

Rajendra Chaudhary S/O Vikram Singh ... vs Union Of India Through National ... on 14 June, 2019

Author: A.M.Badar

Bench: Indrajit Mahanty, A. M. Badar

APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.580 OF 2016

DHAN SINGH S/O. SHIV SINGH)...APPELLANT

V/s.

- 1) UNION OF INDIA THROUGH NATIONAL)
INVESTIGATION AGENCY)
- 2) STATE OF MAHARASHTRA THROUGH)
A.T.S.)
)
- 3) CENTRAL BUREAU OF INVESTIGATION)...RESPONDENTS

WITH

CRIMINAL APPEAL NO.581 OF 2016

LOKESH SHARMA S/O. GOPAL KRISHAN)...APPELLANT

V/s.

- 1) UNION OF INDIA THROUGH NATIONAL)
INVESTIGATION AGENCY)
- 2) STATE OF MAHARASHTRA THROUGH)
A.T.S.)
)
- 3) CENTRAL BUREAU OF INVESTIGATION)...RESPONDENTS

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WITH

CRIMINAL APPEAL NO.622 OF 2016

MANOHAR S/O. RAM SINGH NARWARIA)...APPELLANT

V/s.

- 1) UNION OF INDIA THROUGH NATIONAL)
INVESTIGATION AGENCY)
- 2) STATE OF MAHARASHTRA THROUGH)
A.T.S.)
)
- 3) CENTRAL BUREAU OF INVESTIGATION)...RESPONDENTS

WITH

CRIMINAL APPEAL NO.623 OF 2016

RAJENDRA CHAUDHARY)...APPELLANT

V/s.

- 1) UNION OF INDIA THROUGH NATIONAL)
INVESTIGATION AGENCY)
- 2) STATE OF MAHARASHTRA THROUGH)
A.T.S.)
)
- 3) CENTRAL BUREAU OF INVESTIGATION)...RESPONDENTS

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WITH

CRIMINAL APPLICATION NO.179 OF 2017
IN
CRIMINAL APPEAL NO.580 OF 2016

SHAFIQUE AHMED MOHD SALIM)...APPLICANT

IN THE MATTER BETWEEN

DHAN SINGH @ RAM LAKHAN DAS)
MAHARAJ @ SUBHAS @ LAKHAN)
SON OF SHIV SINGH CHOUDHRY)...APPLICANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

WITH

CRIMINAL APPLICATION NO.182 OF 2017
IN
CRIMINAL APPEAL NO.581 OF 2016

SHAFIQUE AHMED MOHD SALIM)...APPLICANT

IN THE MATTER BETWEEN

LOKESH SHARMA @ KALU PANDIT @)
TIWARI SON OF GOPAL KRISHNA SHARMA)...APPLICANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

WITH

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CRIMINAL APPLICATION NO.180 OF 2017

IN
CRIMINAL APPEAL NO.622 OF 2016

SHAFIQUE AHMED MOHD SALIM)...APPLICANT

IN THE MATTER BETWEEN

MANOHAR NARWARIA RAM SINGH)
NARWARIA)...APPLICANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

WITH

CRIMINAL APPLICATION NO.181 OF 2017
IN
CRIMINAL APPEAL NO.623 OF 2016

SHAFIQUE AHMED MOHD SALIM)...APPLICANT

IN THE MATTER BETWEEN

RAJENDRA CHAUDHRY @ DASHRATH @)
SAMANDER @ LAXMAN DAS SON OF)
VIKRAM SINGH CHOUDHRY)...APPLICANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Subhash Jha a/w. Mr.Harekrishna Mishra and Ms.Ankita
Pawar, Advocate for the Appellant in Criminal Appeal No.580 of
2016.

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Mr.Niteen Pradhan a/w. Mr.Aditya Lasaria, Mr.Anthony Nadar,
Advocate for the Appellant in Criminal Appeal No.581 of 2016.

Mr.Prashant Pushp Maggu a/w. Mr.Sujendar Yadav, Advocate for
the Appellant in Criminal Appeal No.622 of 2016.

Mr.J.P.Mishra a/w. Mr.Amarendra Mishra, Mr.Asif Shaikh and
Mr.Sanket Kolapte, Advocate for the Appellant in Criminal Appeal
No.623 of 2016.

Mr.Prakash Shetty, Special Public Prosecutor a/w. Ms.Geeta
Godambe, Public Prosecutor for the National Investigation
Agency.

Mrs.M.M.Deshmukh, APP for the Respondent - State.

Mr.B.A.Desai, Senior Counsel a/w. Ms.Adeeba Khan, Advocate for
the Applicant/Intervenor in all the Criminal Applications.

CORAM : INDRAJIT MAHANTY &
A. M. BADAR, JJ.

DATE : RESERVED ON 30th APRIL 2019
PRONOUNCED ON 14th JUNE 2019

JUDGMENT :

(PER : A.M.BADAR, J) 1 These are appeals under Section 21 of the National Investigation Agency Act, 2008 (hereinafter referred to as NIA Act for the sake of brevity) challenging the common order dated 6 th APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc June 2016 passed by the learned Special Judge under the NIA Act, Greater Mumbai, thereby rejecting bail applications at Exhibit Nos.598, 599 and 604 filed by accused persons in MCOC Special Case Nos.23 of 2006 along with 8 of 2013 and 3 of 2010. Criminal Appeal bearing No.580 of 2016 is filed by appellant/accused no.16 Dhan Singh Shiv Singh, Criminal Appeal bearing No.581 of 2016 is filed by appellant/accused no.17 Lokesh Sharma, Criminal Appeal bearing No.622 of 2016 is filed by appellant/accused no.14 Manohar Narwaria whereas Criminal Appeal bearing No.623 of 2016 is filed by appellant/accused no.15 Rajendra Chaudhary for assailing the said order dated 6 th June 2016 rejecting their bail applications. All these appeals are being decided by this common judgment as bail applications of all these appellants/accused were decided by a common order by the learned trial court.

FACTUAL BACKGROUND INCIDENT & INVESTIGATION 2 Facts, in brief, leading to the institution of the present appeals can be summarized thus :

APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc

(a) On 8th September 2006 (Friday) four bomb explosions took place at Malegaon in Nashik district of Maharashtra State.

At about 1.50 p.m. to 2.00 p.m. of 8 th September 2006, three bombs exploded in the premises of Hamidia Masjid and Bada Kabrastan and at about 1.30 p.m. to 2.00 p.m. fourth bombs exploded at Mushawarat Square of Malegaon. These explosions resulted in death of 31 persons and about 312

persons had suffered hurt as well as grievous hurt. These incidents resulted in registration of Crime No.95 of 2006 and 96 of 2006 at Azad Nagar Police Station, Malegaon, Nashik.

(b) On 13th September 2006, one fake bomb was found at window ventilator of a shop at Mohammadia Masjid Shopping Complex. This has resulted in registration of Crime No.3088 of 2006 at the City Police Station, Malegaon, District Nashik.

APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc TRANSFER OF INVESTIGATION TO THE ANTI TERRORIST SQUAD ON 23rd OCTOBER 2006

(c) After initial investigation by Malegaon Police, vide order dated 23rd October 2006, the Director General of Police, Maharashtra, was pleased to transfer investigation of these crimes to the Anti-Terrorist Squad, Mumbai. Accordingly, Crime No.7 of 2006 came to be registered at the Police Station Anti-Terrorist Squad, Mumbai, covering all these crimes for the purpose of investigation. This crime came to be registered for offences punishable under Sections 302, 307, 324, 325, 427, 212, 295, 121A, 153A, 120B read with 34 of the Indian Penal Code, under Sections 3(1)(i), 3(2), 3(3) and 3(4) of the Maharashtra Control of Organised Crime Act, 1999 (hereinafter referred to as MCOC Act for the sake of brevity), under Sections 10, 13, 16, 17, 18, 19, 20 and 23 of the Unlawful Activities (Prevention) Act, 1967 (hereinafter referred to as U.A.(P) Act for the sake of brevity), under Sections 6 and 9(b) of the Explosives Act, 1884, under Sections 3, 4, 5 and 6 of the Explosive APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc Substance Act, under Section 12(1)(c) of the Passport Act, 1967 and under Section 7 of the Criminal Law Amendment Act against thirteen accused persons, out of which 9 are arrested and remaining four are shown to be wanted.

Accused arrested were as follows :-

- (i) Arrested accused no.1 Noorul Huda Samsudoha,
- (ii) Arrested accused no.2 Shabbir Ahmed Masiullah,
- (iii) Arrested accused no.3 Raees Ahmed Rajjab Ali Mansuri,
- (iv) Arrested accused no.4 Dr.Salman Farsi Abdul Latif Almi,
- (v) Arrested accused no.5 Dr.Farogh Iqbal Ahmed Magdumi,
- (vi) Arrested accused no.6 Shaikh Mohd. Ali Alam Anamat Ali Shaikh,
- (vii) Arrested accused no.7 Aasif Khan Bashir Khan @ Junaid @ Abdulla,
- (viii) Arrested accused no.8 Mohd. Jahid Abdul Majjid Ansari,
- (ix) Arrested accused no.9 Abrar Ahmed Gulam Ahmed.

APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc Accused shown as wanted were as under :-

- (x) Wanted accused no.10 Riyad Ahmed Shafi Ahmed,
- (xi) Wanted accused no.11 Ishtiyahq Ahmed Mohd. Issaq,
- (xii) Wanted accused no.12 Munnawar Ahmed Mohammed Ahmed and
- (xiii) Wanted accused no.13 Muzammil.

EVIDENCE COLLECTED BY THE ANTI-TERRORIST SQUAD REFLECTED IN ITS CHARGESHEET DATED 21st DECEMBER 2006

(c) After completion of investigation, Anti-Terrorist Squad of the Maharashtra State filed charge-sheet against accused persons in Crime No.7 of 2006 on 21st December 2006 and undisputedly the trial court on taking cognizance of offences was pleased to register the case as MCOC Special Case No.23 of 2006.

