IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRIMINAL APPEAL NO.294 OF 2022

APPELLANT : Adv. Surendra S/o Pundalik Gadling, Aged – 55 Years, Occ: Legal Practitioner R/O. 79, Misal Lay Out, Bhim Chowk, Jaripatka Police Station, Nagpur, At Present Lodged at 4/41, Anda Cell, Taloja Central Prison, New Mumbai.

..VERSUS..

RESPONDENT : State of Maharashtra, Through, P.S.O. Etapalli, P.S. Etapalli, Tahsil- Aheri, Distt. Gadchiroli

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Shri Firdos T. Mirza, Advocate with Nihalsing B. Rathod, Advocate for Appellant.
Shri Neeraj B. Jawade, Special Public Prosecutor for Respondent/State.

CORAM : **VINAY JOSHI AND VALMIKI SA MENEZES, JJ.**

RESERVED ON : **5th JANUARY, 2023.**

PRONOUNCED ON : **31st JANUARY, 2023.**

JUDGMENT : (PER : VALMIKI SA MENEZES, J.)

. Heard. **Admit**.

2. By consent of the learned Counsel appearing for the parties, this Criminal Appeal is taken up for final hearing.

3. By this appeal, filed under Section 21(4) of the National Investigation Agency Act, 2008 ("NIA Act"), the Appellant has challenged judgment and order dated 28.03.2022, passed by the Sessions Court, Gadchiroli, in Sessions Case No.99/2019 (State of Maharashtra, Through P.S.O. Police Station, Etapalli, District : Gadchiroli ..V/s.. Surendra Pundlik Gadling and others), refusing regular bail to the Appellant, who is accused No.1 in that Trial.

4. Sessions Case No.99 of 2019 was registered upon filing final report dated 29.05.2019 under Section 173 of the Code of Criminal Procedure, 1973 ("CrPC").

The facts, as seen from the charge-sheet filed by the NIA, are as follows :

4.1 The First Information Report ("FIR") came to be registered as Crime No.35 of 2016, with Police Station, Etapalli, Tahasil Aheri, District Gadchiroli, under Sections 307, 341, 342, 435, 323, 504, 506, 143, 147, 148, 149 and 120(B) of the Indian Penal Code, 1860 ("IPC"), Sections 5 and 28 of the Indian Arms Act, 1959 ("IA Act"), Section 135

of the Maharashtra Police Act, 1951 ("MP Act") and Sections 16, 18, 20 and 23 of the Unlawful Activities (Prevention) Act, 1967 ("UAP Act").

4.2 It is alleged in the FIR, recorded at the behest of one Rajvindarsing Harising Shergil, owner and driver of Truck bearing No.MH-33/4348, that an incident occurred on 23.12.2016 at around 11:30 a.m. to 15:00 p.m. at Surjagad Pahadi within the jurisdiction of Etapalli Police Station. The FIR dated 22.12.2016, discloses that the informant drove his vehicle via. Alapalli-Etapalli road carrying iron ore. That around 100 to 150 trucks belonging to various transport companies named in the FIR, arrived at Surjagad hill, and since by then it was night time, all truck drivers, including the complainant were waiting to get permission receipts from the office of Lyod Metal Company to load iron ore on their trucks. The complainant further stated that his truck was followed by other trucks and when they reached at a distance about one kilometer from Surjagad hill, he saw few of trucks standing by the side of the road. He stopped his vehicle behind the queue of trucks and at about 11:30 p.m., he heard

shouting in abusive language with words “Sale Madarchod, Truck Ke Niche Utaro, Bhagna Nahi, Sale Chodunga Nahi”. The FIR further records that on hearing such abusive language and on being directed to dismount from the trucks, he saw the driver of the front truck walking back on foot. The informant noticed that the men who were in-front of his truck were holding sticks and axes. They threatened the informant and other drivers asking them to get down from the vehicles, upon which he, alongwith the cleaner of his truck alighted from the vehicle, Some of the armed men in olive green uniforms were asking all the drivers to alight from the trucks and all of them were gathered at one place, which was at a distance about 100 meters away from the main road, in the forest.

4.3. The informant then states that all the drivers were gathered and asked to sit down on the ground and warned not to run lest they would be burnt. The informant noticed some of the men breaking open the diesel tank of the front truck and then setting it on fire. It was also alleged that some of these men used axes and broke the window panes and cut

the tyres of these trucks. These men were addressing each other in Hindi by name “Ramko” and “Gonglue”, while around 10 to 12 other associates went to the main road and kept a watch for the police when at that time one of them replied ‘ok Sainath Anna’. The men in green uniforms requested one amongst them named “Narmadakka” to take physical search of all the truck drivers, pursuant to which, one of these men forcibly put his hand into the pocket of the informant and took out his mobile handset. Likewise all the mobile handsets of other truck drivers were also taken away.

4.4 It is further alleged that the “Naxals” in olive green uniform prodded the drivers and cleaners at gun point pushing them forward and abusing the drivers and cleaners by uttering words “sale, can’t you walk properly”. The “naxalites” forcibly took the drivers and cleaners to the hilltop, made them sit on the ground in an area, which they cordoned off, after which, the Chief of the armed assailants made enquiries about the owners of the transport companies, which information was provided by the informant and other truck drivers. The names of the owners of the trucks and of

the transport companies were noted down on a chit by the assailants. Thereafter, the drivers were made to sit separately from the cleaners.

4.5. It is then alleged that by that time some of the trucks parked on the hilly areas were seen burning from a distance and there was smoke emanating from the burning trucks. The informant also heard the sound of exploding tyres.

4.6. It is further alleged that the man was standing behind the drivers, suddenly started beating the drivers with a stick saying "does the road belong to your father?, you people never allow us, motor cycle riders, any space and drive your trucks over the motorcycle riders."

4.7. It is further alleged that those naxalites assaulted them with sticks on their chest, hands, back and waist and some of them were saying "Sainath Anna, shall we burn these people". The assailants including one man in plain clothes present at the spot, then attempted to set the drivers on fire by pouring diesel on their bodies and were saying "Joganna,

Bhashkar Anna, Savita, Tarkka, what is the benefit of burning the drivers, the owners are different, we will cut them into pieces and burn them". These assailants then asked one "Kopa" to come out with his fellow associates. Around 40 to 50 armed naxalites, who were in green uniform came forward. 60 to 70 other men in plain clothes came out from the surrounding forest and they all gathered at one place. It is stated that the naxalites were talking among themselves and calling out to their comrades, using the above mentioned names. The Chief of the "naxalites" asked his comrades not to burn the drivers and out of fear, the drivers and cleaners took an oath, as dictated to them by the naxalites. Thereafter, the naxalites instructed them to report the matter to the Police Station and allowed them to go.

4.8. It was further alleged in the FIR that, at the time of the incident, armed naxalites, who were in olive green uniform as well as those in plain clothes were shouting slogans like "Communist Party Zindabad, Maoist Organization Zindabad, Lal Salam Zindabad". The informant noticed that around 39 vehicles including 35

trucks, three Poclain machines and one motorcycle were burnt, causing huge loss of property. The informant also alleged that around 40 to 50 armed naxalites in green uniform alongwith 60 to 70 other men, who were in plain clothes equipped with arms, held them at gun point and broke open diesel tanks of the vehicles and set on fire all the vehicles, causing loss of property.

4.9. The informant then took medical treatment from a private doctor on 27.12.2016 and reported the incident on the same day at the Police Station Etapalli. On the basis of the said report, offences came to be registered in Etapalli Police Station against the active members of the Communist Party of India (Maoist) namely Narmadkka, Sainath, Ramko, Gongalu, Goganna, Bhaskar, Savita, Tarakka, Kopa and 40 to 50 other associates and 60 to 70 persons supporting them vide Crime No.35 of 2016 registered on 27.12.2016 for the offences punishable under under Sections 307, 341, 342, 435, 323, 504, 506, 143, 147, 148, 149 and 120(B) of the Indian Penal Code, 1860, Sections 5 and 28 of the Indian Arms Act, 1959, Section 135 of the Maharashtra Police Act,

1951 and Sections 16, 18, 20 and 23 of the Unlawful Activities (Prevention) Act, 1967.

4.10. During the course of the investigation, the Police visited the spot and prepared a panchanama of the scene of offence; the Police also seized incriminating articles and arrested the accused namely Masa Mura Hichami, Lalu Kehaka Gundru, Irpa Bira Usendi, Thuge Dalsu Hichami and Dinesh Masu Pungati between 18.01.2017 and 17.02.2017.

4.11. From the charge-sheet, it also transpires that the Appellant/Applicant was in custody of Vishrambag Police Station at Pune, in connection with Crime No.4 of 2018, for allegedly committing offences under the UAP Act and IPC, and during the course of that investigation, the Pune Police conducted a search of the house of the Applicant on 17.04.2018. During the search operation, various incriminating documents and articles were seized from the house of the Applicant at Pune, under a search panchanama. The hard-disk of the computer belonging to the Applicant

was also seized during the search. A forensic analysis of the hard-disk, which was found during the search, revealed material stored on it showing that the Applicant, alongwith other co-accused in that case were members of the banned organization C.P.I. (Maoist). The Investigating Officer in that case also found from the recovery of the incriminating material against the Applicant, that the Applicant/accused provided aid to the naxalites, who were working at the ground level and that the Applicant had entered into a conspiracy with various co-accused and absconding accused in that case, and was involved in the Surjagad incident alleged in the FIR/charge-sheet in the present case.

4.12. It is further alleged in the charge-sheet that the investigating machinery found that the Applicant had given directions to other accused to set the vehicles on fire and cause loss of property in the Surjagad incident. The material recovered from the Applicant/accused, according to the investigation, disclosed that Members of the Maharashtra State Regional Committee of Maoist had appreciated the work of the Applicant regarding the incident in question.

4.13. The investigation also unearthed some literature published in the "Maoist Information Bulletin-34" of the month of July to December – 2016, which was seized from the possession of the Applicant. The investigation also revealed that the Applicant wrote a letter to co-accused in the Pune case, Varavara Rao, about collection and distribution of funds to the naxalites. That the accused provided secret information about Government activities and maps of certain areas, to the underground naxalites, in order to prompt them into violent acts.

4.14. It is further the case in the charge-sheet that during the course of investigation, a witness statement under Section 164 of CrPC, was recorded of one Makbul alias Harsh alias Atul alias Sudarshan Satyadeo Ramteke, resident of Nagpur, a naxalite who had surrendered before a Judicial Magistrate First Class, Aheri, whereat he had stated that the Applicant and other co-accused in the Vishrambag Pune case, had directed the underground naxalites to oppose the operation of Surjagad mines and that the Applicant instigated him (Sudarshan Ramteke) and other naxalites to join the C.P.I.

