

(2012) 09 GAU CK 0022
In the Gauhati High Court
Case No : Criminal Appeal No. 219 of 2011

Ashringdaw Warisa @ Partha Warisa

APPELLANT

Vs

National Investigation Agency and Others

RESPONDENT

Date of Decision : 10-09-2012

Acts Referred:

Arms Act, 1959 — Section 25(1B)(A)
Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1
Constitution of India, 1950 — Article 136, 141, 162, 73
Criminal Procedure Code, 1973 (CrPC) — Section 167(2A), 173, 437, 439
National Investigation Agency Act, 2008 — Section 21, 21(4), 6(5), 8
Penal Code, 1860 (IPC) — Section 120B, 121, 121A
Terrorist and Disruptive Activities (Prevention) Act, 1987 — Section 20, 20(8), 20(9)
Unlawful Activities (Prevention) Act, 1967 — Section 16, 17, 18, 19, 20

Citation : (2013) 2 GLT 1

Hon'ble Judges : Iqbal Ahmed Ansari, J; Arun Chandra Upadhyay, J

Bench : Division Bench

Advocate : D.K. Mishra, Mr. B. Saha and Ms. S. Jahan, for the Appellant; D.K. Das, SC, NIA, for the Respondent

Final Decision : Dismissed

Judgement

Iqbal Ahmed Ansari, J.—This is an appeal, u/s 21(4) of the National Investigation Agency Act, 2008, (in short, "the NIA Act"), directed against the order, dated 16.09.2011, passed, in Misc. Case No. (NIA) 32/2011 (arising out of NIA Case No. 01/2009 under Sections 120B / 121 / 121A read with Sections 16, 17, 18, 19 and 20 of the Unlawful Activities (Prevention) Act, 1967) by the Special Court, Guwahati, constituted under the NIA Act, whereby the prayer of the accused-appellant, Ashringdaw Warisa, to allow him to go on bail stands rejected. We have heard Mr. D. K. Mishra, learned Senior counsel, assisted by Ms. S. Jahan, learned counsel, appearing for the appellant. We have also heard Mr. Mr. D. K. Das, learned Standing counsel, National Investigation Agency, appearing for the respondents.

BACKGROUND FACTS

2. The material facts, giving rise to this appeal, may, in brief, be set out as under:

(i) Some significant amendments have been made in the Unlawful Activities (Prevention) Act, 1967, by the Unlawful Activities (Prevention) Amendment Act, 2008, the amendment having come into force on 31.12.2008. The amendments, amongst others, introduced certain conditions, whereby the powers of the court, u/s 437 of the Code of Criminal Procedure, have come to be restricted by placing some fetters on the court's discretion to allow an accused person to go on bail.

(ii) Basistha P.S. Case No. 170/2009, u/s 120B /121 /121(A) IPC read with Section 25(1B)(A) Arms Act, was, initially, registered against two accused persons, namely, Phojendra Hojai and Babulal Kemprai, on the ground that, on 01.04.2009, at about 4-00 p.m., when vehicle Nos. AS-01-AH-1422 and AS-01-1-0609 were intercepted at 14th Mile G.S. Road, Guwahati, and searched, both the accused, suspected to be cadres and linkmen of a banned organization, namely, DHD (J), were found in the vehicles, wherefrom a sum of rupees one crore, in cash, and two pistols were recovered, the money being meant for purchase of arms and ammunitions for the said banned organization. The accused were accordingly taken into custody and investigation was started by the Assam Police. On being produced before the Chief Judicial Magistrate, Kamrup, Guwahati, the two accused aforementioned were remanded to police custody.

(iii) On 18.05.2009, both the accused, namely, Phojendra Hojai and Babulal Kemprai, were granted bail by the High Court, in exercise of its powers u/s 439 Cr.PC., in Bail Application No. 1637/2009.

(iv) On 31.05.2009, Mohit Hojai, the then Chief Executive Member, N. C. Hills Autonomous Council, and R. H. Khan (i.e., the accused-appellant herein), who is not only the Deputy Director, Social Welfare Department, but also the Liaison Officer, N. C. Hills Autonomous Council, were arrested by Assam Police and, on their production before the Chief Judicial Magistrate, Kamrup, they were remanded to police custody for two days. The Court, on the prayer for extension of police custody made by the Investigating Officer of the Assam Police, allowed further extension of the police custody for a period of two more days by its order, dated 02.06.2009. However, further prayer for custodial interrogation was rejected by the Chief Judicial Magistrate, Kamrup, who, however, granted permission to the Investigating Officer to interrogate the present accused-appellant, Redaul Hussain Khan, in Central Jail, Kamrup, Guwahati.

(v) While investigation of Basistha Police Station Case No. 170/2009 aforementioned was pending with the State police, the Central Government, in exercise of its power u/s 6(5), read with Section 8 of the NIA Act, directed, on 01.06.2009, investigation of the said case by the National Investigation Agency (in short, "the NIA"). In terms of the directions, so issued by the Central Government, the NIA registered a case under the NIA Act, the Case being NIA Case No. 1/2009.

(vi) Before, however, registration of the case aforementioned by the NIA, three more persons, namely, 1. Mihir Barman @ Jewel Garlossa @ Debojit Sinha, 2. Ahsringdaw Warisha @ Partha Warisha (i.e., the present appellant), and 3. Sameer Ahmed, were arrested by the Assam Police, at Bangalore, in connection with Basistha Police Station case aforementioned. The NIA moved, on 05.06.2009, the Chief Judicial Magistrate, Kamrup, and filed FIR in the NIA Case No. 1/2009 aforementioned. On 06.06.2009, the accused persons were, on being produced before the Chief Judicial Magistrate, Kamrup, remanded to police custody. In terms of the order, passed by the Chief Judicial Magistrate, on 06.06.2009, Basistha P.S. Case No. 170/2009 aforementioned was tagged with the NIA Case No. 1/2009 and, on the basis of the application made by the NIA, the Court allowed accused Mohit Hojai and R. H. Khan to be taken into custody by the NIA for a period of 10 days and the three accused, namely, 1. Mihir Barman @ Jewel Garlossa @ Debojit Sinha, 2. Ahsringdaw Warisha @ Partha Warisha (i.e., the appellant herein), and 3. Sameer Ahmed, were remanded, for a period of 14 days, to the custody of the NIA.

(vii) By a Gazette notification, dated 09.07.2009, issued by the Government of India, Ministry of Home Affairs, in exercise of its powers u/s 3 of the Unlawful Activities (Prevention) Act, 1967, DHD(J), along with its factions, wings and front organizations, came to be declared as "unlawful organization".

(viii) Three of the accused persons, namely, R. H. Khan, Ahsringdaw Warisa @ Partha Warisha (i.e., the appellant herein) and Sameer Ahmed, then, approached this Court seeking to invoke its jurisdiction u/s 439 CrPC. None of the accused aforementioned applied for bail to the Chief Judicial Magistrate, Kamrup, or to the Sessions Judge, Kamrup; rather, they applied for bail, directly, to this Court u/s 439 Cr.PC.

(ix) One of the important questions, which arose before the High Court, in the matter of application for bail, which the three accused aforementioned had so made, u/s 439 Cr.PC, to this Court, was as to whether the bail applications were maintainable at all in law.

