact that this Murlidhar Mulchandani has not been believed by the Court in a case where the accused were charged for participating in an offence concerning communal disturbances. There are so many other eye-witnesses even as per the say of the prosecution but none of them has named the present petitioner though he is wellknown being

close to the said Kalota-President of Godhra Nagarpalika who is also a business man of Godhra town. So, there are number of grounds whereby it can be safely inferred, prima facie, that present petitioner is not guilty of the offence punishable under P.O.T.A.. The details as to the filing of the earlier petitions and the results of them are mostly similar to the other petitions referred to hereinabove. It is categorically submitted that in the statements of Ajay Baria and Anwar Kalota recorded under Section 164 of the Code, they do not involve the present petitioner in the matter. The period of detention in judicial custody also should be considered in light of the fact that substantial part of the investigation is over and about 3 charge-sheets have been filed. The fact of alleged confession made by one or two accused persons qua the criminal conspiracy hatched, has no significance because there is no evidence linking the present petitioner with any of the persons who have allegedly hatched the alleged conspiracy. In the circumstances, it is submitted that discretion may be exercised in favour of the present petitioner and the petitioner may be enlarged on bail.

Misc. Cri. Application No. 1031 of 2003 :

16. The contentions of the present petitioner are mostly similar to the contentions raised by the petitioners of Misc. Cri. Application Nos. 606, 857 and 866 of 2003. Initially, the petitioner was arrested for the incident allegedly occurred in Godhra town and he has been acquitted by the competent Court. The petitioner is an employee of Godhra Transport Credit Society and he is collecting the daily savings from the members. It is contended that he worked from 8-00 a.m. to 12-00 noon and when he was collecting the amounts from the members, all of a sudden curfew was imposed in Godhra town. He had collected amounts from approximately 170 persons and there are entries in respect of the same in the passbook of the members. When he was intercepted by the police, he was going to the residence of Accountant-Khurshid Hayal and he was taken by the police as one of the violators of curfew suddenly imposed and was implicated in the abovesaid offence occurred in Godhra town. Thereafter, on the strength of transfer warrant issued by the learned J.M.F.C. he has been arrested formally in the present crime. It is submitted that the finding recorded by the learned Sessions Judge while acquitting the present accused on pages 26 and 27 may be considered while exercising discretionary jurisdiction in favour of the petitioner. It is further argued by the learned Counsel for the petitioner G.R. 240 that while dealing with the bail plea of the present petitioner the fact of enlargement of number of accused persons on bail, who has participated in the ghasty crime committed throughout the State simultaneously in Baroda and Ahmedabad may be considered. The case of the present petitioner may not be the case which can be equated with the cases of other accused on. the principle of parity. But the resistance put forward by the prosecution on the strength of ghastiness of the crime may not be considered as a base in rejecting the bail plea of the present petitioner and the case of the present petitioner individually may be considered in the light of the nature of evidence collected by the prosecution and legality of evidence collected by the prosecution qua the role played by the present petitioner and the effect of criminal conspiracy allegedly hatched prior to the commission of the present offence. It is lastly submitted that there are number of grounds under which it can be inferred that present petitioner is not guilty of the offence punishable under P.O.T.A.. So, the Court may exercise the discretion in favour of the present petitioner-accused in enlarging him on bail.

17. I have considered the rival contention and I would like to mention the submissions advanced in the light of the relevant legal provisions.

18. All these petitions have been moved by the respective petitioner in the months of January and February, 2003. Misc. Cri. Application No. 606 of 2003 was circulated on 31-1-2003 and as the advance copy was served on the respondent-State the learned Spl. Public Prosecutor Mr. J. M. Panchal appeared and had waived the notice of Rule for respondent-State and had requested that the matter may be adjourned to 14-2-2003, and thereafter, to 19-2-2003. Affidavit-in-reply on behalf of the respondent-State has been tendered on 5-3-2003. Meanwhile, pending admission hearing, learned Spl. Public Prosecutor had informed the Court that the State Government has resolved to apply P.O.T.A. to the crime in connection with the petitioner, who have prayed for bail and the Court was informed that now the State will have to appoint a Public Prosecutor in view of the Scheme of P.O.T.A. and it will not be possible for him to appear on behalf of the State Government in these petitions. So at his request the matter was adjourned, and ultimately, the State arranged for Public Prosecutor and learned Public Prosecutor Mr. A. D. Oza appeared and tendered affidavit-in-reply on behalf of the State on 5-3-2003. This Court was entrusted with a different type of assignment during the concerned roster but as the petitioners of these petitions have moved applications for bail and had withdrawn the same with permission to file fresh petitions before the concerned Sessions Court, these applications have been heard by this Bench.

19. Mr. P. M. Thakkar learned senior Counsel appearing for Mr. Y. M. Thakker for the petitioner in Misc. Cri. Application No. 606 of 2003 has taken this Court through the contents of the F.I.R. and the relevant statements of eye-witnesses and the officials recorded mainly on 27-2-2002 and 28-2-2002 and in the early days of investigation. He has also taken me through the various stages concerning the progress of the investigation of the crime and the filing of the charge-sheet including the supplementary charge-sheets on respective date and the fact of alleged development whereby the State Government resolved to apply P.O.T.A. accepting the proposal of the Investigating Agency.

19.1 When the learned Counsel for the petitioner was developing his arguments on facts as well as on the relevant legal aspects, learned Addl. Advocate General Mr. Kamal Trivedi requested the Court to deal with the preliminary points and the basic objections taken by the State Government in the affidavit-in-reply. It is necessary to mention that some deviation has been made while hearing the parties and affording them opportunity to submit their contentions so that they feel satisfied that they have been afforded opportunity to put forward their case before the Court.

20. In the first part of submissions learned Counsel Mr. P. M. Thakkar and Mr. S. V. Raju have been heard and both of them have submitted that the petitioners are in judicial custody for more than one year; no formal charge-sheet under the P.O.T.A. has been filed and the Special Court lacks jurisdiction especially when the competent Sessions Court has rejected the bail plea of the petitioners accused on merits after filing of the charge-sheets; when the petitioners have already approached this Court making grievances against the decision of the concerned Sessions Court, they have already invoked the jurisdiction of this Court under Section 39 of the Code, when these petitions were moved and came up for hearing for the first time and the Spl. Public Prospector had appeared and waived notice on behalf of respondent-State, the provisions of P.O.T.A. were not

invoked.

20.1. The second part of the submission is the submission of the learned Addl. Advocate General Mr. Trivedi. As the learned counsel for the petitioners have consented that the learned Addl. Advocate General may be heard first on preliminary points so that they can respond to the legal submissions so made by the learned Addl. Advocate General while putting their case before the Court. So, I have heard the learned Addl. Advocate General.

20.2. In the third part I have heard Mr. P. M. Thakkar learned Sr. Counsel responding to the preliminary submissions on merits, made by the learned Addl. Advocate General as to the maintainability of the petitions in the light of the invocation of P.O.T.A., constitution of Special Court to hear the cases, concerned criminal offences punishable under P.O.T.A. and the fact of Sessions Cases pending in the Court of learned Sessions Judge, Panchmahals at Godhra.

20.3. Mr. Anandjiwala, Mr. S. V. Raju, Mr. M. A. Kharadi and Mr. E. E. Saiyed learned Counsel for the respective petitioner are also heard in the light of the facts of their respective petition.

20.4. Mr. Raju and Anandjiwala, though have mostly adopted the arguments advanced by Mr. Thakkar on larger points raised by learned Addl. Advocate General, they have attempted to clarify the factual as well as legal points relevant to the bail plea raised by the present petitioners.

21, Mr. A. D. Oza learned P. P. thereafter appeared and submitted that the say of the respondent-State and the investigating agency also requires consideration, and therefore, at his request, the say of the State has been considered and thus arguments have been advanced by learned Addl. Advocate General for both viz. the State Government and the investigating agency.

22. For the sake of convenience and brevity, it would be proper for the Court to deal with the submissions advanced by the learned Counsel for the parties in the background of general provisions of law regarding bail.

22.1 According to Addl. Advocate General present petitions are now not maintainable especially after 19-2-2003 when the report dated 18-2-2003 was placed before the learned J.M.F.C. (Railways) at Godhra as well as the Sessions Court, Panchmahals at Godhra for invocation of additions of relevant provisions of P.O.T.A. in connection with the aforesaid F.I.R. i.e. CR No. I-9 of 2003 read with above referred all other charges mentioned in different charge-sheets filed on earlier .occasions. On 19-2-2003, the learned Sessions Judge was requested to inform all the concerned accused persons, including the present petitioners, to the effect that provisions of P.O.T.A. have been invoked against them.

22.2. After filing of the affidavit-in-reply on behalf of the State Government in all these petitions on 6-3-2003, a Special Court under P.O.T.A. came to be established by the State Government. The State Government has granted the requisite sanction in respect of invocation of the provisions of P.O.T.A. on 11-3-2003 against various accused persons including the present petitioners. According to Mr. Trivedi, learned Addl. Advocate General in the light of these developments, present

applications for bail are not at all maintainable. It is argued that in the light of the provisions of Sections 23, 25, 26, 34 and 49 of P.O.T.A., this Court may reject these applications for bail without going into the merits as to entitlement of bail of all these petitioners and they may be relegated to Special Court constituted under the Notification dated 6-3-2003 as per the Scheme of Section 23 of the P.O.T.A. It is further submitted by Mr. Trivedi that Section 49 of P.O.T.A. speaks about the modified application of certain provisions of Code. Sub-sections (6) and (7) of Section 49 of P.O.T.A. are identical to Sub-section (8) of Section 20 of erstwhile T.A.D.A. Act of 1987 as well as like Section 37(1)(b) of Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as 'the N.D.P.S. Act') providing for entertaining of application for bail respect of offences punishable under the said Act by Special Court. Section 34 of the of the P.O.T.A. provides for bail to this Court. Sub-section (1) of Section 34 provides that notwithstanding anything contained in the Code, an appeal shall lie to the High Court from the judgment, sentence or order not being an interlocutory order by a Special Court. Sub-section (2) of Section 34 provides that said appeal shall have to be heard and decided by a Bench of 2 Judges of the High Court. Sub-section (3) of Section 34 of the P.O.T.A. puts embargo and the same should be read in reference to Sub-section (4) of Section 34 whereby an exception is carved out. While developing his arguments Mr. Trivedi has referred to the provisions of Section 19(1) of erstwhile T.A.D.A. Act, 1987 and Section 16(1) of erstwhile T.A.D.A. Act of 1985 providing an appeal to the Supreme Court. Therefore, he submitted that the nature of restraints placed on the power of Special Court or designated Court to grant bail are very much relevant and the ratio propounded by the Apex Court in reference to Sub-section (8) of Section 20 of T.A.D.A. Act of 1987 being relevant may be taken into account and all these applications may be rejected holding them to be not maintainable on account of the constraints of Section 49 read with Section 34 of P.O.T.A..

22.3 In support of the above submissions, Mr. Trivedi has placed reliance on the decision of Usmanbhai Dawoodbhai Memon v. State of Gujarat reported in 1988 (2) GLR 859 (SC) : 1988 (2) SCC 271 where the Apex Court was responding to two questions raised before it, viz.

> (i) The jurisdiction and power of the High Court to grant bail under Section 439 or Section 482 of the Code to an accused person held in custody for offences punishable under Sections 3 and 4 of the erstwhile T.A.D.A. Acts of 1985 and 1987; and
>
> (ii) The nature of restraints placed on the power of the designated Court under the Acts to grant bail within the constraints of Section 20(8) of the T.A.D.A. Act, 1987.

Putting reliance on Para 22 of the decision (on page 289), he has submitted that,

(i) in view of the explicit bar in Section 19(2) of the T.A.D.A. Act, 1987 (identical to Section 16(2) of T.A.D.A. Act, 1985 and Section 34(3) of P.O.T.A.) there is exclusion of power and jurisdiction of this Court as well as the Sessions Court in the matter of grant of bail under Sections 438, 439 and 482 of the Code.

(ii) T.A.D.A. Act being a special Act must prevail in respect of the jurisdiction and power of the High Court to entertain application for bail under Section 439 of the Code or, by recourse to its inherent power under Section 482 of the Code. The power of the designated Court to grant bail is relatable to

Section 437 of the Code but the exercise of the said power is subject to limitations placed by Section 28(8) of the T.A.D.A. Act 1987 (identical to Section 17 of the erstwhile T.A.D.A. Act, 1985 and present Section 49(6) & (7) of P.O.T.A..

(iii) Section 16(1) of T.A.D.A. Act, 1985 (identical to Section 19(1) of the erstwhile T.A.D.A. Act, 1987 and similar to Section 34(1) of the P.O.T.A.) confers the right of appeal both on facts as well as on law to the Supreme Court (in the case of P.O.T.A., the said appeal is before the High Court). At this stage, it is pertinent to note that the aforesaid judgment was rendered by the Hon'ble Supreme Court reported in 28 (2) GLR 982 wherein erstwhile T.A.D.A. Act of 1985 was dealt with.