(Maoist) movement and to get involved in the activity of stopping the work of Surjagad mines.

5. It is the case of the Appellant/accused that he was arrested on 30.01.2019 by the Police Officials of Police Station Etapalli alleging involvement in Crime No.35 of 2016 registered with Police Station, Etapalli, Tahasil Aheri, District Gadchiroli, under Sections 307, 341, 342, 435, 323, 504, 506, 143, 147, 148, 149 and 120(B) of the IPC, Sections 5 and 28 of the IA Act, Section 135 of the MP Act and Sections 16, 18, 20 and 23 of the UAP Act.

The Appellant has stated in his application that he is a criminal law practitioner with over 25 years of practice and has defended several accused, who have been implicated under UAP Act, TADA, POTA or on sedition charges. The Applicant claims to be permanent resident of Nagpur District, the sole bread earner of his family consisting of four members and has responsibility of educating his two children. He states that he has no criminal antecedents and has been falsely implicated in the present case, being a target

of police machinery. He states that his entire work is in public domain and that he is a law abiding citizen and officer of this Court.

6. The Applicant further states that out of the five accused arrested in the present case, accused Nos.3 to 6 and one Irpa Bira Usendi, who is since deceased, have been granted regular bail by the Sessions Judge, Gadchiroli, vide orders dated 18.01.2017, 19.01.2019 15.02.2017 18.02.02017 and 27.03.2017. He has avered that accused No.2 was granted medical bail on 14.02.2021 by this Court. That the Applicant is the only person, who is behind bars in the present case. He states that there is no *prima facie* case against him and the evidence brought on record by the Respondent/State is neither reliable nor admissible.

7. The Applicant further states that after his arrest by Vishrambag Police, Pune, he was remanded for a period of 12 days to police custody, during which time, he completely cooperated with the entire investigation. He states that since 11.02.2019, he has been in magesterial custody till date.

8. The Applicant avers that he has been falsely implicated in this case only after he has got further detention order set aside by the Bombay High Court, by its order dated 24.10.2018, passed in Criminal Writ Petition No.4148 of 2018, in Crime No.4 of 2018, registered with Vishrambagh Police Station, Pune. He has stated that the Special Judge, NIA, Greater Bombay had rejected his bail application on 21.09.2020, which he had challenged in a Criminal Appeal No.220 of 2021 before the High Court of Bombay at its Principal Bench, requesting to release him on temporary bail to join his family to perform the last rites of his mother, who had passed away on 15.08.2020 at Nagpur. After he had performed the last rites of his mother, he surrender on 21.08.2021 and has been in custody sine then.

9. The Applicant further states that he had filed an Application under Section 439 of CrPC before Sessions Court, Gadchiroli, vide Bail Application No.294 of 2019 on 29.05.2019, which was rejected vide order dated 23.09.2019; thereafter he filed a bail application before the High Court bearing Criminal Bail Application (BA) No.109 of 2020,

which came to be disposed vide order dated 11.08.2021, holding the same as not maintainable in view of the judgment of the Hon'ble Supreme Court in ***Bikramjit Sing ..V/s.. State of Punjab***, reported in **2020(10) SCC 616**. On being granted liberty, he availed the statutory remedy of an appeal under Section 21(4) of the NIA Act against order dated 23.09.2019, of the Sessions Court, Gadchiroli with an application for condonation of delay in filing the appeal. This Court was pleased, by its order dated 04.01.2022 to allow the Appellant to withdraw his application/appeal with liberty to file a bail application for fresh consideration before the Sessions Court at Gadchiroli. He then filed a fresh bail application in Sessions Case No.99 of 2019 (at Exhibit-134), whilst being incarcerated at Taloja Central Prison, Navi Mumbai.

The Sessions Court has now rejected his application for bail vide the impugned order, which he has challenged before us in the present appeal filed under Section 21(4) of the NIA Act.

10. The appeal came to be opposed by the Respondent/State, who filed their reply dated 27.04.2022. During the course of hearing, the Applicant has also placed before us, for easy reference, the final report filed against the Appellant in Crime No.4 of 2018 filed by Vishrambag Police Station, Pune, dated 15.11.2018, which is before the designated NIA Court at Mumbai.

11. We have heard Shri Firdos T. Mirza, learned Counsel for Appellant, Shri Neeraj B. Jawade, learned Special Public Prosecutor appearing for the Respondent/State and perused the FIR and final report alongwith the material annexed to it.

12. It is argued by Shri Firdos Mirza, learned Counsel appearing for Appellant/accused that the Sessions Court has failed to examine the material placed before it and failed to apply the principles laid down by the Hon'ble Supreme Court in various judgments, which have considered provisions of Section 43-D(5) of the UAP Act. That the Court below has failed to exercise jurisdiction vested in it to

grant bail in favour of the Appellant. Shri Mirza argues that the Hon'ble Supreme Court in ***Union of India ..V/s.. K. A. Najeeb***, reported in ***(2021) 3 SCC page 713***, has considered the parameters, which apply to the grant of bail under Section 439 of CrPC and statutory restrictions on the rights of an accused to bail under Section 43-D(5) of the UAP Act. He refers to the observations of the Hon'ble Supreme Court in paragraphs 14 and 15 of Union of India ..V/s.. K. A. Najeeb (supra), to argue that it can be legitimately expected that since the Appellant has been in custody since 06.06.2018, for a period of four years, and the trial is at the inception stage, keeping the balance between risk to society by releasing the criminal pending trial and considering the rights of the Appellant, it would be just and proper that the Appellant be released on bail. Learned Counsel for the Appellant then relies upon the judgment of Hon'ble Supreme Court in ***Sagar Tatyaram Gorkhe and Anr. ..V/s.. The State of Maharashtra, reported in MANU/SCOR/00060/2017***, to contend that the Sessions Court has not considered facts like the period of custody

undergone, the likely period within which the Trial can be expected to be completed and the number of witnesses examined, a mandate laid down in the said case law.

13. Shri Mirza, further refers to the judgment of the Hon'ble Supreme Court in ***Thwaha Fasal ..V/s.. Union of India***, reported in ***2021 SCC OnLine SC 1000***, wherein at paragraphs 19 and 20 thereof, it has considered the manner in which, the embargo under Section 43-D (5) of the UAP Act, is to be applied. He submits that in that case, the Hon'ble Supreme Court has held that after perusing the charge-sheet, if the Court is of the opinion, there are reasonable grounds for believing that the accusation against the Applicant is *prima facie* true, that it should reject the bail application of the accused. He submits that the Trial Court has not considered all the material before it, before concluding that accusations against the Appellant are *prima facie* true.

He then refers to ***National Investigation Agency ..V/s.. Zahoor Ahmad Shah Watali***, reported in

(2019) 5 SCC page 1, wherein the Supreme Court has laid down the various considerations to form the opinion of the Court, whilst considering a bail application, in terms of Section 43-D (5) of the UAP Act. He further refers to the observations of the Supreme Court in paragraphs 34 and 35 of that judgment to argue that the Court's view that the accusations made against the accused person are *prima facie* true, are required to be borne out from the reading of the totality of the report made under Section 173 of the CrPC, accompanying documents and the evidence presented to the Court, which includes redacted statements of witnesses recorded under Section 164 of CrPC.

14. Learned Counsel for Appellant then takes us to the provisions of the UAP Act, more particularly to Sections 15, 16, 18, 20 and 23 and argues that for the provisions of Section 15 to be made applicable to the facts set out in the charge-sheet, there has to be a specific allegation against the Appellant, that he was indulging in an act of terrorism; that the material on record should demonstrate that the accused was in some manner threatening the Unity, Integrity, Security

or Sovereignty of India or was indulging in any of the activities set out in Section 15 of the UAP Act. He submits that there is no specific allegation made against the accused that he has indulged in a terrorist act.

It is further submitted that a plain reading of the FIR and statements of witnesses to the Surjagad incident would demonstrate the act of burning of the trucks, would fall within the definition of arson and by no means, would be termed a terrorist act. It is his submission that in any event, the material on record does not connect the Appellant/accused with the particular incident of 23.12.2016.

15. It is further the Appellant's argument that the Communist Party of India (Maoist), which is a banned organization under the Schedule of the UAP Act, has not been made an accused in the charge-sheet. It is argued that for the purpose of invoking a punishment under Section 20 of the UAP Act, it would be incumbent upon the Respondent to implead the organization that the prosecution alleges the accused is a member of it, the Communist Party of

India (Maoist).

16. It is further argued by the learned Counsel for the Appellant that the order of sanction dated 28.05.2019, granted in terms of Rules 3 and 4 of the UAP Rules, 2008, is beyond the time frame of seven working days specified therein, and further that the provisions of Rule 4 are mandatory in nature; that since the decision to grant sanction for prosecution of the Appellant was not adhered to, within the time frame of seven working days, it vitiates the prosecution of the charge-sheet before the Sessions Court. Learned Counsel for the Appellant relies upon a judgment of the High Court of Kerala in ***Roopesh ..V/s.. State of Kerala and Ors., reported in MANU/KE/0889/2022***, which has considered the provisions of Rule 4 of the UAP Rules, and held the time frames stipulated thereunder to be mandatory. Learned Counsel for the Appellant then fairly submits that a question of sanction has also been tested by the Nagpur Bench of this Court in a judgment dated 14.10.2022 in ***Criminal Appeal No.136 of 2017 (Mahesh Kariman Tirki and Ors. ..V/s.. State of Maharashtra) with Criminal Appeal***

No.137 of 2017 (G. N. Saibaba ..V/s.. State of Maharashtra), which has taken a view that the time limits in the provisions of Rule 4 are directory.

17. Learned Counsel then refers to the order of sanction granted by the designated Authority which is the Director of Prosecution, and submits that a bare reading of the order would disclose that it does not refer to any instances of an act, which is alleged to have been committed by the Appellant, which could be *prima facie* considered to be an act falling within any of the provisions of the UAP Act. He further submits that *prima facie* considerations of the material in the charge-sheet are totally absent in the sanction order. He argues that in the absence of the accused being named in any of the statements of the witnesses to the incident of 22.12.2018, there could have been no sanction granted to prosecuting the Appellant.

18. Learned Counsel for the Appellant then takes us through the material appended to the charge-sheet, more specifically to the letters, which were found on the hard-disk

seized from the house of the Appellant under the house search panchanama dated 17.04.2017 by the Police of Vishrambag Police Station at Pune, and contends that these letters were alleged to have been received by, or sent by the Appellant ought to have had an email header on them. It is his submission that in the absence of the email address of the sender and the timing at which, the same was sent or received, all the letters relied upon by the prosecution to contend the involvement of the Appellant in the organization of the alleged crime or to connect him to the banned organization C.P.I. (Maoist) would be improper, as the genuineness of the said letters are in great doubt.