(x) Upon a threadbare discussion, the said three bail applications, made u/s 439 CrPC, seeking to invoke High Court's jurisdiction to grant bail in favour of the accused aforementioned, were rejected, on 29.07.2009, by one of us (Ansari, J.) on the ground of lack of jurisdiction, laying down, inter alia, that under the scheme of the provisions contained in the NIA Act read with the provisions of remand and bail, as stand incorporated in the Code of Criminal Procedure, a person, arrested in connection with an offence, under the NIA Act, can be remanded to custody, police or judicial, by the Special Court, where the Special Court has been constituted, or by the Court of Session, where the Special Court has not been constituted. The Court also held that the source of power of the Special Court or the Court of Session, as the case may be, to consider an application for bail is traceable to, and governed by, the provisions of Section 437 Cr.P.C. and while considering such an application for bail, the Special Court or the

Court of Session, as the case may be, will not exercise the power of bail as if it is considering an application for bail u/s 439 and, consequently, the Special Court or the Court of Session, as the case may be, would have all the limitations, which a Magistrate has, while deciding an application for bail, u/s 437 Cr.PC, and the provisions, contained in Section 439 Cr.PC, cannot be resorted to for the purpose of granting bail and it was also held by the High Court, in its order, dated 29.07.2009, aforementioned, that against an order, passed by a competent court, rejecting bail, or granting bail, the remedy of an aggrieved party lies in preferring an appeal to the High Court, in terms of Section 21(4) of the NIA Act and the remedy, therefore, in such a situation, does not lie in making any application u/s 439 Cr.PC. This Court, therefore, held in its order, dated 29.07.2009, that such an appeal, according to the NIA Act, would require hearing by a Division Bench of the High Court and that in such an appeal, even the merit of the order, granting or refusing bail, can be questioned. The decision came to be reported, in Redaul Hussain Khan and Others Vs. State of Assam and Others, While laying down the law, as indicated hereinbefore, the Court observed and held as under:

77. What emerges from the above discussion is that it is the Special Court under the NIA Act, or the Court of Session, when the Special Court has not been constituted, where an accused is required to be produced if he is arrested in connection with an offence punishable under the NIA Act and, upon his production, it is the Special Court or the Court of Session, as the case may be, which shall have the power to grant bail. The source of power of the Special Court or the Court of Session, as the case may be, to consider an application for bail is traceable to, and governed by, the provisions of Section 437 of the Code and while considering such an application for bail, the Special Court or the Court of Session, as the case may be, will not exercise the power of bail as if it is considering an application for bail u/s 439 and, consequently, the Special Court or the Court of Session, as the case may be, would have all the limitations, which a Magistrate has, while deciding an application for bail, u/s 437 of the Code.

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106. What surfaces from the above discussion, held, as a whole, is that except as provided in Section 167(2-A) of the Code, a person, arrested in connection with an offence, under the NIA Act, can be remanded to custody, police or judicial, by the Special Court, where the Special Court has been constituted, or by the Court of Session, where the Special Court has not been constituted. In view of the fact that the NIA Act envisages a situation, wherein an investigation, as in the present case, may be entrusted to the National Investigation Agency after the State police had made some investigation, it further follows that once the investigation, under the scheme of the NIA Act, is taken over by the Agency, it is

the Special Court or the Court of Session, as the case may be, which can authorize further detention of an arrested accused. When such an arrested accused applies for bail to the Special Court or the Court of Session, as the case may be, the source of power to consider such an application for bail lies in Section 437 and not Section 439 of the Code. Even a High Court cannot invoke its powers u/s 439, to grant bail if it has been refused by the Special Court or the Court of Session, as the case may be, nor can the High Court, in exercise of its power, u/s 439, cancel bail if bail has been granted to such an accused by the Special Court or the Court of Session, as the case may be. If the bail has been refused or granted by the Special Court or the Court of Session, as the case may be, the aggrieved party may, however, prefer an appeal, in terms of Section 21, to the High Court. Such an appeal has to be heard by a Division Bench of the High Court and in such an appeal, the merit of the order, granting or refusing bail, can be questioned.

107. In the backdrop of the position of law, as indicated above, it becomes clear that the present three applications for bail, which have been made u/s 439 of the Code, are not entertainable in law and must, therefore, fail.

108. In the result and for the reasons discussed above, all these three bail applications are hereby dismissed as not maintainable.

(Emphasis is added)

(xi) Complying with the position of law, as had been laid down, in Redaul Hussain Khan (supra), the appellant herein (i.e., Ashringdaw Warisa) filed an application before the Sessions Judge (Special Court), Kamrup, Guwahati, seeking bail; but his bail application came to be rejected.

(xii) A charge-sheet came to be laid, on 17.11.2009, before the learned Special Court, by the NIA, against as many as 14 accused persons, including the appellant herein and all the arrested persons, whose names have been mentioned above. The three accused persons, namely, Jayanta Kumar Ghosh, Debasish Bhattacharjee @ Bappi, and Sandeep Kumar Ghosh @ Sambhu, had applied for bail, but their applications for bail were rejected by the learned Special Court on 31.12.2009. As against the order, rejecting their prayer for bail, they had preferred appeals, u/s 21 of the NIA Act, to this Court, and these appeals were also dismissed by a Division Bench of this Court on 28.05.2010. The decision of the Division Bench stands reported as Jayanta Kumar Ghosh & Ors. Vs. State of Assam & Ors., reported in 2010 (4) GLT 1. Similarly, the present accused-appellant, Ashringdaw Warisha, too, on failing to obtain bail from the learned Special Court, had, after filing of the charge-sheet against him and others, preferred appeal, but this appeal, too, having been heard, was dismissed by the said Division Bench of this Court on 28.05.2010. The decision, with regard to dismissal of the appeal of the present accused-appellant, Ashringdaw Warisha, too, stands reported in Jayanta Kumar Ghosh and others (supra).

(xiii) Thereafter, the present appellant, Ashringdaw Warisa, applied for bail in the

learned Special Court, which came to be registered as M.C. (BA) No. 32/2011.

3. The above application for bail having been rejected, on 16.09.2011, by the learned Special Judge, this appeal, u/s 21(4) of the NIA Act, has, now, been preferred by the present appellant, his case being, in brief, thus: The appellant's earlier application for bail was rejected on the ground that the appellant had been staying with Jewel Garlosa, Chairman of DHD(J), at Bangalore, at the time of his arrest and that the appellant was involved in a cash transaction, at Guwahati, whereby money passed to DHD(J), though the appellant is completely innocent, he was appointed as a peace facilitator and it was necessary, on the part of the appellant, to be with Jewel Garlosa in order to convince him to come to negotiation table with the Government and it was because of the efforts made by the appellant that the members of DHD(J) agreed and submitted a memorandum, containing proposal for peace talks, in the month of July, 2008, to the Home Minister through Joint Secretary, Govt. of India. The appellant had in his possession, at the time of his arrest, documents to show that he was a peace facilitator between the Government, on the one hand, and DHD(J), on the other, and all these documents were also seized by the NIA, but the said documents do not found place in the seizure memo furnished by the NIA. Though the appellant applied to the learned Special Judge, NIA, to call for copies of the documents from the GOC, Eastern Command, Ministry of Home Affairs, Govt. of India, and Special Branch, Police Station Kahilipara, Guwahati, so as to prove the appellant's case that he was a peace facilitator, this application was turned down. Though the appellant applied for obtaining these documents to various Government agencies, his requests have not been conceded to. In the meanwhile, however, in order to facilitate the peace talk, applications, seeking bail, were made by Jewel Garlosa, Chairman, DHD(J), and Niranjana Hojai, Commander-in-Chief, DHD(J), and though their applications were not resisted by the NIA, the learned Special Judge did not allow their application for bail, whereupon both the said accused, Jewel Garlosa and Niranjana Hojai, preferred an appeal, which gave rise to Criminal Appeal No. 126/2011, and a Division Bench of this Court has passed an order, on 12.08.2011, granting interim bail for a period of four months so that the said two accused could not initiate peace talks and since thereafter, the said interim bail has been extended from time to time.

4. The NIA has resisted the Bail Application by filing their affidavit-in-opposition, wherein they have reiterated the case, which they had submitted earlier, when the present appellant's appeal, namely, Criminal Appeal No. 35/2010, was taken up by this Court for consideration and decision, by this Court, in the appeal, which the appellant had preferred, was rendered, the decision having been reported in Jayanta Kumar Ghosh (supra).