23. While hammering these points Mr. Trivedi submitted that Sub-section (4) of Section 34 of P.O.T.A. takes the aforesaid legal position, emerging from the said judgment in the case of Usmanbhai (supra), one step ahead, whereby it has been provided that an appeal shall lie to the High Court against the order of the Special Court granting or refusing bail. Sub-section (4) of Section 34 of P.O.T.A, reads as under :

> "Nothwithstanding anything contained in Sub-section (3) of Section 378 of the Code, an appeal shall lie to the High Court against an order of Special Court granting or refusing bail."

Thus, there was no such provision in the erstwhile T.A.D.A. Act of 1985 or 1987. Thus, by virtue of said provisions under P.O.T.A., according to Mr. Trivedi, legal position as regards exclusion of the jurisdiction of the High Court for entertaining an application for bail in respect of the offences punishable under P.O.T.A. as well as other laws, is further expressly confirmed by statutory provisions.

24. Placing reliance upon the observations of the Apex Court in the case of State of Punjab v. Kewal Singh reported in 1990 (Supp.) SCC 147, it is submitted that the High Court has no jurisdiction to entertain an application for bail under Section 439 of the Code. Reiterating the ratio of the decision in the case of Kewal Singh (supra), the Apex Court has held in Para 2 as under :

> "We are of the view that High Court had no jurisdiction to entertain an application for bail under Section 439 of the Code. We accordingly grant leave, set aside the order passed by the High Court releasing respondents on bail and direct that they be taken into custody."

According to Mr. Trivedi, the very principle has been considered again by the Apex Court in the case of Narcotics Control Bureau v. Kishan Lal & Ors. reported in 1991 (1) SCC 705. Referring to the provisions of N.D.P.S. Act as well as the observations made in the case of Usmanbhai (supra) the Apex Court has observed that there is explicit bar under Section 19(2) of the T.A.D.A. excluding the jurisdiction of the High Court to entertain an application for bail under Sections 439 or 482 of the Code referring to the observations which are on page 712.

25. Mr. Trivedi has also placed reliance upon the decision of the Division Bench of this Court in the case of Suresh Ramtirath Yadav v. State of Gujarat reported in 1990 (1) GLR 104 and especially on the observations made in Para 23 of the judgment which reads as under :

> "The decision in the case of Usmanbhai Dawoodbhai v. State of Gujarat (supra) clearly affirms the decision of the Gujarat High Court to the effect that the High Court has no jurisdiction to entertain any proceeding either under Section 439 or under Section 482 of the Code of Criminal Procedure arising out of an order passed by the designated Court under the Terrorist and Disruptive Activities (Prevention) Act, 1985.....The prayers of the petitioner are pure and simple to release him from the judicial custody which can be only by way of bail for which the appropriate forum is the designated Court."

Thus, according to Mr. Trivedi though the accused persons are in custody for more than one year, they cannot be held entitled to bail under Section 167(2) of Code because no formal charge-sheet is required to be filed. All the petitioners have been charge-sheeted much earlier. There is nothing like P.O.T.A. charge-sheet for separate offences under P.O.T.A., so far as the present case is concerned, Undisputedly, the report in respect of offences under I.P.C. and other offences have been filed under Section 173(2) of the Code on 22-5-2002, 20-9-2002 and 19-12-2002. But as a result of further investigation, the investigating agency found that the offences under P.O.T.A. have been committed, and therefore, appropriately these provisions have been invoked and a report/application has been made for addition of relevant provisions of P.O.T. A. in the charge-sheet. It was open for the investigating agency to submit report under Section 173(8) of the Code and said report has been submitted. In support of this submission, Mr. Trivedi has placed reliance upon the observations made by the Apex Court in the case of T. T. Antony v. State of Kerala reported in AIR 2001 SC 2637 wherein it has been observed that :

> "...the information first entered in the station house diary, kept for this purpose, by a police officer-in-charge of a police station is: the First Information Report-F.I.R.....AlI other information made orally or in writing after the commencement of the investigation into the cognizable offence disclosed from the facts mentioned in the First Information Report and entered in the station house diary by the police officer or such other cognizable offences as may come to his notice during the investigation, will be statements falling under Section 162 of Cr.P.C. No such information/statement can properly be treated as an F.I.R. and entered in the station house diary again, as it would in effect be a second F.I.R. and the same cannot be in conformity with the scheme of the Code and the investigating agency leans during the investigation or receives a fresh information that the victim died, no fresh F.I.R. under Section 302 I.P.C. need be registered which will be irregular, in such a case alteration of the provisions of law in the first F.I.R. is the proper course to adopt. Let us consider a different situation in which H having killed W, his wife, informs the police that she is killed by an unknown person or knowing that W is killed by his mother or sister, H owns up the responsibility and during the investigation the truth is detected, it does not require filing of fresh F.I.R. against H the real offender who

can be arraigned in the report under Section 173(2) or 173(8) of Code as the case may be."

Thus, according to Mr. Trivedi, there is no need of filing any formal separate charge-sheet which can be termed as P.O.T.A. charge- sheet since charge-sheet is already filed on the day on which P.O.T.A. was invoked the accused were facing trial as accused persons committed to the Court of Sessions. Now, as per the scheme of P.O.T.A., the case against the present petitioners along with other accused persons, has stand transferred as per the scheme of P.O.T.A.. According to Mr. Trivedi now what would be filed at a further date will be further reports as per the provisions of Section 173 of the Code. In support of this submission Mr. Trivedi has placed reliance on the following 3 judgments :

(i) J. Alexander v. State of Karnataka, reported in 1996 Crl.LJ 592 (Karnataka High Court)

(ii) State of West Bengal v. Salap Service Station, reported in 1994 Supp. (3) SCC 318.

(iii) C.B.I. v. R. S. Pai, reported in AIR 2002 SC 1644 (Para 7)

26. According to Mr. Trivedi, the investigating agency can carry out further investigation in respect of offences after a report under Sub-section (2) of Section 173 of the Code and if further investigation discloses some fresh offences connected with the transaction connected with the transaction which is the subject-matter of earlier report a further report can be submitted. It is observed that the purpose of Sub-section (8) of Section 173 of the Code enables the investigating agency to continue, if it is so required, with the investigation or to search and gather further evidence and a report can be submitted to the Court. Mr. Trivedi has taken me through the relevant port of the report of the Law Commission pursuant to which Section 173(8) came to be introduced into the Code. So, it is not the case where this Court can grant default bail. The Special Court, under P.O.T.A. can grant the bail application, for non P.O.T.A. offences. According to Mr. Trivedi it would be neither logical nor legal to hold that this Court can grant bail qua non P.O.T.A. offences or the P.O.T.A. Court, cannot reconsider the bail plea rejected by the Sessions Court where the Investigating Agency had not invoked the provisions of P.O.T.A.. The Court which is competent to try the accused can consider the bail plea of the accused facing trial before it, unless there is an express bar to that effect and it cannot be submitted that Special Court constituted under the P.O.T.A. lacks jurisdiction to entertain bail application for non P.O.T.A. offences. Referring to certain observations of the Apex Court in the case of Harshad S. Mehta v. State of Maharashtra, reported in AIR 2001 SC 3774 it is submitted that the expression "trial" is not defined in the Act of the Code. For the purpose of the Act, it has a wider connotation also includes in its pre-trial stage as well. So, according to Mr. Trivedi, the Special Court can entertain an application for bail in respect of non-P.O.T.A. offences especially when all the persons have been relegated for trial and other proceedings as per the scheme of P.O.T.A., on the day of which the Special Court came to be constituted for the area of the entire state of Gujarat. When the Special Court has power to try non-P.O.T.A. offences it is quite obvious that it has ample powers to conduct all such proceedings including those of remand, bail etc. of pre trial stage as held by the Apex Court in the case of

Harshad Mehta (supra).

27. It is also argued that there is no need to formally arrest the petitioners for P.O.T.A. offences arising out of same transaction/ occurrence to which the accused persons were originally arrested for offences under I.P.C. All the petitioners were arrested for the offences committed within the territorial jurisdiction of Godhra Railway Police Station and on their arrest they were remanded to the police custody. The State Government had already invoked the provisions of P.O.T.O. but as there was no legal cogent evidence with the investigating agency that charge was dropped. The investigation being sensitive and when some of the accused are still absconding in the complicity of the accused persons, has kept the investigating agency busy with the investigation of the crime. When the investigating agency found that the accused persons are involved in more serious offences punishable under P.O.T.A. during the same occurrence arising out of the same transaction, proper report is now submitted. The prosecution agency was not, once during investigation, equipped with the evidence of criminal conspiracy hatched, which came to be disclosed now on account of some statements including the confessional statement of some accused persons. Mr. Trivedi has placed reliance upon Paras 4 and 5 of the affidavit-in-reply of Kantipuri Bava, Dy. Superintendent of Police (WesternRailway), Ahmedabad. It would be appropriate to reproduce the relevant part of the affidavit-in-reply filed in all the applications including Misc. Cri. Application No. 606 of 2003.

> "7. Before proceeding further, I must put on record that Section 23 of the P.O.T.A. provides for constitution of Special Court to be presided over by a Judge to be appointed by the State Government with the concurrence of the Hon'ble the Chief Justice of the Hon'ble High Court.
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> 8. In view of the aforesaid developments, I most respectfully submit that the present application filed by the applicant herein, seeking bail in respect of the offences referred to in Para 2 hereinabove punishable under the provisions of various legislations, having been registered against the applicant prior to the aforesaid developments, would not survive. The same would therefore, be liable to be disposed of as infructuous. In view of the provisions of P.O.T.A., the applicant and other persons named as accused in the matter would consequently have to move the Special Court, which alone would have jurisdiction to try, decide and entertain the regular bail application/s. If and when such regulate bail application is made before the Special Court, the same shall have to be decided in accordance with law not only in respect of the above-referred offences punishable under I.P.C. read with Railway Act read with Property Damages Act, but also the offences which came to be invoked subsequently with reference to the provisions of P.O.T.A. in respect of which, further investigation is in progress."

Mr. Trivedi has relied upon the observations of the Apex Court in the case of Central Bureau of Investigation v, Anupam Kulkarni reported in 1992 (3) SCC 141 : AIR 1992 SC 1768 wherein it has been observed that "All these offences including the so-called serious offence were discovered at a later stage arising out of the same transaction in connection with which the accused was arrested. Therefore, there is marked difference between the two situations. The occurrences constituting two

different transactions give rise to two different cases and the exercise of the power under Section 167(1) and (2) should be in consonance with the object underlying the said provision in respect of each of those occurrences which constitute two different cases.

After the expiry of the first period of 15 days the further remand during the period of investigation can only be in judicial custody. There cannot be any detention in the police custody after the expiry of first 15 days even in a case where some more offences either serious or otherwise committed by him in the same transaction come to light at a later stage. But this bar does not apply if the same arrested accused is involved in a different case arising out of the different transaction. Even if he is in judicial custody in connection with the investigation of earlier case, he can formally be arrested regarding his involvement in different case and associate him with the investigation of the other case and can be remanded pending the investigation. If the investigation is not completed within the period of 90 days or 60 days, then the accused has to be released on bail. The period of 90 days or 60 days has to be computed from the date of detention as per the orders of the Magistrate and not from the date of arrest by the police."

According to Mr. Trivedi, the nature of evidence available today with the invesigating agency links all these petitioners with the offences punishable under P.O.T.A. read with Section 120B of I.P.C., and therefore, they cannot be enlarged on bail by any Court other than the Special Court constituted under Section 27 of the P.O.T.A. or by the Appellate Bench of the High Court consisting of two High Court Judges scrutinising the decision on the bail plea raised before the Special Court. Therefore, there is no scope for this Court for exercising discretionary jurisdiction vested with the Court under Section 439 or 482 of the Code or read with both these provisions of the Code.

28. Mr. Trivedi has attempted to compare the provisions of N.D.P.S. Act with P.O.T.A. and T.A.D.A. Acts of 1985 and 1987 with P.O.T.A.. It is argued that while dealing with offences punishable under the N.D.P.S. Act, the jurisdiction of the High Court to entertain a bail application under Section 439 or Sec, 482 of the Criminal Procedure Code ("Code" for short) is not barred, either explicitly or impliedly. On the contrary, the provisions of Section 36A(3) of the N.D.P.S. Act suggest that nothing contained therein shall be deemed to affect the powers of the High Court regarding bail under Section 439 of the Code. It is further argued that this apart, N.D.P.S. Act does not have any provision like Sections 16(1) and (2) of T.A.D.A. Act, 1985 or Sections 19(1) and (2) of T.A.D.A. Act 1987 or Sections 34(1) and (3) of P.O.T.A., creating an explicit bar, excluding the jurisdiction of High Court to entertain an application for bail under Section 439 or Section 482 of the Code. Mr. Trivedi further argued that it is under the above circumstances that the Apex Court in the case of Narcotics Control Bureau v. Kishan Lal (supra), held that the power and jurisdiction of the High Court to grant bail under Section 439 in respect of N.D.P.S. offences is very much there despite there being Special Court constituted under the N.D.P.S. Act. In view of this, the aforesaid proposition laid down in the above case cannot be applied to the present case.