(d) Evidence collected by the Anti-Terrorist Squad of the Maharashtra State against all accused persons was reflecting that the accused persons were members of Students Islamic APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc Movement of India which is a terrorist organisation as defined by Section 2(m) of the U.A.(P) Act. They conspired with each other with criminal intention, formed an organised crime syndicate and committed illegal acts with illegal means with object of promoting insurgency and to overthrow the government. By exploding four bombs at two sites i.e. Mushawarat Square as well as Hamidia Masjid and Bada Kabrastan, they caused murder of 31 persons and caused injuries to 312 persons. By use of violence, they waged war against government and civic authorities by striking terror causing destruction of life and disruption of tranquility.

(e) Accusation made by investigating agency i.e. the Anti-

Terrorist Squad against accused named above are to the following effect :

On 1st February 2003, accused no.6 Shaikh Mohd. Ali Alam Anamat Ali Shaikh went to Pakistan and had undergone terrorist training. He also sent accused no.2 Shabbir Ahmed APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc Masiullah to Pakistan for undergoing terrorist training. In May 2006, after marriage ceremony of accused no.1 Noorul Huda Samsudoha, there was meeting of accused persons and it was decided to carry out bomb blast to infuriate muslims for causing riots. This meeting was followed by several meetings at Mumbai for chalking out plan for committing subversive activities. In the meeting held in third week of July 2006, accused no.2 Shabbir Ahmed Masiullah persuaded accused no.6 Shaikh Mohd. Ali Alam Anamat Ali Shaikh to make arrangements for providing material to assemble

bombs. Accused no.6 Shaikh Mohd.

Ali Alam Anamat Ali Shaikh and accused no.7 Aasif Khan Bashir Khan @ Junaid @ Abdulla then procured entire material including 20 kilograms RDX for assembling bombs and supplied it to accused no.2 Shabbir Ahmed Masiullah who in turn stored it in his godown at Malegaon. Then, in fourth week of July 2006, two Pakistan nationals including wanted accused Muzammil gave guidance to other accused persons for assembling these bombs. This was done at the APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc godown of accused no.2 Shabbir Ahmed Masiullah. Bombs were assembled by using RDX, ammonium nitrate, lead and iron splinters at godown of accused no.2 Shabbir Ahmed Masiullah. Electric circuits of the IED were used in assembling bombs and it was decided to explode the bombs on the busy day of Shab-e-barat falling on Friday of September 2006 for causing maximum impact. Bicycles were purchased for conducting this operation from the Hindu shop owners.

(f) The charge-sheet of the Anti-Terrorist Squad is further reflecting the following facts :

On 7th September 2006, there was meeting of accused persons. However, as accused no.2 Shabbir Ahmed Masiullah was arrested in August 2006 by Mumbai Police, he was not present in the said meeting. In that meeting, responsibility was given to wanted accused Munnawar Ahmed Mohammed Ahmed to purchase bicycles from Hindu shop owners. It was decided to keep bombs on bicycles and APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc to carry out the explosion of those bombs at Hamidia Masjid and Bada Kabrastan as well as Mushawarat Square. On 8th September 2006, accused no.5 Dr.Farogh Iqbal Ahmed Magdumi, accused no.12 Munnawar Ahmed Mohammed Ahmed etc. directed accused no.1 Noorul Huda Samsudoha, accused no.3 Raees Ahmed Rajjab Ali Mansuri, wanted accused Riyadh Ahmed Shafi Ahmed and two unknown persons to place three bombs at Hamidia Masjid and Bada Kabrastan. Two bomb laden boxes and one bicycle on which third bomb bag was fixed was provided to them. Accused no.1 Noorul Huda Samsudoha parked bicycle at the parking lot. Accused no.3 Raees Ahmed Rajjab Ali Mansuri hung the bag of bombs on entrance gate of Hamidia Masjid. Wanted accused no.10 Riyadh Ahmed Shafi Ahmed and two others placed the bomb on the wall opposite to Wazu khana of the Masjid. In a similar way, accused no.8 Mohd. Jahid Abdul Majjid Ansari, accused no.9 Abrar Ahmed Gulam Ahmed with wanted accused no.11 Ishtiyahq Ahmed Mohd. Issaq went to Mushawarat Square with another bicycle on APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc which another bomb/IED was placed. Accused no.8 Mohd. Jahid Abdul Majjid Ansari and wanted accused no.11 Isthiyaq Ahmed Mohd. Issaq parked the bicycle having bomb/IED next to the electric pole at Mushawarat Square. Thereafter, the bombs exploded causing death of several humans apart from injury to several people.

(g) The charge-sheet filed by the Anti-Terrorist Squad was further reflecting the fact that on 12 th September 2006, there was meeting between the accused persons and it was decided to plant a fake bomb containing traces of explosives at the Mohammadia Masjid for worsening public order.

Accordingly, the fake bomb prepared by mixing quantity of the RDX with the soil at the godown of accused no.2 Shabbir Ahmed Masiullah came to be planted at the window ventilator of the shopping complex of Mohammadia Masjid by accused no.1 Noorul Huda Samsudoha with assistance of two unknown persons. This fake bombs came to be detected by police, resulting in registration of yet another crime.

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(h) During course of investigation, the Anti-Terrorist Squad seized mud, three pieces of wire, two cells etc. from the spot of the incident on 13th September 2006 and sent these articles to the Forensic Science Laboratory at Nashik. On 19th September 2006, six samples of soil from godown of accused no.2 Shabbir Ahmed Masiullah were sent to the Forensic Science Laboratory. Traces of RDX i.e. cyclonite were detected in one sample. The Forensic Science Laboratory reported that earth samples from the spot and sample from godown are same. On 29 th September 2006, samples of black and white spots from wooden bed of accused no.6 Shaikh Mohd. Ali Alam Anamat Ali Shaikh came to be collected and seized. The Forensic Science Laboratory reported presence of traces of RDX, ammonium nitrate and charcoal in those samples. Forensic expert opined that RDX, ammonium nitrate and fuel oil was used for explosion at Malegaon. Accordingly, relying on statements of witnesses examined by it as well as forensic evidence collected during investigation, the charge-sheet APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc was presented by the Anti-Terrorist Squad, of which the cognizance was taken by the concerned Special court.

TRANSFER OF INVESTIGATION TO THE CBI ON 5th FEBRUARY 2007 AND INVESTIGATION BY CBI LEADING TO FILING FURTHER REPORT ON 4th APRIL 2011

(i) The record shows that the Central Bureau of Investigation (hereinafter referred to as CBI for the sake of brevity), in pursuant to the notification dated 5 th February 2007 of the Central Government and consent given by the State Government on 11th January 2007, started further investigation of the case pertaining to the bomb blasts at Malegaon from 13th February 2007. The CBI produced report from the Forensic Science Laboratory received after filing of the charge-sheet by the Anti-Terrorist Squad and also placed on record sanction to prosecute accused persons. The CBI, along with the supplementary charge-sheet, APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc produced a Compact Disc containing intercepted conversation of accused persons. Voice sample of accused no.8 Mohd. Jahid Abdul Majjid Ansari was forwarded by the CBI to the Forensic Science Laboratory, which reported that the questioned voice and the sample voice of accused no.8 Mohd. Jahid Abdul Majjid Ansari are similar. That Compact Disc with opinion of the forensic expert was produced with the supplementary charge-sheet. Statement of Abrar Ahmed Gulam Ahmed came to be recorded. Other evidence collected by the Anti-Terrorist Squad was also verified by the CBI and accordingly, supplementary

charge-sheet against the very same accused persons came to be presented on 11th February 2010 by the CBI.

TRANSFER OF INVESTIGATION TO THE N.I.A. ON 4th APRIL 2011

(j) After filing of the supplementary charge-sheet by the CBI, on 4th April 2011, the Government of India directed further investigation of the Malegaon bomb blasts case by the NIA APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc by resorting to its power under Section 6(5) of the NIA Act. Accordingly, RC No.3 of 2011 came to be registered by the NIA on 6th April 2011 for commencing further investigation and ultimately, the NIA filed the supplementary charge-sheet against totally different accused persons out of which four accused/appellants in these appeals are challenging the order rejecting their bail applications by the learned Special court under the NIA Act. The NIA has filed charge-sheet against the new accused persons in respect of the very same incident for offences punishable under Sections 302, 307, 324, 325, 326, 427, 436, 295 read with 120B and 153A of the Indian Penal Code, under Sections 15, 16 and 18 of the U.A.(P) Act as well as under Sections 3, 4, 5 and 6 of the Explosive Substance Act and under Sections 6A and 9B of the Explosives Act. The NIA has not resorted to the penal provisions of the MCOC Act and the Passport Act. The charge-sheet in the form of supplementary charge-sheet came to be filed by the NIA by giving clean chit to the persons arraigned as accused by the Anti-Terrorist Squad of APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc the Maharashtra Police and the CBI. Accused persons arraigned by the NIA in its charge-sheet dated 22 nd May 2013 are as under :

(i) Manohar son of Ramsingh Narwaria @ Digaria @ Sumer Thakur (accused no.14/appellant herein)

(ii) Rajendra Vikramsingh Chaudhari @ Dashrath @ Samander @ Bada Yadav @ Laxman Das (accused no.15/appellant herein)

(iii) Dhan Singh Shiv Singh @ Ram Lakhan Das Maharaj @ Subhas @ Lakhan (accused no.16/appellant herein)

(iv) Lokesh Sharma @ Kalu Pandit @ Ajay Tiwari (accused no.17/appellant herein)

(v) Sunil Joshi (accused no.18 - deceased)

(vi) Ramchandra Gopal Singh (wanted accused no.19)

(vii) Ramesh Venkat Mahalkar @ Amit @ Prince (wanted accused no.20)

(viii) Sandip Dange (wanted accused no.21)
APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc INVESTIGATION BY THE
N.I.A. RESULTING IN FILING OF THE FURTHER REPORT ON 22nd MAY 2013

(k) Perusal of the charge-sheet dated 22 nd May 2013 of the NIA shows that it has come to the conclusion that evidence collected by the previous investigating agencies is not worth reliance. The NIA brushed aside evidence collected by the Anti-Terrorist Squad of Maharashtra State and the CBI.