PRELIMINARY OBJECTION TO CRIMINAL APPEAL NO. 12/2012 BY THE NIA

5. What may, now, be noted is that the appeal, which has arisen out of NIA Case No. 1/2009, has been resisted, at its threshold, by the NIA, by contending, inter alia, that the appellant, Ahsringdaw Warisha @ Partha Warisha, had earlier filed

his application for bail, in NIA Case No. 1/2009, and the prayer for bail having been rejected by the learned Special Court, the appellant had preferred, u/s 21 (4) of the NIA Act, an appeal to this Court and, as this Court, too, upheld the order of the learned Special Court rejecting the appellant's prayer for bail and thereby dismissed the appellant's appeal, namely, Criminal Appeal No. 35/2010, and this appeal, in the absence of any change in the circumstances of the case and in the absence of any new fact having emerged on record, is not sustainable and may, therefore, be dismissed.

6. Repeated applications for bail, submits Mr. Das, have been discouraged by the Supreme Court and, though the doctrine of *res judicata* does not apply to bail applications, the person, moving the bail application, if his applications for bail were already rejected, must show new grounds, or change in the circumstances or some new facts having emerged or come on record, which, according to him, entitles him (i.e., the applicant) to apply afresh for bail. Reliance, in support of his submissions, is placed by Mr. Das on the decision, in *State of Tamil Nadu Vs. S.A. Raja*, , wherein the Supreme Court observed as under:

Where a learned Single Judge of the same court had denied bail to the respondent for certain reasons and that order was unsuccessfully challenged before the appellate forum, without there being any major change of circumstances, another fresh application should not have been dealt with within a short span of time unless there were valid grounds giving rise to a tenable case for bail. Of course, the principles of *res judicata* are not applicable to bail applications, but the repeated filing of the bail applications without there being any change of circumstances would lead to bad precedents. (Emphasis is added)

7. In the case at hand, submits Mr. Das, there is no change in the circumstances and since not only learned Special Court, but this Court, too, did not find it fit, in the past, to allow the present appellant, Ashringdaw Warisa, to go on bail in the face of the facts of the case at hand and the law relevant thereto, the appellant, logically speaking, could not have sought for bail, in the learned Special Court, without any change in the circumstances and/or without any new material having come on record in his favour.

8. To put it a little differently, when the learned Special Court's earlier order, rejecting bail, in NIA Case No. 1/2009, has been upheld by this Court in appeal and thereby the order of the learned Special Court stands, by operation of law, subsumed into the appellate order, passed by this Court, in the appellant's earlier appeal, it logically follows that unless there is any change in the circumstances, or some new grounds are shown, the bail application, in NIA Case No. 1/2009, wherein charge-sheet was submitted, on 17.11.2009, is not sustainable; but, so far as the appeal, arising out of the rejection of the present appellant's prayer for bail by the learned Special Court, in NIA Case No. 2/2009, wherein charge-sheet was submitted on 18.10.2010, is concerned, the same can be heard and decided on merit.

9. In the case at hand, particularly, NIA Case No. 1/2009, contends Mr. Das, the appellant, Ashringdaw Warisa, has not been able to show, reiterates Mr. Das, any new ground warranting change in the conclusions of this Court, which it had arrived at, while considering the appellant's earlier appeal against the learned Special Court's order rejecting his application for bail.

10. We may pause here to point out that similar preliminary objection had been raised, in Criminal Appeal No. 14/2012, which was an appeal preferred u/s 21(4) of the NIA Act by accused Jayanta Kumar Ghosh, and, while responding to the preliminary objection, it had been also pointed out, on behalf of accused-appellant, Jayanta Kumar Ghosh, that Jewel Garlosa and Niranjana Hojai had been granted (as contended by the present appellant too) interim bail by a Division Bench of this Court, on 12.08.2011, and, hence, there was no reason why the accused-appellant, Jayanta Kumar Ghosh, be not extended the similar benefit. As the present appellant, Ashringdaw Warisa, too, makes, in effect, same submissions, as has been done by accused-appellant, Jayanta Kumar Ghosh, to impress upon this Court that he was entitled and ought to be, therefore, allowed to go on bail, it is necessary to point out how the response of the accused-appellant, Jayanta Kumar Ghosh, had been dealt with by this Court and how this Court came to the conclusion that granting of interim bail to accused Jewel Garlosa (who was arrested with the present appellant) and Niranjana Hojai cannot be made a ground for allowing another accused, such as, the present appellant, to go on bail. The relevant observations, made in Criminal Appeal No. 14/2012, by this Court are, therefore, reproduced below:

APPELLANT'S REPLY TO THE PRELIMINARY OBJECTION OF THE NIA

29. Attempting to repel the above submissions, made on behalf of the NIA, resisting the maintainability of Criminal Appeal No. 14/2012, which has arisen out of NIA Case No. 1/2009 (wherein charge-sheet was submitted on 17.11.2009, and the learned Special Court has kept its order, on the framing of charges, reserved) and, apprehending, perhaps, that the failure of the appellant, Jayanta Kumar Ghosh, to obtain bail, in NIA Case No. 1/2009, would frustrate the appellant's attempt to obtain his liberty on bail even if he happens to be granted bail in NIA case No. 2/2009, Mr. P. K. Goswami, learned Senior counsel, has submitted that there has been change in circumstances of the present case inasmuch as a "truce" has been entered into between the Government of India and the State Government, on the one hand, and DHD(J), which had been, at one point of time, declared as an unlawful association, on the other, and, pursuant to this "truce", Niranjana Hojai, who was alleged to be the Commander-in-Chief of the DHD(J), and its Chairman, Jewel Garlosa @ Mihir Barman @ Debojit Sinha, had applied for bail in the Special Court, but the learned Special Court declined, on 21.07.2010, to grant them bail, whereupon the said two accused preferred an appeal, which gave rise to CrI. Appeal No. 126/2011.

30. It needs to be pointed out, submits Mr. Goswami, learned Senior counsel, that it was contended by the NIA and also the State of Assam, in learned Special

Court, that on the demand of the civil society, a peace process stood initiated with the said outfit and in consonance with the said peace process, the Governments, both, the Central as well as State, had initiated dialogue with the said outfit and, in the such circumstances, the release of the said two appellants, namely, Niranjana Hojai and Jewel Garlossa, would be necessary to sign a peace accord between the said outfit and the State of Assam so that there could be a permanent solution to the insurgency problem in the North Cachar Hills area.

31. It has been pointed out by Mr. P. K. Goswami, learned Senior counsel, that a Division Bench of this Court, in its order, dated 12.08.2011, passed in Criminal Appeal No. 126/2011, did make an observation that the learned Special Court's rejection of bail, in the light of the interpretation given by it to the provisions of Section 43(D)(5) of the UA(P) Act, is correct, but as the submission, made before the High Court, was that the appellants were not asking for bail, but only interim bail to participate in the peace process and, as the NIA and the Government of Assam had no objection to the interim bail, the High Court granted interim bail to Niranjana Hojai, the self-styled Commander-in-Chief, and Jewel Garlossa, the self-styled Chairman of the said unlawful outfit.

32. Thus, according to Mr. P. K. Goswami, learned Senior counsel, while the persons, who had allegedly led DHD(J) and had allegedly wielded and used arms illegally and indulged in terrorist and disruptive activities, have been allowed the liberty of bail, because the interim order for bail, which was initially for a period of four months, has been subsequently extended, in the name of "truce", the present appellant, Jayanta Kumar Ghosh, who was allegedly a mere provider of fund to DHD(J), has been denied bail, interim or otherwise, and has been kept incarcerated for almost three years.

