

(2015) 04 MAD CK 0088

In the Madras High Court

Case No : Writ Petition Nos. 28468, 33234 and 33235 of 2014 and W.P.(MD)
Nos. 16935, 16986 and 17875 of 2014

A. Beema Dowlath and Others

APPELLANT

Vs

State of Tamil Nadu and Others

RESPONDENT

Date of Decision : 09-04-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 21
Criminal Procedure Code, 1973 (CrPC) — Section 154, 177, 407, 407(3), 408
National Investigation Agency Act, 2008 — Section 11, 11(1), 12, 13(1), 20
Penal Code, 1860 (IPC) — Section 489-A
Terrorist and Disruptive Activities (Prevention) Act, 1987 — Section 20(8)
Unlawful Activities (Prevention) Act, 1967 — Section 2(1)(d), 2(d), 45, 48
Weapons of Mass Destruction and their Delivery Systems (Prohibition of Unlawful Activities) Act, 2005 — Section 10, 6, 6(3), 7

Citation : (2015) WritLR 449

Hon'ble Judges : V. Ramasubramanian, J

Bench : Single Bench

Advocate : R. Sankarasubbu, for the Appellant; A.L. Somayaji, A.G. assisted by P. Sanjay Gandhi, A.G.P., Advocates for the Respondent

Final Decision : Allowed

Judgement

V. Ramasubramanian, J.—The petitioners, who are facing prosecution for various offences under the Indian Penal Code, the Explosive Substances Act and/or the Unlawful Activities (Prevention) Act, have come up with the above writ petitions, challenging a Government Order in G.O.Ms. No. 534, Home (Courts II) Department dated 05.8.2014 constituting a Special Court for the trial of all the cases under the National Investigation Agency Act.

2. I have heard Mr. K.K. Ramakrishnan, Mr. R. Sankarasubbu, Ms. M. Subha, Mr. S.M.A. Jinnah and Mr. C.M. Arumugam, learned counsel for the petitioners and Mr. A.L. Somayaji, learned Advocate General assisted by Mr. P. Sanjay Gandhi, learned Additional Government Pleader.

3. For the purpose of better appreciation of facts, I am presenting in a tabular column, the names of the petitioners, the writ petition numbers, the complaint registered against each one of them, the offences alleged against the petitioners in the first information reports and the courts, before which, the petitioners were facing prosecution, before the issue of the impugned Government Order.

4. By the Government Order impugned in these writ petitions, the Government constituted a Special Court at Chennai (Poonamallee) in exercise of the powers conferred by Section 22(1) of the National Investigation Agency Act, 2008, (for brevity "NIA Act, 2008") for the trial of the following eight cases, namely,

- "(a) Crime No. 599 of 2013, Vellore North Police Station;
- (b) Crime No. 297 of 2013, Hasthampatti, Salem Police Station;
- (c) Crime No. 1 of 2013, Crime Branch CID, Tirunelveli;
- (d) Crime No. 554 of 2013, Thideer Nagar Police Station;
- (e) Crime No. 237 of 2011, Thirumangalam Taluk Police Station;
- (f) Crime No. 653 of 2012, Vellore South Police Station;
- (g) Crime No. 90 of 2013, Paramakudi Police Station; and
- (h) Crime No. 408 of 2013, Gudiyatham Police Station."

5. The Government Order constituting a Special Court at Poonamallee for the trial of the above cases, is assailed by the petitioners primarily on the following grounds:

"(i) the provisions of the NIA Act, 2008, are not applicable to the cases on hand, since these cases were not investigated by the National Investigation Agency;

(ii) the definition of the word "Court" in Section 2(1)(d) of the Unlawful Activities (Prevention) Act, 1967, does not include a Special Court constituted under Section 22 of the NIA Act, 2008;

(iii) the ordinary offences triable by the normal Courts of Sessions, cannot be taken to be acts of terrorism, so as to warrant trial by Special Courts and that by forcing the accused to engage a new counsel at the new place of trial, the valuable right of defence available to an accused is sought to be diluted;

(iv) cases pending before the normal Sessions Courts cannot be transferred, except in accordance with the procedure prescribed by Section 407(3) of the Code of Criminal Procedure;

(v) the constitution of Special Court only for the trial of eight criminal complaints is violative of Articles 14 and 21 of the Constitution and the secular fabric of the democratic polity; and

(vi) the offences cannot be tried in Special Court constituted outside the places

within whose territorial jurisdiction the offences were allegedly committed."

6. Since the contentions (iii), (iv), (v) and (vi) are capable of being disposed of without much ado, I shall take them up first.

CONTENTION No. (iii):

7. The third contention is that ordinary offences triable by the normal Courts of Sessions, cannot be taken to be acts of terrorism, so as to warrant trial by Special Courts and that by forcing the accused to engage a new counsel at the new place of trial, the valuable right of defence available to an accused is sought to be diluted.