He Submits that the entire process followed in the seizure panchanama, which was conducted at the residence of the Appellant at Pune, and the process of attachment of the hard-disk and other printed material is flawed and is not in accordance with the procedures provided under Section 16 of the Information Technology Act, 2000 ("IT Act"), as one could not consider that the electronic record comprising the letters to be a secure electronic record, within the meaning of

Section 14 of the IT Act; he further contends that the entire procedure followed for attachment of the hard-disk during the seizure was contrary to the Security Procedure Rules under the IT Act. He takes us through the report of the Forensic Science Laboratory dated 14.11.2018 and contends that the hash value of the hard-disk was taken for the first time at the Directorate of Forensic Science Laboratories at Kalina, Santacruz (East) Mumbai, and prior to that there was no hash value recorded by the cyber crime experts, who accompanied the raiding team, that conducted the seizure of the hard-disk.

19. It is further the contention of the learned Counsel for the Appellant that the procedure contemplated under the Information Technology Rules, 2021 ("IT Rules") requires a hash value to be taken of the content of the hard-disk by the cyber crime expert before cloning or creating a mirror image of the data contained therein, applying the digital signature of the cyber crime expert to the hard-disk, which procedure has not been demonstrated on the examination report dated 14.11.2018, nor is there any statement in the seizure

panchanama recording the hash value of the data on the hard-disk, at the time of its seizure. He therefore contends that there being neither a certificate under Section 65B of the Evidence Act, 1872, to support the report nor any material to show the procedure followed, whilst seizing the hard-disk, the entire material cannot be considered a secure electronic record of the data in the said hard-disk, and would have to be discarded being inadmissible. He submits that except for this record, which is suspect, there is no material in the charge-sheet to implicate the Appellant.

20. It is further the contention of Shri Mirza that under the provisions of Section 45A of the Act, the opinion of the expert, who examines the electronic evidence would be relevant only if such evidence was collected after following the procedure under the IT Act, and Rules framed therein; he further submits that its a requirement of law that for the purpose of the Act, it is only Officers of those institutions, which are notified by the Government of India, in terms of the provisions Section 79A of the IT Act, who could give an expert opinion on the examination of the electronic evidence.

He argues that the Directorate Forensic Science Laboratories of the Government of Maharashtra at Kalina, Santacruz (East) Mumbai, is not a notified laboratory for the purpose of Section 79A of the IT Act, and therefore, no presumptions can be attached to the forensic report dated 14.11.2018.

He is then argued that the rule prohibiting double jeopardy would apply to the present case as the Appellant would be facing two separate trials based upon the same material collected in the two investigations.

21. It is further argued by the Appellant that in terms of the judgments of the Hon'ble Supreme Court in Union of India ..V/s.. K. A. Najeeb (supra), and Sagar Tatyaram Gorkhe and Anr. ..Vs.. The State of Maharashtra, (supra), the Sessions Court has committed an error by not considering, the fact that the Appellant has spent significant time in jail, pending investigation and filing of the charge-sheet. It is contended that on all these grounds and also considering the fact that the Appellant is an Advocate with considerable repute, having a fixed place of habitation and

roots, there would be no room for the Respondent/State suspecting that he would jump bail or not keep the terms of bail.

22. Shri Neeraj B. Jawade, learned Special Public Prosecutor appearing for the Respondent/State has vehemently opposed the appeal, supporting the impugned order of rejection of bail to the Appellant mainly on the submission that from a perusal of the material on record, there is enough evidence at this *prima facie* stage not only to connect the Appellant to the banned organization C.P.I. (Maoist), but to the organization of various programmes and acts of this banned organization, which would amount to an act of terrorism or an act of waging war against the State. He further contends that the material on record, in terms of the observations made by the Hon'ble Supreme Court in National Investigation Agency ..V/s.. Zahoor Ahmad Shah Watali (supra) and Thwaha Fasal ..V/s.. Union of India (supra), are enough to record a finding, on the basis of broad probabilities, recording the involvement of the accused in the commission of the offences.

He further contends that the scope of enquiry at the stage of granting bail by the Sessions Court is to decide whether *prima facie* material is available against the accused of commission of the offences alleged in the charge-sheet and whether that material *prima facie* establishes the association of the accused with a terrorist organization C.P.I. (Maoist) and such grounds exist for believing that the accusation against the accused is *prima facie* true. Learned Special Pubic Prosecutor has referred to a Division Bench Judgment of this Court dated 19.09.2022 in ***Criminal Appeal No.351 of 2022, Hany Babu ..V/s.. National Investigation Agency and Anr.***, which considered the restrictusion imposed under Section 43-D(5), whilst considering an application for bail under the UAP Act. It is contended by the learned Special Public Prosecutor that the Sessions Court has correctly assessed the material before it by applying the principles laid down in the case of grant of bail and in terms of restrictions under the special provisions of Section 43-D (5) of the UAP Act, and its conclusions that there are reasonable grounds for believing that the accusation against the Appellant is *prima*

facie true, cannot be faulted.

23. It is then submitted by the Respondent that the grounds taken by the Appellant to charge him of the offences alleged in the present charge-sheet would amount to a case of double jeopardies, since the Appellant has been charged of the very same offences in the charge-sheet filed before the designated NIA Court in (Bhima Koregaon violation case). The learned Special Public Prosecutor submits that the charge-sheet in that case, no doubt has material produced with it which overlaps with the material produced in the charge-sheet before us, but the incident on the basis of which, the charge-sheet is filed before the Special NIA Court at Mumbai was of 08.01.2018. He contends that the present charge-sheet was on the basis of the incident of burning of trucks at Surjagad hills on 23.12.2016, but material collected during the investigation of Bhima Koregaon case based upon the incident of 08.01.2018 at Pune, and the searches conducted at the house of the Appellant during the investigation of that case revealed connection of the Appellant, at the organizational level of the banned

organization C.P.I. (Maoist) to both the incidents. It is on this basis that he contends that there is no room for taking a defence of double jeopardy, as the involvement of the Appellant in each incident is separate and distinct even though there may be overlaps, in terms of the evidence collected in each investigation.

24. It is further argued by the learned Special. Public Prosecutor that the Appellant has never raised any objection or made any accusation at any point of time, either during the search operations at his residence or during any of the proceedings before the Special NIA Court at Mumbai or before the Sessions Court in the present case, that the hard-disk attached during the seizure was tampered with or that he had an objection to conducting the raid in his house. He takes us through the provisions of Section 2(ze) of the IT Act, which defines what is "secure system" and contends that no material was transferred from the hard-disk during the seizure, as can be seen from the seizure panchanama and from the report of the forensic lab. He takes us through the seizure panchanama and the report to contend that what was

seized was the entire hard-disk, which was sealed and then sent to the forensic lab, where the cyber expert has, at the time of accessing the hard-disk applied his digital signature and followed the same process after creating a clone or mirror image of the data on the hard-disk, inline with the procedure laid down in the IT Rules and in terms of the IT Act. He further contends that in any event, all these would be the matters of leading evidence in the trial and the experts would have to prove the documents and be cross-examined; that it would be improper for the Sessions Court to go into all these mattes at the stage of considering the grant of bail, more so considering the restrictions imposed under Section 43-D (5) of the UAP Act.

25. Learned Special Public Prosecutor then takes us through the published material attached by the raiding party during the search of the house of the Appellant at Pune and refers to a "Maoist Information Bulletin-34" of July to December-2016, which was found at the house of the Appellant. The Bulletin specifically refers to the incident of 23.12.2016 at Surjagad, Gadchiroli. He submits that a

reading of this bulletin leaves no manner of doubt that the Appellant was in possession of material, which incriminates him in Surjagad incident of burning of trucks and waging an armed struggle against the elected Government, which amounts to an act of terrorism under the UAP Act.

He then takes us to copies of the various letters found on the hard-disk attached from the premisses of the Appellant, wherein there is a vast amount of correspondence between one comrade Surendra (meaning the Appellant Surendra Gadling), and other members of the organization, which include comrades i.e. Varvara (meaning Varvara Rao), Prakash (meaning Namballa Keshvrao), Milind (meaning Milind Babarao Teltumbade). It is his argument that a reading of the contents of those letters, would confirm the involvement of the Appellant at the organizational level of the banned group C.P.I. (Maoist); it would also leave no doubt as to the involvement of the Appellant in mobilizing funds through hawala channels, organizing the cadre in the forest of Gadchiroli to carry out the attack on the trucks, and in handling the negative public opinion that had developed

after the incident. He further argues that the contents of these letters also refer to the praise showered upon the Appellant by other members of the banned organization for carrying out of the incident and to the references made therein of the different members of the organization for whom, the Appellant provided support in the form of legal counsel in various cases instituted against them. It is further argued that the letters also connect the accused to the Bhima Koregaon incident at Pune as there are several references to the organization of that incident and to the involvement of the Appellant in the follow up action in that incident, in relation to the organization.

26. We now proceed to weigh the rival contentions of the Appellant and the Respondent/State in the light of the law laid down by the Supreme Court and keeping in mind the various law provisions applicable to this case. At the outset, we must record that this being an appeal under the provisions of Section 21(4) of the NIA Act, the scope of our consideration of the impugned order rejecting bail to the Appellant would be limited to examine whether the Sessions

Court has considered the material on record in the light of various pronouncements of the Hon'ble Supreme Court, whilst considering the grant of bail in a matter under the UAP Act, and in terms of the restrictions and fetters placed on the designated Court under Section 43-D (5) of the UAP Act.

27. For ready reference and consideration, we quote various provisions of the UAP Act, which we would deal with, whilst deciding this appeal. Section 2(1)(ec) defines a person :

> *"2. **Definitions**.- In this Act, unless the context otherwise requires,-*
> *(ec) "person" includes-*
> *(i) an individual,*
> *(ii) a company,*
> *(iii) a firm,*
> *(iv) an organization or an association of persons or a body of individuals, whether incorporated or not,"*
>
> *Section 2(1)(k) defines a "terrorist act"*
>
> *(k) "terrorist act" has the meaning assigned to it in section 15, and the expressions "terrorism" and "terrorist" shall be constructed accordingly;*
>
> *Section 2(1)(m) states that "terrorist organization" means an organisation listed in the (First Schedule) or an organisation operating under the same name as an organisation so listed;"*

28. Section 15 of the UAP Act sets out, what constitutes the offence of a terrorist act, for which the punishment prescribed under Section 16, in case the act results in death of any person would be imprisonment for life or the death penalty; in other cases, Section 16 prescribes an a term imprisonment which shall not be less than five years, but which may extend to imprisonment for life. Section 18 of the UAP Act prescribes, an imprisonment for a term which may extend to life for the act of conspiring or abetting or advising or inciting or facilitating the commission of a terrorist act or an act preparatory to commission of a terrorist act.