29. In the same way, quoting Sections 9, 13, 19 and Sub-Sections (6) to (9) of Section 20 of T.A.D.A. Act, 1987 and the provisions of sub-sees. (1) and (2) of Section 16 of T.A.D.A. Act 1985 Mr. Trivedi has submitted that Sections 34(1)(3) and (4) of P.O.T.A. creates an explicit bar, excluding the jurisdiction of the High Court to entertain an application for bail for the offences punishable under

P.O.T.A. and other offences under Section 439 of the Code. While comparing the Defence of Internal Security of India Rules, 1971 with P.O.T.A., it is submitted that the ratio of the decision in the case of Balchand Jain v. State of M, P. reported in AIR 1977 SC 366 cannot be made applicable in the present case as already observed by the Apex Court in the case of Usmanbhai (supra) while dealing with the T.A.D.A. provisions owing to the following reasons :-

> (1) The provisions of Defence of India Act, 1971 and more particularly contained in Section 12 as well as those contained in Rule 184 of Defence of Internal Security of India Rules are not, in any manner, pan materia with the provisions of the erstwhile T.A.D.A. Acts or P.O.T.A, and that therefore, there arises no question of comparison.
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> (2) The Supreme Court itself in the aforesaid case of Balchand Jain v. State of M. P. ruled that "it is not possible to read the provisions of Rule 184 as laying down a self-contained Code for grant of bail....Rule 184 cannot be construed displacing altogether the provisions of Code of Criminal Procedure Code in regard to bail" whereas in the present case P.O.T.A. is a self contained Code laying down itself the hierarchy of the Courts and expressly bars under Section 34(3) read with Section 34(4) the jurisdiction of the High Court to grant bail under Section 439 of the Code.
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> (3) The main and only issue in the case of Balchand (supra) before the Supreme Court was the matter pertaining to grant of anticipatory bail under Section 438 of the Code and not the regular bail under Section 439 of the Code, and therefore, even otherwise, the said judgment of the Supreme Court cannot be applied in the present case.

30. It is argued that by virtue of the provisions of Sub-section (3) of Section 34 of P.O.T.A. which is absolutely identical like Section 19(2) of erstwhile T.A.D.A. Act of 1987 as well as by virtue of Sub-section (4) of Section 34 of P.O.T.A., similar provisions was never there in the erstwhile T.A.D.A. Act, there is an explicit bar created to the jurisdiction of this Court in the matter of granting of bail under Section 439 or under Section 482 of the Code and the ball applications therefore, are required to be filed only before the Special Court constituted under the P.O.T.A. None of the petitioners has approached the Special Court for bail after its constitution, and therefore, this Court should either reject the applications on merits or should dispose of these appositions directing the petitioners to approach the Special Court at the first instance for bail if they are desirous for such relief, pending trial Section 34 of the P.O.T.A. provides for an appeal to this Court i.e. before two Judges of the High Court and even interlocutory orders only qua grant or refusal of bail application by the Special Court have been made appealable. It is submitted that non-obstante clause in the provisions even is found slightly in incongruous in reference to Sub-section (3) of Section 378 of the Code, it is apparent that the order of granting bail or rejecting, is made appealable and it suggests that an appeal against an interlocutory order of Special Court granting or refusing bail, is a matter of right inasmuch as for preferring an appeal against such interlocutory order of the Special Court, no leave like the one contemplated under Section 378(3) of the Code is required. The intention of the Legislature in the present case of P.O.T.A. is obviously to see that the bail applications are first decided by the Special Court and that appeal is provided to the High Court against the order of the

Special Court. It is this intention of the Legislature which is required to be translated while interpreting the provisions of Section 34 of the P.O.T.A. and not the phraseology with some incongruity of Sub-section (4) of Section 34 of the P.O.T.A..

31. In support of the above submission Mr. Trivedi has quoted the observations of Apex Court in the case of A.M.C. v. Nilaybhai R. Thakore reported in 2000 (1) GLR 634 which is worth quoting.

> "We, therefore, think it appropriate to rely upon the famous oft-quoted principle relied on by Lord Denning in the case of Seaford Court Estates Ltd. v. Asher. 1949 (2) All ER 155 (CA) wherein he held :
>
> "When a defect appears a Judge cannot simply fold his hands and blame the draftsman. He must see to work on the constructive task of finding the intention of Parliament, and then he must supplement the written words so as to give 'force and life' to the intention of the legislature....A Judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out ? He must then do as they would have done. A Judge must not alter the material of which the Act is woven, but he can and should iron out the creases".

This statement of law made by Lord Denning has been consistently followed by this Court starting in the case of M. Pentiah v. Muddala Veeramallappa, AIR 1861 SC 1107 and followed as recently as in the case of S. Gopal Reddy v. State of A.P., 1996 (4) SCC 596 : AIR 1996 SC 2184. Thus, following the above rule of interpretation and with a view to iron out the creases in the impugned rule which offend Article 14, we interpret Rule 7 as follows :

> 'Local student means a student who has passed H.S.C. (sic S.S.C./New S.C.C. Examination and the qualifying examination from any of the High Schools or Colleges situated within the Ahmedabad Municipal Corporation limits and includes a permanent resident student of the Ahmedabad Municipality who acquires the above qualifications from any of the High Schools or Colleges situated within the Ahmedabad Urban Development Area'."

32. It is vehemently submitted by Mr. Trivedi that because of the so-called incongruity, one should not seek to re-write Sub-section (4) of Section 34 by drawing unnecessary assumption in the matter of the hearing of the appeal by the High 'Court and that the relevant Section of the Act should be read harmoniously and reasonably in juxtaposition of other sub-sections so as to avoid any incongruity and/or repugnancy. It is argued that in that view of the matter, it would be rather imperative and in the fitness of things that guidance provided by Sub-section (2) of Section 34 in the matter of hearing of an appeal under Sub-section (1) by a Bench of two Judges of the High Court, should be taken as a sacrosanct for determining as to the Bench of how many Judges of the High Court should hear the appeal under Sub-section (4) of Section 34 of the P.O.T.A. against an order of the Special Court Court granting or refusing bail.

32.1 In support of this submission Mr. Trivedi has cited the decision of the Apex Court in the case of Madanlal v. S. Changdeo Sugar Mills Ltd. reported in AIR 1962 SC 1543 where the Apex Court was dealing with the principle of interpretation of statutes in reference to Sections 76(1) and (2) of the relevant Act and after referring the earlier decision of the Apex Court in the case of Tahsildar Singh v. State of U. P. reported in AIR 1959 SC 1012 it is submitted that a section of an enactment must be construed as a whole.

33. According to Mr. Trivedi the only conclusion which can be drawn by interpreting the provisions of Section 34 of P.O.T.A. lies in the fact that every appeal against the judgment, sentence, order not being interlocutory order of the Special Court granting or refusing bail shall be heard by a bench of two Judges of the High Court, The decision of Madras High Court in the case of Paza Nedumman v. State of Tamil Nadu (supra) supports this submission. In the case before the Madras High Court, originally the Special Court had rejected several bail applications filed under Section 49(7) of P.O.T.A. vide interlocutory orders and appeals filed against the same under Section 34(4) of P.O.T.A. were heard by a Bench of two Judges of Madras High Court. In the same way, the bail plea raised by one Mohmed Allimuddin v. State of Maharashtra was decided by the Bench of two Judges of Bombay High Court (unreported decision in Criminal Appeal No. 522 of 2002).

34. One more technical argument is also advanced by Mr. Trivedi whereby it is submitted that present petitioners had approached the Special Court under P.O.T.A. by moving default bail applications and said applications have been rejected. So, in the light of these facts, all the bail applications deserve to be dismissed in limine and the petitioners of all the bail applications should not be permitted to indulge into multiplicity of proceedings, which amounts to abuse of process of law.

35. Mr. P. M. Thakkar learned Sr. Counsel has responded on all the points raised by the learned Addl. Advocate General Mr. Trivedi in the preliminary objections by reading all the decisions, mainly the decisions in the cases of Usmanbhai (supra) and T. T. Antony (supra) referred to and relied upon by the learned Addl. Advocate General and also some other decisions in support of the bail plea raised by the petitioners, especially petitioner of Misc. Cri. Application No. 606 of 2003. The submissions of Mr. S. V. Raju and Mr. Anandjiwala learned Counsel for the respective petitioners are also similar to the submissions advanced by Mr. Thakkar and they have attempted to refer to the relevant principle of law of bail in reference to the sequence of events and in the background of sent of facts in the cases on hand.

36. Learned Counsel for the petitioners have placed reliance mainly on the following decisions in support of their say :-

1. AIR 1998 SC 2001 in the case of K. Chandrasekhar v. State of Kerala.

2. 2001 (6) SCC 181 in the case of T. T. Antony v. State of Kerala,

3. 1988 (2) SCC 271 : 1988 (2) GLR 859 (SC) in the case of Usmanbhai Dawoodbhai Memon & Ors. v. State of Gujarat.

4. 1997 (1) GLR 127 in the case of State of Gujarat v. Madia Nitin M.

5. 1976 (4) SCC 572 in the case of Balchand Jain v. State of Madhya Pradesh.

6. 1991 (1) SCC 705 in the case of Narcotics Control Bureau v. Kishal Lal & Ors.

7. 1984 (2) GLR 883 in the case of Vihabhai Ramdas Patel v. Hemtuji Shivaji Dabhi & Anr.

8. Criminal Appeal No. 1606 of 2002 in the case of Paza Neduraman v. State & Ors.

9. 2003 Cri.LJ 288 in the case of Bandi Narendra Kumar v. State of A. P.

10. 1987 (2) GLR 978 in the case of State of Gujarat & Anr. v. Balwantsinh Karsansinh Vaghela.

11. AIR 2002 SC 285 in the case of State of Maharashtra v. Mrs. Bharati Chandmal Varma @ Ayesha Khan.

12. 1996 Cri.LJ 3042 in the case of S. N. Purtado v. Dy. S. P., C.B.I., Cochin & etc.

13. Criminal Appeal No. 522 of 2002 in the case of Mohammad Allimuddin v. State of Maharashtra.

37. It is submitted that the ratio of the decision in the case of Usmanbhai (supra) does not help the respondent-State and the same does not affect adversely as to the maintainability of these bail applications moved under Section 439 read with Section 482 of the Code, after rejection of regular bail applications filed by the petitioners in the competent Court and that too after submission of 3 charge-sheets on different date by the investigating agency. By referring relevant Paras 7, 9, 13, 14, 18, 19, 20 and 22 of the decision it is submitted that it cuts the arguments advanced by the learned Addl. Advocate General Mr. Trivedi. In the case of Usmanbhai (supra) the Apex Court was dealing with the bail plea raised by an accused of an offence punishable under T.A.D.A. Act of 1987. The scheme of T.A.D.A. Act 1987 qua the bail has been considered in reference to Sections 439, 437 and 482 of the Code. The Apex Court has considered the manifest intention of the Legislature to take away the jurisdiction and power of the High Court under the Code with respect to the offences under the Act and it is observed by the Apex Court that no other construction is possible. But here in the present cases it should be held that other construction is possible and there is no manifest intention to take away the jurisdiction and/ or powers of the High Court. Sub-section (1) of Section 34 of P.O.T.A. should be read in reference to the powers of this Court under the Code and the scheme of Section 49 of P.O.T.A. where by the Legislature has intended to put certain restrictions and/or embargo while exercising discretionary jurisdiction qua bail pleas.

38. According to Mr. Thakkar the scheme of T.A.D.A. Act taking away the jurisdiction and powers of the High Courts, is not there in P.O.T.A. By referring to the phraseology of the above-referred

Sub-section (4) of Section 34 of P.O.T.A., it is submitted that this sub-section simply deals with the bail plea where an appeal under Sub-section (3) of Section 378 of the Code is concerned. Section 378 of the Code provides for an appeal in case of acquittal. If the scheme of Section 34 of P.O.T.A. is considered as a whole in the light or Sub-section (3) of Section 378 of the Code, then it can be interpreted only that the aggrieved party, is entitled to invoke the appellate jurisdiction even without obtaining formal leave of the High Court. There were no provisions like Sub-section (4) of Section 34 of P.O.T.A. in the erstwhile T.A.D.A. Act of 1987.