8. The above argument is advanced mainly by Mr. R. Sankarasubbu, learned counsel for the petitioner, on the basis of a few decisions of the Supreme Court which defined what an act of terrorism is.

9. In *Usmanbhai Dawoodbhai Memon and Others Vs. State of Gujarat*, AIR 1988 SC 922 : (1988) CriLJ 938 : (1988) 1 SCALE 494 : (1988) 2 SCC 271 : (1988) 3 SCR 225 , the Supreme Court was primarily concerned with two issues, namely (i) the jurisdiction and power of the High Court to grant bail either under Section 439 of the Code or by recourse to the inherent powers under Section 482 to a person held in custody, accused of an offence under the Terrorist and Disruptive Activities (Prevention) Act, 1987, and (ii) the nature of the restraint placed on the power of the Designated Courts to grant bail to such person, in view of the limitations placed on such a power under Section 20(8) of the Act.

10. The batch of cases that were before the Supreme Court in *Usmanbhai*, fell into three distinct categories, as seen from paragraph 5 of the report, namely (a) communal riots resulting in offences of murder, arson, etc. by persons of one community against another, (b) incidents giving rise to acts of violence resulting in communal riots due to instigation, and (c) those connected with trade union activities or those connected with private disputes relating to ownership of property. Since the cases before the Supreme Court arose out of the refusal of bail and the opinion of the High Court that its jurisdiction also stood totally excluded, the Supreme Court pointed out in *Usmanbhai* that the Act, namely Terrorist and Disruptive Activities (Prevention) Act, 1987 is a drastic measure and that it should not be ordinarily resorted to, unless the Government's law enforcing machinery had failed. In paragraph 15 of the report, the Supreme Court pointed out that the Act is an extreme measure to be resorted to, when the Police cannot tackle the situation under the ordinary penal law. Therefore, on the basis of this judgment, it is contended by Mr. R. Sankarasubbu, learned counsel appearing for some of the petitioners that the cases on hand do not fall within the category of cases where the law enforcing machinery of the Government can be stated to have failed and where the State Police can be said to have become unable to tackle the situation under the ordinary penal law.

11. In *Niranjan Singh K.S. Punjabi v. Jitendra Bhimraj Bijjaya* [1991 SCC (Cri)

47], the Designated Court under the Terrorists and Disruptive Activities (Prevention) Act directed the case to be transferred to the regular Court of Sessions. But, the said order was challenged and an application for bail was moved. Since the application for bail was rejected, the matter was taken to the Supreme Court. It is, in that context, that the Supreme Court cited with approval the decision in *Usmanbhai*. After quoting paragraph 15 of the decision in *Usmanbhai*, the Supreme Court observed that "it is only in those cases where the law enforcing machinery finds the ordinary law to be inadequate or not sufficiently effective for tackling the menace of terrorist and disruptive activities that resort should be had to the drastic provisions of the Act". The Court also observed that while invoking a criminal statute, such as Terrorists and Disruptive Activities (Prevention) Act, the prosecution is duty bound to show from the record of the cases and the documents collected that facts emerging therefrom *prima facie* constituted an offence within the letter of the law. The Court went on to hold that "when a law visits a person with serious penal consequences, extra care must be taken to ensure that those whom the legislature did not intend to be covered by the express language of the statute are not roped in by stretching the language of the law". Therefore, it is the contention of the learned counsel for the petitioners that the Government ought not to have invoked the power under Section 22 of the NIA Act, 2008, to deal with ordinary offences where the accused are alleged to have used traditional weapons to settle scores in private disputes which do not tantamount to acts of terrorism.

12. Relying upon a decision of the Supreme Court in *Kartar Singh Vs. State of Punjab*, (1994) 2 JT 423 : (1994) 3 SCC 569 : (1994) 2 SCR 375 , it is contended by Mr. Sankarasubbu, learned counsel for the petitioner that to be an act of terrorism, something more than the commission of a mere crime is necessary. It must be shown that there was a grave emergent situation created either by external forces or by anti-nationals throwing a challenge to the very existence and sovereignty of the country in its democratic polity. According to the petitioners, there was no allegation either of external forces or of anti-nationals throwing a challenge to the existence or the sovereignty of the country. Even in cases involving shooting down of several persons with the most modern weapons due to gang rivalry, the Courts have not considered the same to be acts of terrorism. Therefore, it is the contention of the learned counsel that a Special Court ought not to have been created for the trial of such ordinary offences.

13. But, the above contentions of Mr. R. Sankarasubbu, learned counsel for the petitioners are fallacious. What we are now concerned about is the validity of the Government Order constituting a Special Court under Section 22 of the NIA Act, 2008. The said question has to be considered only with respect to the legal aspects and not with respect to the factual aspects. As a matter of fact, the constitution of the Special Court and the transfer of the cases to the Special Court under the impugned Government Order are not final. The Special Court itself has been conferred with a power under Section 20 of the NIA Act, 2008, to transfer the case back to the regular Court of Sessions, if it is of the opinion,

after taking cognizance, that the offence is not triable by it. When a Court created by a statute is conferred even with the power to decide its own jurisdiction, I do not think that I should be called upon to examine the facts of the case to find out whether the offences alleged against the petitioners constitute acts of terrorism, so as to warrant the constitution of the Special Court or not.