33. In effect, thus, the alleged chief architects of the DHD(J) are, points out Mr. Goswami, on interim bail, though they were the ones, who had, according to the NIA, taken to arms illegally and controlled and used their cadres for various disruptive activities; whereas the present appellant, Jayanta Kumar Ghosh, is accused of having provided fund to the said outfit by means of misappropriation of government funds and by carrying the money, so misappropriated, to Mohit Hojai, who was the Chief Executive Member, N.C. Hills Autonomous Council, and who, according to the NIA, was chosen and made the Chief Executive Member of the N.C. Hills Autonomous Council by removing his predecessor-in-office with the help of threatening call made by Niranjana Hojai, so that the activities of the DHD(J) could be effectively carried out with the help of Mohit Hojai, but the said Niranjana Hojai, now, is enjoying, at the behest of the Government, the benefit of interim bail. This apart, points out Mr. Goswami, a large number of the cadres of the said one-time banned unlawful association, DHD(J) have been recruited into the regular police force of the State.

34. When persons, who allegedly took to arms, according to the NIA, are enjoying the freedom and liberty of bail, though in the form of interim bail, there is no rational cause, grieves Mr. Goswami, for resisting the bail of the present

appellant and this, according to Mr. Goswami, is the change in the circumstances since the time the last appeal, seeking bail by the present appellant, was dismissed by this Court.

35. Yet another ground for seeking present appellant's bail, points out Mr. Goswami, is that the CBI had registered a case with regard the misappropriation of funds by the public servants in N.C. Hills Autonomous Council, because the NIA had declined to investigate into the case, though the NIA did have the power, under the NIA Act, to investigate such cases, too; and, in the charge-sheet, which the CBI has submitted, in this regard, the present appellant's name does not figure as an accused.

36. Coupled with the above, it is further submitted by Mr. Goswami, learned Senior counsel, that the most important ground, which the appellant, Jayanta Kumar Ghosh, seeks to press for consideration is that this Court had observed, in the earlier round of litigation, that, while considering an appeal, u/s 21 of the NIA Act, arising out of an order either granting bail or rejecting bail by the Special Court, constituted under the NIA Act, this Court does not, while sitting as an appellate Court, enjoy the special power, which the High Court, otherwise, enjoys u/s 439 of the Code. This proposition of law, according to Mr. Goswami, needs to be reviewed inasmuch as this Court, contends Mr. Goswami, while sitting, in appeal, against an order rejecting bail or granting bail, passed by the learned Special Court, is not denuded of the special power, which it has and, otherwise, enjoys u/s 439 of the Code.

37. In other words, what Mr. Goswami contends is that notwithstanding the restrictive provisions, contained in proviso to Section 43D(5) of the UA(P) Act, disempowering the Court from granting bail to an accused if the Court, on perusal of the case diary or the report, made u/s 173 Cr.PC, is of the opinion that there are reasonable grounds for believing that the accusations against the accused are prima facie true, this Court, in an appeal u/s 21 of the NIA Act, has, nevertheless, the special power, u/s 439 of the Code, to grant bail to an accused, who may, otherwise; be covered by the proviso to Section 43D(5).

38. Besides the merit of this appeal, which includes the duration of incarceration of the appellant (which we would deal with later), there are, thus, three specific grounds for seeking an order of bail in the present appeal, namely, (i) "truce", (ii) the charge-sheet, filed by the CBI, does not implicate the appellant and (iii) restrictive provisions, embodied in Section 43D(5) of the UA (P) Act, do not apply to the High Court, when the High Court exercises its appellate jurisdiction u/s 21(4) of the NIA Act, because the High Court remains free to take recourse to its special power conferred by Section 439 Cr.PC and grant, in exercise of its appellate jurisdiction, bail to a person, whose case may fall within the ambit of the proviso to Section 43D(5) of the UA (P) Act.

CONCEPT OF PROVISIO TO SECTION 43D(5)

39. We pause, at this stage, for a moment to point out that while dealing with

the concept of the proviso to Section 43D(5), the Division Bench, in Jayanta Kumar Ghosh Vs. State of Assam, reported in 2010 (4) GLT 1, observed and held as to what the expression prima facie and the expression true, which appear in the proviso to Section 43D(5), convey. The relevant observations, made in this regard, read as under:

63. Before proceeding further, it is also, to our mind, necessary to ascertain as to what the scope of the proviso to Section 43-D(5) is and when would this proviso be attracted. While dealing with this aspect of the appeal, it is necessary to bear in mind that the proviso to Section 43-D(5) states 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 u/s 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". The expression, "prima facie true" is an expression, which does not, ordinarily, appear in penal statutes.

64. Let us, therefore, ascertain as to what the word "prima facie" means. The word, prima facie, has been described in the Black's Law Dictionary as: "sufficient to establish fact or raise a presumption unless disproved or rebutted". Rebuttable presumption means an inference drawn from certain facts that establish a prima facie case which may be overcome by the introduction of contrary evidence. Rebuttable presumption also means prima facie presumption or disputable presumption or conditional presumption.

65. The Concise Dictionary of Collins has defined, prima facie, as an adjective thus: "At first sight; as it seems at first." "And prima facie evidence is an evidence that is sufficient to establish a fact or to raise a presumption of the truth unless controverted."

66. Warton's Law Lexicon defines that a prima facie case does not mean a case proved to the hilt, but a case, which can be said to be established if the evidence, which is led in support of the same, are believed.

67. The Supreme Court, in Martin Burn Ltd. Vs. R.N. Banerjee, , observed thus:

.....A prima facie case does not mean a case proved to the hilt, but a case, which can be said to be established if the evidence, which is led in support of the same, were believed. While determining whether a prima facie case had been made out, the relevant consideration is whether, on the evidence led, it was possible to arrive at the conclusion, in question, and not whether that was the only conclusion, which could be arrived at on that evidence.

68. The meaning of the word, "prima facie", given in Marlin Burn Ltd. (supra), has been followed by the Supreme Court, in its later decision, in The Management of the Bangalore Woollen Cotton and Silk Mills Co. Ltd. Vs. B. Dasappa, M. T. represented by the Binny Mills Labour Association, .

69. From the meaning, attributed to the word, "prima facie", by various dictionaries, as indicated above, and the observations, made by the Supreme

Court, in its decisions, in *The Management of the Bangalore Woollen Cotton and Silk Mills* (supra), what clearly follows is that *prima facie* is a Latin word, which means, "At first sight or glance or on its face" and, in common law, it is referred to as "the first piece of evidence of fact", i.e., considered true unless revoked or contradicted.

70. In the face of the above observations made by the Supreme Court, it may be construed that *prima facie* case would mean whether the inference drawn is a possible inference or not.

71. The word, "true", according to Collins Dictionary, means something, which is not false, fictional or illusory, but factual and confirming with reality or exactly in tune. Webster's Third New International Dictionary defines True as: "Something, which is in accordance with fact or reality".

72. The word, "true" has been defined, in World Book Dictionary, as "Agreeing with fact, not false".

73. Thus, the expression, "*prima facie* true", would mean that the court shall undertake an exercise to determine as to whether the accusations, made against the accused, are inherently improbable and/or wholly unbelievable. Ordinarily, while considering a complaint, made against an accused, the court assumes the contents of the complaint to be true and correct and, then, proceed to decide as to whether the allegations, made in the complaint, make out a case of commission of offence by the accused or not. No exercise is required to be undertaken by the court to determine the truthfulness or veracity of the accusations. However, when the word, "*prima facie*", is coupled with the word, "true", it implies that the court has to undertake an exercise of cross-checking the truthfulness of the allegations, made in the complaint, on the basis of the materials on record. If the court finds, on such analysis, that the accusations made are inherently improbable, or wholly unbelievable, it may be difficult to say that a case, which is *prima facie* true, has been made out.