Section 20 prescribes, the punishment for being a member of a terrorist organization, which may extend to imprisonment for life, while Section 23 prescribes enhanced penalties, where a person with an intent to aid any terrorist or terrorist organization contravenes the provisions of Explosives Act, Flammable Substances Act, Arms Act or is in possession of any explosive, and prescribes a prison term, which may extend to imprisonment for life.

29. Section 43-D provides for modified application of the provisions of Section 167 of the Code of Criminal Procedure, 1973 and it reads as under :

> ***"43-D. Modified application of certain provisions of the Code.-***
>
> *(1) Notwithstanding anything contained in the Code or any other law, every offence punishable under this Act shall be deemed to be a cognizable offence within the meaning of clause (c) of section 2 of the Code, and "cognizable case" as defined in that clause shall be construed accordingly.*
>
> *(2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that in sub-section (2),—*
>
> *(a) the references to "fifteen days", "ninety days" and "sixty days", wherever they occur, shall be construed as references to "thirty days", "ninety days" and "ninety days" respectively; and*
>
> *(b) after the proviso, the following provisos shall be inserted, namely:—*
>
> *"Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Court may if it is satisfied with the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of ninety days, extend the said period up to one hundred and eighty days:*
>
> *Provided also that if the police officer making the investigation under this Act, requests, for the purposes of investigation, for police custody from judicial custody of any person in judicial custody, he shall file an affidavit stating the reasons for doing so and shall also explain the*

delay, if any, for requesting such police custody.".

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

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

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

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

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

(4) Nothing in section 438 of the Code shall apply in relation to any case involving the arrest of any person accused of having committed an offence punishable under this Act.

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

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

(6) The restrictions on granting of bail specified in sub-section (5) is in addition to the restrictions under the

Code or any other law for the time being in force on granting of bail.

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

30. The Hon'ble Supreme Court has considered all the above provisions in various judgments, which are set out and quoted below :

a) Sagar Tatyaram Gorkhe and Anr. (supra) was the case where the Hon'ble Supreme Court was considering an appeal against rejection of an application for bail on behalf of three accused out of a total of 15 accused, where 4 of the remaining accused were absconding and 8 accused had been released on bail. The Appellants in that case were in custody for a period of close to four years and a direction had been given by the Apex Court to complete the trial within six months under its previous order dated 12.07.2016. Despite that, only one witness had been examined. In those facts, the Hon'ble Supreme Court has observed in para 4 of the

judgment as under :

> "4. *The charges against the accused are, undoubtedly, serious. However, as observed in the earlier order of this Court dated 4th May, 2016 such charges will have to be balanced with certain other facts like the period of custody suffered and the likely period within which the trial can be expected to be completed. In our previous order dated 12th July, 2016 passed in the present matter the statement made on behalf of the State that the trial would be completed within a period of six months has been recorded. We are informed today that till date only one witness has been examined and that too his examination is also not over. The prosecution proposes to examine 147 witnesses. The accused appellants have been in custody close to four years."*

31. In National Investigation Agency ..V/s.. Zahoor Ahmad Shah Watali (supra), the Hon'ble Supreme Court was considering the scope of the restrictions under Section 43-D of the UAP Act, inserted by the Act 30.05.2008 with effect from 31.12.2008 and what is required to be kept in mind whilst considering an application for bail under that Act. It has held as follows :

> *"24. A priori, the exercise to be undertaken by the Court at this stage-of giving reasons for grant or non-grant of bail-is markedly different from discussing merits or demerits of the evidence. The elaborate examination or dissection of the evidence is not required to be done at this stage. The Court is merely expected to record a finding on the basis of broad probabilities regarding the involvement of the accused in the commission of the*

stated offence or otherwise.

30. In our opinion, the High Court, having noticed that the Designated Court had not looked at the stated statements presented in a sealed cover, coupled with the fact that the application under Section 44 filed by the investigating agency was pending before the Designated Court, and before finally answering the prayer for grant of bail, should have directed the Designated Court to first decide the said application and if allowed, consider the redacted statements, to form its opinion as to whether there are reasonable grounds for believing that the accusation made against the respondent is prima facie true or otherwise. For, in terms of Section 43D, it is the bounden duty of the Court to peruse the case diary and/or the report made under Section 173 of the Code and all other relevant material/evidence produced by the investigating agency, for recording its opinion.

31. We could have relegated the parties before the High Court but the counsel appearing for the respondent, on instructions, stated that the respondent would prefer to await the decision of the Designated Court and, depending on the outcome of the application under Section 44 of the Act, would contest the proceedings before this Court itself. Accordingly, at the request of the respondent, we kept the present appeal pending. Since the Designated Court has finally disposed of the application preferred by the investigating agency vide order dated 11-1-2019, the correctness whereof has not been challenged by the respondent, the redacted statements of the protected witness concerned have been taken on record.

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

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

33. As regards the redacted statements, objection of the respondent was that the certificate given by the competent authority is not in conformity with the certificate required to be given in terms of Section 164(4) CrPC. This objection has been justly countered by the learned Attorney General with the argument that the objection borders on the issue of admissibility of the said statements. We find force in the submission that the issue regarding admissibility of the statements and efficacy of the certificates given by the competent authority, appended to the redacted statements would be a matter for trial and subject to the evidence in reference to Section 463 CrPC and cannot be overlooked at this stage. Viewed thus, the exposition in Ramchandra Keshav Adke v. Govind Joti Chavare[20], in para 25 of the reported judgment will be of no avail to the respondent.

34. After having analysed the documents and the statements forming part of the charge-sheet as well as the redacted statements now taken on record, we disagree with the conclusion recorded by the High Court. In our opinion, taking into account the totality of the report made under Section 173 of the Code and the accompanying documents and the evidence/material already presented to the Court, including the redacted statements of the protected witnesses recorded under Section 164 of the Code, there are reasonable grounds to believe that the accusations made against the respondent are prima facie true. Be it noted, further investigation is in progress.

38. The charge against respondent is not limited to Section 17 of the 1967 Act regarding raising funds for terrorist acts but also in reference to Sections 13,16,18,20,38,39 and 40 of the 1967 Act. Section 13 is

in Chapter II of the 1967 Act. The special provisions regarding bail under Section 43D(5), however, are attracted in respect of the offences punishable under Chapters IV and VI, such as Sections 16,17,18,20,38,39 and 40 of the 1967 Act. Section 39 and 40 form part of Chapter VI, whereas other sections (except Section 13) form part of Chapter IV to which the subject bail provisions are applicable, mandating the recording of satisfaction by the Court that there are reasonable grounds for believing that the accusation against such person is prima facie true.

39. Reverting to the documents on which emphasis has been placed, Document No. D-32 is the Seizure Memo of properties seized from the premises of Ghulam Mohammad Bhatt (W-29), the then Munshi/Accountant of the respondent (Accused No.10). Document D-132(a) is the green page document, seized during the search of the residence of said Ghulam Mohammad Bhatt, containing information about foreign contributions and expenditures of the respondent (Accused No.10) during 2015/2016. Whether this document is admissible in evidence would be a matter for trial. Be that as it may, besides the said document, the statement of Ghulam Mohammad Bhatt (W-29) has been recorded on 30-8-2017, and 1-11-2017. Whether the credibility of the said witness should be accepted cannot be put in issue at this stage. The statement does make reference to the diaries recovered from his residence showing transfer of substantial cash amounts to different parties, which he has explained by stating that cash transactions were looked after by the respondent (Accused No.10) himself. He had admitted the recovery of the green-coloured document from his residence, bearing signature of the respondent (Accused No.10) and mentioning about the cash amounts received and disbursed during the relevant period between 2015 and 2016. The accusation against the respondent (Accused No.10) is that accused A-3 to A-10 are part of

> *the All Parties Hurriyat Conference which calls itself a political front, whereas their agenda is to create an atmosphere conducive to the goal of cessation of J & K from the Union of India. The role attributed to the respondent (Accused No.10) is that of being part of the larger conspiracy and to act as a fund raiser and finance conduit. Ample material has been collected to show the linkages between the Hurriyat leaders of the J & K and terrorists/terrorist organizations and their continuous activities to wage war against Government of India."*

32. The gist of the reasoning adopted by the Hon'ble Supreme Court in National Investigation Agency ..V/s.. Zahoor Ahmad Shah Watali (supra) is, that the exercise to be undertaken by a Court considering the merits or demerits in a bail application, is different from the exercise of assessing the merits or demerits of evidence. The Supreme Court goes on to hold that at the stage of deciding the bail application under the UAP Act, an elaborate examination or dissection of evidence ought not to be done at that stage, and the Court is only expected to record its findings on the basis of broad probabilities regarding the involvement of the accused in the commission of the alleged offence.

Applying the above parameters to the assessment of the material before it in the case of National Investigation

Agency ..V/s.. Zahoor Ahmad Shah Watali (supra), the Supreme Court deemed it proper to reverse the order of the High Court granting bail and maintain the order of the designated Court, rejecting the application for grant of bail.

33. Thereafter in Thwaha Fasal ..V/s.. Union of India (supra), after considering the law laid down by the Supreme Court in ***Ranjitsing Brahmajeetsing Sharma ..V/s.. State of Maharashtra & Anr, (2005) 5 SCC 294***, ***Union of India ..V/s.. K. A. Najeeb***, reported in ***(2021) 3 SCC page 713*** and ***National Investigation Agency ..V/s.. Zahoor Ahmad Shah Watali***, reported in ***(2019) 5 SCC page 1***, the Apex Court has held that the scope of enquiry whilst deciding a bail application in view of the provisions of 1967 Act is, whether *prima facie* material is available against the accused of commission of the offences alleged under Chapters IV and VI of the 1967 Act. The relevant portions of the judgment are quoted as under :

> *"12. The offence punishable under Section 20 is attracted when the accused is a member of a terrorist gang or a terrorist organisation which is involved in terrorist act. Section 20 is not attracted unless the*

terrorist gang or terrorist organisation of which the accused is a member is involved in terrorist act as defined by Section 15. Section 20 provides for a punishment of imprisonment for a term which may extend to imprisonment for life and fine.

13. On plain reading of Section 38, the offence punishable therein will be attracted if the accused associates himself or professes to associate himself with a terrorist organisation included in First Schedule with intention to further its activities. In such a case, he commits an offence relating to membership of a terrorist organisation covered by Section 38. The person committing an offence under Section 38 may be a member of a terrorist organization or he may not be a member. If the accused is a member of terrorist organisation which indulges in terrorist act covered by Section 15, stringent offence under Section 20 may be attracted. If the accused is associated with a terrorist organisation, the offence punishable under Section 38 relating to membership of a terrorist organisation is attracted only if he associates with terrorist organisation or professes to be associated with a terrorist organisation with intention to further its activities. The association must be with intention to further the activities of a terrorist organisation. The activity has to be in connection with terrorist act as defined in Section 15. Clause (b) of proviso to sub-section (1) of Section 38 provides that if a person charged with the offence under sub-section (1) of Section 38 proves that he has not taken part in the activities of the organisation during the period in which the name of the organisation is included in the First Schedule, the offence relating to the membership of a terrorist organisation under sub-section (1) of Section 38 will not be attracted. The aforesaid clause (b) can be a defence of the accused. However, while considering the prayer for grant of bail, we are not concerned with the defence of the accused.