14. There is one more aspect. The NIA Act, 2008 does not actually create a new set of offences. It merely contains a schedule of various enactments, the offences under which, may be investigated and tried respectively by a Special Agency and a Special Court. What the learned counsel for the petitioner now wants me to do is to see whether the implication of the petitioner for the offences under the Unlawful Activities (Prevention) Act, 1967, is lawful or not. I am not dealing with a quash petition to get into the details of the same. Therefore, the third contention primarily advanced only by Mr. R. Sankarasubbu, learned counsel for some of the petitioners is rejected.

CONTENTION No. (iv):

15. Coming to the fourth contention, the same revolves around the power of transfer under Section 407 of the Code of Criminal Procedure. Relying upon the decision of the Constitution Bench of the Supreme Court in A.R. Antulay Vs. R.S. Nayak and Another, AIR 1988 SC 1531 : (1988) CriLJ 1661 : (1988) 2 Crimes 753 : (1988) 2 JT 325 : (1988) 2 SCC 602 : (1988) 1 SCR 1 Supp , it is contended by Mr. R. Sankarasubbu, learned counsel for the petitioner that even the High Court does not have the power to transfer a case either to a Special Court or to itself, de hors the provisions of Section 407.

16. But, I do not think that the reference to the decision in A.R. Antulay may be appropriate. In the said case, the trial was transferred to High Court itself, making the statutory remedy of appeal to the High Court, meaningless. Therefore, under extraordinary circumstances, the Supreme Court reviewed its own earlier order.

17. Even the reference to Section 407 of the Code, is not appropriate. Section 407 of the Code deals with the power of the High Court to transfer cases. We are not dealing here, with a case of transfer from one Court of Sessions to another under Section 407. We are now dealing with the validity of the constitution of the Special Court, which would be of the same status as the regular Court of Sessions, but would deal with these cases exclusively to ensure speedy trial. Today, several cases are transferred to Fast Track Courts. This is done in exercise of the powers conferred by Sections 407 and 408. They stand apart from cases where Special Courts are created under special enactments. As a matter of fact, Section 13(1) of the NIA Act, which defines the jurisdiction of Special Courts, begins with a non-obstante clause. It states that every scheduled offence investigated by the Agency shall be tried only by the Special Court within whose local jurisdiction it was committed, notwithstanding anything contained in the

Code. Therefore, Section 407 would have no application to the constitution of Special Courts under the NIA Act and the transfer of some cases to such Special Courts. Hence, I have no difficulty in rejecting even the fourth contention.

CONTENTION No. (v):

18. Assailing the constitution of Special Courts only for the trial of eight criminal complaints listed in the Schedule to the impugned Government Order, it is contended by Mr. K.K. Ramakrishnan, learned counsel for the petitioner that the same is violative of Articles 14 and 21 of the Constitution and the secular fabric of the democratic polity. According to the learned counsel, there are any number of cases in which allegation of commission of offences under the Unlawful Activities (Prevention) Act, 1967 have been made. From out of those cases, the State Government picked up only eight cases where the accused belong to the minority community. Therefore, it is contended Mr. K.K. Ramakrishnan, learned counsel for the petitioner, that the impugned order is violative of Articles 14 and 21.

19. But, I do not think that such a contention can be accepted. Merely because the eight cases covered by the impugned Government Order relate to those where the accused belong to the minority community, there can be no automatic inference that there is a discrimination tearing the secular fabric. The petitioners have not furnished any statistics to show how many cases have been registered under the Unlawful Activities (Prevention) Act, 1967, against the persons belonging to the majority communities and those belonging to the minority communities to show whether there was any discriminatory treatment. In any case, the exercise of a power by the State, merely to constitute Special Courts for the trial of certain cases, cannot be tested on the anvil of Article 14. Therefore, the said contention deserves to be rejected.

CONTENTION No. (vi):

20. Coming to the sixth contention, Section 13(1) of the NIA Act, 2008 prescribes that notwithstanding anything contained in the Code, every scheduled offence investigated by the Agency should be tried only by the Special Court within whose local jurisdiction it was committed. This provision is somewhat similar to Section 177 of the Code, which stipulates that every offence shall ordinarily be enquired into and tried by a Court within whose local jurisdiction it was committed.

21. But, this contention loses sight of one important fact, namely that the jurisdiction of a Special Court is not restricted by territorial limits. Under Section 11(1), the Central Government is competent to constitute Special Courts for such area or areas or for such case or class or group of cases as may be specified in the notification. Therefore, if a Special Court is constituted by the Central Government, its territorial jurisdiction is defined in the notification issued by the Central Government itself, in terms of Section 11(1).