During the course of investigation by the Anti-Terrorist Squad of Maharashtra Police, resorting to the provisions of MCOC Act and following the procedure prescribed therein, confessional statements of accused persons came to be recorded. The NIA reported that those accused persons have stated that their confessions were recorded under duress and pressure. It has stated that accused no.9 Abrar Ahmed Gulam Ahmed, whose confession was recorded by the Anti-Terrorist Squad and it was later confirmed before the Chief Metropolitan Magistrate on 20 th December 2006, was subsequently retracted by the said accused. The NIA APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc further stated in its charge-sheet that panch witnesses C3 and C4 who had witnessed lifting of soil samples from godown of accused no.2 Shabbir Ahmed Masiullah, denied their presence at the time of collecting samples. The NIA further reported that from 12.15 hours to 20.00 hours of 13th September 2006, presence of witness C3 was shown at the spot of seizure of fake bomb but at 16.30 hours he was shown to be present at panchnama regarding seizure of clothes. Witness A369 made his statement before the Magistrate under Section 164 of the Code of Criminal Procedure. He witnessed preparation of bombs. However, when he was examined by the NIA, this witness retracted and said that his statement was recorded under duress. Accused no.8 Mohd. Jahid Abdul Majjid Ansari, who was one of the planter of bomb, told the NIA that he was present on that day at Village Fulsawangi in Yavatmal District. The NIA has stated in its charge-sheet that twelve persons from Fulsawangi village affirmed presence of accused no.8 Mohd. Jahid Abdul Majjid Ansari at Village Fulsawangi. According APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc to the NIA, accused no.2 Shabbir Ahmed Masiullah was in judicial custody on 8th September 2006 i.e. the day of bomb blast at Malegaon. With this, it concluded that real culprits are the accused newly arraigned by it as accused no.14 to accused no.21.

(l) The NIA sought to rely on evidence collected by it by stating that on 18th December 2010 one Asimanand made confession in Mecca Masjid blast case to the effect that deceased accused Sunil Joshi told him that bomb blast at Malegaon is handy work of his boys. Said Asimanand had spoken about meeting held in June 2006 at the house of Bharat Rateshwar of Valsad. Said Asimanand confessed that he suggested that Malegaon be chosen for bomb blast as it has 86% Muslim population. Thereafter, deceased accused no.18 Sunil Joshi told him that during Diwali of 2006, his men exploded the bombs at Malegaon.

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(m) According to the NIA, accused persons arraigned by it entered in criminal conspiracy at Bagli in Dewas District of Madhya Pradesh. Training in arms and assembling/making of bombs/IED came to be imparted under supervision of deceased accused no.18 Sunil Joshi for committing terrorist act in Muslim religious places. In a house at Indore, equipments required for preparing IED were stored by wanted accused no.19 Ramchandra Gopal Singh and wanted accused no.20 Ramesh Venkat

Mahalkar @ Amit @ Prince.

Bombs were prepared by wanted accused no.19 Ramchandra Gopal Singh, wanted accused no.20 Ramesh Venkat Mahalkar @ Amit @ Prince and accused no.17 Lokesh Sharma @ Kalu Pandit @ Ajay Tiwari under guidance of wanted accused no.21 Sandip Dange. Reconnaissance was conducted thrice at Malegaon before 8 th September 2006 for selecting the place. Then, on 7 th September 2016, wanted accused no.19 Ramchandra Gopal Singh with accused no.14 Manohar Narwaria @ Digaria @ Sumer Thakur, accused no.15 Rajendra Vikram Singh APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc Chaudhari @ Dashrath @ Samander @ Bada Yadav @ Laxman Das and accused no.16 Dhan Singh Shiv Singh @ Ram Lakhan Das Maharaj @ Subhas @ Lakhan (appellants) left Indore with four bombs and reached Malegaon in the morning hours of 8th September 2006.

(n) According to the NIA, bombs were planted and exploded in Malegaon in the following manner :-

Accused no.14 Manohar Narwaria @ Digaria @ Sumer Thakur and accused no.15 Rajendra Vikram Singh Chaudhari @ Dashrath @ Samander @ Bada Yadav @ Laxman Das purchased two bicycles of Hero Jet make and Atlas make by posing themselves respectively as Sumer Thakur and Badal Yadav from the shopkeepers at Malegaon. Then one bag with two bombs came to be hung by accused no.16 Dhan Singh Shiv Singh @ Ram Lakhan Das Maharaj @ Subhas @ Lakhan on the bicycle of accused no.15 Rajendra Vikram Singh Chaudhari @ Dashrath @ Samander @ Bada Yadav @ Laxman Das. They both then went to Mushawarat APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc Square, Malegaon. Accused no.15 Rajendra Vikram Singh Chaudhari @ Dashrath @ Samander @ Bada Yadav @ Laxman Das kept one bomb/IED in metallic box and fixed that box on the carrier of the bicycle. That bicycle was then parked near the electric pole at Mushawarat Square.

Accused no.15 Rajendra Vikram Singh Chaudhari @ Dashrath @ Samander @ Bada Yadav @ Laxman Das then kept the bag containing one bomb/IED on the tree inside Hamidia Masjid and Bada Kabrastan.

(o) According to the charge-sheet filed by the NIA against the newly added accused, wanted accused no.19 Ramchandra Gopal Singh and accused no.14 Manohar Narwaria @ Digaria @ Sumer Thakur went to the Hamidia Masjid and Bada Kabrastan with two bombs in a bag hung on the bicycle. A box containing one bomb was then fitted in the bicycle and it was parked inside the Hamidia Masjid and Bada Kabrastan. Another bomb was kept in the bag and it was hung on the main gate of the Hamidia Masjid by APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc accused no.14 Manohar Narwaria @ Digaria @ Sumer Thakur. After planting the bombs in this manner, they went to Jalgaon and from there they went to Indore.

(p) According to the charge-sheet filed by the NIA, on 8 th September 2006, accused no.17 Lokesh Sharma @ Kalu Pandit @ Ajay Tiwari called media house from the PCO at Delhi and informed that "Dharmasena" takes the responsibility of the bomb blast at Malegaon. The NIA has further stated in the charge-sheet that on 28 th January 2013, in the Test Identification Parade, both accused persons were identified.

(q) In its charge-sheet, the NIA mentioned that vide Spot panchnama, Azad Nagar Police Station seized frame of Atlas bicycle bearing No.MF 86 9215 from Mushawarat Square.

It was purchased by accused no.15 Rajendra Vikramsingh Chaudhari @ Dashrath @ Samander @ Bada Yadav @ Laxman Das in the name of Badal Yadav. Similarly, a APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc broken frame of Hero Jet bicycle bearing no.XT 7066 came to be seized by police from Hamidia Masjid and Bada Kabrastan. It was purchased by accused no.14 Manohar Narwaria @ Digaria @ Sumer Thakur in the name of Sumer Thakur.

(r) In its charge-sheet, the NIA averred that the accused persons had disclosed locations where they got down at Malegaon, places where bombs were planted, place from where they board bus for Jalgaon. They had also identified training camp at Bagli and spot where demonstrations were given. With this evidence, charge-sheet came to be filed by attributing the guilt on the newly added accused no.14 to accused no.17 as well as wanted accused no.19 to accused no.21.

(s) After arrest of Asimanand in separate offence and after recording his confessional statement, original accused nos.1 to 9 preferred bail applications which was not opposed by APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc the NIA and then they were ordered to be released on bail. Subsequently, those accused persons came to be discharged.

(t) Appellants/accused nos.14 to 17 then preferred applications for bail before the learned Special court under the NIA and those applications came to be rejected by the impugned order dated 6th June 2016.

SUBMISSIONS AT BAR AND CASE LAW PRESSED IN SERVICE ON BEHALF OF PARTIES 3 We have heard the learned counsel appearing for appellants/accused. We have also heard the learned Special Public Prosecutor appearing for the NIA. On behalf of the intervenor, Mr.B.A.Desai, learned senior counsel so also Mr.Sharif Shaikh, learned counsel, advanced arguments. However, after conclusion of his arguments, with a reason of conflict of interest, Mr.Sharif Shaikh, learned counsel, requested for discharge from appearing for the intervenor and that is how, Mr.B.A.Desai, learned senior counsel advanced further arguments on behalf of the intervenor.

APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc 4 It is argued on behalf of appellants/accused persons that appellants/accused persons are behind bars as under-trial prisoners from the year 2012-2013. They have suffered under- trial detention for a period more than 6½ years and as yet the trial has not commenced. Therefore, they are entitled for bail. It is also urged on behalf of appellants/accused persons that restriction as defined in Section 43D of the

U.A.(P) Act is not applicable to the case in hand as due to filing of the charge-sheet by the Anti-Terrorist Squad and supplementary charge-sheet by the CBI against original accused persons, there are no reasonable grounds for believing that accusations against the present appellants, who have been arraigned as accused by the NIA and that too after a period of about six years from the date of the incident, are prima facie true. It is submitted on behalf of appellants/accused persons that infact transfer of the case for further investigation to the NIA by the Union of India is per-se malafide, when scientific investigation was conducted by two premiere investigation agencies by the State i.e. Anti-Terrorist Squad of the State of Maharashtra and CBI. Investigation carried out by these agencies APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc immediately after the incident is more reliable, credible and based upon scientific process. The learned counsel appearing for appellants/accused persons also urged that, infact, after entrustment of investigation to the NIA vide order dated 4 th April 2011 by the Union of India, nine accused alleged to be members of the terrorist organization named SIMI arraigned as accused by the Anti-Terrorist Squad and the CBI preferred fresh bail applications on 1st October 2011 and the then Home Minister of the Central Government made a statement on 1st November 2011 that the NIA will not oppose bail applications of those accused. Record reveals that the NIA has filed a say not opposing the bail applications of nine original accused i.e. alleged members of the SIMI on 4th November 2011 and subsequently they were granted bail by the Special court under the NIA Act. Thereafter, they are also discharged. Say granting no objection to their bail by the NIA was filed on 4th November 2011 when appellants/accused persons were not even arrested in the subject trial.

APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc 5 It is further argued that confession of Asimanand, who is neither an accused nor a witness in this case, is not believed by other courts where it was used and the same was discarded by those trial courts. The learned counsel appearing for appellants/accused persons further argued that though there could be multiple investigations leading to filing of multiple charge-sheets, the Investigator has no right to supercede the final report submitted earlier by filing supplementary charge-sheet and such powers can be exercised only by superior courts in exercise of powers conferred by Section 482 of the Code of Criminal Procedure as well as under Articles 226, 136 and 32 of the Constitution of India. In the case in hand, the NIA, which filed its supplementary charge-sheet, has virtually overruled the scientific investigation done by the Anti-Terrorist Squad and the CBI reflected in the original charge-sheet of the Anti-Terrorist Squad and the supplementary charge-sheet of the CBI. In this view of the matter, it cannot be said that there are reasonable grounds for believing that accusations against appellants/accused persons are prima facie true. The learned counsel further argued that the APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc Notification dated 4th April 2011 directing investigation to the NIA by the Central Government makes it clear that investigation of offences relating to penal clauses of U.A.(P) Act were not alleged against the accused, nor were they given for investigation. 6 The learned Special Public Prosecutor appearing for the NIA opposed the appeals by contending that there is evidence regarding discovery and recovery under Section 27 of the Evidence Act. Appellant/accused no.14 Manohar Narwaria led the Investigator to the bus stand, Hamidia Masjid and Bada Kabrastan and pointed out the place where the incident took place. Discovery Panchnama reveals motive and actual place of planting bombs. The learned Special Public Prosecutor further argued that appellant/accused no.14 Manohar Narwaria led the Investigator to a place known as Bagli in Dewas District of Madhya Pradesh State and showed the field where

demonstration of bomb making and explosion was given and where training was imparted. Samples of soil were seized from that place. Appellant/accused no.14 Manohar Narwaria also led the Investigator to Jalgaon bus APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc stand from where he left Malegaon. This accused had also demonstrated use of Hero Jet bicycle purchased by him for planting the bomb. He is identified in the Test Identification Parade by the witnesses as a person who purchased Hero Jet bicycle on 8th September 2006. With these arguments, the impugned order is supported by the learned Special Public Prosecutor.

7 The learned Special Public Prosecutor further argued that appellant/accused no.17 Lokesh Sharma @ Kalu Pandit @ Ajay Tiwari made a discovery statement and led the Investigator to Bagli Village and pointed out various places from where soil came to be collected and seized. According to the learned Special Public Prosecutor accused no.15 Rajendra Vikram Singh Chaudhari @ Dashrath @ Samander @ Bada Yadav @ Laxman Das pointed out place of preparation and planting of bombs at Malegaon and showed the place from where the bicycle was purchased as well as the place at Mushawarat Square and Hamidia Masjid and Bada Kabrastan where bombs were planted. This accused also disclosed APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc the place in Bagli Village in Dewas District from where sample of soil came to be collected as well as other places. He also pointed out the bus stand from where he boarded bus at Jalgaon for going to Indore. This appellant/accused had purchased Atlas bicycle in the name of Badal Yadav and he has been identified as purchaser of the bicycle by the witnesses. Both the bicycles were used for planting bombs. According to the learned Special Public Prosecutor, appellant/accused no.16 Dhan Singh Shiv Singh @ Ram Lakhan Das Maharaj @ Subhas @ Lakhan had disclosed places and movements of accused persons till planting of bombs. He also led the Investigator to Bagli Village where training for assembling of bombs and its explosion was given. Samples of soil came to be seized from that place. This accused has also pointed out the place from where they boarded bus from Malegaon for going to Jalgaon and thereafter to Indore.

8 According to the learned Special Public Prosecutor, seized samples of soil from the field in Bagli Village were sent for forensic examination and nitrate radicals were found in the seized APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc soil. The learned Special Public Prosecutor argued that in view of restrictions as provided in Section 43D of the U.A.(P) Act and in view of the judgment of this court in the matter of Pragya Singh Chandrapal Singh Thakur and Ors. vs. State of Maharashtra 1 appellants/accused persons are not entitled for bail. 9 We have heard the learned APP appearing for the State of Maharashtra.

10 As stated in foregoing paragraphs, we have heard Shri Sharif Shaikh, learned counsel appearing for the intervenor and subsequently on his recusal, we have heard Shri B.A.Desai, learned senior counsel appearing for the intervenor at great length of time. It is argued on behalf of the intervenor/victim of the crime in question that there is presumption against appellants/accused persons as envisaged by Section 43E of the U.A.(P) Act, as there is definite evidence regarding involvement of accused persons. Residue of nitrate was found in the soil seized at their instance. By virtue of Section 43E and 43D of the U.A.(P) 1 MANU/MH/0773/2017 APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc Act, normal law for grant of bail, as prescribed by the Code of Criminal Procedure, is dispensed with and as in the case in hand, there are

reasonable grounds for believing that accusations against appellants/accused persons are prima facie true, they are not entitled for grant of bail. The impugned judgment is, as such, perfectly correct. On behalf of the intervenor/victim of the crime in question it is further urged that after blast, by Seizure Panchnama of the same day, part of bicycle frames came to be seized and statement of concerned witnesses were recorded on the very same day. There is no scope to infer that identification of the accused is not proper by those witnesses because as a result of blast occurring on the day on which bicycles were sold, identity of purchaser of bicycles used in the blast was imprinted in brain of the witnesses involved in selling of bicycles to the accused persons. There is no reason to distrust the investigation by the NIA. Appellants/accused persons took training, shared common intention, indulged in conspiracy and caused blasting of bombs, taking precious human lives and causing injuries to several innocent persons. In such a situation, according to the APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc intervenor/victim of the crime in question, trial can be directed to be expedited, as truthfulness of the Test Identification Parade can be considered at the trial. Our attention was drawn to the statement of witnesses involved in selling bicycles allegedly to appellants/accused persons and Memorandum of Test Identification Parade.

11 On behalf of intervenor/victim of the crime in question, reliance is placed on following judgments :

SR. NO.	NAME OF PARTIES AND COURTS	CITATION
1	National Investigation Agency vs. Zahoor Ahmad Shah Watali by the Hon'ble Supreme Court	MANU/SC/0458/2019
2	Redaul Hussain Khan vs. National Investigation Agency by Division Bench of Gauhati High Court	2013(1) GLT 880
3	Jayanta Kumar Ghosh and Anr. Vs. State of Assam and Ors. by Division Bench of Gauhati High Court	2010(4) GLT 1
4	Bharat Mohan Rateshwar vs. The National Investigation Agency by Division Bench of Rajasthan High Court	2013(4) RLW 3385(Raj.)
5	Ashringdaw Warisa @ Partha Warisa vs. National Investigation Agency and Ors. by Division Bench of Gauhati High Court	2019(2) GLT 1

APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc 6 J. K. International vs. State, Govt. (2001) 3 SCC 462 of NCT of Delhi and Ors. by the Hon'ble Supreme Court 7 Santu Mahto vs. State of

Jharkhand AIR 2014 Jhar 108 by Jharkhand High Court 8 Mehboob Ali and Ors. vs. State of (2016) 4 SCC 640 Rajasthan by the Hon'ble Supreme Court With the aid of these judgments, it is argued that the intervenor, being father of the person who died in the bomb blast, has locus to participate in the proceeding. The learned senior counsel further argued that it is settled law that material collected by the investigating agency in respect of accusations leveled against accused persons must prevail until contradicted and overcome or disapproved by other evidence and by virtue of such provision in Section 41D of the U.A.(P) Act, appellants herein are not entitled to be released on bail. Similarly, it is also urged that confessional statement of appellants/accused persons resulted in discovery of fact and this evidence constitute reasonable ground for believing that allegations against appellants/accused persons are prima facie true.

APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc CONSIDERATIONS 12 We have considered the rival submissions and also perused the record and proceedings made available to us. These are appeals under Section 21 of the NIA Act challenging the order dated 6th June 2016 passed by the learned Special Judge under the NIA Act rejecting bail applications moved by all appellants/accused persons nos.14 to 17. Perusal of the impugned common order rejecting bail applications of all accused persons shows that the learned Special Judge relied on statements of witnesses who deposed about sale of two bicycles - one of Hero Jet make and another of Atlas make to appellant/accused no.14 Manohar Narwaria @ Digaria @ Sumer Thakur and appellant/accused no.15 Rajendra Vikram Singh Chaudhari @ Dashrath @ Samander @ Bada Yadav @ Laxman Das under the receipts issued in some other names allegedly told by them. The Special Judge also relied on identification of these two appellants/accused persons during the Test Identification Parade conducted on 28th January 2013 at the instance of the NIA. Disclosure statement of appellant/accused no.14 Manohar Narwaria @ Digaria @ Sumer Thakur and appellant/accused no.15 Rajendra Vikram Singh Chaudhari @ Dashrath @ Samander @ Bada Yadav @ Laxman Das is relied upon by the learned Special Judge. It is held that these appellants/accused persons pointed out the shops from where bicycles were allegedly purchased by them and they have also pointed out proprietor of that shop, which is evidence of conduct on their part. With this, the learned Special Judge concluded that there is prima facie evidence collected by the NIA to show that appellants/accused persons along with absconding accused prepared bombs, planted those bombs on 8th September 2006 and caused explosion due to which 31 persons lost their lives and more than 312 were injured. On the basis of this material, it is held that there are reasonable grounds for believing that accusations against appellants/accused persons are prima facie true and accordingly, their bail applications came to be rejected.