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

75. In the case of *State of Gujarat Vs. Gadhvi Rambhai Nathabhai and Others*, , the Supreme Court while dealing with the principles governing the granting of bail under the TADA, observed:

8. It is true that for the purpose of grant of bail, the framers of the Act require the Designated Court to be satisfied that there were reasonable grounds for believing that the accused concerned was not guilty of such offence but this power cannot be exercised for grant of bail in a manner which amounts virtually to an order of acquittal, giving benefit of doubt to the accused person after weighing the evidence collected during the investigation or produced before the court. At that stage the Designated Court is expected to apply its mind as to whether accepting the allegations made on behalf of the prosecution on their face, there are reasonable grounds for believing that the accused concerned was not guilty of the offence. At that stage the Designated Court is not required to weigh the material collected during the investigation.

76. In short, thus, on a bare reading of the materials, as may have been collected during investigation, if the Special Court finds that the materials, so collected, are sufficient to form, when assumed to be true, an opinion that there are reasonable grounds to believe that the accusations, made against the accused, are prima facie true, the Special Court will be disempowered from releasing the accused on bail. At the stage of bail, no minute scrutiny or microscopic dissection of the materials, collected during investigation, shall be undertaken by the Special Court. Credibility or otherwise of the materials collected would not be the subject-matter of scrutiny. What, at best, the Special Court can do, and shall do, is to examine if the accusations made, on the basis of the materials collected, are wholly improbable. When the materials are, on examination by the Special Court, are found to be not wholly improbable and the Special Court finds, on assuming such materials to be true, that the accusations, made against an accused, as regards commission of an offence under Chapter IV and/or Chapter VI of the UA(P) Act, are prima facie true, such materials would be enough to attract the bar imposed by the proviso to Section 43-D(5).

77. To put it a little differently, the Special Court is required to examine the materials, collected during investigation, assuming the same to be true and if, such materials, on such examination and consideration, are found to make out a case against the accused, the Special Court has to determine if there is any such thing in the materials, so collected, which would make the case, which has been made out against the accused, as a wholly improbable case. If the Special Court, on undertaking such an exercise, finds reasonable grounds to infer that the case, which has been made out against the accused, is not wholly improbable, the case would be treated as a case, which is sufficient for the Special Court to form an opinion that there are reasonable grounds to believe that the accusations, made against the accused, are prima facie true.

78. The expression, "reasonable ground", means something more than prima facie ground, which contemplates a substantially probable case for believing that the accused is guilty of the offence(s) alleged. u/s 437 CrPC, an accused is not to be released on bail if there appear reasonable grounds for believing that he has been guilty of an offence, which is punishable with death or imprisonment for

life. u/s 437 CrPC, the burden is on the prosecution to show existence of reasonable ground for believing that the accused is guilty. Hence, the presumption of innocence, which always runs in favour of the accused, is displaced only on the prosecution showing existence of reasonable ground to believe that the accused is guilty. (See Union of India (UOI) Vs. Thamisharasi and Others, , and Union of India (UOI) Vs. Shri Shiv Shanker Kesari,).

79. Coupled with the above, the proviso to Section 43-D(5) does not require a positive satisfaction by the court that the case against the accused is true. What is required is a mere formation of opinion by the court on the basis of the materials placed before it. The formation of opinion cannot be irrational or arbitrary. Such formation of opinion cannot be based on surmises and conjectures; but must rest on the materials collected against the accused. Since the presumption of innocence runs in favour of the accused, it logically follows that if there are, in given circumstances, grounds for believing that the case, against the accused, is true, a case of commission of offence under Chapter IV or Chapter VI of the UA(P) Act 1967, can be said to have been made out and when such a case is made out, it would be tantamount to saying that reasonable grounds exist for opining that the accusations are prima facie true. In such a case, the bar, imposed by the proviso to Section 43-D(5) on the court's power to grant bail, gets attracted.

80. We may point out that Section 20(8) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as "the TADA Act") (since repealed), laid down that no person, accused of an offence punishable under the said Act, or any rule made thereunder, shall, if in custody, be released on bail, or on his own bond, unless, amongst others, the court is satisfied, where the Public Prosecutor opposes the application, that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence, while on bail. Section 20(9) of the Act made it clear that the limitation on granting of bail, specified in sub-Section (8) of Section 20, is in addition to the restrictions, which the Code of Criminal Procedure, or any other law, in force, imposes.

81. There are no corresponding provisions, in the NIA Act, as were present in Section 20(8) and Section 20(9) of the TADA Act. Notwithstanding, however, the fact that the provisions (as contained in sub-Section (8) and/or sub-Section (9) of Section 20 of the TADA Act) no longer find place in the NIA Act, the fact remains that even under the scheme of the NIA Act, the Special Court, as already discussed above, is a "Court" other than the High Court and Court of Session. In such circumstances, the limitations, imposed by Clauses (i) and (ii) of sub-Section (1) of Section 437 CrPC, are applicable to the Special Court too. In addition thereto, when a case falls within the ambit of the proviso to Section 43-D(5), there would be an additional bar, on the part of the Special Court, to release aft accused on bail, the bar being that the Special Court shall not release the accused on bail or on his own bond if the Court, on perusal of the case diary

or the report made u/s 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.

(Emphasis is added)

"TRUCE" - IF CAN BE A GROUND FOR BAIL

40. Before we enter into the question as to whether this Court, while sitting in appeal, under enjoying its power u/s 439 of the Code, notwithstanding the restrictive provisions contained in Section 43D(5), we must point out that, having heard the submissions made by Mr. Goswami with regard to the "truce", which is said to have been entered into between the State, on the one hand, and the DHD(J) and its chief functionaries, on the other, this Court wanted to determine if such a "truce", as had been entered into, and the granting of bail, because of such "truce", despite the restrictive provisions for bail contained in the proviso to Section 43D(5) of the UA(P) Act, is sustainable in law, for, the "truce", if not sustainable in law, or, if the "truce", so entered into, runs contrary to the Constitutional scheme of governance and does not empower the Court to grant bail in a case of present nature, then, the present appellant cannot complain of discrimination and cannot take advantage of such a "truce", or the order of interim bail, which may have been passed as a sequel to the said "truce". If, on the other hand, the "truce", which is claimed to have been entered into between the DHD(J) and the Government, is in accord with the constitutional scheme of governance and the relevant legislation in force, then, notwithstanding the resistance to this appeal offered by the NIA and the State, the appellant does have a case for consideration, because it would be highly unreasonable, unjust, unfair and irrational to refuse to grant bail to the appellant, when the appellant was, according to the NIA, merely a fund raiser; whereas the persons, who took to arms and were allegedly involved in various terrorist activities, have been enjoying the liberty of bail, though in the form of interim bail, for, no relief can be granted by a Court, in the form of interim relief, if the Court is not empowered to grant, ultimately, the relief, which it has granted in the form of interim relief.

41. We, therefore, directed issuance of notices to, amongst others, the Union of India and the State Government so that we could be apprised of the position of law in the matter and thereby decide effectively not only this appeal, but all other appeals, which are pending before us and are being heard by us.

42. In order to make it explicit as to why we directed notices to be issued, as mentioned hereinabove, we reproduce the order below, which was passed, on 26.04.2012, by this Court.

We have heard Mr. D.K. Das, learned Senior counsel, for the NIA, Mr. Chetry, learned Senior Govt. Advocate, Mr. Z. Kamar, learned Public Prosecutor, Assam, and Mr. R. Sharma, learned ASG.