38.1 The Division Benches of Bombay High Court and Madras High Court have exercised the jurisdiction vested with them as the decisions under challenge were of Special Presiding Judge of the Special Court constituted under Section 23. In the cases on hand, the say of the petitioners is that the competent Sessions Court, at the relevant time has refused to exercise the discretionary jurisdiction on merits, and therefore, this Court should exercise its powers by not accepting the finding recorded by the concerned Sessions Court. Interlocutory order of bail, if it is passed by the Special Court, then appeal is provided. But in absence of express or implied bar, present petitioners should not be asked to approach afresh before the Special Court merely because the investigating agency has decided to invoke P.O.T.A. in the midst of the. investigation and some of the accused persons have been enlarged on bail by competent Court including this Court on merits. On the contrary, according to the petitioners, the ratio of the decision in the case of Balchand Jain (supra) helps the petitioners. Mr. Thakker has placed reliance on Para Nos. 3, 4 and 5 of the said decision. The Apex Court in this cited decision has explained the Non-obstante clause of Rule 184 of Defence of Internal Security of India Rules, 1971. In absence of express bar, the powers flowing from the Code can be exercised, especially when more than one different situations have the possibility to emerge. In the present case, earlier the investigating agency had invoked P.O.T.O. but thereafter the charge under P.O.T.O. was dropped. Mr. Thakkar submitted that the action of filing of the charge-sheet under P.O.T.A. by the investigating agency, subsequent to the dropping of charge under P.O.T.O. when these petitioners were persuading their bail plea before this Court and one of such accused was enlarged on bail after the decision in one of such bail applications and the day on which the present petitions were moved and the reply-affidavit was filed on 5-3-2003 by the respondent-State would cumulatively go to show that all these petitions are very well maintainable and sustainable in absence of express bar. Therefore, the petitioners should not be relegated to the Special Court for raising similar plea which was raised before the competent Sessions Court.

38.2 According to Mr. Thakkar when the respondent State had dropped charge under P.O.T.O., subsequent action of investigating agency and/or State Government to invoke P.O.T.A. under the so called further or additional investigation is impermissible. In support of this say, Mr. Thakkar has placed reliance upon the decision in the case of K, Chandrasekhar v. State of Kerala reported in AIR 1998 SC 2001. In the cited decision the State of Kerala had consented for entrustment Of investigation in a case involving offences punishable under Official Secrets Act to the C.B.I. The C.B.I. completed the investigation and filed final report. Subsequently, the state Government withdrawn the consent and started further investigation in the case, by the State Police and the Court observed that in the facts and circumstances of the issuance of impugned Notification withdrawing the consent does not comport ( ) with the known pattern of responsible 'Government, governed by Rule of law. Mr. Thakkar submitted that while exercising discretionary jurisdiction and

especially dealing with the technical submissions advanced as to the maintainability of the bail applications, this Court should hold that even invoking P.O.T.A. and adding charges of the offences punishable under the P.O.T.A. would not adversely affect the pending bail applications with the High Court under Section 439 and/or 482 of the Code. Mr. Thakkar submitted that the petitioners are not even provided with any further report or copies of papers of the so-called further investigation or statements allegedly recorded by the investigating agency as per the ratio of the decision in the case of T. T. Antony (supra), there can be no second F.I.R. and no fresh investigation in respect of further subsequent information in respect of the same cognizable offence or some occurrence giving rise to one or more cognizable offences. The F.I.R. recorded at the Godhra Railway Police Station being CR No. I-9 of 2002 was very well before the investigating agency and even on the date of filing of 3 charge-sheets, P.O.T.A. was not invoked in the month of December, 2002. The investigating agency after filing of the charge-sheet can make further investigation, normally with the leave of the Court and further evidence, if any, can be collected with the further report or reports under Section 173(8) of the Code. In the present case, no such formal leave is either prayed for by the investigating agency or granted by the Court. Investigation in one case cannot be permitted to continue for an indefinite period by arresting the accused and keeping him in judicial custody. A just balance has to be struck between the citizen's right under Articles 19 and 21 of the Constitution of India and the executive powers of the investigating agency, Mr. Thakkar has placed reliance on the observations made in Para 7 of the decision in the case of State of Gujarat v. Madia Nitin M. reported in 1997 (1) GLR 127. Thus, Court was dealing with the provisions of Sections 14 and 20 of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as 'the Atrocities Act') and has held that the Magistrate is empowered to deal with bail application in such matter. Special Courts under Section 14 of the Atrocities Act are constituted only for the purpose of trial of the offences. For other matters such as investigation, bail etc. the Code would apply. By quoting Sections 14, 15 and 20 of the Atrocities Act and evaluating the scheme, the Court has observed that, "It becomes manifestly evident that wherever the legislature thought it fit has made special provisions even in relation to bail application in a case triable by either Special or designated Court. By making special provisions one can inter intention of legislature to exclude jurisdiction or ordinary criminal Courts. However, Atrocities Act, though it provides for establishment of Special Courts and Special Prosecutors, no express provision is made with regard to pre-trial proceedings i.e. bail applications under Chapter XXXIII of the Code. Therefore, keeping in mind the intention of legislature the Court can look into and even sometimes may go behind words and enactments to give effect to the legislative intention. The Court has further observed that one can safely infer, believe and hold that despite making provisions for Special Courts, only for the purpose of speedy trial, rest of the provisions of the Code shall apply and ordinary criminal Courts can exercise powers vested under Section 437 of the Code in relation to offences under the Act."

39. In short, Mr. Thakkar has hammered the point of absence of express bar of jurisdiction under Sections 437 and/or 439 and 482 of the Code. Mr. Thakkar further submitted that, if the source of power of bail is any provision to Section 49 of the P.O.T.A., then the very Section could have provided for exclusion of jurisdiction of the High Court under Section 439 of the Code, as Section 438 is provided in Sub-section (5) of Section 49 of P.O.T.A., the Special Court is put at parity of the Court of Sessions and after filing of the charge-sheet the petitioners had approached the Court of

Sessions afresh for bail by withdrawing their pending bail applications so that the Sessions Court can consider the bail plea on merits treating the investigation as concluded qua the petitioners-accused who were charge-sheeted by filing report under Section 173(2) of the Code.

40. When this Court is asked to exercise jurisdiction under Section 439 of the Code read with Section 482 of the Code then the utmost embargo or restrictions incorporated in Section 49 of P.O.T.A. can be looked into but their case cannot be thrown out asking them to approach the Special Court afresh. This Court can merely evaluate the prima facie case pleaded by the prosecution and decide whether the petitioners or any of them should be enlarged on bail or not: The affidavit-in-reply mainly deals with sustainability of these bail applications and certain new evidence collected after the arrest of some of the accused of the alleged four groups. Impliedly the Counsel for the petitioners have submitted that in a sensitive ghastly crime in which large number of persons, if have been arrested and charge-sheeted and only because of the charge-sheet is either under Sections 147, 148 and 149 and/or 120B of the Indian Penal Code, bail plea of each such persons arrested should not be thrown away and the Court is supposed to prima facie look into the matter and decide whether a particular petitioner-accused is entitled to any favourable discretionary order. In number of cases under the erstwhile, T.A.D.A. Acts of 1985 and 1987 or N.D.P.S. Act, the Court, while exercising discretionary powers appreciating bail plea raised by the accused, has attempted to look into the nature of evidence against the concerned accused and his role allegedly played by him in the background of nature and gravity of the offence. When it is argued that without evaluating the evidence when it is possible for this Court to hold that the concerned Sessions Court ought to have exercised the discretionary jurisdiction in favour of the petitioner accused where he has failed, then, the bail plea on the sole fact of invocation of P.O.T.A. may not be thrown away by this Court.

41. According to Mr. Thakkar the observations of the Apex Court in the case of Narcotic Control Bureau (supra) helps the petitioners, especially the observations made in Paras 6 and 7 of the judgment. In the cited decision, the Apex Court has referred the case of Usmanbhai (supra). In the case of, Usmanbhai (supra), the Apex Court has observed that -

> "Lastly both the decision in Balchand Jain and that in Ishwar Chand turn on the scheme of the Defence and Internal Security of India Act, 1971. The proceed on the well recognised principle that an ouster of jurisdiction of the ordinary Courts is not to be readily inferred except by express provision or by necessary implication. It all depends on the scheme of the particular Act as to whether the power of the High Court and the Court of Session to grant bail under Sections 438 and 439 exist."

In view of the express bar emerging from the Scheme and especially Section 19 of the erstwhile T.A.D.A. Act, 1987, the Apex Courl upheld the view expressed by the High Court that it has no jurisdiction to entertain an application for bail under Section 439 or under Section 482 of the Code and Sections 36(a)(3) and 37 of the N.D.P.S. Act. The backbone of submission of Mr. Thakkar is that P.O.T.A. being a special enactment, the scheme of Section 49 if considered, then general provisions of Section 439 of the Code have to be read subject to the limitations provided in the said Section 49 in view of Section 4 of the Code.

42. Mr. Thakkar has further argued that there is no question of submitting interim charge-sheet. So, the charge-sheet submitted against the present petitioners in the Court of the learned J.M.F.C. and supplementary charge-sheet may be construed as final report within the meaning of Section 173(2) of the Code, and therefore, considering the nature of the allegations in the police papers submitted to the petitioners, the bail plea should be decided. It is always required that all the details of the offences must be set out in the report under Section 173(2) of the Code submitted by the police officer and would be expecting him to do something more than what the Parliament has expected him to set out therein. In the ease of Vihabhai Ramdas Patel v. Hemtuji Shivaji Dabhi & Anr. reported in 1984 (2) GLR 883 it is held by this Court that after submitting his report, the police officer is entitled to make further investigation depending upon the facts and circumstances of each case under Section 173(8) of the Code and if he obtains further evidence, oral or documentary, he is required to forward further report or reports to the Magistrate regarding such evidence in the manner as prescribed under Sections 173(2) to (6) of the Code. In the present case, it is not the say of investigating agency that any further report on the strength of further evidence obtained during further investigation either oral or documentary is forwarded to the learned Magistrate in the manner prescribed under the abovesaid Section. Mere intimation and conveying the decision of the investigating agency that P.O.T.A. has been invoked because the investigating agency has collected some evidence disclosing the offence punishable under the P.O.T.A., cannot be looked into or considered to connect the petitioners-accused with the crime under P.O.T.A. Counsel for the petitioners have raised their doubts as to the bona fides of invocation of P.O.T.A. when the present petitions preferred under Section 439 of the Code was placed for final hearing after filing of the affidavit-in-reply and when one of such petitioner-accused was enlarged on bail by this Court and several other accused persons enjoying liberty pending trial alleged involved in the very serious or ghastly crimes committed in the cities of Vadodara and Ahmedabad during post-Godhra riots.

43. The petitioners have placed reliance upon the decision of Paza Neduraman v. State (supra) of Madras High Court from two different angles. It is argued by Mr. Thakkar that for want of formal charge sheet under P.O.T.A., the petitioners can be granted default bail or atleast while exercising discretionary jurisdiction, the period for which the petitioners have remained in judicial custody can be considered and they cannot be kept in judicial custody for indefinite period. The Madras High Court was dealing with the decision of Special Court constituted under the P.O.T.A. where whereby the bail pleas and the group of bail applications were resisted merely on the ground that an accused within one year of his detention for the offence punishable under P.O.T.A., cannot be granted bail. So while, considering the question of liberty of a person when there is likelihood of protraction of trial as some accused persons are yet to be arrested, the investigating agency is still under formalities of further investigation etc. the period spent of more than one year in custody in this very crime from the initial date of arrest in connection with the very offence should be taken into account. In support of this submission, the petitioners have relied upon the case of State of Maharasntra v. Mrs. Bharati Chandmal Varma @ Ayesha Khan reported in AIR 2002 SC 285. While considering the embargo in Sub-section (7) of Section 49 of P.O.T.A. the first date of detention should be considered as the date of detention under P.O.T.A. offences.

44. In the case of Bandi Narendra Kumar v. State of A. P. reported in 2003 Cri. LJ 288, the learned Judge has considered the nature of role allegedly played by the petitioner on the type of evidence

available on record against that petitioner accused. The petitioner-doctor was going into the forest and treating the leader of a banned organization. While dealing with the bail plea the Court observed that such an act cannot be said to an act falling under Section 21(l)(a)(b) of Prevention of Terrorism Act, 2002, and therefore, he was enlarged on bail. It is submitted by the learned Counsel for the petitioners that the prosecution, even today mainly places reliance on the nature of evidence collected in the month of March, 2003 and the alleged criminal conspiracy hatched by some master-mind and the learned Addl. Advocate General has attempted even to submit that the investigating agency has even collected convincing evidence to the effect that the root of offence of criminal conspiracy originally lies in some other countries. So, the nature of evidence collected by the prosecution qua the alleged criminal conspiracy also should be considered. The persons who succumb to their mental weakness and enters into mob frenzy especially where the mob clashes takes places, each participant in such group clash, in absence of satisfactory, prima facie evidence, cannot be linked with the persons who are behind such group clashes. No such evidence is either placed before the Court nor available in the papers of investigation; otherwise this would have been brought before the Court in the affidavit-in-reply or additional affidavit. So it is submitted by the petitioners that merely because the prosecution is contemplating a trial before the Presiding Judge of the Special Court constituted under various offence punishable under I.P.C. and other Acts along with offences punishable under P.O.T.A. read with Section 120B I.P.C., they should not be kept behind the bar. Of in the case of Bandi Narendra Kumar (supra), it is not clear whether any Special Court was constituted in the State of A.P. for trying the offences punishable under P.O.T.O. or whether the High Couri was dealing with the merit of the decision of bail plea raised before any Court subordinate to the High Court. It is further argued that while dealing with the bail application, the Court has no jurisdiction either to evaluate the evidence collected by the prosecution and collected by the investigating agency and to pass any comment qua the merit of the entire case of prosecution. However, in number of cases under N.D.P.S. Act, erstwhile T.A.D.A. Acts of 1985 and 1987 and also under National Security of India Rules 1971 when the Courts are asked to scrutinise certain aspects by placing certain embargo or restrictions before exercising discretion in favour of the accused, the Courts are supposed to prima-facie, comment upon the nature of evidence so collected by prosecution

45. So, it is submitted that this Court can look into the merit of the matter prima facie and can decide whether the prosecution has established that the acquisition is well founded and it would not be correct to say that the accused, must prove that he is innocent or not guilty prima facie. For this purpose, the petitioners have placed reliance upon at the decision of this Court in the case of State of Gujarat & Anr. v. Balwanlsingh Karsaminh Vaghela reported in 1987 (2) GLR 978.