13 At this juncture, it is apposite to reproduce provisions of Section 43D(5) of the U.A.(P) Act which reads thus :

APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc "Section 43D - Modified application of certain provisions of the Code.

(1)

(2)

(3)

(4)

(5) Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release: Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is *prima facie* true."

Similarly, Section 43E of the U.A.(P) Act provides that if in a prosecution for an offence under Section 15 of the said Act, it is proved that the arms, explosives or any other substances specified APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc in the said section were recovered from the possession of the accused and it is further proved that there is there is reason to believe that material of similar nature were used in the commission of such offence, then the court shall presume, unless the contrary is shown, that the accused has committed such offence. This mandatory presumption comes into play after recording of evidence in the trial and that too, on proof of recovery of explosives from the possession of the accused. 14 Now let us take a brief resume of the settled legal position while dealing with application for bail for offences punishable under the U.A.(P) Act. The learned senior counsel appearing for the intervenor/victim of the crime in question has rightly relied on judgment in the matter of Zahoor Ahmad Shah Watali (*supra*) wherein the Hon'ble Apex Court has held that the expression "*prima facie* true" would mean that the materials/evidence collected by the Investigating Agency in reference to the accusation against the concerned accused in the first information report must prevail until contradicted or APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc overcome or disapproved by other evidence. In the matter of Redaul Hussain Khan (*supra*) it is held thus in paragraph 139 :

"139 The logical conclusion would, therefore, be that in a case, investigated by the NIA, when the Special Court forms an opinion that there are reasonable grounds for believing that the accused has committed an offence punishable with death or imprisonment for life, the Special Court would have no jurisdiction to grant bail to such an accused except as may be provided by law. In addition thereto, the Special Court shall also not be able to release an accused on bail if the Court, on perusal of the case diary or the report made under Section 173 of the Code of Criminal Procedure, is of the opinion that there are reasonable grounds for believing that the accusation, against such person, as regards commission of offence or offences, under Chapter IV and/or Chapter VI of the Act of 2008, is *prima facie* true."

When the word "prima facie" is coupled with the word "true", it implies that the court has to undertake an exercise of cross- checking the truthfulness of the allegations made in the APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc complaint, on the basis of the materials on record. If the court finds, on such analysis, that the accusations are inherently improbable or wholly unbelievable, it may be difficult to say that a case, which is "prima facie true", has been made out. In doing this exercise, the court has no liberty to come to a conclusion, which may virtually amount to an acquittal of the accused. Mere formation of opinion by the court, on the basis of the material placed before it, is sufficient. In the matter of Jayanta Kumar Ghosh (supra) the Hon'ble Division Bench of Gauhati High Court interpreted provisions of Section 41D(5) of the NIA Act and exhaustively dealt with meaning of words "prima facie, true, and reasonable ground". Paragraphs 69, 74, 78 and 82 of the said judgment can be quoted with advantage.

"69 From the meaning, attributed to the word "prima facie", by various dictionaries, as indicated above, and the observations, made by the Supreme Court, in its decisions, in *The Management of the Bangalore Woollen Cotton and Silk Mills*, (supra) what clearly follows is that prima facie is a Latin word, which means, At first sight or glance or on its face and in common APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc law it is referred to as "the first piece of evidence of fact" i.e., considered true unless revoked or contradicted."

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

"78 The expression, "reasonable ground", means something more than prima facie ground, which contemplates a substantially probable case for believing that the accused is guilty of the APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc offence(s) alleged. Under Section 437 Cr.P.C. an accused is not to be released on bail if there appear reasonable grounds for believing that he has been guilty of an offence, which is punishable with death or imprisonment for life. Under Section 437 Cr.P.C., the burden is on the prosecution to show existence of reasonable ground for believing that the accused is guilty. Hence, the presumption of innocence, which always runs in favour of the accused, is displaced only on the prosecution showing existence of reasonable ground to believe that the accused is guilty. [See *Union of India v. Tharmssharasi*, (1995) 4 SCC 190 and *Union of India v. Shiv Shankar Kesari*, (2007) 7 SCC 798.]"

"82 In short, thus, while the Special Court, constituted under the NIA Act, does not suffer from the limitations, which the TADA courts had by virtue of the provisions of Section 20(8), read with Section 20(9) thereof, the fact remains that the Special Court, not being a court of Sessions or of the High Court, cannot exercise the powers of the Court of Sessions or High Court under Section 439 Cr.P.C. Hence, while dealing with APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc the scheduled offences, covered by the proviso to sub-Section (5) of Section 43D, Special Court, constituted under the NIA Act, would suffer not only from the limitations imposed by clauses (i) and (ii) of sub-Section (1) of Section 437, but also by the proviso to sub-Section (5) of Section 43D of the UA(P) Act, 1967, wherever the provisions, contained in the proviso to Section 43D(5), would be applicable."

In the matter of Bharat Mohan Rateshwar (supra) and Ashringdaw Warisa @ Partha Warisa (supra) while reiterating the similar position of the law in this regard, it is reiterated that in a case, investigated by the agency, if the Special Court forms an opinion that there are reasonable grounds for believing that the accused has committed an offence punishable with death or imprisonment for life, the Special Court would have no jurisdiction to grant bail.

15 As against this, on behalf of appellants/accused persons, reliance is placed on judgment in the matter of Shaheen APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc Welfare Association vs. Union of India 2. Paragraphs 9 and 10 of the judgment need reproduction. Those read thus :

"9 The petition thus poses the problem of reconciling conflicting claims of individual liberty versus the right of the community and the nation to safety and protection from terrorism and disruptive activities. While it is essential that innocent people should be protected from terrorists and disruptionists, it is equally necessary that terrorists and disruptionists are speedily tried and punished. In fact the protection to innocent civilians is dependent on such speedily trial and punishment. The conflict is generated on account of the gross delay in the trial of such persons. This delay may contribute to absence of proper evidence at the trial so that the really guilty may have to be ultimately acquitted. It also causes irreparable damage to innocent persons who may have been wrongly accused of the crime and are ultimately acquitted, but who remain in jail for a long period pending trial because of the stringent provisions regarding bail under TADA. They suffer severe hardship and their families may be ruined."

2 1996 (2) SCC 616 APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc "10 Bearing in mind the nature of the crime and the need to protect the society and the nation, TADA has prescribed in Section 20(8) stringent provisions for granting bail. Such stringent provisions can be justified looking to the nature of the crime, as was held in Kartar Singh's case (supra), on the presumption that the trial of the accused will take place without undue delay. No one can justify gross delay in disposal of cases when undertrials perforce remain in jail, giving rise to possible situations that may justify invocation of Article 21."

In that matter the Hon'ble Apex Court had divided TADA detenus in four classes and held that hardcore under trials whose release would prejudice the prosecution case and their liberty may prove to be a menace to the society in general, and to the complainant and prosecution witnesses in particular, do not deserve to be released on bail, but other classes of TADA detenus who are languishing in jail since long, deserve to be released on bail despite stringent provisions of Section 20(8) and 20(9) of the TADA Act. The detenus falling in other classes were directed to be APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc released on bail, if they have been in jail for 3 years and 2 years respectively. Other under trials TADA detenus whose overt act or involvement directly attracted Section 3 and/or Section 4 of the TADA Act, were directed to be released on bail, if they have been in prison for 5 years or more, and their trial is not likely to be completed within the next six months, unless the court comes to the conclusion that their antecedents are such, that releasing them may be harmful. It is worthwhile to note here that stringent provisions of Section 20(8) of the TADA Act provide that a person accused of offences punishable under the TADA Act cannot be released on bail, if the court is satisfied that there are reasonable grounds for believing that he is guilty of such offence. In the matter of Hussain and Another vs. Union of India 3 it is held that period of deprivation pending trial/appeal cannot be unduly long and timely delivery of justice is a part of human rights. The learned counsel for appellants/accused persons relied on Lieutenant Colonel Prasad Shrikant Purohit vs. State of Maharashtra⁴ which was another case of bomb blast at Malegaon, 3 2017(5) SCC 702 4 2018 (11) SCC 458 APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc occurred on 29th September 2008. In that matter, the appellant was in prison for about 8 years and 8 months. After filing of the charge-sheet by the Anti-Terrorist Squad Mumbai, further investigation of that case was conducted by the NIA as per the order of the Government of India. Relevant portion of paragraph 32 of the said judgment needs reproduction. It is held thus in paragraph 32 :

"32 In view of the foregoing discussion, we are of the considered opinion that there are variations in the charge sheets filed by ATS Mumbai and NIA. Further, the appellant herein, who was at the relevant time was an Intelligence officer of the Indian Army has refuted the claim of conspiracy on the ground of Intelligence inputs which he informed to his superior officers as well and the alleged role of ATS officials in the planting of RDX at the residence of A-11 clearly indicate the fresh grounds which persuade the appellant herein to take a view different from the one taken in the earlier applications. As mentioned earlier, at the stage of granting bail, a detailed examination of evidence and elaborate documentation of the merit of the case need n o t b e u n d e r t a k e n . H o w e v e r , APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc keeping in view the fact that NIA has submitted the supplementary charge-sheet which is at variance with the charge-sheet filed by the ATS and that the trial is likely to take a long time and the appellant has been in prison for about 8 years and 8 months, we are of the considered view that the appellant has made out a prima facie case for release on bail and we deem it appropriate to enlarge the appellant herein on bail, subject to the following conditions."