Certain facts, surfacing, during the course of hearing of these appeals, are, somewhat, not only astonishing, but even shocking. All these appeals are against the orders passed by the learned Special Judge rejecting the applications for bail of the appellants, who have allegedly committed offences under the UA(P) Act, 1967, by, primarily, funding the terrorist gangs or terrorist acts. What transpires, broadly speaking, is that there are two categories of persons, involved in the terrorist acts, one, who had allegedly wielded arms, and the other, who had allegedly arranged funds for such activities. While, those, who had allegedly funded the terrorist gangs or terrorist acts, are incarcerated, but those, who had allegedly wielded arms and acted as members of the terrorist gangs, are either in a camp, which the State Government has set up, or they have been recruited as members of the State police force. Those, who have been so recruited, were, according to the materials as available today, had been members of the terrorist gang. This apart, the terrorist gang also had leaders and the leaders are on interim bail, because National Investigating NIA (in short, "the NIA") has not raised any objection to their being released on bail inasmuch as the State Government has entered into some kind of "truce" with the leaders of the terrorist gang and wants to use them for resolving the dispute. No political dialogue can, however, override the Constitution and the scheme of Constitutional governance, or else, people's faith, in rule of law, Would completely evaporate, particularly, when, those, who had been allegedly wielding arms, are found to be free, and those, who had allegedly funded the terrorist acts, are behind the bar.

One of the submissions, made on behalf of another set of appellants, in similar appeals, is that the "truce", which has been entered into by the State Government and the Government of India with DHD(J) is a ground for reconsideration of bail of the appellants. In short, thus, the "truce", in question, has become the ground for seeking bail.

If such a policy is permitted to be continued, the result Would be that we would have a class of people in this country, who may violate the law with impunity and receive support from the Government in the name of bringing them into mainstream; whereas the State would be punishing those, whose crime may not be as serious as of the ones. Who are receiving support from the Government. Such an approach does not appear to have prima facie support from the Constitution and the laws of this country, because the State, in exercise of its sovereign power, cannot override the Constitution and the laws and all its actions have to be, and must always be, subject to, and consistent with, the scheme of governance as envisaged by the Constitution.

We, therefore, feel constrained to find out from the State as well as the Union Government as to what is their policy decision, whether such a policy decision has the backing of the Constitution and laws of this country and, to be more precise, whether it is permissible for the State to keep the criminal cases pending without formally withdrawing them, but take no action in accordance

with law or take action contrary to law inasmuch as the proviso to Section 43D(5) of UA(P) Act, 1967, does not permit a Court to grant bail to a person if the Court is of the opinion that there are reasonable grounds for believing that the accusation, against such person, is prima facie true.

If those, who had allegedly wielded arms, are allowed to go on bail, how can the same law be applied by the State, or resorted to by the State, for keeping the appellants behind bar. This is the dichotomy, which the State has to resolve, and, for this purpose, requisite facts have to be placed before this Court.

For the moment, therefore, we direct the Commissioner and Secretary to the Government of Assam to appear, in person, along with all relevant records and clarify to this Court as to what is the Government's policy, for what reason the policy has been adopted and whether the policy has the backing of law. In order to comprehensively understand the issues and decide these appeals effectively, we direct that notices be issued to the Union Home Secretary, Attorney General of India and the Advocate General of Assam, too, making the same returnable on 03.05.2012. We make it clear that in case, we find it absolutely indispensable, we may direct appearance of the appropriate officer(s) from the Union Home Ministry with all relevant records and also the Director General, NIA.

Furnish a copy of this order to the learned Standing Counsel, NIA, learned Senior Govt. Advocate, Assam, learned Public Prosecutor, Assam, and the learned ASG for doing the needful.

List these appeals, for further hearing, on 30.04.2012.

(Emphasis added)

43. In pursuance of the order, dated 26.04.2012, passed by us, both, the Union of India as well as the State Government, have filed their affidavits and we have heard, as already indicated above, Mr. H. P. Rawal, learned Additional Solicitor General, on behalf of the Union of India, and Mr. K. N. Choudhury, learned Senior Additional Advocate General, Assam, on behalf of the State Government. We have also heard Mr. P. K. Goswami, learned Senior counsel, for the appellant, and Mr. D. Das, learned Senior counsel, appearing on behalf of the NIA.

44. The sum and substance of what has been submitted, on behalf of the Union of India and the State Government, to the query raised by this Court, by order, dated 26.04.2012 (reproduced above), is as under:

(i) The NCHAC, which is covered by the Sixth Schedule to the Constitution, has been provided, under the scheme of the Constitution, with certain degree of autonomy, for, the area, covered by NCHAC, consists of tribals. Their autonomy, therefore, includes some measure of legislative and executive power, which include financial and other administrative powers for the purpose of carrying on the administration, in the said area, in a manner, which would protect not only the cultural identity of the people of the area concerned, but also would, at the same time, improve their living standards, education and economy. With the

emergence of militancy in the area, development activities were adversely affected in the entire region. In course of time, various groups launched arms struggle against the State raising issues of social, economic, cultural, ethnic and political rights for the people of the NCHAC.

(ii) Realising the futility of violence, a faction of the DHD (i.e., Dima Halang Daogah) came forward, in the year 2002, for peace negotiation with the Government of India, seeking solution to their grievances within the ambit of the Constitution of India, while another faction of DHD opposed such peace talks. This opposition group of militants, eventually, formed a terrorist gang, known as DHD(J), under the leadership of Jewel Garlossa and Niranjan Hojai as their Chairman and Commander-in-Chief respectively.

(iii) After the NIA was entrusted with the investigation of the case, which had given rise to NIA Case No. 1/2009, the situation changed and a demand was raised by some members of the civil society to bring the misguided militant youths to the mainstream of the society. The scheme for surrender-cum-rehabilitation of militants was, therefore, initiated by the government with the object of weaning the misguided youths and hardcore militants from being strayed into the fold of militancy.

(iv) The Government, both the Central as well as the State, have been, therefore, following a multi-pronged policy to deal with the insurgency and militant activities. The "truce", which is one of the grounds for seeking bail by the present appellant, Jayanta Kumar Ghosh, is, thus, a step towards the holistic approach, which the State government, in tandem with the Central Government, has adopted in order to restore normalcy in the area, which falls under NCHAC, and since the peace process, so initiated, could not have been successfully concluded if the leaders of the militant outfit remained incarcerated in jail, the Government decided that the leaders of the DHD(J), particularly, its Chairman, Jewel Garlossa, and its Commander-in-Chief, Niranjan Hojai, may be provided with interim bail in order to facilitate the dialogue for peace and for reaching necessary conclusion, in this regard.

(v) Pursuant to this understanding, an application for bail was moved by Jewel Garlosa and Niranjan Hojai, in the learned Special Court, but the learned Special Court, relying upon the proviso to Section 43D(5), declined to grant bail. The said two accused, namely, Jewel Garlosa and Niranjan Hojai, therefore, preferred an appeal, u/s 21 of the NIA Act, and, as already indicated above, a Division Bench of this Court, by its order, dated 12.08.2011, passed in Crl. Appeal No. 126/2011, allowed the said two persons to go on bail subject to certain conditions imposed by the Court.

45. Besides what have been mentioned above, Mr. Rawal, learned Additional Solicitor General of India, has, referring to the provisions of Articles 73 and 162 of the Constitution of India, submitted that the executive power of the Union, under Article 73, and the executive power of the State, under Article 162, are

coextensive with their respective legislative powers and, hence, whatever can be done or could have been done by way of legislation, the Union as well as the State can do so in exercise of their respective executive powers, too, meaning thereby that in exercise of executive power, the State or the Union, as the case may be, can adopt a policy to enter into a dialogue with the militants so as to bring them to mainstream. The "truce", in question, is, according to Mr. Rawal, a result of such a policy decision of the Government and the Court would not, ordinarily, interfere with such a policy decision.

46. The present initiative for "truce", contends learned Additional Solicitor General, is not outside the scheme of the Constitution of India and the laws, in force, in India, inasmuch as the executive power of the State or of the Union is co-extensive with their respective legislative powers and it is not necessary that there must be a legislation in existence or a legislation in force in order to enable the Executive to adopt a policy and implement the same in exercise of its executive powers. Reliance is heavily placed, on this proposition, by Mr. Rawal, learned Additional Solicitor General, as well as Mr. K. N. Choudhury, learned Sr. Additional Advocate General, on the decision of the Supreme Court, in *Rai Sahib Ram Jawaya Kapur and Others Vs. The State of Punjab*, .