46. The petitioners have also placed reliance on the decision of Mohammad Allimuddin (supra) which deals with the bail plea of two accused persons who have preferred bail applications before the designated Court mainly on the ground of non-filing of police report within the prescribed period of 90 days and the absence of formal extension before the expiry of 90 days, granted by the Special Court. In the cited decision, no charge-sheet was filed. It is argued that once the investigating agency had decided to drop the charge under P.O.T.O. in absence of supplementary charge-sheet along with papers of further investigation, it should be construed that the prosecuting agency has defaulted. It is argued that the petitioners may not be granted default bail on failure of

production of either oral or documentary evidence and even while resisting the present bail applications, it should be held that there is no sufficient prima facie evidence linking the present petitioners with the crime and the offence punishable under P.O.T.A. and it should be concluded that no prudent Court would hold the present petitioners guilty of any offence punishable under P.O.T.A. Mr. Thakkar has pointed out that one Maulvi Hussein Umerji has been arrested on 6-2-2003 and even as per the prosecution, during his custodial investigation certain revelations relating to involvement of certain foreign elements came to be made and further investigation is still in progress. Prior to 6-2-2003, one of the members of core group, upon his arrest on 22-1-2003 had disclosed pre-meditated conspiracy to carry out the Act of terror by the accused persons. This alleged fact was very well before the investigating agency any time between 22-1-2003 and 4-2-2003 and a confessional statement came to be recorded on 5-2-2003 of the said accused person. Even then, the affidavit-in-reply is totally silent on the aspect as to how and in what manner directly or indirectly the petitioners can be termed as co-conspirators of the ghastly crime committed qua the property and persons travelling in Coach Nos. S/6 and S/7 of Sabarmati Express. Therefore, the Court should take a broad view that the allegation of the prosecution was against a big mob of around 1500-3000 persons of minority community and about more than 57 persons have been charge-sheeted till December, 2002.

47. Having considered all the decisions brought to the notice of this Court, of the Apex Court, this Court and other High Courts qua the legal points involved in the matter and the facts of the case of prosecution and the subsequent development of constitution of Special Court under P.O.T.A. in the month of March, 2003, I am of the view that the following facts/aspects can be said to be more relevant and important while deciding the bail plea raised by the present petitioners.

48. It requires to be noted that out of 6, the facts pleaded by 4 petitioners are mostly similar and the case of other two petitioners are comparatively different.

49. The F.I.R. of the crime registered with Godhra Police Station is regarding the incident occurred at Godhra Railway Police Station i.e. at the platform of Godhra Railway Station and near the A cabin of Godhra Railway Station when the Sabarmati Express train stopped at Godhra Railway Station and was proceeding towards Ahmedabad and the passengers travelling in coach numbers referred to as Coach Nos. S/6 and S/7 were attacked by a mob of several hundreds persons. It revealed that a railway coach was set on fire and 58 persons including men, women and children lost their lives because of the burn injuries sustained by them in the incident. Referring to the papers of investigation supplied to the petitioners-accused including the statements of witnesses recorded by the investigating agency and panchnamas drawn by the investigating agency, number of questions and counter-questions have been raised by the learned Counsel for the parties and they have also responded to the queries raised by the Court. It is not necessary to comment upon the evidence collected as regards (i) exact time of arrival of the Sabarmati Express train at Godhra Railway Station; (ii) how and when the quarrel between the passengers on the platform started; (iii) as to how many minutes or seconds the incident of first pulling of the chain occurred after the train had left for destination towards A cabin; (iv) the distance between Railway platform and A cabin of Godhra Railway Station; (v) the total length of the train; (vi) whether the coaches S/6 and S/7 had crossed the A cabin; (vii) the distance between A-cabin and these two coaches in feet and yards, and

(viii) the location from where the eye-witnesses of the incident have seen the actual act of attack on the train; (ix) the second attack on the train as well as police personnel etc. by the mob of around 2500-3000 people of minority community, and (x) the movement on parallel rail track, if any, since the process of investigation is still going on, for the purpose of the present bail applications, detailed discussion of this evidence is likely to prejudice either sides.

50. It is an accepted proposition of law that the bail Court is not supposed to evaluate the evidence. It can be further stated that a detailed comment also normally should not be made when the Court feels that it is likely to prejudice either parties or may either hamper or provide some clue to the investigating agency especially when the process of investigation has not been completed. The nature of offence committed qua the person and property is so heinous that the learned Counsel appearing for the petitioners even have impliedly accepted that if there is reasonable convincing prima facie evidence against any of the present petitioners and if the element of false implication is totally missing, then the persons involved in such crime does not deserve any favourable discretionary order and that too pending investigation.

51. The Court is not inclined to divide the entire incident into 2 or more different parts when prima facie it is apparent that the offences punishable under the I.P.C. and other Acts referred to by the investigating agency in the police reports filed under Section 173(2) of the Code against the present petitioners-accused have been committed by them in the process.

52. For the purpose of the present petitions, it is relevant to note that in the present case, once the investigating agency had pleaded that the offences punishable under P.O.T.O. have been committed; but thereafter, and before filing of the charge-sheet, the learned J.M.F.C. was informed that these allegations have been dropped.

52.1 In the affidavit of Kantipuri Bava, the D.S.P. (Western Railway), Ahmedabad, he has stated that -

> "When the offences punishable under the above-referred provisions of law were registered against the applicant with Godhra Police Station pursuant to which the applicant was arrested,...which ultimately culminated into filing of the charge-sheet referred to above, the provisions of P.O.T.O. were also invoked against the applicant herein and others on 3-3-2002. But thereafter, having realised that there is no sufficient evidence and material to attract the provisions of P.O.T.O., the same came to be dropped on 25-3-2002. However, at that time aforesaid charge sheets came to be filed with a categorical note therein that further investigation is in progress".

52.2 Undisputedly, from the date on which P.O.T.O. was invoked and the charges were dropped, no Special Court was constituted under the P.O.T.O. and therefore, the petitioners were subject to the jurisdiction of the concerned Sessions Court. Till the P.O.T.O. was replaced by the Act-P.O.T.A., no such Court was constituted or any area or for the entire area of State of Gujarat. Till the date of constitution of the Court under Section 23 of the P.O.T.A. for the entire area of State of Gujarat, the grievances of the petitioners were supposed to be adjudicated by a Presiding Judge of the Court of

Sessions having jurisdiction over the territory of District Panchmahals considering the place of incident and the relevant provisions of the Code.

52.3 Present petitioners had approached the Sessions Court for bail invoking jurisdiction of the Court and after appreciating the submissions made on behalf of the petitioners and the learned Special Public Prosecutor, the learned Addl. Sessions Judge has rejected the request to grant bail.

52.4 Present petitions, have been filed invoking jurisdiction of this Court under Sections 439/482 of the Code expressing grievances against the finding recorded by the learned Addl. Sessions Judge and continued the request as till the date of filing of the reply-affidavit, no Special Court was constituted by the State of Gujarat under Section 23 of P.O.T.A. Obviously, therefore, there was no Public Prosecutor or Addl. Public Prosecutor or Special Public Prosecutor appointed in exercise of the powers vested with the Government and the learned Spl. Public Prosecutor Mr. J. M. Panchal had appeared in petitions preferred till the day on which the Special Court came to be constituted under P.O.T.A.

53. The categorical submissions made by the present petitioners that on the date of filing of the charge-sheet, there was not, even prima facie evidence with the investigating agency about the involvement of any organization which has been declared as a terrorist organization in the event or any fact on the basis of which it can be said or submitted before the trial Court that the offence relating to membership of a terrorist organization has been made out, in reference to the petitions.

53.1 It was also not the say that the act allegedly committed by any of the petitioners can be said to be an act giving support to a terrorist organization needs consideration.

53.2 The respondent-State and the investigating agency mainly rely on the facts and evidence collected by the investigating agency subsequent to the filing of the main and 2 supplementary charge-sheets against the present petitioners-accused and rejection of the applications for bail moved by them before the Court of Sessions and this Court.

54. I would like to quote the relevant part of Para 2 of the affidavit filed by Kantipuri Bava, D.S.P., Western Railway that -

> "I respectfully submit that I am making the present reply-affidavit for the limited purpose of bringing on record certain developments which took place subsequent to the filing of the main and two supplementary charge-sheets against the applicant herein as well as subsequent to the applicant having filed the subject application. In my humble submission, the said subsequent developments have rendered the subject application of the applicant seeking regular bail in respect of the offences punishable under Sections 143, 147, 148, 149, 337, 338, 328, 438, 320, 307, 120B and 153A of the Indian Penal Code read with Sections 3 and 4 of the Prevention of Damages of Property Act read with Section 135 of B. P. Act, totally infrutuous."

(Emphasis)

55. Neither the oral submission nor the reply-affidavit takes care of the contentions raised by the petitioners that a bare reading of the charge-sheets filed against particular applicant, does not reveal that the respective applicant had any active role in the ghastly act of entering into the railway train with motive or in attacking passengers of Coaches Nos. S/6 and S/7 or in setting fire to any part of the railway compartment. The name of none of the petitioners is mentioned in any of the act of pulling the chain or putting fire into the Railway compartment by cutting vestibule or for carrying any inflammable or for pouring the same in the Railway compartment.

56. The act of constitution of the Court under Section 23 of P.O.T.A. and requirement of affording an opportunity of hearing to the Public Prosecutor appointed under Section 28 of P.O.T.O. have been mainly projected while resisting the present petitions and it is simultaneously argued that if Section 49 of the Code, if read with Section 34 of P.O.T.A., it is clear that the bail plea of such an accused can be entertained only by either Special Court constituted under Section 23 or by a Division Bench of the High Court dealing with the appeal provided under Sub-section (4) of Section 34 of P.O.T.A. and any Court other than these two forums has jurisdiction to deal with the bail application of such an accused. The jurisdiction of this Court under Section 439 of the Code is impliedly barred. It is true that erstwhile T.A.D.A. of 1985 and 1987 are statutes enacted and operative in reference to the very subject matter which is being taken care of by P.O.T.A. in the present time. While comparing the provisions of Section 19 of erstwhile T.A.D.A. of 1987 with Section 34 of P.O.T.A., it is clear that Sub-section (1) is materially similar in which the appeal provided under the statute must be preferred to the Supreme Court under the scheme of T.A.D.A. and an appeal is provided under P.O.T.A. against the decision of the Special Court to the High Court, both on facts and law. It is clarified by Sub-section (2) of Section 34 that every appeal under Sub-section (1) shall have to be heard by a Bench of two Judges of the High Court. Sub-section (2) of Section 19 of T.A.D.A. is part materia to Sub-section (3) of Section 34 of P.O.T.A. which says that -

> "any appeal against any bail or revision shall lie to any other Court from any judgment, sentence or order including an interlocutory order of a designated Court."

It is an accepted principle of law that an order either granting or refusing bail to the detenu pending trial, is an order of interlocutory nature. So, it is hammered by the learned Addl. Advocate General before this Court that any proceeding either in the form of appeal or revision or in any other form, is not maintainable and after invocation of P.O.T.A. in reference to CR No. I-9 of 2002 registered with Godhra Railway Police Station, the petitioners should be relegated to Special Court and only Special Court can deal with such a plea. If any accused succeeds, he can enjoy liberty under a bail order. But if the decision is against such an accused, he is supposed to prefer an appeal before the High Court and only a Bench of two Judges would have jurisdiction to deal with such a plea. The words "any Court" mentioned in Sub-section (3) of Sections 34 excludes jurisdiction of this Court i.e. High Court, if it is invoked under Section 439 and/or 482 of the Code. Learned Addl. Advocate General has fairly accepted that there is an element of incongruity in Sub-section (4) of Section 34 of P.O.T.A. But the scheme of Section 34 should be read in harmony and in reference to Sub-sections (1) and (2) of Section 34.

Technically, the decision of special Court under P.O.T.A. is not under challenge.

57. I have carefully considered the provisions of Chapter 29 of the Code dealing with the provisions qua "Appeals" in the Code and Section 378 in case of acquittal. If the argument of learned Addl. Advocate General advanced on the basis of the ratio of the decision of the Apex Court in the case of Tehsildar Singh (supra), is appreciated, then it can be also argued and inferred that latter part of Sub-section (4) of Section 34 providing an appeal against the order of Special Court granting or refusing bail, deals with appeal in reference to an appeal preferred under Section 378 or at the most appeal preferred against the decision of a Special Court. It is true that the decisions cited before this Court by the learned Counsel for the petitioners in support of their say from Madras High Court and Bombay High Court, are the decisions of a Bench of two Judges of respective High Court. But on reading of both the judgments, it is clear that both these High Courts were dealing with the order passed by the Presiding Judge of a Special Court under Section 23 and not of the Sessions Court.