In the said matter also, apart from similar provisions of Indian Penal Code, U.A.(P) Act and Explosive Substance Act, penal provisions of MCOC Act were invoked against the appellant/accused therein.

16 In the case in hand, undisputedly, after carrying out detailed investigation, the Anti-Terrorist Squad of the State Police submitted a report as envisaged by sub-Section (2) of Section 173 of the Cr.P.C. on 21st December 2006 to the Special court under the NIA Act, which took cognizance of the said offence. Subsequent thereto, further investigation of the case was APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc entrusted to the CBI by the Central Government and accordingly, the CBI after conducting further investigation and on obtaining further evidence submitted the further report to the Special court under the NIA Act on 11 th February 2010 by endorsing and affirming investigation carried on by the Anti-Terrorist Squad, Maharashtra State. After filing of this further report in terms of Section 173(8) of the Cr.P.C. by the CBI, the Central Government vide order dated 4th April 2011 entrusted further investigation of the subject crime to the NIA which submitted further report on 22nd May 2013 by arraigning present appellants/accused persons and others as accused no.14 to accused no.21. Undisputedly, in its further report, the NIA has categorically mentioned in Clause (xvii) that evidence collected by NIA in further investigation is not in consonance with the evidence collected by previous investigating agencies.

17 In the light of this finding of the NIA in its further report, let us put on record position of law, so far as interpretation of Section 173(8) of the Cr.P.C. is concerned. Shri Niteen APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc Pradhan, learned counsel appearing for appellants/accused persons, has rightly relied on judgment of the Honourable Supreme Court in the matter of K. Chandrashekhara vs. State of Kerala and Others⁵, Babubhai vs. State of Gujarat & Others⁶ and Vinay Tyagi vs. Irshad Ali @ Deepak and Others ⁷. Perusal of these judgments makes it clear that even after submission of police report under sub-section (2) of Section 173 of the Cr.P.C. on completion of investigation, the police has right of "further investigation" under sub-section (8) of Section 173 of the Cr.P.C. but not of "fresh investigation" or "reinvestigation". The Honourable Apex Court has considered the dictionary meaning of "further" (when used as an adjective) is "additional; more; supplemental". "Further" investigation therefore is the continuation of the earlier investigation and not a fresh investigation or reinvestigation to be started ab initio wiping out the earlier investigation altogether. This conclusion is supported also by the fact that sub-section (8) clearly envisages that on completion of further investigation the investigating agency has to 5 (1998) 5 SCC 223 6 (2010) 12 SCC 254 7 (2013) 5 SCC 762 APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc forward to the Magistrate a "further" report or reports - and not fresh report or reports - regarding the "further" evidence obtained during such investigation. For better understanding of the matter, it is necessary to quote paragraphs 37 to 40 from the judgment in the matter of Babubhai (supra).

"37 This Court in K. Chandrasekhara Vs. State of Kerala & Ors. (1998) 5 SCC 223; Ramachandran Vs. R. Udhayakumar & Ors. (2008) 5 SCC 413; and Nirmal Singh Kahlon (supra); Mithabhai Pashabhai Patel & Ors. Vs. State of Gujarat (2009) 6 SCC 332; and Kishan Lal Vs. Dharmendra Bafna (2009) 7 SCC 685 has emphasised that

where the court comes to the conclusion that there was a serious irregularity in the investigation that had taken place, the court may direct a further investigation under Section 173(8) Cr.P.C., even transferring the investigation to an independent agency, rather than directing a re-investigation. "Direction of a re-investigation, however, being forbidden in law, no superior court would ordinarily issue such a direction. (Mithabhai Pashabhai Patel case, (2009) 6 SCC 332). [SCC page 337, para 13]"

APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc "38 Unless an extra ordinary case of gross abuse of power is made out by those in charge of the investigation, the court should be quite loathe to interfere with the investigation, a field of activity reserved for the police and the executive. Thus, in case of a mala fide exercise of power by a police officer the court may interfere. (vide: S.N. Sharma Vs. Bipen Kumar Tiwari & Ors. AIR 1970 SC 786)." "39 In Kashmeri Devi Vs. Delhi Administration & Anr. AIR 1988 SC 1323, this Court held that where the investigation has not been conducted in a proper and objective manner it may be necessary for the court to order for fresh investigation with the help of an independent agency for the ends of justice so that real truth may be revealed. In the said case, this court transferred the investigation to the CBI, after coming to the conclusion that investigation conducted earlier was not fair."

"40 The above referred to judgments of this Court make it clear that scheme of investigation, particularly, Section 173(8) Cr.P.C. provides for further investigation and not of re- investigation. T h e r e f o r e , i f t h e C o u r t , c o m e s t o t h e c o n c l u s i o n t h a t APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc the investigation has been done in a manner with an object of helping a party, the court may direct for further investigation and ordinarily not for re- investigation."

Thus, what is provided for by the law is "further investigation"

and not "reinvestigation" or "fresh investigation". Even superior courts are cautioned not to direct fresh or reinvestigation ordinarily.

18 In the matter of Vinay Tyagi (supra), the Honourable Supreme Court has framed two questions and answered them in paragraphs 53 and 54 of the judgment. The questions, so framed, and answers given thereto, are reproduced for better understanding in the matter.

"Question No.1 : Whether in exercise of its powers under Section 173 of the Code of Criminal Procedure, 1973 (for short, 'the Code'), the Trial Court has the jurisdiction to ignore any one of the reports, where there are two reports by the same or different investigating agencies in furtherance of the orders of a Court? If so, to what effect?

APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc Answer No.1 : The court of competent jurisdiction is duty bound to consider all reports, entire records and documents submitted therewith by the Investigating Agency as its report in terms of Section 173(2) of the Code. This Rule is subject to only the following exceptions;

a) Where a specific order has been passed by the learned Magistrate at the request of the prosecution limited to exclude any document or statement or any part thereof;

b) Where an order is passed by the higher courts in exercise of its extra- ordinary or inherent jurisdiction directing that any of the reports i.e. primary report, supplementary report or the report submitted on 'fresh investigation' or 're-

investigation' or any part of it be excluded, struck off the court record and be treated as non est."

"Question No.2 : Whether the Central Bureau of Investigation (for short 'the CBI') is empowered to conduct 'fresh'/'re-investigation' when the cognizance has already been taken by the Court of competent jurisdiction on the basis APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc of a police report under Section 173 of the Code?

Answer No.2 : No investigating agency is empowered to conduct a 'fresh', 'de novo' or 're-

investigation' in relation to the offence for which it has already filed a report in terms of Section 173(2) of the Code. It is only upon the orders of the higher courts empowered to pass such orders that aforesaid investigation can be conducted, in which event the higher courts will have to pass a specific order with regard to the fate of the investigation already conducted and the report so filed before the court of the learned magistrate."

It is, thus, clear that, the Special court cannot have any jurisdiction to ignore any of the reports but the same is duty bound to consider all reports, entire record and documents submitted by the Anti-Terrorist Squad, CBI as well as the NIA in the crime in question registered because of bomb blast at Malegaon on 8th September 2006.

APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc 19 As stated in the opening paragraph of this judgment, while reproducing facts of the case, further report dated 22 nd May 2013 of the NIA submitted to the Special court indicates that it has prima facie conducted fresh reinvestigation into the offence by taking lead from confession made by one Asimanand, who was an accused in Mecca Masjid blast case. Our attention was drawn to the judgments of the trial court where that confession was considered by the Special court for the NIA at Jaipur, Rajasthan, in Sessions Case No.2 of 2011 decided by the Additional Metropolitan Sessions Judge and Special Judge, NIA for the Hyderabad, in Special Case No.3 of 2013 decided by the learned IV Additional Metropolitan Sessions Judge cum Special Judge for NIA, in Case No.5RBT/01.07.2011/03.08.2018 decided by Special Judge for the NIA for the State of Haryana at Panchkula. Undisputedly the said confessional statement of Asimanand came to be rejected by the trial courts in those cases. Be that as it may, the Investigator from the NIA went on to examine nine persons who are allegedly members of the banned organization SIMI who were arraigned as accused by previous investigating agencies i.e.

APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc Anti-Terrorist Squad, Maharashtra State and the CBI. After examining those accused persons, the NIA reported that confessions of those accused persons were made under duress and pressure. It is worthwhile to note that confessions were recorded by the earlier investigating agency i.e. the Anti-Terrorist Squad as per provisions of the MCOC Act. The NIA, by way of fresh investigation, accepted plea of alibi of original accused no.8 Mohd. Jahid Abdul Majjid Ansari - one of the alleged planters of the bomb, by concluding that his stand that at the time of the blast he was at Village Fulsawangi in Yavatmal District, is affirmed by twelve persons of Fulsawangi. This investigating agency further concluded that Panch C3 and C4 were not present at the time of collecting samples from godown of accused no.2 Shabbir Ahmed Masiullah. By conducting reinvestigation, the NIA has reported that witness A369 has retracted his earlier statement under Section 164 of the Cr.P.C. This witness was a witness to preparation of bombs by original accused persons arraigned as accused by the Anti-Terrorist Squad vide its report under Section 173(2) of the Cr.P.C. Perusal of the report submitted by the NIA, APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc which is in the nature of further report in terms of provisions of Section 173(8) of the Cr.P.C., shows that the same is prima facie an outcome of fresh investigation conducted by the NIA by making critical analysis of evidence collected by earlier two investigating agencies and this was done without there being any order by the superior court. In the light of judgment of the Honourable Apex Court in the matter of Vinay Tyagi (supra), final report, submitted under the provisions of sub-section (2) of Section 173 of the Cr.P.C. by the Anti-Terrorist Squad, Maharashtra State, and further report submitted under the provisions of sub-section (8) of Section 173 of the Cr.P.C. by the CBI before the Special court, cannot be ignored for deciding the instant appeals challenging rejection of bail applications of appellants/accused persons by the learned Special Judge by the impugned order dated 6th June 2016. 20 At the cost of repetition, it needs to be mentioned here that final report submitted by the Anti-Terrorist Squad, Maharashtra State, shows that evidence was collected by the Investigator pointing out that there were several meetings held by APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc accused persons for conspiring to commit terrorist acts and for committing subversive activities at Malegaon in order to infuriate Muslims for causing riot. For executing the plan hatched after indulging in criminal conspiracy, as reported by the Anti-Terrorist Squad in its final report, accused no.6 Shaikh Mohd. Ali Alam Anamat Ali Shaikh and accused no.7 Aasif Khan Bashir Khan @ Junaid @ Abdulla procured entire material including 20 kilograms of RDX for assembling bombs and supplied it to accused no.2 Shabbir Ahmed Masiullah, who stored it in his godown. Evidence collected by the Anti-Terrorist Squad shows that then bombs were assembled in the godown of accused no.2 Shabbir Ahmed Masiullah and there is a witness who has vouched about this fact. The final report further shows that bombs were accordingly planted for executing the object of conspiracy on 8 th September 2006 by accused no.1 Noorul Huda Samsudoha, accused no.3 Raees Ahmed Rajjab Ali Mansuri, wanted accused no.10 Riyad Ahmed Shafi Ahmed, accused no.8 Mohd. Jahid Abdul Majjid Ansari and accused no.9 Abrar Ahmed Gulam Ahmed as well as other accused persons. After blasts of bombs on 8 th September APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc 2006, the Investigator had collected samples such as pieces of bicycles, earth, wall scrapings, wires, damaged boxes, pieces of iron splinters etc. Similarly, during the course of investigation, on 29th September 2006, the Anti-Terrorist Squad of Maharashtra State had seized samples of black and white spots from wooden bed of accused no.6 Shaikh Mohd. Ali Alam Anamat Ali Shaikh, who allegedly supplied RDX to co-accused Shabbir Ahmed Masiullah (accused no.2). These samples were sent for

forensic examination during the course of investigation. It is worthwhile to mention here that letter dated 11th September 2006 of the Forensic Science Laboratory shows that seizures from the spot came to be effected by officials of the Forensic Science Laboratory, who were present with the police while conducting Spot Panchnama and it was thereafter that the officers of the Forensic Science Laboratory had handed over the samples to police for sending those for forensic examination. This fact is also clear from the Spot Panchnama dated 8th September 2006 conducted by the officers of the Azad Nagar Police Station. In the light of this factual position, report of the Forensic Science Laboratory shows APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc that high explosives had been used for causing explosion and IED might have been ignited by time device. Chemical analysis of seized articles from the spot showed presence of cyclonite (RDX), ammonium nitrate and fuel oil. The report of Chemical Analyser further shows that nitrate - the post explosion residue or organo nitro compound was detected in bottles containing small metal pieces recovered from bodies. Thus, report of the Forensic Science Laboratory shows that cyclonite (RDX) was used for preparation of bombs. Seized samples of soils from godown of accused no.2 Shabbir Ahmed Masiullah were sent to Forensic Science Laboratory for chemical analysis thereof. Traces of RDX i.e. cyclonite were found in one of the said samples of soil on its chemical analysis. The Forensic Science Laboratory further reported that earth samples from the spot of the incident at Malegaon and sample from godown of accused no.2 Shabbir Ahmed Masiullah are same. Upon chemical analysis of scrapings of black and white spots seized from wooden bed of accused no.6 Shaikh Mohd. Ali Alam Anamat Ali Shaikh, the Forensic Science Laboratory reported presence of traces of RDX, ammonium nitrate APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc and charcoal therein. This accused no.6 Shaikh Mohd. Ali Alam Anamat Ali Shaikh, according to the final report submitted by the Anti-Terrorist Squad, Maharashtra State, had procured twenty kilograms RDX for assembling bombs and supplied the same to accused no.2 Shabbir Ahmed Masiullah. During the course of further investigation, the second investigating agency i.e. the CBI had collected additional reports from the Forensic Science Laboratory incriminating accused persons arraigned by the Anti-Terrorist Squad, Maharashtra State. The CBI has also submitted the Compact Disc containing intercepted conversation of accused no.8 Mohd. Jahid Abdul Majjid Ansari. Sample of his voice was also forwarded to the Forensic Science Laboratory, which reported that voice in the intercepted conversation and the sample voice of Mohd. Jahid Abdul Majjid Ansari are similar. In addition, the CBI had also recorded statement of accused no.9 Abrar Ahmed Gulam Ahmed, in support of accusation against persons arraigned as accused by the Anti-Terrorist Squad, Maharashtra State. This incriminating evidence available against accused nos.1 to 9 as well as absconding accused nos.10 to 13 will have to be kept in mind, APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc while deciding instant appeals challenging order rejecting bail applications of accused nos.14 to 17, who came to be impleaded as accused persons by the third investigating agency i.e. the NIA, vide its report dated 22nd May 2013, which is virtually a report submitted on fresh investigation.

21 By keeping in mind this material collected by two investigating agencies prior to submission of the further report dated 22nd May 2013 by the NIA, now let us examine whether material collected by the NIA is sufficient to hold that there are reasonable grounds for believing that accusations against present appellants/accused nos.14 to 17 are prima facie true. Provisions of sub-section (5) of Section 43D of the U.A.(P) Act speaks about "reasonable ground". "Reasonable ground" means something more than prima facie ground. It contemplates of substantially probable case for

believing that the accused is guilty of the offence alleged. For arriving at the conclusion regarding "prima facie true" the court is required to consider whether accusations are true, unless contradicted, and for this purpose, the court has to undertake an exercise of cross-checking the truthfulness of allegations, on the basis of material on record. If accusation against accused persons is inherently improbable or wholly unbelievable, no "prima facie true" case is said to have made out. These parameters will have to be evaluated, by keeping in mind even the material collected by the earlier two investigating agencies prior in point of time, in view of mandate of law laid down by the Honourable Apex Court in the matter of Vinay Tyagi (supra). The NIA, which has arraigned present appellants as accused in the incident dated 8th September 2006 by its further report dated 22nd May 2013, has relied upon evidence in the nature of identification of some of them by witnesses, who were owners or employees of the bicycle shop at Malegaon, apart from their confessional statements and recoveries effected from Village Bagli in Dewas District. Forensic evidence is also being relied. Let us examine this evidence collected by the NIA for considering whether it amounts to formation of reasonable ground for believing that accusation against appellants/accused persons is prima facie true. According to the NIA, appellant/accused no.15 Rajendra Vikram Singh Chaudhari @ Dashrath @ Samander @ Bada Yadav @ Laxman Das had purchased Atlas bicycle from bicycle shop owner at Malegaon cited as witness B22. Witness cited as B23 is an employee of witness B22. Statements of witnesses B22 and B23 were recorded by the local crime branch of Nashik on 9th September 2006. Undisputedly, appellant/accused no.15 Rajendra Vikram Singh Chaudhari @ Dashrath @ Samander @ Bada Yadav @ Laxman Das is not a resident of Malegaon nor he had reason to be acquainted with these two witnesses. He came to be arrested on 29th December 2012. Test Identification Parade of appellant/accused no.15 Rajendra Vikram Singh Chaudhari @ Dashrath @ Samander @ Bada Yadav @ Laxman Das was conducted on 28th January 2013 by the Nayab Tahsildar at Mumbai Central Prison. Memorandum of Test Identification Parade dated 28th January 2013 shows that B23 - employee of the bicycle shop, identified appellant/accused no.15 Rajendra Vikram Singh Chaudhari @ Dashrath @ Samander @ Bada Yadav @ Laxman Das as the person who had purchased Atlas bicycle, the frame of which was found on the blast site at Malegaon. Purchase of bicycle was allegedly made in morning hours of 8th September 2006. This appellant/accused no.15 Rajendra Vikram Singh Chaudhari @ Dashrath @ Samander @ Bada Yadav @ Laxman Das was arrested on 29th December 2012. He was not a resident of Malegaon. Even if version of the NIA that witness B23 had an occasion to see appellant/accused no.15 Rajendra Vikram Singh Chaudhari @ Dashrath @ Samander @ Bada Yadav @ Laxman Das is accepted, it was for a very short span of time on 8th September 2006. Test Identification Parade was allegedly held on 28th January 2013 i.e. after a period of about 6½ years. In this Test Identification Parade, this appellant/accused is showed to be identified by witness B23. Similar is evidence in respect of appellant/accused no.14 Manohar Narwaria @ Digaria @ Sumer Thakur, who was arrested on 29th December 2012. He, allegedly, purchased Hero Jet bicycle in the morning hours of 8th September 2006 from Santosh bicycle dealer where A350 was working as a fitter. Statement of this witness was recorded on 10th September 2006 by the local crime branch. Appellant/accused no.14 Manohar Narwaria @ Digaria @ Sumer Thakur was made to stand in the Test Identification Parade on 28th January 2013, in which, it is alleged that, witness A350 has identified him as purchaser of the

bicycle. This appellant/accused is also not a resident of Malegaon. For a very brief span of time, it is alleged, witness A350 had an occasion to see appellant/accused no.14 Manohar Narwaria @ Digaria @ Sumer Thakur on 8 th September 2006. Still, he is stated to be identified by this witness, after a period of about 6½ years. Though accused no.1 to accused no.9 were arrested soon after the incident and despite the fact that statements of owners, son of the owner and employees of the bicycle store, from where the bicycles were allegedly purchased by persons who caused blasts at Malegaon, were recorded soon after the investigation by the local police, accused nos.1 to 9 were not shown to these witnesses nor were they subjected to Test Identification Parade even by the NIA. Witness B22, who is owner of the bicycle shop and had more opportunity to see the customers who purchased the bicycles, was not put up as an identifying witness in the Test Identification Parade conducted at the instance of the NIA, after about 6½ years of the incident. Similarly, APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc witness A347 and A353, who are owner and son of the owner of Santosh bicycle dealer, from where Hero Jet bicycle was allegedly purchased by appellant/accused no.14 Manohar Narwaria @ Digaria @ Sumer Thakur, were not put up as identifying witness in the Test Identification Parade. These aspects demonstrate that evidence regarding identification of these two appellants/accused persons, by itself, does not constitute reasonable ground, as required by provisions of Section 43D(5) of the U.A.(P) Act for denying relief as claimed by them. Further, it was pointed out on behalf of appellants/accused persons to the learned Special Judge that the Test Identification Parade was conducted after seven years of the incident and it is highly impossible that the person who saw the unknown persons before seven years, and that too for a short period, would identify them after seven years. However, this argument is lightly brushed aside by the learned Special Judge by holding that this aspect can be considered after completion of evidence of witnesses. It was expected of the learned Special Judge to consider this submission, in order to arrive at a conclusion, whether evidence of the Test Identification Parade, in such circumstances, amounts to reasonable ground, as required in Section 43D(5) of the U.A.(P) Act. 22 It is not in dispute that there is no witness to the fact alleged by the NIA that appellants/accused persons used the bicycles to purchase and planted bombs causing explosion at Malegaon.