20. The stringent conditions for grant of bail in sub-section (5) of Section 43D will apply only to the offences punishable only under Chapters IV and VI of the 1967 Act. The offence punishable under Section 13 being a part of Chapter III will not be covered by sub-section (5) of Section 43D and therefore, it will be governed by the normal provisions for grant of bail under the Criminal Procedure Code, 1973. The proviso imposes embargo on grant of bail to the accused against whom any of the offences under Chapter IV and VI have been alleged. The embargo will apply when after perusing charge sheet, the Court is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true. Thus, if after perusing the charge sheet, if the Court is unable to draw such a prima facie conclusion, the embargo created by the proviso will not apply.

23. Therefore, while deciding a bail petition filed by an accused against whom offences under Chapters IV and VI of the 1967 Act have been alleged, the Court has to consider whether there are reasonable grounds for believing that the accusation against the accused is prima facie true. If the Court is satisfied after examining the material on record that there are no reasonable grounds for believing that the accusation against the accused is prima facie true, then the accused is entitled to bail. Thus, the scope of inquiry is to decide whether prima facie material is available against the accused of commission of the offences alleged under Chapters IV and VI. The grounds for believing that the accusation against the accused is prima facie true must be reasonable grounds. However, the Court while examining the issue of prima facie case as required by sub-section (5) of Section 43D is not expected to hold a mini trial. The Court is not supposed to examine the merits and demerits of the evidence. If a charge sheet is already filed, the Court has to examine the material forming a part of charge sheet for deciding the issue

> *whether there are reasonable grounds for believing that the accusation against such a person is prima facie true. While doing so, the Court has to take the material in the charge sheet as it is."*

34. Thwaha Fasal ..V/s.. Union of India (supra), also deals with considerations for the application of the provisions of Section 43-D(5) of the UAP Act, in the absence of sanction for prosecution of the accused under sub-section (1) or Section 45 of the 1967 Act. The Supreme Court has considered the fact that whilst offences were registered under Sections 20, 38 and 39 of the 1967 Act, against the accused, the NIA did not seek sanction for prosecuting of any of the accused for the offences punishable under Section 20, and such sanction was sought for only offences punishable under Sections 38 and 39 of the 1967 Act. The considerations on the question of the effect of grant of sanction are found in para 25 of Thwaha Fasal ..V/s.. Union of India (supra), which are quoted as under :

> *"25. The order of sanction dated 18th April 2020 is a part of the charge sheet which is placed on record of these appeals. Paragraphs 2 and 3 of the order of sanction show that though the offence was registered under Sections 20, 38 and 39 of the 1967 Act, by a letter dated 13th April 2020, NIA did not seek sanction for*

prosecuting any of the three accused for the offence punishable under Section 20. Sanction was sought to prosecute the accused nos.1 and 2 for the offences punishable under Sections 38 and 39. In addition, a sanction was sought to prosecute the accused no.2 under Section 13. Paragraph 4 of the order refers to the authority appointed by the Central Government under sub-section (2) of Section 45 consisting of a retired Judge of a High Court and a retired Law Secretary, as well as the report submitted by the said authority. Paragraph 6 of the said order records prima facie satisfaction of the Central Government that a case is made out against the accused under the provisions of the Act of 1967, as mentioned in letter dated 13th April 2020. Thus, as of today, sanction under sub-section (1) of Section 45 has not been accorded for prosecuting the accused for the offence punishable under Section 20 of the Act of 1967 and, therefore, as of today, the Special Court under NIA Act cannot take cognizance of the offence punishable under Section 20. Therefore, for deciding the issue of prima facie case contemplated by sub-section (5) of Section 43D, the case against the both accused only under Sections 38 and 39 is required to be considered. In view of the absence of sanction and the fact that NIA did not even seek sanction for the offence punishable under Section 20, a prima facie case of the accused being involved in the said offence is not made out at this stage. As stated earlier, sub-section (5) of Section 43D will not apply to Section 13, as Section 13 has been incorporated in Chapter III of the 1967 Act."

35. Whilst dealing with the subject of grant of sanction, we take note of the fact that in the present case, the Government of Maharashtra has granted sanction by its order dated 28.05.2019 for prosecution of the present Appellant

alongwith other accused for offences punishable under Sections 16, 18, 20 and 23. Considering this situation, the facts of the case before us are markedly different from the facts in the case of Thwaha Fasal ..V/s.. Union of India (supra), before the Supreme Court, which proceeded on the basis that there was no sanction accorded against those accused for the offence punishable under Section 20 of the 1967 Act.

36. We now refer to the judgment in Union of India ..V/s.. K. A. Najeeb (supra), wherein the Hon'ble Supreme Court was considering whether the presence of statutory restrictions under Section 43-D(5) of the UAP Act *per se* does not oust the ability of Constitutional Courts to grant bail on the grounds of violation of Part III of the Constitution of India. Whilst considering the balance between the Fundamental Rights of a citizen under Part III of the Constitution and the statutory restrictions under Section 43-D(5) of the UAP Act, the Supreme Court has held at paragraphs 17, 18 and 19 as under :

"17. It is thus clear to us that the presence of statutory restrictions like Section 43-D (5) of UAPA per se does not oust the ability of constitutional courts to grant bail on grounds of violation of Part III of the Constitution. Indeed, both the restrictions under a statue as well as the powers exercisable under constitutional jurisdiction can be well harmonised. Whereas at commencement of proceedings, the courts are expected to appreciate the legislative policy against grant of bail but the rigours of such provisions will melt down where there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has exceeded a substantial part of the prescribed sentence. Such an approach would safeguard against the possibility of provisions like Section 43-D (5) of the UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial.

18. Adverting to the case at hand, we are conscious of the fact that the charges levelled against the respondent are grave and a serious threat to societal harmony. Had it been a case at the threshold, we would have outrightly turned down the respondent's prayer. However, keeping in mind the length of the period spent by him in custody and the unlikelihood of the trial being completed anytime soon, the High Court appears to have been left with no other option except to grant bail. An attempt has been made to strike a balance between the appellant's right to lead evidence of its choice and establish the charges beyond any doubt and simultaneously the respondent's rights guaranteed under Part III of our Constitution have been well protected.

19. Yet another reason which persuades us to enlarge the respondent on bail is that Section 43-D (5) of the UAPA is comparatively less stringent than Section 37 of the NDPS Act. Unlike the NDPS Act where the competent court needs to be satisfied that prima facie the accused is not guilty and that he is unlikely to commit

> *another offence while on bail; there is no such precondition under UAPA. Instead, Section 43-D (5) of the UAPA merely provides another possible ground for the competent court to refuse bail, in addition to the well-settled considerations like gravity of the offence, possibility of tampering with evidence, influencing the witnesses or chance of the accused evading the trial by absconsion, etc."*

37. It is thus clear that <u>Union of India ..V/s.. K. A. Najeeb</u> (supra), was a case where the Hon'ble Supreme Court considered the special facts of that case, namely the stage at which the trial was at, the number of witnesses which were left to be examined and the unlikely event of the trial being completed for years together.

38. Applying the ratio of the various judgments cited by us above, we now proceed to refer to the material on record and the charge-sheet, which we examine, keeping in mind that our efforts would be to determine whether that material would lead us to conclude that there are reasonable grounds to believe that the accusations made that material against the Appellant are *prima facie* true.

39. At the outset, we note that the allegations made against the Appellant, as claimed by the prosecution, are on the basis of Sections 16, 18, 20 and 23 of the UAP Act read with the provisions of the Indian Penal Code, the Arms Act and the Maharashtra Police Act. A reading of the statement/complaint of Rajvindarsing Harising Shergil clearly sets out that about 100 to 150 trucks belonging to transport companies, were detained by armed men in olive green uniform on the day of the incident. The complaint further states that the drivers of these trucks were asked to alight from the trucks and were taken to a spot in the forest and several of them were beaten up by the assailants. The complaint further alleges that the assailants were chanting slogans such as "Communist Party Zindabad, Maoist Organization Zindabad, Lal Salam Zindabad", making direct references to the Communist Party (Maoist) a banned organization under the schedule to the UAP Act. The complaint further alleges that around 39 vehicles were set on fire by the naxalites after breaking open their diesel tanks, clearly demonstrating the intent of the mob and the fact that

they were acting in concert and with the common intent of terrorising the drivers and cleaners of the trucks.

40. A further reading of the complaint alleges that the assailants were joined by another group of men in plain clothes, who came out of the forest and the conversation recorded amongst the assailants of threatening to kill the drivers, and the act of dousing some of the drivers with diesel to set them on fire, were clearly acts designed to create terror in the minds of the drivers and the cleaners of the trucks, who were instrumental in transporting iron ore from the Surjagad mines to the factory of Lloyd Metal Company.

It is clear from the statements that the group of assailants were acting with common intent to create terror not just in the minds of the drivers of the trucks, but with an intent to stop the working of the mining activity in that area, which would result in a threat to the economic security as also the security of the factory set up in that area. *Prima facie,* therefore, the acts alleged in the complaint/FIR, would be acts, which would squarely fall within the definition of the

word "terrorist act" under Section 15 of the UAP Act. Consequently, the terrorist act if proved, would attract punishment under Sections 16, 20 and 23 of the UAP Act. Another aspect that stands out from a reading of the FIR was the fact that the members of the armed group used fuel from the tanks of the trucks, which is a flammable substance and set fuel tanks on fire. The armed men were also carrying weapons, which included fire arms. Both these acts would squarely fall under the provisions of Section 15 of the UAP Act (using flammable/explosive substance whilst committing the arson and carrying and using fire arms to terrorise the drivers).

41. The next question would be whether there is material on record to connect the Appellant in terms of the provisions of Section 20 of the UAP Act to a terrorist gang or terrorist organization.