22. If a Special Court is constituted by the State Government under Section 22, all cases in respect of which Special Court is constituted, stand automatically transferred to the Special Court by virtue of Section 22(4). The moment transfer takes place, the territorial limits stipulated in the Code of Criminal Procedure, automatically vanish. If the argument of the petitioner is accepted, Sections 407 and 408 of the Code themselves are antithetic to Section 177 of the Code. Therefore, this argument is also rejected.

23. One incidental argument advanced by the learned counsel for the petitioners is that the right to a fair trial by engaging a counsel of their chose is also offended when a Special Court is constituted at a place which is about 400 kms away from the original place. But, this argument is liable to be rejected, in view of two important facts, namely, (i) that under Section 12 of the NIA Act, 2008, the Special Court is competent either on its own motion or on an application made by the Public Prosecutor to hold sittings in any place other than its original place of sitting, and (ii) in any case, the accused can avail the facility of the Legal Services Authority. Therefore, the fact that someone has to engage a counsel at a distant place, cannot by itself determine the validity of the constitution of the Special Court.

CONTENTION No. (i):

24. The first ground on which the petitioners assail the impugned Government Order is that the provisions of the NIA Act, 2008, are applicable only to cases investigated by an Agency constituted under the Act and that since the National Investigation Agency did not investigate the offences in respect of the cases that have now been transferred to the Special Court, the State Government could not have invoked Section 22 of the NIA Act, 2008.

25. To appreciate this contention, it is essential that we take a look at the provisions of the Act. In the aftermath of the terror attacks in Mumbai, the Parliament amended the Unlawful Activities (Prevention) Act, 1967 and created a National Security Agency, by enacting the NIA Act, 2008. It was enacted, with the object of constituting an Investigating Agency at the National Level to investigate and prosecute offences affecting sovereignty, security and integrity of India, security of State, friendly relations with foreign States and offences under the Acts enacted to implement international treaties, agreements, conventions and resolutions of the United Nations and other international organisations. The Statement of objects and reasons of the NIA Act, 2008, reads as follows:

"Over the past several years, India has been the victim of large scale terrorism sponsored from across borders. There have been innumerable incidents of terrorist attacks, not only in the militancy and insurgency affected areas and areas affected by Left Wing Extremism, but also in the form of terrorist attacks and bomb blasts, etc. in various parts of the hinterland and major cities, etc. A large number of such incidents are found to have complex inter State and international linkages, and possible connection with other activities like the

smuggling of arms and drugs, pushing in and circulation of fake Indian currency, infiltration from across the borders, etc. Keeping all these in view, it has for long been felt that there is need for setting up an Agency at the Central level for investigation of offences related to terrorism and certain other Acts, which have national ramifications. Several experts and Committees, including the Administrative Reforms Commission in its Report, have also made recommendations for establishing such an Agency.

The Government after due consideration and examination of the issues involved, proposes to enact a legislation to make provisions for establishment of a National Investigation Agency in a concurrent jurisdiction framework, with provisions for taking up specific cases under specific Acts for investigation, provisions for setting up of Special Courts and for other related matters. These provisions are proposed to be incorporated in the National Investigation Agency Bill, 2008.

The Bill seeks to achieve the objectives mentioned above."

26. The Act is divided into five chapters, the first containing the preliminaries, such as the title and application and the definitions of expressions, the second dealing with the constitution of the National Investigation Agency, the third dealing with investigation by the Agency, the fourth dealing with constitution of Special Courts and the fifth dealing with miscellaneous matters.

27. Section 3(1) of the Act empowers the Central Government to constitute a Special Agency to be called the National Investigation Agency for the investigation and prosecution of offences under the Acts specified in the Schedule. Interestingly, the Act by itself does not create or recognise a new set of offences. All that the Act does is (i) to empower the Central Government to create for the purpose of investigation, a National Investigation Agency and (ii) to empower the Central Government as well as the State Governments to constitute Special Courts for trying offences committed under the enactments listed in the Schedule. The Schedule to the NIA Act, 2008, lists out the following as the Acts, for the prosecution of offences under which, the provisions of NIA Act, 2008 could be invoked:

"(i) The Atomic Energy Act, 1962,

(ii) The Unlawful Activities (Prevention) Act, 1967,

(iii) The Anti-Hijacking Act, 1982,

(iv) The Suppression of Unlawful Acts against Safety of Civil Aviation Act, 1982,

(v) The SAARC Convention (Suppression of Terrorism) Act, 1993,

(vi) The Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002,

(vii) The Weapons of Mass Destruction and their Delivery Systems (Prohibition of Unlawful Activities) Act, 2005, and

(viii) The offences under Chapter VI of the Indian Penal Code and Sections 489-A to 489-E of the Indian Penal Code."

28. Sections 6 to 10 of the Act contain the procedure for investigation by the National Investigation Agency. In order to understand the scope of Sections 6 to 10 and the reach of the first contention of the petitioners, it may be necessary to extract the provisions of Sections 6 to 10. Hence, they are extracted as follows:

"Investigation of Scheduled Offences.