58. Sub-section (5) of Section talks about the period of limitation whereby an aggrieved party is asked to prefer an appeal within the period of 30 days from the date of the judgment, sentence or an order appealed from, (emphasis). Of course, the High Court has jurisdiction to entertain an appeal even alter expiry of the said period of 30 days, if it is satisfied that the appeal has placed sufficient cause for not preferring the appeal within the prescribed period of limitation i.e. 30 days.

59. The law of the land qua bail is clear. Only with a view to protect the liberty of a person and that too zealously, the Courts have held that even successive application for bail is not barred. There can be more than one applications for bail. Even temporary bail plea also can be pleaded by an accused without preferring an application for regular bail or even after rejection of such application stating reasons for such bail. Section 378 of the Code talks about two types of appeals and even after the order of conviction, the accused so convicted can pray for bail in view of the scheme of Section 389 of the Code. So considering the scope to pray for default bail under Section 167 of the Code or bail under Sections 437, 439 or Section 389 of the Code are the provisions relevant. It can be argued that an accused whose bail has been either rejected or granted by the Special Court, the aggrieved party has no substantive right to request for bail to the higher Court i.e. to the High Court after the expiry of 30 days, unless the High Court after recording satisfaction permits such party to file appeal against the order. This Court is neither to reply nor supposed to comment upon this emphasised embargo imposed on a meritorious right to raise plea at convenient point of time or as and when desired.

60. Sub-section (4) of Section 34 of P.O.T.A. indicates that an appeal against the order of acquittal can be filed and the same is maintainable even without formal leave. Non-obstante clause in Sub-section (4) requires to be read in such similar clauses in Sub-section (1) of Section 34. It is possible for the Court to churn and record finding as regards the scheme of Sections 23, 29, 34, 35 and 49 of P.O.T.A. in reference to Sections 167, 437, 439 and 389 of the Code in the background of the decisions of the Apex Court and this Court, some of which have been cited by the learned Counsel for the petitioners. In view of the nature of controversy brought before this Court, I am inclined to leave this exercise, keeping the question open being a larger question for reason. Undisputedly, the report/application intimating invocation and addition of charges under the relevant provisions of P.O.T.A. has been preferred on 18-2-2003. Last application of the present batch of applications i.e. Misc. Cri. Application No. 1031 of 2003 was tendered before the registry on

13-2-2003 and the same was permitted to be circulated on 14-2-2003. So, till the date of filing of the present petitions, charges of the offence under P.O.T.A. were not added in connection with the aforesaid F.I.R. being CR-No. I-9 of 2002. All these petitioners had earlier approached the Sessions Court for bail as they were committed to the Court of Sessions and after filing of the charge-sheet under Section 173(2) of the Code. So, obviously while dealing with bail plea raised by the present petitioners, provisions as regards the procedure and powers of the Special Court cannot be said to be applicable. Even otherwise, subject to the other provisions of P.O.T.A. a Special Court, for the purpose of trial of any offence can exercise powers of a Court of sessions and trial is to be conducted before the Special Court as if the Court is a Court of Session. Adding of charge of the offences punishable under P.O.T.A. for invocation of P.O.T.A. by itself would not nullify the entire proceedings which had taken place before the Sessions Court, Panchmahals at Godhra and its effects including the rejection of bail plea of the present petitioner.

61. Section 35 of P.O.T.A. takes care of transitional situation. So, the case of the present petitioners and the bail plea raised before this Court under Section 439 making grievances against the rejection of their bail plea before the Sessions Court is of the period which can be said to be transitional period or the applications preferred prior to the commencement of such transition period. I would like to quote the relevant Section 35 of the P.O.T.A. which reads as under :

> "Section 35(1) The jurisdiction conferred by this Act on a Special Court, shall, until a Special Court is constituted under Section 23, in the case of any offence punishable under this Act, notwithstanding anything contained in the Code, be exercised by the Court of Sessions of the division in which such offence has been committed and it shall have all the powers and follow the procedure provided under this Chapter.
>
> (2) On and from the date when the Special Court is constituted under Section 23, every trial under the provisions of this Act, which would have been required to be held before the Special Court, shall stand transferred to that Court on the date on which it is constituted."

62. Undisputedly, the Special Court for the area mentioned in the Notification dated 6-3-2003 has been constituted. So, till the date of constitution of the Special Court, Sessions Court, Panchmahals at Godhra was authorised to exercise the powers of Special Court and to follow the procedure provided under Chapter 4.

62.1 Section 34 is a part of Chapter 4 of P.O.T.A. In order to analyse and appreciate the submissions on the point of maintainability of learned Addl. Advocate General that after invocation of P.O.T.A. on 18-2-2003 and prior to the constitution of Special Court on 6-3-2003 this Court, whether could have entertained the present bail applications or the accused should have been asked to go afresh to the concerned Sessions Judge for dealing with the bail pleas raised by them. It was open and otherwise possible for the State Government to constitute a Special Court presided by a Sessions Judge at Godhra to whom the accused were committed for trial and the Court where the present petitioners had already preferred their applications for bail in the light of the papers submitted with report under Section 173(2) i.e. charge-sheet. Merely because a Court is constituted at place B

instead of place A whether the accused can be asked to undergo same or similar exercise especially when they are in judicial custody since long for one year. It can be submitted technically "Yes" that the very accused persons could be have been relegated to the Sessions Court, Panchmahals at Godhra if the very Judge who has rejected the application for bail, is the Presiding Officer of the Special Court constituted under Section 23 of P.O.T.A. These applications, whether could have been treated as appeals is the question; the answer obviously would be No. But the independent provision of a different chapter of P.O.T.A. i.e. Section 49 is able to help this Court, when the discretionary powers are to be exercised in the light of the facts and the law prevailing.

63. Section 49 is the first section of Chapter 6 of P.O.T.A. dealing with miscellaneous provisions. Section 49 says about the modified application of certain provisions of Cr.P.C. Sub-section (1) provides that every offence punishable under P.O.T.A. should be deemed to be a cognizable offence and the case under the Act will be a cognizable case as defined in Clause (c) of Section 2 of the Code. Sub-section (2) provides some modification in Section 167 of Cr.P.C. Section 268 of the Code is made applicable in relation to cases involving an offence punishable under this Act subject to certain modification vide Sub-section (3) of Section 49. But it is not a matter of dispute that merely because Section 268 is made applicable, it would not affect the jurisdiction of a competent Court in passing bail orders. Sub-section (4) of Section 49 puts the Special Court in parity with the Court of Sessions and it should be construed that Special Court is a Court of Sessions under Sections 366, 367 and 371 of the Act are concerned. Sub-section (5) of the Act provides that provisions of Section 438 of the Code shall not apply in relation to any case involving the arrest of an accused of having committed the offence punishable under P.O.T.A. Sub-section (6) puts restriction to the effect that no person, accused of an offence punishable under P.O.T.A., shall if in custody, be released on bail or on his own bond unless the Court gives the Public Prosecutor an opportunity of being heard. So, the obligation is on the part of the Court to offer an opportunity to the Public Prosecutor before releasing the accused on bail or on personal bond. Sub-section (7) says that :

> "Where the Public Prosecutor opposes the application of the accused, to release on bail, no person accused of an offence punishable under this Act or any rule made therein shall be released on bail until the Court is satisfied that there are grounds for believing that he is not guilty of committing such offence."

The ratio propounded by the Apex Court while dealing with similar or pan materia provisions of Sub-section (8) of Section 20 of erstwhile T.A.D.A. and Sections 36A and 37 of N.D.P.S. Act, are relevant and the some such decisions cited during the course of hearing by the learned Counsel appearing for the parties, have been referred to hereinabove.

64. It can be further argued that the day on which the application for bail was rejected by the learned Addl. Sessions Judge, was not supposed to consider the embargo/restriction provided in Sub-section (7) of Section 49 of P.O.T.A. But the accepted proposition of law is that an accused raising bail is not supposed to establish that he is innocent.

65. After a plain reading of papers of investigation, a prudent man is able to reach to a conclusion that there are grounds for believing that one is not guilty of committing the said offence, then within

one year of detention, he can be enlarged on bail. When the Sessions Court has rejected the application observing that for the grounds mentioned in the decision, the Court is not inclined to exercise the discretionary jurisdiction in favour of the accused petitioners, it would not be proper on technical arguments, to hold that the same person, if appointed as Presiding Judge constituted under the Act, should be asked to re-record finding to the whether there are no grounds for believing that he is not guilty of committing the offence punishable under P.O.T.A. or there is evidence, prima facie, to connect the present accused with the crime punishable under P.O.T.A. Therefore, it would not be either legal or proper to read the proviso to Sub-section (7) of Section 49 in reference to other Sub-sections of Section 49 because of the restrictions put by each sub-section i.e. from Sub-sections (5) to (9) of Section 49 which deals with different fact situations and causes expressing different Legislative intent. Proviso to Sub-section (7) say that after the expiry of a period of one year from the date of detention of the accused for the offence under this Act, the provisions of Sub-section (6) of this Section i.e. Section 49 shall apply.

66.(i) The petitioners of Misc. Cri. Applications Nos. 606, 857, 864 and 1031 of 2003 have been been arrested formally in the month of March, 2003 when they were in judicial custody in reference to CR No. I-66 of 2002 registered with Godhra Police Station. So, in the light of ratio of the decisions of in the cases of Mohammad Allimuddin (supra) and Bharati Chandmal Varma (supra) the date of first arrest is relevant for the purpose. When applications for bail were preferred before the Court of Sessions and the same were heard and decided, the say of the learned Public Prosecutor appearing in the matter was not that the petitioners are guilty of offences punishable under P.O.T.A.. When such submission is made before this Court, while dealing with the bail plea, the Court positively can consider that since how much period each accused is under detention and whether the period of one year from the date of detention has expired or not.

66.(ii) When the Court is asked to exercise powers, then the period of detention is normally looked into vis-a-vis the gravity of the offence and quantum of punishment prescribed for the offence. Therefore, the date on which the Court is asked to exercise discretionary power to grant bail to an accused, the date of filing of the bail application should not be considered relevant but the date of effective hearing of such application is more relevant, this would avoid multiplicity of proceedings, and therefore, proviso to Sub-section (7) would have much bearing on the merit of the present bail plea.

66.(iii) So the cases where the bail plea is opposed by the learned Public Prosecutor, then the Court, within one year of detention, cannot enlarge the accused on bail unless it is recorded that there are grounds for believing that he is not guilty of committing offence under P.O.T.A. If the application is not opposed, no such finding is required to be recorded and the cases where the period of one year has expired from the date of detention, the restriction provided under Sub-section (7) of Section 49 would not have any room to play. So, the the embargo provided under Sub-section (6) only shall apply in such cases. Therefore, the cases where the period of one year from the date of order of detention has expired, after hearing the learned Public Prosecutor and appreciating the resistance put forward by him, the Court can exercise discretionary jurisdiction either in favour or against the accused.

67. As observed by the Madras High Court in the case of Paza Neduraman (supra), Sub-section (7) of Section 49 of P.O.T.A. is a departure from the normal rule, in the sense that it heightens the burden of defence. The plain meaning would be that instead of showing that there is no prima facie case against him for conviction, the accused would have to show that there is a prima facie case for his acquittal. The provision suggests that after expiry of one year from the date of detention of the accused, proviso to Sub-section (6) of Section 49 shall apply. Considering the logic applied by the Special Court at Chennai and the stipulation in Sub-section (7) of Section 49, the High Court has held in these decisions that -

> "This Court is conscious that the legislature can never be taken to have intended to give power to any authority to act in bad faith of power to abuse its powers."

All that is suggested by the proviso to Sub-section (7) is that after the expiry of the period of one year from the date of detention application, Sub-section (6) would implicitly excluding the rigour of Sub-section (7) and as such there would be no need for the accused to establish that he is prima facie not guilty or there are grounds for believing that he is not guilty. Any Section or proviso of a statue cannot be stretched further and beyond its language. The Special Court at Chennai had observed that the Court is absolutely powerless to grant bail within one year of detention of the accused. In the present case on the date of hearing of the applications, agitating the grievances against the rejection of bail, when listed for hearing and the reply-affidavit was filed, no Special Court was existing. No Special Court was also constituted by the Government as per the scheme of P.O.T.A. The investigating agency had intimated the petitioners-accused regarding invocation of relevant provisions of P.O.T.A. on of about 19-2-2003. So, the petitioners can legitimately argue that immediately on the 11th day of the intimation given to the learned J.M.F.C. (Railways) at Godhra, the obligation to convince the bail Court that there are grounds for believing that he is innocent or that there are grounds for believing that he is not guilty of committing such offence, was discharged.