A perusal of the letters, which were found on the analysis of the hard-disk seized from the house of the Appellant would leave no doubt that the Appellant was

connected with the banned organization C.P.I. (Maoist), whose name is listed in the schedule to the Act. A reading of these letters clearly reveals that the Appellant was not just engaged as an Advocate of some of the members of the banned organization, but he was involved in raising finance and moving money from place to place and providing financial support to the cadre of the banned organization C.P.I. (Maoist) in the area of Gadchiroli. There are direct references in these letters to the name of the Appellant in a letter written by one "comrade Milind" to the incident in question at Surjagad hills, which are quoted below:

> *"आशा करते है की, आप सभी ठीक होंगे, पिछले ३–४ माह से हमारे वरिष्ठ कॉमरेड्स कॉ. वरवरराव तथा हमारे कानुनी मदतगार कॉ. सुरेंद्र गडलिंग द्वारा दिय गये मार्गदर्शन के मुताबीक जो भी कारवाई देश के अलग अलग हिस्सो मे खासकर दिसंबर महिने मे गडचिरोली तथा छ. ग. के कॉमरेड्स द्वारा कम संख्याा मे रहते हुअे सुरजागड में किया गये हमलेने हमे राष्ट्रीय स्तर मे बहुत प्रसिध्दी दिलवाई है प्रचार माध्यमो तथा दुश्मनों द्वारा हमारी संख्या को ५०० बताकर हमारी बडी उपस्थीती वहॉ दर्ज करवाई है ऐसी ही कारवाइ जिसमें हमें ज्यादा से ज्यादा प्रसिध्दी प्राप्त हो हमें आने वाले दिनो मे करना है कुछ बडी कारवाईयों के बारे मे कॉ. वरवरराव और कॉ. सुरेंद्र ने उसे सफलता पुर्वक अंजाम देने के लिये तथा जंगल के कॉमरेड्स तक यह योजनायें*

पहुचाकर ऐसे ही बडे काम करवाने की जबाबदेही कॉ. सुरेंद्र को दी है इसके लिये उन्हें कॉ वरवरराव ने फंड उपलब्ध करवाया है जिसमें से कॉ. सुरेंद्र कुछ फंड आपतक पहुचायेंगे आप उनके संपर्क में रहकर कारवाई करे"

42. The letter is allegedly written by "comrade Milind", which according to the prosecution's case is one Milind Baburao Teltumbade alias Jiva, whose name appears at serial No.15 of the list of C.P.I. (Maoist) - Polit Bureau Members maintained by the Respondent. Another letter addressed by "comrade Varvara" addressed to a "comrade Surendra", according to the prosecution referring to Surendra Gadling, Appellant herein, refers to the negative public opinion that various T.V. channels and newspapers were publishing about the Communist Party (Maoist); the letter further refers to the Appellant's involvement in the use of lakhs of rupees for funding the cadre of the organization in the area of Gadchiroli in Maharashtra and of Bastar in Madhya Pradesh; the letter also refers to the effect of denominitization (नोटबंदी) on the recruitment of urban cadre of the organization. The specific references in that letter are quoted below :

"आप इस बारे में दिये हुअे विश्वास को बनाये रखने मे कामयाब नही हुअे जिससे हमारे अर्बन कॅडर मे टुट का खतरा महसुस हो रहा है आपको इसके लिये नोटबंदी के दौरान लाखों रुपये की फंडीग कि जा चुकी है जिसमें से गडचिरोली और बस्तर में आपने जितना फंड उपलब्ध करवाने था वह नही कराया इस बातों से संघटन मे आपको लेकर नाराजी वातावरण है

इस घटना की क्षतीपुर्ती तुरंत करने की आवश्यक्ता है ऐसा वरिष्ठ कॉमरेडो का मानना है इसलिये आप महाराष्ट्र तथा छत्तीसगठढ के कॉमरेडो से संपर्क कर उन्हे उनके काम में गतिशीलता लाने के लिये कहे और दुश्मनों के मनोबल को तोडने में अपना सहयोग करें"

43. The above quotations leave no doubt in ones mind that in if its contents are proved against the Appellant, it would demonstrate that the Appellant was indeed a member of the C.P.I. (Maoist) organization, which is a banned organization and he was involved at its organizational level both in terms of arranging its funding in the areas of Gadchiroli and Bastar and also involved in the organization of the cadre to wage war against the "enemy", which is the State.

44. The next letter, which we make reference to is alleged to have been written by the Appellant Surendra to

"comrade Prakash", whose name finds reference in the list of C.P.I. (Maoist) - Polit Bureau Members at serial No.1, alleged by the Respondent to be one Namballa Keshav Rao alias Basavaraj alias Prakash, the General Secretary of the C.P.I. (Maoist) organization operating in the District of Shrikakulam in the State of Andhra Pradesh. The letter refers to funding of operations through Hawala channels to comrades in the State of Chhattisgarh and Maharashtra. The letter also refers to the death of 12 to 20 comrades/operatives of the party in an encounter, and suggests that the party needs to take revenge against the enemy for the death of those comrades. The relevant portions of the letter are quoted below :

> *"मैंने दिनांक २२/०४/२०१७ को दिल्ली जाकर संघटनद्वारा भेजे गये छततीसगढ के वरिष्ठ सी.सी. कॉमरेड से मुलाकात की तथा उन्हें बस्तर तथा महाराष्ट्र में किये जाने वाले ऑपरेशन के लिये मेरे पास दिया गया फंड हवाला के माध्यम से उपलब्ध करवाया । जिसके बहुत अच्छे परिणाम दिखाई दे रहे है।*
>
> *दुश्मनोद्वारा प्रचारीत की जा रही बात की हमले में हमारे संघटन के १२ ते २० सदस्य मारे गये इससे हमारे संघटन के सदस्यों के मनोबल पर असर पडेगा इसे झुठा साबीत करने के लिये एक फॅक्ट फाईडीग कमेटी का गठन किया जाये जो वहॉ*

जाकर यह प्रचारीत करे की मारे गये लोग यह स्थानीय निर्दोष आदिवासी है । जिन्हें बदला लेने के लिये दुश्मनों द्वारा जबरन मारा गया है । इससे मिडीया कव्हरेज हासील होकर सामान्य जनता मे दुश्माने की छवी खराब होगी तथा केंद्र सरकार द्वारा बार बार दिये जा रहे बयान की हम अन्य विकल्प तलाश करेंगे पर रोक लगेगी ।"

45. A further reading of this letter reveals that its author "Surendra" makes reference to other operatives of the party, "comrade Rona", "Hany Babu", and "comrade Amit Bhoumik", and further reference to operations to be carried out in the city of Pune through its urban cadre. The letter also makes reference to operations to be carried out in the jungle by recruiting urban cadre and sending them in such operations to the jungles. The letter also suggests that this urban cadre would be used for revenge for the death of 25 persons, who were killed by the enemy (the State). The letter also refers to enclosure of certain maps giving information of the movements of Bastar Police and deployment of personnel of the CRPF (Central Reserve Police Force) in camps, in order to organize and plan their ambush as a means to avenge the death of 25 comrades. The above references are quoted

below :

"अॅड कॉ. अमित भौमीक, पुना यह हमे ऑपरेशन तथा अर्बन कॅडर में प्रचार तथा सेदंश भेजवाने मे महत्वपुर्ण भुमिका निभा रहे है । इन्हें संघटन की ओर से ओर अधिक जिम्मेदारी दी जा सकती है । यह जंगल मे ऑपरेशन के लिये अर्बन कॉमरेडो को रिकुट करके भेजने का काम करने के लिये बहुत उपयुक्त व्यक्ती है ।

हमारे कॉमरेडों ने बुर्कापाल मे जो दुश्मनों की हालात खराब की और उनके २५ लोग मारे उसके लिये बधाई । अभी इस घटना से दुश्मन सदमें में है । तुरंत एक दो और कारवाई करने का संकेत प्राप्त हुआ है । उस हिसाब से आप स्वयं देख ले । इस पत्र के साथ कुछ नकशे भी भेज रहा हुँ जिसमें बस्तर पुलिय और सीआरपीएफ कॅम्पस के डिप्लॉयमेंन्ट की ताजा जानकारी मेरे पास आयी थी वह आपको अगले एमबुश की प्लानिंग में काम आयेगी ।

क्रांतीकारी अभिवादन के साथ,

कॉ. सुरेंद्र "

46. Then reference can be made to yet another letter addressed by "Surendra" to "comrade Varvara", wherein it is stated that the author Surendra has appeared for "comrade Saibaba" at his trial. This letter also makes reference to the negative effect of denominitization on the financing of the organization's operations in Gadchiroli and Chhattisgarh due to the paucity of funds. The letter further shows the direct

involvement of Surendra in the organization of operations in the areas of Gadchiroli and Bastar. The letter also makes reference to information given to the public of an attack carried out by his comrades on the enemy at Bastar, which was published through handbills distributed in Gadchiroli district; the letter also refers to the effect of the attack nation wide, which the author claims, the nation had taken note of the strength of the party. The letter also refers to the fact that the effect of the attacks was felt even by the Central Government, who took note of the operation. The portions of this letter are also quoted below :

> *"इन घटनाओं से केंद्र सरकार तक हिल गयी है आशा करता हु की हमारे कॉमनेडस ऐसे ही बडे आपरेशन आपके मार्गदर्शन में करेंगे । बस्तर में जहाँ दुश्मनों की सेंट्रल फोर्स कम है उस जगह की पहचान करके बडे हमले करने के लिये आप के निर्देश को उन तक पहुचा दिया गया है । आशा करते है यह ऑपरेशन वहाँ के कॉमरेड्स सफलतापुर्वक करेंगे । जिससे दुश्मन बॅकफुट पर जायें । मुझे कुछ कॉमरेड्स के द्वारा मिली जानकारी के मुताबीक उसुर, पामेद, एमलागुण्डा, पालाचलमा, भेजी, केरलापाल इन जगह दुश्मन फोर्स का डिप्लायमेंट कम है जिससे हमें एम्बुश लगाने में आसानी हो सकती है ।"*

47. We then refer to the statements contained in the "Maoist Information Bulletin-34" of July-December 2016 attached from the residence of the Appellant at Pune. The bulletin specifically refers to various guerrillas operations conducted under the control of the Central Committee, Communist Party of India (Maoist) at Gatta village under Gatta Police Station, Gadchiroli District, where several Policemen were injured. The bulletin then makes specific reference to the incident of 23.12.2016, which is subject matter of the present charge-sheet, which is quoted below :

> *"On 23 December, PLGA's main, secondary and base forces as well as the masses in their hundreds burnt down 76 trucks, three earthmovers and a motorcycle belonging to four contractors in Surjagarh of Gadchiroli which were transporting iron-ore from the Surjagarh mines. The central and state government in collusion with the mining company Lloyds are hell bent on opening the mines in spite of the persistent and vehement opposition by the people of 76 villages surrounding the Surjagarh hills which will be directly affected by the mining. It was a people's armed action against the government-Lloyds Mining Company nexus. To facilitate mining by the imperialist financed MNC Lloyds the BJP government is setting up a number of new police stations and paramilitary camps in and around Surjagarh and strengthening its 'carpet security'. For the last eight-nine years the people have been struggling against the mining project. Now the fascist*

Modi government in collusion with the imperialists is trying to open this project using force and violence. The people's resistance has also intensified as a result, of which this incident is a latest example. This action has halted the mining and transportation work for the time-being."