6. (1) On receipt of information and recording thereof under section 154 of the Code relating to any Scheduled Offence the officer-in-charge of the police station shall forward the report to the State Government forthwith.

(2) On receipt of the report under sub-section (1), the State Government shall forward the report to the Central Government as expeditiously as possible.

(3) On receipt of report from the State Government, the Central Government shall determine on the basis of information made available by the State Government or received from other sources, within fifteen days from the date of receipt of the report, whether the offence is a Scheduled Offence or not and also whether, having regard to the gravity of the offence and other relevant factors, it is a fit case to be investigated by the Agency.

(4) Where the Central Government is of the opinion that the offence is a Scheduled Offence and it is a fit case to be investigated by the Agency, it shall direct the Agency to investigate the said offence.

(5) Notwithstanding anything contained in this section, if the Central Government is of the opinion that a Scheduled Offence has been committed which is required to be investigated under this Act, it may, suo motu, direct the Agency to investigate the said offence.

(6) Where any direction has been given under sub-section (4) or sub-section (5), the State Government and any police officer of the State Government investigating the offence shall not proceed with the investigation and shall forthwith transmit the relevant documents and records to the Agency.

(7) For the removal of doubts, it is hereby declared that till the Agency takes up the investigation of the case, it shall be the duty of the officer-in-charge of the police station to continue the investigation.

Power to transfer investigation to State Government.

7. While investigating any offence under this Act, the Agency, having regard to the gravity of the offence and other relevant factors, may--

"(a) if it is expedient to do so, request the State Government to associate itself with the investigation;

or

(b) with the previous approval of the Central Government, transfer the case to the State Government for investigation and trial of the offence."

Power to investigate connected offences.

8. While investigating any Scheduled Offence, the Agency may also investigate any other offence which the accused is alleged to have committed if the offence is connected with the Scheduled Offence.

State Government to extend assistance to National Investigation Agency.

9. The State Government shall extend all assistance and co-operation to the Agency for investigation of the Scheduled Offences.

Power of State Government to investigate Scheduled Offences.

10. Save as otherwise provided in this Act, nothing contained in this Act shall affect the powers of the State Government to investigate and prosecute any Scheduled Offence or other offences under any law for the time being in force."

29. A careful look at Sections 6 to 10 extracted above, would show that the Scheme of Chapter III of the Act could be summarised as follows:

"(a) If the Officer in-charge of a Police Station receives information relating to the commission of a scheduled offence, he should forward a report to the State Government, after recording the information under Section 154 of the Code;

(b) Upon receipt of the report from the Officer in-charge of the Police Station, the State Government should forward a report to the Central Government;

(c) The duty of the Officer in-charge of the Police Station who receives information, does not stop with the forwarding of the information to the State Government. He is obliged to continue with the investigation, till any other Agency takes up the investigation. This is by virtue of Sub-section (7) of Section 6;

(d) Upon the receipt of a report from the State Government, the Central Government should determine within 15 days whether the offence is a scheduled offence or not and whether it is a fit case to be investigated by the National Investigation Agency or not;

(e) If the Central Government is of the opinion that it is a scheduled offence and it is a fit case to be investigated by the National Investigation Agency, it should hand over the investigation to the National Investigation Agency;

(f) What happens if the Central Government does not take a decision within 15 days as required by Section 6(3) or if the Central Government decides not to entrust the investigation to the National Investigation Agency, is that the State Government will continue with the investigation. In such cases, the matter will go out of the purview of the NIA Act, 2008;

(g) Even in the absence of any report from the State Government, the Central Government is empowered to suo motu direct the National Investigation Agency to investigate an offence, if it is of the opinion that a scheduled offence had been committed;

(h) Once the Central Government either suo motu, or upon the report of the State Government entrusts the investigation to the National Investigation Agency, the State Government shall switch over to the hands off mode;

(i) After the investigation is entrusted to the National Investigation Agency, the National Investigation Agency can do two things, namely (i) request the State Government to associate itself with the investigation, or (ii) transfer the case to the State Government itself with the prior approval of the Central Government."

30. Therefore, it is clear that once the Central Government receives a report from the State Government relating to the commission of any scheduled offence, it can independently determine whether it is a fit case to be investigated by the Agency. If it is a fit case, the Central Government would entrust the investigation to the National Investigation Agency. If not, the State Government and the regular police officer would continue with the investigation. Even in cases where the Central Government entrusts the investigation to the National Investigation Agency, it is open to the National Investigation Agency to transfer the case to the State Government both for investigation and for trial, but with the previous approval of the Central Government.

31. The power of the State Government and the local police to continue with the investigation, will terminate only if the National Investigation Agency takes over the investigation. Till then, the State Government should continue to investigate and prosecute.