23 According to the NIA, appellants/accused persons had used the field at Bagli Village for assembling/making bombs/IEDs under supervision of deceased accused no.18 Sunil Joshi for committing terrorist acts in Muslim religious places. At that place, bombs were prepared by wanted accused no.19 Ramchandra Gopal Singh, wanted accused no.20 Ramesh Venkat Mahalkar @ Amit @ Prince and wanted accused no.17 Lokesh Sharma @ Kalu Pandit @ Ajay Tiwari under guidance of wanted accused no.21 Sandip Dange. There is no witness to vouch about this fact. According to this investigating agency, on the basis of confessional statements made by appellants/accused persons, samples of soil APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc came to be collected from a field in Village Bagli. Report of chemical analysis of those samples does not show detection of cyclonite (RDX) in it. What was found therein was nitrate radicals. As against this, report of forensic laboratory shows presence of cyclonite (RDX) from articles seized from the spot of explosion of bombs at Malegaon. Traces of "cyclonite" i.e. RDX were found in seized samples of soil from godown of accused no.2 Shabbir Ahmed Masiullah and in scrapings from wooden bed of accused no.6 Shaikh Mohd. Ali Alam Anamat Ali Shaikh. Here, again, it needs to be put on record that because of such divergence and variance, this forensic evidence cannot be said to constitute reasonable ground

as envisaged by Section 43D(5) of the U.A.(P) Act. This conclusion is the result of cross-checking of truthfulness of allegations on the basis of material on record collected by different investigating agencies in the subject crime. 24 Next comes evidence regarding recovery and discovery on the basis of alleged confessional statement of appellants/accused persons. The learned Special Judge in APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc paragraph 40 of the impugned order dated 6 th June 2016 has categorically held thus :

"True is that in all the disclosure statements given by accused persons nothing incriminating has been seized by the NIA at their instance. The disclosure statements which prima facie appears stereo type simply points out the prior and subsequent acts prior and after the bomb blast of accused persons. In their disclosure statements they show the places from where the cycles were purchased, the manner of planting bombs, the manner of recce conducted by them prior bomb blast and their act of disbursement subsequent to the bomb blast."

It is, thus, clear that, on appreciation of evidence regarding confessional statement of appellants/accused persons, the learned Special Judge came to the conclusion that there was no recovery or discovery of incriminating fact. In paragraph 39, the learned Special Judge further concluded that the name and address of bicycle shops was already known to police, and as such, pointing out those shops to the Investigator by the accused is of no assistance. In the light of this discussion and conclusion by the APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc learned Special Judge, one will have to scrutinize the alleged confessional statements of appellants /accused persons which are virtually stereo type. The NIA has alleged that accused persons disclosed location where they got down at Malegaon and places where bombs were planted. They showed places from where they boarded bus from Malegaon to Jalgaon and travelled from Jalgaon to Indore. They identified the place used as training camp at Bagli Village where demonstration was given. Thus, confessional statements of appellants/accused persons are not admissible in evidence as those do not lead to discovery of a fact deposed to by them. Spots of blasts at Malegaon were already known to the Investigator. Bicycle stores from where bicycles were allegedly purchased were also known to the Investigator. Owners and other staff members of the bicycle stores were also known to the Investigator. Bus stands at Malegaon, Jalgaon and Indore cannot be said to be unknown to the Investigator. Those are public places. No physical object incriminating accused persons came to be seized at the instance of appellants/accused persons. The sample of soil allegedly seized from the field at Bagli Village was APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc not found to be containing cyclonite/RDX. In the light of this factual position emerging from the record, it is not possible to conclude that there are reasonable grounds for believing that accusation against appellants/accused persons is prima facie true, and therefore, they are not entitled for bail. 25 Even otherwise, all appellants/accused persons are arrested either at the end of the year 2012 or in the beginning of the year 2013. They are behind bars as under trial prisoners for a period of 6½ years. Allegations against them are to the effect that, they indulged in terrorist acts by causing bomb explosion at Malegaon on 8th September 2006. Whether such undue long detention as under trial prisoner is justified or not, is considered by the Hon'ble Supreme Court in Shaheen Welfare Association (supra). The Hon'ble Supreme Court has considered cases of TADA detenus undergoing undue long detention either as under

trial detention or detention pending appeals filed by them. While considering the cases of accused against whom allegations of commission of terrorist acts and disruptive activities are leveled, APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc the Hon'ble Supreme Court has laid down guidelines that if such under trial prisoners whose overt acts or involvement directly attracts Section 3 and/or Section 4 of the TADA Act, have been in prison for five years or more and their trial is not likely to be concluded within the next six months, they can be released on bail, unless the court comes to the conclusion that their antecedents are such that releasing them may be harmful to the lives of the complainant, the family members of the complainant or witnesses. Identical is the case in hand, wherein, all appellants/accused persons are behind bars as under trial prisoners for more than five years. Their trial is not going to be finished within next six months. Rather, these appeals are of the year 2016. There is nothing on record to come to the conclusion that appellants/accused persons are having criminal antecedents or that releasing them may be harmful to the lives of informant, family members of the victim or witnesses in the case. Therefore, applying the law laid down by the Hon'ble Supreme Court in the matter of Shaheen Welfare Association (supra), even otherwise, these appellants/accused are entitled to be released on bail.

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26 As noted in foregoing paragraphs, final report submitted by the Anti-Terrorist Squad, Maharashtra State, was endorsed and affirmed by the CBI, which conducted further investigation. However, by conducting fresh investigation, the NIA disapproved those reports and impleaded present appellants and others as accused persons, after about six years from the incident. In such situation, observations of the Hon'ble Apex Court in the matter of Lieutenant Colonel Prasad Shrikant Purohit (supra), as noted in paragraph 32 of the report, applies with full force to the case in hand, because of divergence and variance of evidence reflected from the charge-sheet and supplementary reports.

CONCLUSION 27 In the light of foregoing discussion, we are unable to concur with the finding of the learned Special Judge, to the effect that, there are reasonable grounds for believing that accusation against appellants/accused persons is prima facie true. Therefore, APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc they are certainly entitled to be released on bail, during pendency of the trial, and as such the order :

ORDER

i) Appeals are allowed.

ii) The impugned order dated 6th June 2016 passed below Exhibits 598, 599 and 604 by the learned Special Judge under the NIA Act, 2008, for Greater Mumbai, in MCOC Special Case Nos.23 of 2006 along with 8 of 2013 and 3 of 2010, is quashed and set

aside.

iii) Bail applications moved by appellants/accused persons are allowed.

iv) Appellants/accused persons are directed to be released on bail on their executing P.R.Bond in the sum of Rs.50,000/-

each and on furnishing 1 or 2 solvent sureties in the like amount, by each of them, to the satisfaction of the trial court.

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v) Appellants/accused persons shall appear before the Special Court on each and every date of hearing unless exempted by the said court. They shall not protract the trial.

vi) Appellants/accused persons shall not extend any threat, promise or inducement, either directly or indirectly, to any person/witness acquainted with the fact of the case, so as to dissuade that person/witness from disclosing the said fact to the court or investigating agency or any other police officer.

vii) Appellants/accused persons shall not leave India without prior permission of the learned trial court.

viii) They shall surrender their passports to the trial court, if they are possessing the same, before being released on bail.

ix) The appeals are disposed of accordingly.

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x) In view of disposal of appeals, all criminal applications stand disposed off.

28 It is clarified that observations made in this judgment are prima facie observations only made for the purpose of deciding the instant appeals relating to rejection of bail applications moved by appellants/accused persons. None of the observations in this judgment shall be construed to mean any expression of opinion on merits of the plea made by the parties and intervenor in other proceedings. Similarly, observations made in this judgment shall have no bearing on trial of the case.

(A . M . B A D A R , J .) (I N D R A J I T M A H A N T Y , J .)
APPEALS-580-2016-581-2016-622-2016-623-2016-J.doc LATER ON :

29 At this stage, the learned counsel appearing for appellants /accused persons prays that initially for a period of four weeks, appellants/accused persons be released on cash bail, as much time would

be required for obtaining solvency certificate thereby depriving liberty of appellants/accused persons. The request made is genuine, and therefore, we direct that initially for a period of four weeks, appellants/accused persons be released on cash bail of Rs.50,000/- each. They shall furnish surety, as directed, within this period.

(A. M. BADAR, J.)

(INDRAJIT MAHANTY, J.)