68. Sub-section (8) of Section 49 clarifies that the restriction of granting bail specified in Sub-sections (6) and (7) are in addition to the restriction under the Code or in any other law for the time-being in force for granting bail. It is neither argued nor contended that by the State or investigating agency that the bail plea deserves rejection under the restrictions contemplated by Sub-section (8) of Section 49 in the present case. Sub-section (9) is a harsh restriction starling with non-obstante clause but it would apply to a person-accused, if he is not an Indian citizen. So, it is not necessary to go into the discussion qua the effect of Sub-section (9) of Section 49, as the same is not warranted.

68.1 It is true that Section 53 talks about presumption as to offences under this section but the case of submission of prosecution does not fall in the category of cases referred to in Section 53 of P.O.T.A. 68.2 So when this Court is requested to reject the bail plea on the ground of ghastiness of the crime and the gravity of the offence committed, the case of an individual petitioner should be evaluated unless there is satisfactory prima-facie evidence or some material on record demonstrating details to the effect that one is directly involved in such offence by an act or omission or there is evidence under which it can be inferred that his act or omission was part of the conspiracy hatched and under which he can be branded to be a person of the core group of the

accused person who have hatched the conspiracy for committing such a ghastly and grave offence and that too falling in the category of any of the offences made punishable under the P.O.T.A. With due respect no such details has been brought before this Court nor has been offered to accused with additional report. It is submitted by the learned Addl. Advocate General that the investigation is in a sensitive stage and the prosecution would not like to disclose any minute detail, at this stage. It is apparent from the case of prosecution that it relies mainly on the arrest of persons of the core group who have allegedly hatched conspiracy which have roots in other countries or one neighboring country. It is submitted that such sensational and shocking evidence is collected sometime between 22-1-2003 and 26-1-2003 and on 5-2-2003 confessional statements of the persons arrested on 22-1-2003 have been recorded which give demonstrating details of conspiracy as well as the role played by the other accused persons. The name of one of the accused arrested on 6-2-2003 is also disclosed namely, Maulvi Hussein Umergi which reveals the involvement of certain foreign element. But it is not pointed out that there are reasons to believe that a particular accused is one of the persons of the core group who have hatched criminal conspiracy to commit the crime.

69. Having considered submissions advanced by the learned Addl. Advocate General with all sensitivity, the law propounded by the Apex Court and this High Court as regards criminal conspiracy cannot be ignored. Even if the complaint itself is read of CR No. I-9 of 2002, 3 to 4 different events said to have occurred after the arrival of the Sabarmati Express train at Godhra Railway platform and a big mob attempted to assault the police and R.P.F. personnel who had arrested certain persons from the scene of offence so that such apprehended persons can be freed or can be forcibly taken away by the mob. The star witnesses whose statements are recorded in the early days of investigation, knowing some of the petitioners because of inter se negative relations have not assigned any role to the petitioners who were initially arrested for other crime i.e. CR No. I-66 of 2002 registered with the Godhra Town Police Station.

70. It is clear that when the petitioners are under detention for more than one year, it becomes obligatory on the part of the prosecution to first establish that the accusation is well founded and it would not be either legal or correct to say that the accused must prove that he is innocent at bail stage. It would be appropriate to refer to some part of the judgment of the Apex Court in the case of State of Tamil Nadu v. Nalini reported in AIR 1999 SC 2640 (Rajiv Gandhi Assassination case) Where the Apex Court was evaluating on the basis of evidence collected and led by the prosecution in reference to accused Nos.

16 and 17 (Ravi & Suseendran). Narrating 11 different circumstances in Para 599 of the judgment in Para 600, the Apex Court has observed that -

> "From all these factors prosecution seeks to inter that Ravi (A-16) and Suseendran (A-17) had knowledge of the object of conspiracy, had agreed to the same and were thus members of the conspiracy. At one point of time Ravi (A-16) in his confession did say that he had a strong suspicion that that the target was Rajiv Gandhi but that would certainly not make a member of the conspiracy. In wireless message dated 7-5-1991 sent by Sivarasan to Pottu Amman he categorically stated that only three persons, namely, he, Subha and Dhanu knew about the object of conspiracy.

Association, however, strong of Ravi (A-16) with Sivarasan and between Ravi (A-16) and Suseendran (A-17) could make them members of the conspiracy without more."

The Apex Court ultimately by churning the law as to criminal conspiracy confirmed the conviction of only 4 accused persons under Section 120B read with Section 302 I.P.C. Argument of learned Addl. Advocate General as referred to earlier, is also based on the charge of criminal conspiracy and the petitioners are addressed as members of core group. It would be proper to mention some part of Para 574 from Nalini's case (supra).

"Some of the broad principles governing the law of conspiracy may be summarized though, as the name implies, a summary cannot be exhaustive of the principles :

1. xxxxx

2. xxxxx

3. xxxxx

4. xxxxx

5. When two or more persons agree to commit a crime of conspiracy, then regardless of making or considering any plans for its commission, and despite the fact that no step is taken by any such person to carry out their common purpose, a crime is committed by each and every one who joins in the agreement. There has thus to be two conspirators and there may be more than that. To prove the charge of conspiracy it is not necessary that intended crime was committed or not. If committed it may further help prosecution to prove the charge of conspiracy.

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

7. A charge of conspiracy may prejudice the accused because it is forced them into a joint trial and the Court may consider the entire mass of evidence against every accused. Prosecution has to produce evidence not only to show that each of the accused has knowledge of object of conspiracy but also of the agreement. In the charge of conspiracy Court has to guard itself against the danger of unfairness to the accused. Introduction of evidence against some may result in the conviction of all, which is to be avoided. By means of evidence in conspiracy, which is otherwise inadmissible in the trial of any other substantive offence prosecution tries to implicate the accused not only "in the conspiracy itself but also in the substantive of crime of the alleged conspirators. There is always difficult in tracing the precise

contribution of each member of the conspiracy but then there has to be cogent and convincing evidence against each one of the accused charged with the offence of conspiracy. As observed to judge Learned Hand that "this distinction is important today when many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders".

8. As stated above, it is unlawful agreement and not its accomplishment, which is the gist or essence of the crime of conspiracy. Offence of criminal conspiracy is complete even though there is no agreement as to the means by which the purpose is to be accomplished. It is the unlawful agreement, which is the gravamen of the crime conspiracy. The unlawful agreement which amounts to a conspiracy need not be formal or express, but may be inherent in and inferred from the circumstances, especially declarations, acts and conduct of the conspirators. The agreement need not be entered into by all the parties to it at the same time but may be reached by successive actions evidencing their joining of the conspiracy."

71. One accused whose case is materially similar to other 4 petitioners-accused who were arrested initially for the offence committed within the Godhra Town Police Station on 27-2-2002 had approached this Court by filing Misc. Cri. Application No. 930 of 2003 (Abidhussain Abdulkarim Shaikh v. State of Gujarat) and after hearing the learned Special Public Prosecutor this Court (Coram : C. K. Buch, J.) has enlarged the accused on bail by order dated 14-2-2003. It is necessary to quote the relevant part of the said bail order in the abovesaid case which says that -

"...The other arguments advanced by Mr. Raju is that if the officer who has recorded the statement had committed mistake in recording the correct name uttered by the witness, even then the present petitioner has not been assigned any specific role or an overt act in the serious incident occurred near "A" cabin of Godhra Railway Station. According to Mr. Raju this witness Dipak Nagindas Soni had contested Municipal Election against the present petitioner in the same Ward No. 8 of Godhra Municipality. So, it was possible for this witness and for the investigating officer to bring positive evidence on record that a person identified by him in the presence of the group of accused persons with deadly weapons and who has been named as Habid Karim is the same person who has contested the election against him beyond which the present petitioner who had contested election he was an advocate. So, this description could also have been found from the papers of investigation. It is not a matter of dispute that except this witness, nobody has named this petitioner present at the spot of incident. It is also pertinent to note that statements of 13 persons were recorded on the day of incident itself i.e. on 27-2-2002 and statements of 12 witnesses were recorded on the next day i.e. 28-2-2002. However, except P.W. Dipak Nagindas Soni, none has disclosed the presence of the present applicant. The submission of learned Special P. P. Mr. J. M, Panchal is that it is not possible for the witnesses to identify each of the accused person found at the spot when big mob is participating in commission of crime. In response of the query on the strength of the submissions made by Mr. Raju, Mr. V. M. Panchal has fairly accepted that this very

petitioner was arrested by the Police in one another offence committed in Godhra Town between 9-00 to 11-00 a.m. on 27-2-2002 i.e. on the very day on which the present crime was committed near Godhra Railway Station. He was also arrested on 27-2-2002 evening, and thereafter, he was formally arrested in the present crime on 13-3-2002 by way of transfer warrant. Without going into the other details as to the distance between two spots and the time of actual incident occurred near Godhra Railway Station and the Godhra town where certain properties and shops were set on fire, the present petition was tried by the Sessions Court and has been acquitted by the Court. Today, the xerox copies of the voter's identity card and the Sanad issued by the Bar Council have been tendered by Mr. Raju and it seems that at the time of alleged incident he was a young man of about 25-26. The grounds which are placed before this Court for bail plea were placed before the Sessions Court. But appreciating the evidence given to the investigating officer by witness Dipak Nagindas Soni, the Court had not accepted the bail plea. Earlier also the present petitioner had prayed for bail before this Court but as the investigation was incomplete the request for bail was not found acceptable, and therefore, the petitioner was permitted to withdraw his petition. Three charge-sheets have been filed by the investigating agency and I am told that as some of the accused are still absconding the investigation is going on. So, it would not be logical to anticipate that the trial against the present petitioner would reach to its logical end in a very near future. It is true that gravity of the offence, severity of the punishment and the impact of order of bail if passed on society are relevant aspect. But considering the totality of facts available on record the Court is inclined to use discretion in favour of the petitioner. Of course, stringent conditions are required to be imposed so that he may not play with any witnesses as he being a person concerned with Court proceedings. I have also considered the period of the present petitioner as undertrial for the very crime while exercising discretion in favour of the petitioner. Hence, the present application is allowed."

72. Some discrepancy as to the name or surname of the accused or some confusion qua the name of the father of the accused would not help the accused much. On such grounds only one cannot be enlarged on bail that the case of prosecution against him suffers with inherent infirmity or he has been dragged into serious trial on mistaken identity. But the Court is supposed to see and appreciate all other aspects without evaluating the evidence. The nature of evidence collected by the prosecution, the type of witnesses cited, time of recording statement etc, are unless looked into, it would not be possible for any Court to pass an order either rejecting or granting bail in view of the restrictions put by Section 49. So, without entering into the evaluation of the evidence collected by the prosecution, the Court is supposed to pass a reasoned order based on the material available from the police papers.

73. Three different charge-sheets have been filed. As discussed earlier the investigation is still going on and the learned Addl. Advocate General even was not sure that when the investigation is likely to be over on the date on which he has concluded his arguments.

74. Mr. Thakkar and Mr. Raju learned Counsel appearing for the petitioners though have argued at length, in the light of Sections 173(2), (5) and (8) and have submitted that the ratio of the decision in the case of T. T. Antony (supra) should be applied and in absence of positive supplementary charge-sheet the accused should be enlarged on bail ignoring the so-called gravity or sensitivity pleaded by the investigating agency. The arguments advanced on this aspect needs detailed consideration. However, at the initial stage whether the petitioner accused are simply praying for bail pending trial keeping the question open it would be appropriate to observe in the light of the decisions cited and referred to hereinabove that further investigation or continuation of investigation leading to filing of more than one supplementary charge-sheet or putting fresh materials thereafter cannot be said to be impermissible or illegal when the investigating agency is clear on the date on which the report under Section 173 is submitted that the investigation is still going on and the prosecution agency may put fresh material. This situation may arise in all cases where large number of accused have been found involved and some of them are either absconding or attempting to drag the investigation to complexity. So, this ground cannot help the petitioners,

75. It is true that the two decisions cited by the petitioners of Madras High Court and Bombay High Court dealing with the bail of accused persons facing trial for the offence punishable under P.O.T.A. have been decided by two Judges Bench of the respective High Court. Both these High Courts were dealing with appeal filed against the decisions of Special Court constituted under Section 23 in the respective-State.

76. The petitioners have preferred bail application before this Court making grievances against the decision of Court of Sessions refusing bail to them, which was pending before this Court at the relevant time and one of such applications for bail has been decided by this Court by the decision referred to hereinabove.

77. The learned Addl. Advocate General has attempted to impress upon this Court that all the remaining and. pending applications should be dismissed and the petitioners should be asked to approach the Special Court afresh for bail so that the Presiding Judge of Special Court can appreciate the case of the prosecution in the light of all relevant provisions and the restrictions imposed under Section 49 of the Act. If this submission is accepted, then the resultant effect would be of relegation of the petitioners-accused to Special Court for bail afresh. This submission is not found acceptable because it does not take care of the fact situation if the same Judge/Court would have been appointed under Section 23 to act as a Judge/Court competent to try the cases of offence punishable under P.O.T.A. 77.1 It is decided by the Apex Court in more than one decisions some of which have been cited to show that the source of power to grant bail, is not in the special statute viz. either erstwhile T.A.D.A. or P.O.T.A. But certain provisions of Special Act regulate the powers flowing from the Code and especially from Sections 437/439.