32. Insofar as the constitution of Special Courts is concerned, Section 11 of the Act empowers the Central Government to constitute Special Courts for the trial of the scheduled offences. A similar power is vested under Section 22 upon the State Government to constitute Special Courts for the trial of the offences. The moment a Special Court is constituted either by the Central Government or by the State Government, the trial of the offence investigated by the State Government under the provisions of the Act will stand transferred to such Special Court. Despite the power vested upon the Central Government under Section 11 and upon the State Government under Section 22 to constitute Special Courts for the trial of the scheduled offences, the Special Court itself is conferred with a power under Section 20 of the Act to transfer the case to a regular Court having jurisdiction under the Code, if after taking cognizance of any offences, the Special Court is of the opinion that the offences are not triable by it. This special power is vested in the Special Court under Section 20 of the Act.

33. Therefore, the Scheme of the Act can be split into two parts, one relating to investigation and the other relating to trial. Insofar as investigation is concerned, the Scheme of the Act appears to be

"(i) that within 15 days of receipt of a report from the State Government, about the commission of a scheduled offence, the Central Government may entrust the investigation to a National Investigation Agency,

(ii) that the National Investigation Agency to whom the investigation is entrusted, has three options, namely, either to investigate the offence by itself, or to investigate the offence by associating the State Government, or to transfer the case to the State Government itself for investigation and trial, and

(iii) that in two contingencies, namely where the Central Government does not react to the report of the State Government at all under Section 6(3), or where the investigation is transferred to the State Government under Section 7(b), the State Government alone will continue and complete the investigation."

34. Insofar as the trial of the scheduled offences is concerned, the Scheme of the Act appears to be (i) that the Central Government may constitute a Special Court to try the offence, (ii) the State Government may constitute a Special Court to try the offence, and (iii) the Special Court itself may transfer the case back to the normal Court having jurisdiction under the Code, if it is of the opinion that the offence is not triable by it.

35. If we keep in mind the Scheme of the Act with regard to the investigation and with regard to the trial, it would be clear that the power vested in the Special Court is not merely to try the offences, but also to determine its own jurisdiction. Despite the fact that the Special Court is a creature of the statute, the Court is empowered under Section 20 to hold that the offence is not triable by it. This power under Section 20 is indicative of the fact that the Special Courts constituted either under Section 11 or under Section 22 can proceed only if the offence is triable by it and not otherwise.

36. As I have indicated earlier, the Central Government has two options, upon receipt of a report under Section 6(3). The first option is to determine within 15 days whether a scheduled offence has been committed and whether it is a fit case for investigation by the National Investigation Agency, having regard to the gravity of the offences and other relevant factors. The other option available to the Central Government is to simply ignore the report of the State Government and not react to it at all. If the Central Government chooses to exercise the second option, there is no scope either for the Central Government to constitute a Special Court under Section 11 or for the State Government to constitute a Special Court under Section 22.

37. In case the Central Government chooses to exercise the first option, namely to pass an order within 15 days entrusting the investigation to the National Investigation Agency, three options are made available to the National Investigation Agency, namely, (a) to investigate the offence by itself, or (b) to investigate the offence by associating the State Government, or (c) to transfer the investigation to the State.

38. Once the National Investigation Agency chooses to exercise the first or the second option, namely to investigate by itself or to investigate the offence in association with the State Government, the Central Government would become competent to constitute a Special Court under Section 11. In case the National Investigation Agency chooses to go for the third option, namely that of transferring the investigation to the State Government, then the trial may take place in a Special Court constituted by the State Government under Section 22.

39. Just as the Central Government has two options, namely (a) either to entrust the investigation to the National Investigation Agency, or (b) not to do so, and just as the National Investigation Agency has three options, which I have indicated above, the Special Court also has two options, namely (i) to try the offence, or (ii) to transfer the trial to the regular Court under the Code.

40. Therefore, the Scheme of the Act, as found in Chapters III and IV, makes it crystal clear that the first contention of the petitioners cannot hold water. It is not necessary that the investigation by the National Investigation Agency is a sine qua non for the trial of the scheduled offences by a Special Court. Since the National Investigation Agency has an option under Section 7(b) to transfer the case to the State Government for investigation and trial and also since Section 22(2)(ii) makes it clear that the reference to "Agency" appearing in Section 13(1) should be construed as a reference to the Investigation Agency of the State Government, it is clear that a Special Court could be constituted by the State Government under Section 22(1), even in cases where the Investigation Agency was only that of the State Government. Hence, the first contention of the petitioner deserves to be rejected.

CONTENTION No. (ii):

41. The second contention of the petitioner is that the definition of the word "Court" in Section 2(1)(d) of the Unlawful Activities (Prevention) Act, 1967, does not include a Special Court constituted under Section 22 of the NIA Act, 2008.

42. In order to understand the scope of the above contention, it is necessary to take a look at the transition that the 1967 Act has undergone in a period of about 41 years from 1967 to 2008.