47. Notwithstanding what has been submitted by the learned Addl. Solicitor General of India, it needs to be placed on record that there can be no dispute that the executive powers of the Union or the State are co-extensive with their respective legislative powers; but one can also not lose sight of the fact that the exercise of executive powers is subject to the provisions of the Constitution. This position was also not disputed. We have, therefore, having regard to the submissions made by the State as well as the Central governments, pointedly put to the learned Addl. Solicitor General if there is a legislation in place, whether the Union or the State, as the case may be, can, in exercise of its executive powers, take action contrary to the legislation. Keeping in tune with the dignity of the high office, which he holds, and the fairness, which such an office demands, the unhesitant answer of Mr. Rawal to the query, so put to him by the Court, was that neither the Centre nor the State can do an act, in exercise of its executive powers, if the act is contrary to a legislation.

48. The logical extension of what Mr. Rawal has submitted and Mr. KN Choudhury, learned Advocate General, has not disputed, is that if the case of *Niranjan Hojai and Jewel Garlosa* were covered by the proviso to Section 43D(5) of the UA (P) Act, then, they could not have been enlarged, on bail, by the learned Special Court and the High Court, as an appellate Court, cannot interfere with such an order, when the learned Special Court's order is not contrary to, or inconsistent with, the proviso to Section 43D(5).

49. When the above aspect of the matter was pointedly put to Mr. Rawal and Mr. Choudhury, none of them claimed that even if the cases of *Niranjan Hojai and Jewel Garlosa* were covered by the proviso to Section 43D(5), they could have been enlarged on bail, interim or otherwise, by the High Court in exercise of its

appellate jurisdiction u/s 21(4) of the NIA Act.

50. Clearly, therefore, release of the said two accused persons, on interim bail, were, even according to the Government, not supported by law and, hence, their release, on interim bail, cannot be cited as an example by the present appellant to demand that he, too, be released on bail, or else, the State would be discriminating him as against those, who had taken resort to arms. The law, on this subject is more than abundantly clear.

51. Before a person alleges discrimination, he must show that the action, which was taken in favour of someone, but is being refused to be taken in his case, was in accordance with law meaning thereby that if an action, executive or otherwise, of the Union or the State, is found to be contrary to law, then, no person can claim that the State must repeat such act in the name of removing discrimination.

52. Noticing that the High Courts, in exercise of their writ jurisdiction, have been passing orders to remove discrimination and thereby asking the authorities concerned to repeat the illegality, the Supreme Court has expressed its anxiety on such approach and has laid down the position of law, in Chandigarh Administration and another Vs. Jagjit Singh and another, , in the following words:

8. We are of the opinion that the basis or the principle, if it can be called one, on which the writ petition has been allowed by the High Court is unsustainable in law and indefensible in principle. Since we have come across many such instances, we think it necessary to deal with such pleas at a little length. Generally speaking, the mere fact that the respondent authority has passed a particular order in case of another person similarly situated can never be the ground for issuing a writ in favour of the petitioner on the plea of discrimination. The order in favour of the other person might be allowed and valid or it might not be. That has to be investigated first before it can be directed to be followed in the case of the petitioner. If the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the respondent authority to repeat the illegality or to pass another unwarranted order. The extraordinary and discretionary power of the High Court cannot be exercised for such a purpose. Merely because the respondent authority has passed one illegal/unwarranted order, it does not entitle the High Court to compel the authority to repeat the illegality over again and again. The illegal/unwarranted action must be corrected, if it can be done according to law - indeed, wherever, it is possible, the Court should direct the appropriate authority to correct such wrong orders in accordance with law - but even if it cannot be corrected, it is difficult to see how it can be made a basis for its repetition. By refusing to direct the respondent authority to repeat the illegality, the Court is not condoning the earlier illegal act/order nor can such illegal order constitute the basis for a legitimate complaint of discrimination. Giving effect to such plea would be prejudicial to the interests of law and will do incalculable mischief to public interest. It will be a negation of law and the

rule of law. Of course, if in case the order in favour of the other person is found to be a lawful and justified one it can be followed and similar relief can be given to the petitioner if it is found that the petitioners' case is similar to the other persons' case. But then why examine another person's case in his absence rather than examining the case of the petitioner who is present before the Court and seeking the relief. Is it not more appropriate and convenient to examine the entitlement of the petitioner before the Court to the relief asked for in the facts and circumstances of his case, than to enquire into the correctness of the order made or action taken in another person's case, which other person is not before the case nor is his case. In our considered opinion, such a course - barring exceptional situations - would neither be advisable nor desirable. In other words, the High Court cannot ignore the law and the well accepted norms governing the writ jurisdiction and say that because in one case a particular order has been passed or a particular action has been taken, the same must be repeated irrespective of the fact whether such an order or action is contrary to law or otherwise. Each case must be decided on its own merits, factual and illegal, in accordance with relevant legal principles. The orders and actions of the authorities cannot be equated to the judgments of the Supreme Court and High Courts nor can they be elevated to the level of the precedents, as understood in the judicial word. (What is the position in the case of orders passed by authorities in exercise of their quasi-judicial power, we express no opinion. That can be dealt with when a proper case arises.

(Emphasis is added)

53. What follows from the above discussion is that the "truce" does not give any right to the present appellant to demand his release on bail, when the "truce" and the subsequent action, which the Government has taken pursuant to such "truce" of getting Niranjana Hojai and Jewel Garlosa released, by ignoring the law, such an action of the Government cannot be said to be a validly changed situation warranting the appellant's release on bail. If we acted wrongly in the past, though may be unconsciously, it would not be fair, on our part, to act wrongly today and that, too, fully conscious that our action was earlier wrong.

54. Coupled with the above, it has been specifically submitted, on behalf of the Union of India, by Mr. Rawal, learned Addl. Solicitor General of India, that the present appellant, as a provider of fund to the DHD(J), is not entitled to bail nor is any of the other appellants, in the present series of appeals, is, according to Mr. Rawal, entitled, in the face of the materials on record, to be released on bail.

55. It has been further made clear by Mr. Rawal, learned Additional Solicitor General, that as far as the present appellant, Jayanta Kumar Ghosh, is concerned, he cannot derive any strength or support from the "truce", in question, and his case, according to Mr. Rawal, being fully covered by the proviso to Section 43D, cannot be considered on the same footing as the cases of DHD(J) leaders, namely, Jewel Garlosa and Niranjana Hojai.

56. Supporting the submissions of the learned Additional Solicitor General, Mr. D. K. Das, learned Senior counsel, appearing for the NIA, has also resisted, as already indicated above, the present appellant's prayer for bail on the ground that the appellant's case is fully covered by the proviso to Section 43D(5) and, hence, the present appellant's case cannot be considered fit for being granted bail.

57. In effect, thus, notwithstanding the fact that the "truce", which the Central and the State Government have claimed to have entered into with DHD(J), the Union of India and the NIA have resisted the present appeal on the ground that the appellant's case, being fully covered by the proviso to Section 43D(5), the appellant is not entitled to be granted bail.

58. Resisting the present appeal, Mr. Rawal, learned Additional Solicitor General, has also submitted that no insurgent outfit or terrorist gang or unlawful association can function and survive without funds being made available to such terrorist gang or unlawful association by way of extortion or otherwise. In the case at hand, according to learned Additional Solicitor General, there are sufficient materials on record showing a criminal conspiracy to wage war against the State and also to commit various "terrorist acts", the present appellant was a party to the said criminal conspiracy and he had made available funds, by various means, to the executants of the DHD(J) and not only the appellant, but also the persons, similarly situated as the appellant is, may not be given the benefit of bail, for, their liberty on bail, contends the learned Additional Solicitor General, would have adverse affect not merely on the ongoing peace process, but would also create impediments in the orderly and fair trial inasmuch as the appellant can, if released on bail, influence the witnesses and persons, acquainted with the facts of the case, by making use of the money, which the appellant has had access to; and thereby defeat justice.