77.2 The phraseology of Sub-section (4) of Section 34 indicates, indirectly two contingencies : (i) where an accused is found guilty of the offence punishable under the I.P.C. or any other law such as Arms Act, Explosives Act etc. but has been acquitted by the very judgment of the offence punishable under P.O.T. A. and the period of imprisonment being less than 3 years, the trial Court, if enlarges the accused on bail (ii) Special Court passing order holding improper invocation of P.O.T.A. and in

view of other charges releasing the accused on bail, having effect of acquittal from offences punishable under P.O.T.A., then without obtaining any leave of High Court, the aggrieved party can file an appeal as a matter of right and can challenge or resist the bail order. Therefore, it can be said that provisions of Section 19 of the erstwhile T.A.D.A. of 1987 and provisions of Section 34 of P.O.T.A. cannot be said to be totally pari materia or exactly similar.

77.3 Once a law viz. P.O.T.O. was invoked in connection with the very crime and the same was dropped and now it is the say of the respondent-State that further investigation reveals about the commission of offences punishable under P.O.T.A., and therefore, these provisions have been invoked. The case pleaded against the present petitioners and mainly the petitioners-accused who were arrested for the offence registered with the Godhra Town Police station being CR No. I-66 of 2002, is concerned, as it is and in the light of the charge-sheet filed, a Court can comment upon and observe whether the offence allegedly committed falls in the category of offences made punishable under P.O.T.A. But it would be neither be legal nor appropriate to make such observations and it should be left to the Judge who has to try the accused as original Court as per procedure prescribed by the Code, merit. The back bone of the argument of the learned Addl. Advocate General is that in the light of the charge of criminal conspiracy, each member individually can be held guilty of offence punishable under P.O.T.A., Therefore, the strength in the charge of criminal conspiracy of committing offences punishable under P.O.T.A. or to do an act or omission which have been made punishable under P.O.T.A. can be closely screened. The decisions in reference to charge under Section 120B I.P.C. read with P.O.T.A., considered and quoted, take absolute care of present case.

77.4 It is true that Special Court can be said to be a Court other than High Court or Court of Session within the meaning of Section 437 of the Code. But as the erstwhile T.A.D.A. was manifestly excluding the jurisdiction of the High Court and in terms subordination of the designated Court to the High Court defined in Section 2(l)(e) which is not present in P.O.T.A. So, the fact situation which has emerged during the transition period, without co-relating the date of order of bail passed in favour of the accused arrested in this very crime and the arrest of some of the other accused referred to by the learned Addl. Advocate General in the months of January and February, 2003 or the date of recording of their confessional statements and the date of invocation of P.O.T.A. 77.5 I agree that even while dealing with the present bail applications, this Court cannot ignore the restrictions provided by Section 49 of P.O.T.A. But when the petitioners are under detention for a period of more than one year, the restriction provided, under Sub-section (7) of Section 47, as discussed earlier, shall not have any significance. So, the general rule of criminal jurisprudence can be applied and according to this rule "every accused is presumed to be innocent", and therefore, the law of bail of the country says that liberty of a person may zealously be protected. It is true that "bail is a Rule and Jail is an exception" may not be a good proposition of law. But the bail plea of each accused who have been charge-sheeted for any grave or serious offence irrespective of the number of the accused or alleged role played should be rejected and all such persons should be kept behind the bar till the trial.

77.6 The Court is inclined to state that it is desirable to be consistent when the Court is asked to exercise discretionary powers. The decision in the case of Rajdeo Sharma v. State of Bihar reported in AIR 1998 SC 328 : [1999 (1) GLR 709 (SC)] and the subsequent decision re-affirming the

judgment and guidelines given by the Apex Court in the case of A. R. Antulay v. R. S. Naik reported in AIR 1992 SC 1701 in the case of P. Ramchandra Rao v. State of Karnataka, due weightage should be given to the constitutional guarantee flowing from Article 21 of the Constitution of India and this cannot be ignored.

77.7 Normally, if a case for release of the applicant on bail, is otherwise made out, in the light of the entire set of facts brought to the notice of the Court, then the accused should be released on bail. The impact of grant of bail to the accused on the society at large, is also one of the criteria. In the same way, the Apex Court has deprecated the mechanical rejection of bail. It is pointed out that there are speaking circumstances on the papers of investigation that the 4 accused who were arrested in the offence registered with Godhra Town Police Station on 27-2-2002 itself are able to point out from the papers of investigation that the arrival of the respective accused on the spot of the alleged incident, may be immediately after or at the time when the District Superintendent of Police or other responsible police officials had reached on the spot of the incident. The say of the petitioners accused cannot be ignored totally at bail stage by merely stating that the say of the accused is a defence version and the same should be examined on the touchstone of trial.

77.8 It is true that petitioner of Misc. Cri. Application No. 857 of 2003 has not specifically averred that he was arrested initialy for offences registered with Godhra Town Police Station. However, on the set of facts pleaded and placed before the Court, the case of the petitioner stands on a different footing, and therefore, the Court feels that discretionary jurisdiction can be exercised in favour of the petitioner in Misc. Cri. Application No. 857 of 2003.

78 Even after the lapse of more than one year, according to the prosecution, the same accused persons are yet to be arrested but it is mentioned in the affidavit-in-reply that release of particular petitioners-accused is likely to prejudice either the investigation or arrest of a particular absconding accused.

78(i) I have also considered the aspect which is relevant that if the accused are mechanically thrown out of this Court, then the observations made favourable by the Sessions Court may lose its importance.

79. A plain reading of the affidavit-in-reply and the nature of evidence being collected by the prosecution is simultaneous with element of fishing a point on probable or improbable clues. So the scope of protraction of trial for a very long period can be visualised. So this is a case where any Court can reject a bail plea observing that the rejection is temporary and the petitioner may approach the Special Court for bail, after some weeks or months,

80. The non-obstante clause referred to in Section 34 or Section 49 of P.O.T.A. with which the Section/Sub-section starts should be given its due meaning. Such clause is intended to restrict or to regulate the powers flowing from the source. Therefore, while exercising discretionary jurisdiction in connection with grant of bail, provisions of the Code should be necessarily be subject to the conditions so restricted or regulated by such non-obstante clause. This Court is supposed to take care of that situation only in the light of the discussions made by the Apex Court. In the case of

Narcotic Control Bureau (supra), the Apex Court has referred to the decision of Usmanbhai (supra) and observed that there is explicit bar under Section 19(2) of T.A.D.A. to exclude the jurisdiction of High Court to entering an appeal or revision against the judgment of the designated Court and this explicit bar has taken out the designated Court from subordination of the High Court. In Para 16 of the decision in the case of Usmanbhai (supra) it has been observed that "As a matter of construction, we must accept the contention advanced by learned counsel appearing for the State Government that the Act being a Special Act must prevail in respect of the jurisdiction and power of the High Court to entertain an application for bail under Section 439 of the Code or by recourse of its inherent powers under Section 482". The observations in Para 22 of Usmanbhai's case (supra) (SCC page 289-290) are important. Referring the decision in Balchand Jain's case (supra) and that in Ishwerchand (supra) the Apex Court has observed that "From the above discussion it emerges that in Usmanbhai's case (supra) the Supreme Court did not express anything contrary to what has been observed in Balchand Jain case (supra) and on the other hand at more than one place observed that such enactments should prevail over the general enactment and the non-obstante clause must be given its due importance. For all the aforesaid reasons we hold that the powers of the High Court to grant bail under Section 439 are subject to the limitations contained in the amended Section 37 of the N.D.P.S. Act and the restrictions placed on the powers of the Court under the said Section are applicable to the High Court also in the matter of granting bail. The point of law is ordered accordingly".

81. Undisputedly Section 49 of P.O.T.A. deals with modified application of certain provisions of the Code, does not say anything about the exclusion of the applicability of Section 439 of the Code. The jurisdiction and power of Special Court is derived from the Act and it is an Act that one must primarily look into in deciding the question under scrutiny. Section 29(1) provides for exclusion of jurisdiction for trial of offences under the P.O.T.A. The decision in the case of Usmanbhai (supra) says that construction of Section 14 and especially Sub-section (3) of Section shows the manifest intention of the Legislature to take away the jurisdiction and power of the High Court under the Code with respect to the offences under the Act. In P.O.T.A;, no such manifest intention of Legislature to take away the jurisdiction and powers of High Court is emerging and so the ratio propounded by the Apex Court in the case of Narcotic Control Bureau (supra) is able to help the present petitioner to material extent.

82. I am not inclined to observe anything in reference to the arguments advanced by the learned Sr. Counsel Mr. Thakkar and Mr. Anandjiwala for the petitioners, whereby they have hammered that several accused persons involved in heinous massacre and sensitive crimes, obviously affecting the harmony and peace of the State, have been enlarged on bail on merits and on the strength of papers of investigation (i.e. in post-Godhra massacre violence cases). Of course, they have accepted that they are not praying for bail on parity with those persons who are bailed out in number of offences committed in the district of Panchmahals and in other parts of the State after the Godhra incident. These submissions even cannot help the petitioners in any way because this would be an extraneous aspect and the Court is not supposed to base its decisions on any extraneous consideration; but it is rightly submitted that 4 (four) petitioners out of 6 (six) individually whose case is materially similar to a person who has been enlarged on bail by this Court cannot be ignored, and therefore, the case of those four petitioners should not be thrown out on technical plea raised by the prosecution. Even for

the sake of argument, it is accepted that the order either rejecting or granting bail is made appealable and statutory right has been conferred on the party aggrieved under Section 34 of P.O.T.A., it may be mentioned here that the petitioners herein before this Court, have not challenged any decision of rejection of their bail by a Presiding Officer or a Judge of Special Court. Present proceedings have to be taken care of in the light of Constitutional guarantee and other contingencies which have emerged from typical fact situation and in absence of any provision taking care of such contingency.

83. Section 35 as mentioned above, contrary helps the logic developed and advanced by the petitioners.

84. Thus, on merits, the case of petitioners in Misc. Cri. Application Nos. 842 and 863 of 2003 cannot be said to be similar to the persons who were arrested for any other offences committed in Godhra Town. The distance between Godhra Town and Godhra Railway Station, especially, A cabin, statement of D.S.P. Snri Raju Bhargav and the statement of other main witnesses whose statements have been recorded in the earlier days of investigation makes the case of the petitioners of Misc. Cri. Application Nos. 606, 857, 864 and 1031 of 2003 materially different from the present two Misc. Cri. Applications.

85. The conduct of the petitioner-accused in Misc. Cri. Application Nos. 842 and 863 of 2003, their late arrest and the identity established add some more gravity, and therefore, on the ground of parity/similarity to the petitioner-accused whose applications have been favourably decided as mentioned above, would not help the petitioners gf these two petitions. In the circumstances, their bail plea is not found acceptable.

85.1 The Court cannot ignore the fact that petitioner-accused in Misc. Cri.

Application No. 842 of, 2003 has undisputedly attempted to mislead the investigating agency and so this aspect should be left to the appreciation of the trial Court. If the plea of the accused is not found acceptable by the trial Court as to the blindness, then the trial Court may take a different view of the matter.

85.2 The ultimate result is that Misc. Cri. Application Nos. 842 and 863 of 2003 are required to be rejected and they are accordingly rejected. Rule discharged in both these petitions.

86. Misc. Cri. Application Nos. 606, 857, 864 and 1031 of 2003 are required to be allowed and they are allowed accordingly. The petitioner in each of these petitions is ordered to be released on bail in connection with, the CR No. I-9 of 2002 registered with Godhra Railway Police, Station on his executing a bond of Rs, 25,000/- (Rupees twenty-five thousand only) with one surety of the like amount of a person having immovable property in the State of Gujarat to the satisfaction of the lower Court and subject to the conditions that he shall,

(a) not take undue advantage of his liberty or abuse his liberty;

(b) not act in a manner injurious to the interest of the prosecution;

(c) maintain law and other;

(d) mark his presence before Godhra Railway Police Station on every Monday between 9-00 a.m. to 2-00 p.m. till further orders;

(e) not leave the local limits of Godhra Town without the prior permission of the concerned Sessions Judge;

(f) furnish the address of his residence at the time of execution of the bond and shall not change the residence without prior permission of this Court;

(g) surrender his passport, if any, to the lower Court within a week and shall not apply for fresh passport;

(h) pending trial of the present case, if the applicant is found involved or named in F.I.R. in any other case in connection with the offence punishable for imprisonment of the period exceeding THREE YEARS, he shall report to the concerned police station at the earliest and preferably within 72 hours;

(i) shall not approach any witness directly or indirectly during the course of proceeding.

87. If breach of any of the above conditions is committed, the Sessions Judge/Special Court concerned will be free to issue warrant or take appropriate action in the matter.

88. Bail before the concerned Court having jurisdiction to try the case.

89. Rule is made absolute in Misc. Cri. Application Nos. 606, 857, 864 and 1031 of 2003. Direct Service permitted.

The registry is directed to keep copy of this judgment in the companion matters. Direct Service.