43. The Unlawful Activities (Prevention) Act, 1967 was originally conceived only as an enactment to impose reasonable restrictions on the (i) freedom of speech and expression (ii) right to assemble peaceably and without arms and (iii) right to form associations. The focus of the Act was to tackle the growth of regionalism in the country at that time and hence the Act was enacted after the Parliament amended the Constitution under The Constitution (sixth amendment) Act, 1963 based on the recommendations of the Committee on National Integration and Regionalism appointed by the National Integration Council. The Act, in its original form, contained only 21 sections divided into 4 chapters. It enabled the Central Government to declare certain associations as unlawful, prescribed penalties for being members of such associations and provided for a remedy to a Tribunal

constituted under the Act. Consequently, the Act did not contemplate the creation of a Special court at all.

44. But in the years 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006 and 2008, the Security Council of the United Nations passed several resolutions requiring the member States to take action against certain terrorists and terrorist organisations and to freeze their accounts. Therefore, two major amendments were made to the Act, one under Amendment Act 29 of 2004 and another under Amendment Act 35 of 2008.

45. The 2004 amendment was necessitated due to the repeal of The Prevention of Terrorism Act, 2002. It was under this amendment that a whole new set of definitions were incorporated and Chapter IV dealing with Punishment for Terrorist Activities was also inserted. In other words, the scope of the Act was enlarged under the 2004 amendment, from being a law merely dealing with unlawful associations, to a law dealing both with unlawful associations and with terrorist activities. For the first time, the word "court" was sought to be defined under section 2(d) to mean a criminal court having jurisdiction under the Code to try offences under the Act. Therefore, if there had been no further amendment to the Act after 2004, the offences under the 1967 Act are liable to be tried only before the normal criminal court having jurisdiction.

46. After the 2004 amendment to the Unlawful Activities (Prevention) Act, 1967, the Administrative Reforms Commission submitted a report titled "Combating Terrorism- Protecting by Righteousness". Based on the said report, the Government decided to bring about 2 legislative measures. The result was that the Parliament passed two enactments simultaneously in 2008. One was the NIA Act, 2008 and the other was the Unlawful Activities (Prevention) Amendment Act, 2008. The essential difference between the 2 Acts was that while the 1967 Act defined certain acts as offences and also provided a machinery for their investigation and trial, the NIA Act, 2008, did not create any new offence but created only a separate agency for investigation and a special court for trial.

47. As stated earlier, before the 2008 Amendment, the word "Court" was defined in Section 2(1)(d) of the Unlawful Activities (Prevention) Act, 1967 to mean only a criminal Court having jurisdiction under the Code to try the offences under the Act. But, by the amendment of the year 2008, the definition was expanded to include a Special Court constituted under the NIA Act, 2008. However, while doing so, a mistake appears to have crept in. The definition of the expression "Court" in Section 2(1)(d) of the Unlawful Activities (Prevention) Act, 1967, after its amendment reads as follows:

"2. Definitions:

(1) In this Act, unless the context otherwise requires,--

...

(d) "court" means a criminal court having jurisdiction, under the Code, to try

offences under this Act [and includes a special court constituted under section 11 or under section 21 of the National Investigation Agency Act, 2008 (34 of 2008);"

Instead of using the numeral 22, the draftsman has wrongly used the numeral 21 in the definition of the expression "court".

48. Despite the fact that both enactments were passed simultaneously, Section 2(1)(d) of the Unlawful Activities (Prevention) Act, 1967 does not contain a reference to Section 22. As a matter of fact, the NIA Act, 2008, is Act No. 34 of 2008. The Unlawful Activities (Prevention) Amendment Act, 2008, is Act No. 35 of 2008. In other words, in terms of chronology, the Unlawful Activities (Prevention) Amendment Act, 2008, followed the NIA Act, 2008.

49. The NIA Act, 2008, speaks about the constitution of Special Courts only under Sections 11 and 22. Section 21 of the NIA Act does not speak about the constitution of a special court but speaks only about appeals to the High Court. Two types of appeals are provided under Section 21. The first is from a judgment, sentence or order, not being an interlocutory order. The second is from an order granting or refusing bail. The power of the High Court to entertain an appeal beyond the period of 30 days, as stipulated in Sub-section (5) of Section 21 is circumscribed. In other words, the power to condone the delay is only up to 60 days. I do not know whether the NIA Act treats the High court also as a special court, by circumscribing its appellate jurisdiction under section 21.

50. But, unfortunately, despite the fact that section 21 of the NIA Act, 2008 does not deal with the constitution of the Special Court, the definition of the word "Court" in Section 2(1)(d) refers only to Sections 11 and 21 of the NIA Act and not to Section 22. The High Court of Kerala, in an interesting decision in *Ashruff Vs. State of Kerala*, (2011) CriLJ 1021, took the view that the reference to Section 21 in Section 2(1)(d) of the Unlawful Activities (Prevention) Act, 1967, was a typographical error and that the same should be read as Section 22. But, in *Rajesh and Others v. State of Kerala* [A. No. 1795 of 2013 decided on 09.4.2013], another learned Judge of the Kerala High Court doubted the correctness of the view taken in *A shruff* case, though on a different point.