The bulletin also published photo graphs of the charred remains of few of the 76 vehicles carrying iron ore to the Lloyds Plant from Surjagarh, which, the bulletin claimed were burnt down by the People's Liberation Guerrilla Army (PLGA). The contents of the article clearly refer to the act of burning the trucks to be an act of waging war against the Government/State. The article also refers to the acts of the fascist Government acting in collusion with imperialist in trying open the mining project with Lloyds Mining Company, which was a Multinational Company. The references made in the article were obviously reporting an act of waging war against a duly elected Government.

48. A plain reading of the above referred material, in the form of the letters and the Maoist bulletins, would leave us to conclude that if its contents were to be considered, there would be a reasonable ground for believing that the

accusations made against the Appellant are *prima facie* true.

49. The learned Counsel for the Appellant has argued that the material, which was seized from the residence of the accused in the form of letters contained in the hard-disk attached during the raid conducted by the Police, could not be relied upon at all, since the same were attached in breach of the Standard Operating Procedure under the IT Act, and are also contrary to the provisions of Sections 45-A and 65-B of the Evidence Act.

At the outset, we must point out that a plain reading of the panchanama conducted at the house of the Appellant records the entire hard-disk from the computer of the accused was seized. The documents produced before us do not establish the accusation that the Investigating Authorities started the computer of the accused at his residence, transferred the data from the hard-disk and then shut it down during the operation of seizure. The hard-disk appears to have been sealed and sent to the forensic laboratory for analysis. The report of the forensic laboratory

prima facie shows that the cyber crimes technicians accessed the hard-disk for the first time at the laboratory by means of his own digital signature, specifying the hash value of the information contained in the hard-disk at the time it was first accessed at the lab, creating a clone or mirror image of the data in the hard-disk, and then re-applying the digital signature of the technician at the time of shutting down the hard-disk. A reading of the report would *prima facie* shows that what was then used for analysis was the clone or mirror image copy of the data on the original hard-disk.

We are conscious of the fact that all this material could be considered as evidence against the Appellant only after it is proved as admissible evidence at a Trial.

50. We are therefore of the *prima facie* view that at this stage, on considering the content of the hard-disk, that is the content of the letters that we have referred to, though they are subject to proof under the Evidence Act, and in terms of procedure set out under the Information Technology Act, 2000, they are nevertheless material considered for deciding

the application for bail. Suffice to state, at this *prima facie* stage, the Sessions Court has proceeded to consider the effect of the contents of the said letters, which would be ultimately subject to proof at the trial. We find that the Sessions Court has considered the contents of the letters, the printed material and the statements/complaint in their right perspective, and correctly applied the principles enunciated by the Hon'ble Supreme Court in National Investigation Agency ..V/s.. Zahoor Ahmad Shah Watali, (supra), Thwaha Fasal ..V/s.. Union of India (supra) and Union of India ..V/s.. K. A. Najeeb (supra), whilst considering the bail application, we find no fault in the *prima facie* conclusions arrived at by the Sessions Court in considering the material on record, at this stage, and in terms of the special provisions of Section 43-D (5) of the UAP Act.

51. We now make reference to a judgment of the Division Bench of this Court passed in Hany Babu ..V/s.. National Investigation Agency and Anr. (supra), which was rendered on an appeal filed under Section 21(4) of the NIA Act, wherein the Appellant had challenged an order dated

14.02.2022, passed by the Special Court (NIA) Greater Mumbai, rejecting the Appellant's application for bail. In that case, the Appellant Hany Babu was the accused No.12 in Special Case No.414 of 2022 on the FIR No.4 of 2018 filed on 08.01.2018, which commenced the investigation in the (Elgar Parishad) case, wherein the present Appellant is also an accused. That case was an investigation conducted into involvement of various accused including the present Appellant, that led to the violence and death of an innocent person near Bhima Koregaon in Pune District, on 01.01.2018. A Division Bench of this Court, whilst considering the bail appeal of Hany Babu has made references to the analysis of the seized electronic/digital articles from the residence of the present Appellant, amongst others and the involvement of the Appellant and other accused in that case, including Rona Wilson, Shoma Sen, Mahesh Raut, Comrade M. alias Milind Teltumbade (now deceased), Comrade Prakash alias Navin alias Ritupan Goswami (absconding), Comrade Manglu (absconding), Comrade Dipu (absconding), who were alleged to have

committed acts punishable under Sections 13, 16, 17, 18, 18(B), 20, 38, 39 and 40 of the UAP Act.

52. Hany Babu ..V/s.. National Investigation Agency and Anr. (supra), makes extensive reference to the very same letters and bulletin referred to by us, forming part of the charge-sheet before the Sessions Court at Gadchiroli, it considers the role of the Appellant in that case, in the light of the charge of conspiracy in relation to the entire case and his active involvement as a prominent member of the Communist Party of India (Maoist), a designated terrorist organization.

This Court, after making reference to the principles laid down by the Hon'ble Supreme Court in National Investigation Agency ..V/s.. Zahoor Ahmad Shah Watali (supra), has held at para 15 of Hany Babu (supra) as under :

> *"15. ....The Hon'ble Supreme Court observed that under the proviso to sub-section (5), it is the court's duty to be satisfied that there are reasonable grounds for believing that the accusation against the accused is prima facie true or otherwise. By its very nature, the expression "prima facie true" would mean that the materials/evidence collated by the investigating agency*

about the accusation against the accused concerned in the first information report must prevail until contradicted and overcome or disproved by other evidence and on the face of it, shows the complicity of such accused in the commission of the stated offence The Hon'ble Supreme Court held that the duty of the court at this stage is not to weigh the evidence meticulously but to arrive at a finding based on broad probabilities. It was further held that exercise to be undertaken by the court is different from discussing merits or demerits of the evidence. The court is merely expected to record a finding based on broad probabilities regarding the involvement of the accused in the commission of the stated offence or otherwise. The Hon'ble Supreme Court, observing that High Court had overstepped the jurisdiction under Section 43-D (5) by holding a mini-trial and weighing evidence, set aside the order passed by the High Court."

This Court then makes reference to the scope of Section 43-D (5) of the UAP Act and to the judgments of the Supreme Court in Union of India ..V/s.. K. A. Najeeb (supra), and in Thwaha Fasal ..V/s.. Union of India (supra), and considers the applicability of the provisions Section 10 of the Indian Evidence Act, 1872, to the case, has held at para 20 as under :

"20. The broad principle emerging from the above provision is that the acts and declarations of the conspirators which have been undertaken during various times and places are admissible in evidence to show that by the act of conspiring together, the conspirators as a

body has assumed themselves individuality and whatever is done and said by one in furtherance of a common design is an act of all. The illustration appended to Section 10 would show that the material placed on record, which gives an account of the conspiracy and reference to the terrorist acts, would be relevant against the Appellant, and this provision applies to the case at hand. In view of Section 43-D(5) and the dicta of the Hon'ble Supreme Court referred to above, material placed before us in totality will have to be accepted at this stage, and accordingly, the role and the material against the Appellant will have to be examined."

This Court then lists out the two sets of the document referred to in that charge-sheet, the first being a compilation of document seized from Hany Babu and the second compilation being a document seized from the Co-accused and other material relevant to that case, which include the various letters found in the hard-disk seized from the residential premisses of the present Appellant and the catalogue of weapons, which is also referred to in the present charge-sheet. This Court then elaborately analysed the material under reference and came to a *prima facie* conclusion of the involvement of the Appellant in the context of Section 43-D of the UAP Act. It then refers to the very same letters, which form part of the present charge-

sheet, to which we have made reference in the earlier part of this judgment and arrives at the following findings :

> *"46. A communication in Hindi from comrade Surendra (Surendra Gadling) (Accused No.3) to Prakash (Ritupan Goswami) (WA-2) is HDD Cyp 172/18 Ex. 1 Ltr-2704 Cyp 172/18 Ex.1\Users\Sumit\Desktop\Pen Drive Backup 29.03.2015\Local Disk\Red Ant Dream\ Material 639-640. It states that the enemy (State) has killed 10 to 20 party members, and a fact-finding committee is necessary to be organised, which will publicise that those killed are innocent tribals. Media coverage needs to be created so that a negative image is created in the eyes of the general public. He then refers to the propaganda in favour of Saibaba at Delhi, and for that purpose, he is in contact with comrade Rona (Rona Wilson) (Accused No.2) and HB (Appellant), and comrade Prakash (Ritupan Goswami) (WA-2) should give them instructions. He then congratulated comrade Prakash (Ritupan Goswami) (WA-2) that the party comrades that the party had killed 25 persons of the enemy. The learned ASG informs that these 25 persons were police personnel. The letter also refers to gathering information on police and CRPF camps deployment, which would suit ambush planning."*

The judgment then makes reference to the role of the Appellant in that case, seen in the light of the charge of conspiracy, in relation to the entire case of the NIA in that regard. Observations are made to that effect in para 49 of the judgment, which reads as under :

49. The role of the Appellant cannot be seen separately as sought to be put forth by the learned Counsel for the Appellant. It will have to be seen in the light of the charge of conspiracy as to the entire case of the National Investigation Agency in this regard. The documents highlighted above and the others on record and the facts unearthed during the investigation, based on which we must proceed at this stage, show that the Appellant is an active and prominent member of the CPI (Maoist) Party. The CPI (Maoist) Party is designated as a terrorist organisation. The CPI (Maoist) is working to establish a people's government through violent means in an armed struggle. It wants to undermine and seize power from the State. The Appellant, along with other accused, are working for different mass organisations to further the activities of the CPI (Maoist) Party. The CPI (Maoist) Party has chalked out a detailed strategy for the furtherance of its role to overthrow the lawful Government, and the same strategy and tactics are adopted by the accused and the Appellant. The material placed on record by NIA shows that the platform of the Elgar Parishad Programme was used by having established underground contact with the banned organisation CPI (Maoist) Party through its activists working in Delhi, including Appellant. This led to unrest and the death of one person. The Appellant was fully entrenched in the activities of the CPI (Maoist) Party, a banned organisation, and the Revolutionary Democratic Front (RDF), also a banned organisation. The chart showing e-mail communications and contacts between the accused is part of the record."