59. We may also place on record the submissions of Mr. D. Das, learned Senior counsel, appearing for the NIA, who resisted the appeal tooth and nail, both on the ground of law and on the grounds of facts, by contending, inter alia, that the appellant had been a part of the larger conspiracy, as indicated in the charge-sheet, and had not only helped the DHD(J) by misappropriation of government funds, but also by carrying money from one place to another for the functionaries of the DHD(J). In this regard, Mr. Das further points out that it was on 09.07.2009 that the DHD(J) was declared as an unlawful association for a period of two years; and though the said notification has not been renewed or/or no new notification has been published in this regard, DHD(J), its members and associates are still required to be treated as members of the unlawful association, within the meaning of the UA(P) Act, at the time, when they had acted in the manner as they are claimed, in the charge-sheet, to have acted.

60. What surfaces from the above discussion is that the fact that there has been so-called "truce" between the Government of India or the State, on the one hand, and the DHD(J), on the other, such a "truce" does not empower either the

Union or the State government to act contrary to law in the name of exercising sovereign authority of the State inasmuch as every organ of the State, be it Executive, Legislature or Judiciary, derives its source of authority from the Constitution and when the Constitution does not permit any of these organs including, obviously, the Executive to act, in exercise of its power, contrary to the legislation, which occupies the field, the present appellant, Jayanta Kumar Ghosh, cannot claim, depending upon the release of Niranjana Hojai and Jewel Garlosa, on interim bail, that he, too, shall be released on bail, because Niranjana Hojai and Jewel Garlosa were the ones, who had allegedly used arms; whereas the present appellant had alleged to have funded the DHD(J) by acting what Mohit Hojai had directed, especially, when not merely Mohit Hojai, but even the present appellant, Jayanta Kumar Ghosh, formed integral part of the conspiracy, which Jewel Garlosa and Niranjana Hojai had entered into with Mohit Hojai to carry out their "terrorist act".

11. Coupled with the above, it is of paramount importance to note that Section 21(4) of the NIA Act, admittedly, provides that an order of the Special Court, granting or refusing bail, is an appealable order. The NIA Act, it must be very clearly understood, has not vested, in the High Court, the power to grant bail as a Court of first instance. The question of granting or refusing bail would, in the High Court, arise, in such a case, only when an appeal is brought to the High Court against an order passed by the Special Court refusing or granting bail. At the same time, if one examines the power of the High Court u/s 439 Cr.PC., an accused can, (though not ordinarily), approach the High Court seeking bail, u/s 439 Cr.PC., without even moving the trial Court for bail. An appeal, if provided by a statute, is a continuation of a proceeding to a higher forum. The provisions for appeal do not imply conferring of independent jurisdiction on the High Court; rather, the appellate power confers jurisdiction on the High Court to examine legality, correctness or propriety of the order, which may be challenged, but the ambit of the power remains co-extensive with the power of the trial Court and, in the present case, the Special Court constituted u/s 21(4) of the NIA Act.

12. Thus, the difference in jurisdiction between a trial Court and appellate Court lies in the power of the latter to sit, as an appellate Court, over the judgment and order, as the case may be, of the trial Court. In so far as the law applicable to the subject-matter is concerned, there is no distinction between the trial Court and an appellate Court. For instance, if a trial Court holds an accused person's case covered by the proviso to Section 43D(5) and this finding is upheld by the High Court as the appellate Court, the appellate Court cannot hold that notwithstanding the fact that the finding of the trial Court is correct, it would still allow the accused to go on bail. This apart, when an order is passed by the appellate Court agreeing or disagreeing with the order of the trial Court, the trial Court's order is subsumed by the appellate Court's order by virtue of the doctrine of merger. Explaining the doctrine of merger, though in the context of a writ appeal, this Court observed, in the case of *State of Arunachal Pradesh and Others Vs. Nefa Udyog and Others*, , as under:

22. What emerges from the law laid down in *Kunhayammed* (Supra) is that where an appeal is provided against an order passed by a Court and the appeal is preferred, then, the decision of the lower Court forum merges into the decision of the appellate Court and it is the latter's decision, which subsists, remains operative and is capable of enforcement in the eyes of law. The position of the special leave applications made under Article 136 is, somewhat, different. The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. The first stage is up to the disposal of the prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and the SLP is converted into an appeal. The doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of the doctrine of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution, the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against only when it exercises appellate jurisdiction (i.e. after the leave to appeal is granted) and not while it exercises the discretionary jurisdiction on the question as to whether the petition for special leave to appeal shall be granted or not. The doctrine of merger, therefore, in such cases, comes into play if the special leave to appeal is granted and not when the question as to whether the leave would be granted or not is considered and decided. An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case, it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. What such an order implies is that the Supreme Court was not inclined to exercise its discretion so as to allow the appeal being filed. If the order refusing leave to appeal is a speaking order, i.e. when reasons are assigned for refusing the grant of leave, then, the order has two implications. Firstly, the statement of law contained in such an order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court, which would bind the parties thereto and also the Court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country; but it does not mean that the order of the Court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting SLP or that the order of the supreme Court is the only order binding as *res judicata* in subsequent proceedings between the parties. Once leave to appeal has been granted and the appellate jurisdiction of Supreme Court has been invoked, the order passed in appeal would attract the doctrine of merger. On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before the Supreme Court, the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule (1) of Order 47 of the C.P.C.

(Emphasis is added)

13. Thus, unlike rejection of bail, u/s 437 CrPC, which is not an appeal able order, the bail, granted or refused by a Special Court under the NIA Act, is an appeal able order. In an appeal, the power of the appellate Court is co-extensive with the power of the trial Court meaning thereby that the High Court, as the appellate Court, has no greater power than the trial Court (i.e., the Special Court) and, if the order of the trial Court is affirmed by the appellate Court, the order of the trial Court merges into the order of the appellate Court and it is the appellate Court's order, which remains in force. Consequently, so long as the facts, settled in the appellate Court's order, remain undisturbed and intact, the trial Court cannot change or vary its order unless there is any change in the circumstances or any new facts come on record.

14. When, therefore, this Court, in its earlier appellate order, clearly concluded that there were reasonable grounds to believe that the accusations, against the accused-appellant, were prima facie true attracting the proviso to Section 43D(5) of the UA (P) Act, this conclusion could not have been disturbed by the learned Special Court unless fresh facts emerged or change, in the circumstances, could have been shown to have taken place.

15. Though Mr. D.K. Mishra, learned Senior counsel, appearing on behalf of the appellant, has tried to impress upon this Court that the appellant was a peace negotiator, we are, in the light of the materials, which have been collected by the NIA, and in the backdrop of the reasons, which we have assigned, while dismissing the appellant's earlier appeal, namely, Criminal Appeal No. 35/2010, do not find that the appellant was a person unconnected with the activities of the DHD(J) inasmuch as there are reasonable grounds to believe that the appellant was deeply involved in the activities of DHD(J) and was helping, in every possible manner, accused Jewel Garlosa not merely for the purpose of arranging place of his stay, but also providing him with false identity so that he could escape the clutches of law. It is no part of the duty of the appellant to arrange false documents and deceive the Government and Governmental agencies. In fact, the materials, collected so far, furnish reasonable grounds to believe that the accused, Ahsringdaw Warisha @ Partha Warisha, was deeply involved, even during his stay, at Bangalore, in strengthening the hands of Mohit Hojai, Niranjan Hojai and Jewel Garlosa so as to facilitate commission of further terrorist acts.

16. Situated thus, we do not find that the appellant has been able to make out any case warranting interference by this Court with the learned Special Court's order rejecting the application for bail of the present appellant. Because of what have been discussed and pointed out above, this appeal fails and the same shall accordingly stand dismissed.