51. But, it is a well settled proposition of interpretation of statutes that a penal provision has to be construed strictly. "The Court cannot proceed on the basis that what is contained in the original text of the Act, is either a typographical or a clerical error. A Court cannot proceed on logic, as the letter of the law need not always follow logic".

52. In the Interpretation of Statutes (12th Edition), Maxwell says:

"The strict construction of penal statutes seems to manifest itself in four ways: in the requirement of express language for the creation of an offence; in interpreting strictly words setting out the elements of an offence; in requiring the fulfillment to the letter of statutory conditions precedent to the infliction of punishment; and in insisting on the strict observance of technical provisions

concerning criminal procedure and jurisdiction."

53. In Craies and Statute Law (7th Edn. At p. 529) it is said that penal statutes must be construed strictly. At page 530 of the said treatise, referring to U.S. v. Wiltberger, [(1820) 2 Wheat (US) 76], it is observed, thus:

"The distinction between a strict construction and a more free one has, no doubt, in modern times almost disappeared, and the question now is, what is the true construction of the statute? I should say that in a criminal statute you must be quite sure that the offence charged is within the letter of the law. This rule is said to be founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the Legislature, and not in the judicial department, for it is the Legislature, not the Court, which is to define a crime and ordain its punishment."

54. In Tuck v. Priester, [(1887)] 19 QBD 629] which is followed in London and County Commercial Properties Investments v. Attn Gen., [(1953) 1 WLR 312], it is stated:

"We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation, which will avoid the penalty in any particular case, we must adopt that construction. Unless penalties are imposed in clear terms they are not enforceable. Also where various interpretations of a section are admissible it is a strong reason against adopting a particular interpretation if it shall appear that the result would be unreasonable or oppressive."

55. Maxwell and Craies, whom I have quoted above, are from the decision of the Supreme Court in R. Kalyani Vs. Janak C. Mehta and Others, (2009) CLT 272 : (2008) 12 JT 279 : (2009) 1 SCC 516 . Therefore, the omission in Section 2(1) (d) of the Unlawful Activities (Prevention) Act, 1967, to make a reference to Section 22 of the NIA Act, 2008, is actually fatal to the case of the respondents. If it is a typographical or a clerical mistake, I do not think I have the power to correct the same. Therefore, the second contention of the petitioners has to be upheld.

56. Unfortunately for the respondents, the Unlawful Activities (Prevention) Act, 1967, which was amended after the passing of the NIA Act, 2008, also contains a non obstante clause in section 48. Under this section 48, the provisions of this Act will have effect notwithstanding anything to the contrary contained in any other law. This non obstante clause will cover even the NIA Act, since it was passed before the Unlawful Activities (Prevention) Amendment Act, 2008 was passed. Under section 45 of the UAPA, 1967, there are certain restrictions for a court to take cognisance of an offence under the Act. Therefore, unless the court to which the cases of the petitioners are transferred, is a court within the meaning of the expression "court" appearing in section 2(1)(d), the offences under this Act cannot be tried by that court. Since the definition in section 2(1) (d) does not include a special court constituted under section 22 of the NIA Act,

2008, the impugned order is without the sanction of law.

57. It is a pity that a mistake in a numeral appearing in a section has changed the complexion of the game. But in matters of this nature, it is not within the prowess of this court to correct an error in a statutory provision. Therefore, the writ petitioners are entitled to succeed on this ground.

58. The impugned notification comprises of 2 parts, namely (i) the constitution of a special court under section 22(1) of the NIA Act, 2008 and (ii) the transfer of the cases of the writ petitioners to the said court for trial. While the first part of the impugned order is in accordance with section 22(1) of the NIA Act, 2008, the second part is not in tune with the provisions of the Unlawful Activities (Prevention) Act, 1967, especially in the light of the definition of the expression "court" under section 2(1)(d) of the Act. The writ petitioners are facing trial for offences under (i) the IPC (ii) the Explosive Substances Act and (iii) Unlawful Activities (Prevention) Act, 1967.

59. The Explosive Substances Act, 1908, is not included in the Schedule to the National Investigation Agency Act, 2008. But, the Unlawful Activities (Prevention) Act, 1967 and the offences under Chapter VI of the Indian Penal Code are included in the Schedule to the NIA Act, 2008. But, as pointed out earlier, the offences under the Unlawful Activities (Prevention) Act, 1967, cannot be tried by a Court unless it is a Court within the definition of the expression under Section 2(1)(d) of the Unlawful Activities (Prevention) act, 1967. Since a Court constituted under Section 22 of the NIA Act, 2008 is not included within the said definition, the impugned order is illegal.

60. In view of the above, the writ petitions are allowed and the impugned order is quashed only insofar as it relates to the transfer of the cases of the petitioners, implicated for offences under the provisions of the Unlawful Activities (Prevention) Act, 1967. There will be no order as to costs. Consequently, connected M.Ps. are closed.