It further makes reference to the various communications in Hindi from the present Appellant to Prakash and other party comrades, which were seized in that case from the residence of the Appellant and produced as part of the charge-sheet in the present case. The observations at para 52 of the judgment read as under :

"52. In this context, the case of the NIA in the chargesheet is that members of the banned organisation CPI (Maoist) have engaged in a protracted armed struggle based on guerrilla warfare, and they have attacked and killed many government security forces from time to time and looted their weapons and acquired materials required to prepare the explosives. There is a specific assertion of killing the army personnel. Specific documents on record, such as communications in Hindi from Surendra (Surendra Gadling) (Accused No.3) to Prakash (Ritupan Goswami) (WA-2), referred to earlier, congratulate the party comrades that the party had killed 25 persons of the enemy that is police personnel. The letter also refers to gathering information on police and CRPF camps deployment, which would suit ambush planning. A document seized from the Appellant is about integrated weapon training. Based on this, NIA alleged that the CPI (Maoist) has carried out the killings methodically, engaging in armed conflict. The material shows that by treating the armed forces of the State and the police as enemies by use of firearms and weapons, the members of the police and armed forces have been made targets and killed, and the conspiracy also refers to elimination of constitutional functionaries. There is, therefore, no merit in the contention of the Appellant that no terrorist act is alleged."

53. Independent of the observations of this Court in Hany Babu ..V/s.. National Investigation Agency and Anr (supra), we have arrived at the *prima facie* conclusions of the involvement of the Appellant evident from the very same letters and "Maoist Information Bulletin-34" seized from the Appellant herein. The material on record thus leads us to

conclude *prima facie*, and keeping in view the provisions of Section 43-D (5) of the UAP Act, the involvement in the organization of the Surjagad incident referred to in a charge-sheet and his membership of the banned organization Communist Party of India (Maoist).

54. We now deal with the contentions of the Appellant that the order of sanction dated 28.05.2019 granted by the Government of Maharashtra to the prosecution of the Appellant is not in terms of Rules 3 and 4 of the UAP Rules 2008, in that, it is beyond the time frame of seven working days set out therein. The argument is based upon a submission that the provisions of the Rules are mandatory, and if not followed, would vitiate the entire prosecution.

55. This contention was considered by the High Court of Kerala in Roopesh ..V/s.. State of Kerala and Ors. (supra), as to whether a delay of six months in granting sanction under the said Rules would be violative of the time frame prescribed in the UAP Rules. The High Court of Kerala considered the effect of the 2008 amendment to the UAP

Act and whether the timeline set out in Rule 4 **and** non-adherence to the timelines would vitiate the entire trial. The Kerala High Court whilst considering this issue has opined that the provisions of sanction and the timeline stipulated therein are mandatory and sacrosanct and has held thus :

> *"22. As we already noticed, UA(P)A was in force from the year 1967 with the requirement of a sanction by the appropriate Government without any stipulation of time. The enactments which sought to prevent terrorist activities brought out subsequently also had the very same requirement of a consent without any stipulation of time. From the wealth of experience gleaned over more than half a century, when such enactments were in force; the Parliament consciously in the year 2008 brought in a provision where the requirement was not only a sanction form the appropriate Government but a prior recommendation from an Authority constituted under the Act, which had to be perused by the appropriate Government before sanctioning a prosecution. As has been noticed in the various precedents the provisions under the UA(P)A have an added rigour. The investigating agency is given a wider latitude in so far as the time frame for completing the investigation which in turn makes it more rigorous for the accused, which is made further harsh by the restrictions in granting bail as found in sub-sections (5) & (6) of S.43-D, the presumption under S.43-E and the overriding effect to the enactment as conferred under S.48. This is the context in which S.45 (2) has been incorporated, with provision, for an Authority to be constituted for an independent review of the evidence gathered, whose recommendation also has to be considered before the sanction is granted. There is also provided a time frame*

for the recommendation of the Authority to be made and the sanction of the Government issued; hitherto not included in identical penal statutes. The time frame, as we noticed is unique and it brings in consequences hitherto unavailable and the viability of a second proceedings would be on a very sticky wicket; especially when it could enable the investigating agency to move the Authority and the Government repeatedly if an earlier attempt is unsuccessful. We hasten to add that we are only thinking aloud and that contention would have to be left for another day, another proceeding, to be answered; as we are not now on that aspect and we would resist the temptation to make an obiter.

23. We are of the opinion that the provision for sanction is mandatory and the stipulation of time also is mandatory and sacrosanct. We have noticed the legislative history of the enactments and the provision for sanction incorporated thereunder, to take cognizance of charges based on activities labelled and defined as unlawful, terrorist and disruptive. It has to be found that the sanction under the UA(P)A granted after six months from the date of receipt of recommendation of the authority is not a valid sanction. It also has to be stated that the sanction orders merely speak of the Government, after careful examination of the records of investigation in detail, being fully satisfied of the accused having committed an offence punishable under Ss.20 and 38 of the UA(P)A. The sanction order merely referred to the records of investigation in the respective crimes, the letter of the State Police Chief and the recommendation of the authority constituted under S.45 of the UA(P)A.

24. It is to be emphasized that S.45(2) of the UA(P)A makes it mandatory for the Authority to make an independent review of the evidence gathered in the course of investigation and make a recommendation within such time as prescribed, to the appropriate Government. This does not absolve the appropriate

Government from applying its mind since otherwise there was no requirement for a further sanction from the appropriate Government. We have seen from the precedents that sanction for prosecution is a solemn and sacrosanct act which requires the sanctioning authority to look at the facts and arrive at the satisfaction, of requirement of a prosecution. It was held in Anirudh Singhji Karan Singhji Jadeja [supra] that despite the letter of the DSP being exhaustive, the Government ought to have verified that the allegations as stated by the DSP were borne out from the records. In the case of UA(P)A despite the independent review made by the Authority constituted under S.45, the Government has to arrive at a satisfaction without merely adopting the recommendation of the Authority. The Government, it is to be emphasized, has no obligation to act in accordance with the recommendation of the Authority. The sanction is of the Government and not the Authority and the recommendation of the Authority only aids or assists the Government in arriving at the satisfaction. In the present case there is no such application of mind discernible, but for the reference to the recommendation of the Authority and the laconic statement of the Government, that details have been verified, on which satisfaction is recorded as to the offence having been committed by the accused, for which prosecution has to be initiated. We find the sanction order of the UA(P)A to be not brought out in time, as statutorily mandated and bereft of any application of mind; both vitiating the cognizance taken by the Special Court."

56. A Division Bench of this Court in Mahesh Kariman Tirki and Ors. ..V/s.. State of Maharashtra (supra), had the occasion to consider the same question and after referring to Roopesh ..V/s.. State of Kerala and Ors. (supra),

has concluded that the provisions of Rule 3 and 4 are not mandatory, in the sense that their infraction does not *ipso facto* vitiate the sanction accorded unless the accused can demonstrate some prejudice or failure of justice. Whilst considering the provisions of Rule 3 and 4 of the 2008 UAP Rules and the judgment of the Kerala High Court in Roopesh ..V/s.. State of Kerala and Ors. (supra), the Bombay High Court has held as under :

> "*7. Of extreme significance, in our considered view, is the amendment to the provisions of Section 45 of the UAPA which is brought about by Act 35 of 2008.*
>
> *(xxx) We are conscious of the view of the Kerala High Court in **Roopesh**[14], that the period prescribed in Rules 3 and 4 of the 2008 Rules is mandatory. We have also noticed the contrarian view of the Punjab and Haryana High Court. We are further informed that the Special Leave Petition filed by the State of Kerala is withdrawn and the question of law is kept open. While we have no hesitation in holding that the requirement of independent evaluation of the evidence on record by the appointed authority and submission of report, in contradistinction with communication conveying the recommendations, is mandatory, with deepest respect to the view of the Kerala High Court in **Roopesh**[15], we are not inclined to hold that the time limit prescribed for making the recommendation or according sanction is mandatory. The prima facie inference that use of the word "shall" raises a presumption that the provision is mandatory may stand rebutted by other considerations and one*

> *extremely relevant consideration is the consequences which may flow from such construction. We are not inclined to construe the time frame as inexorable, breach whereof may have the unintended consequence of nipping the prosecution in the bud. We are not suggesting even for a moment that the time period can be violated with impunity. Albeit directory, the time frame must be substantially complied with. The effect of gross delay in submitting recommendatory report and according sanction may have to be examined on case to case basis, and the principles underlying Sections 460 and 465 of the Code of 1973 may come into play."*

57. We must take note of the fact that Mahesh Kariman Tirki and Ors. .V/s.. State of Maharashtra (supra), was a judgment rendered after trial, that is to say whilst testing a judgment of conviction of the Appellants therein, for the offences punishable under Sections 13, 18, 20, 38 and 39 of the UAP Act. We also take note of the fact that the Bombay High Court has noted that ordinarily, substantial compliance of Rule 4 is obligated, however, the accused will have to demonstrate some prejudice or causation or failure of justice due to the failure to adhere to the time frame statutorily prescribed under the Rules. In Mahesh Kariman Tirki (supra), the accused did not assail the time frame under

Rule 4 during the course of trial nor assailed the sanction order on the basis that there was infraction of the statutorily prescribed time period for making the recommendation and according the sanction. Further, in that case, the sanction order was not challenged during the course of the trial on its merits, that is to say on the ground of non-consideration of the material before the Authority whilst according the sanction.

We therefore deem it appropriate to leave this question open for the Appellant, if he is desirous to take up such objection, on its merits at the stage of charge or trial, if deems it fit. The observations made herein on the question of grant of sanction are only *prima facie* observations and we leave it open for the Sessions Court, if such objection is taken on its merits to deal with the same during the stage of trial.

58. On a consideration of the totality of the material on record alleged against the Appellant, we find that there is reasonable ground for believing the accusations of the National Investigation Agency against the Appellant having

been part of a conspiracy and abetting the commission of terrorist acts, as also having direct membership of the banned organization Communist Party of India (Maoist) are *prima facie* to be true. We have also considered that there is material on record of the charge-sheet would *prima facie* leads to the conclusion that the threat posed to the public and the seriousness of the entire conspiracy alleged against the Appellant would far out weigh the other considerations put forth by the Appellant, namely that he is a prominent Advocate with a long unblemished record at the bar, that he is the sole bread winner of his family or that he has not been involved in any earlier crime, would require to be rejected.

59. We find that the learned Sessions Judge, whilst passing the impugned order, has referred to the relevant provisions of the UAP Act, and considered the application of the accused Surendra Gadling on the anvil of the provisions of Section 43-D (5) of the UAP Act. The learned Sessions Judge has also extensively considered the material on record and has, after applying the principles of law laid down in the various judgments of the Supreme Court on considerations

for grant of bail in view of the provisions Section 43-D (5) of the UAP Act, correctly arrived at the conclusion that there are reasonable grounds for believing that the accusations made against the Appellant in the charge-sheet are true. We find no reason to arrive at a conclusion different from the one taken by the Sessions Court, whilst rejecting the Appellant's bail application.

60. For the reasons stated by us hereinabove, we reject the present criminal appeal.

(VALMIKI SA MENEZES, J.) **(VINAY JOSHI, J.)**

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