

**(2010) 05 GAU CK 0016**  
**In the Gauhati High Court**  
**Case No : Criminal Appeal No. 25 of 2010**

|                               |    |            |
|-------------------------------|----|------------|
| National Investigation Agency | Vs | APPELLANT  |
| Redaul Hussain Khan           |    | RESPONDENT |

**Date of Decision :** 28-05-2010

**Acts Referred:**

Arms Act, 1959 — Section 25(1B)  
Criminal Procedure Code, 1973 (CrPC) — Section 167, 167(2), 167(2A), 173, 173(1)  
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20(8),  
20(9), 37, 37(1)  
National Investigation Agency Act, 2008 — Section 11, 11(1), 14(3), 16, 16(1)  
Penal Code, 1860 (IPC) — Section 120B, 121, 121A  
Terrorist and Disruptive Activities (Prevention) Act, 1987 — Section 14(3), 20(8),  
20(9), 3  
Unlawful Activities (Prevention) Act, 1967 — Section 13, 15, 16, 17, 18

**Citation :** (2010) 3 GLT 302

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

**Bench :** Division Bench

**Advocate :** D.K. Das, for the Appellant; D.K. Mishra, Z. Alam, S.P. Bhattacharjee and S. Jahan, for the Respondent

## Judgement

I.A. Ansari, J.—When pitted against each other, which one is more important—liberty of a person, or the security of the State? Society has struggled to find a uniform answer to this question in all its stages of civilization. There was a time, when the concern of the security of the State made rulers ignore the question of personal liberty of their subjects. As the civilizational standards started rising, participation of the people in the governance of the State started increasing. The experience taught the people that ignoring personal liberty, in all cases and in all circumstances, may prove counter-productive inasmuch as it may turn the ruler—whether an individual or a group of persons—into a despot and dictator. Ignoring personal liberty may even slide the State to the brink of tyranny and, eventually, plunge the State into such a catastrophe as could destroy the State itself.

2. The human civilization, therefore, realized that a balance has to be struck

between the two. While the concern of the security of the State, in all conditions and always, may not be allowed to override the concerns of civil liberty, the civil liberty must also be subjected to certain restrictions so that the liberty does not become a licence to do anything, which anyone pleases to do, for, civil liberty, beyond a point, may also prove disastrous for the State inasmuch such licencees would tempt to ignore the law and defeat thereby the very rule of law, which is the cherished goal of civil liberty.

3. Fortunately, in India, her Constitution creates a balance between the two conflicting interests-civil liberty and security of the State. All laws, in India, have to, therefore, withstand the test of this constitutional balance. With the spread of terrorism, human civilization has been put under severe strain inasmuch as terrorism is, now, testing our value system. Do we allow the concerns of civil liberty to be ignored in order to escape the horrors of terrorism? Should we learn to forget the values, which we have attached so far to an individual's human rights, even if he is an offender? No wonder that "terrorism" has become, in the present day world, the greatest threat to human civilization.

4. The concern for security of the State has, therefore, made the State make more and more stringent laws. Lest the State also does not become as insensitive as a terrorist, all the acts of the State and the laws, made by the State, must be tested and interpreted on the touchstone of human rights. A successful State administers its laws with meaning and effect. A person, accused of an offence, must be brought to book in accordance with law. In order, however, to be brought to book, the accused must be allowed to survive. The security concern of the State cannot, therefore, be limitless and be allowed to put such restrictions on the liberty of the accused as would deny to him his right of not to be deprived of his life except as the law prescribes. Consequently, the law, in such cases, has to be interpreted in a manner, which would make the law just, fair and reasonable. The present appeal throws up one of such questions and we are invited to decide, amongst others, a question as to whether a person can be allowed to go on bail on the ground of his sickness, if he is accused of an offence, which, under a given penal provision, does not entitle him the right to go on bail? If so, whether it would be wise for the Court to ignore all such conditions, which are, otherwise, required to be satisfied before the Court allows an accused person to go on bail? Thus, the Court is required to interpret the restrictive conditions imposed on civil liberty of an accused in a manner, which would advance the legislative intent. While interpreting the law and applying the same to the facts of a given case, the Court may have to exercise its discretion. Should, therefore, the Court's discretion be guided by set principles or be left to the Court to be applied judiciously as would advance not only the legislative intent, but also the cause of justice?

5. While speaking for the Court, in *Gurcharan Singh and Others Vs. State (Delhi Administration)*, , P.K. Goswami, J., pithily put thus,

There cannot be an inexorable formula in the matter of granting bail. The facts

and circumstances of each case will govern the exercise of judicial discretion in granting or cancel-ting bail.

6. Speaking for the Court, Chandrachud, C.J., observed, in *Gurbaksh Singh Sibbia v. State of Punjab* reported in (1982) SCC 565, as under:

15. Judges have to decide cases as they come before them, mindful of the need to keep passions and prejudices out of their decisions.... Life is never static and every situation has to be assessed in the context of emerging concerns as and when it arises.

7. When discretion is conferred on the Court, it is unwise to discover a universal formula of its application, for, facts of each case may differ and thereby frustrate the very purpose of conferring discretion. No two cases are alike on facts, as observed Chandrachud, C.J., in *Gurbaksh Singh Sibbia v. State of Punjab* reported in (1982) SCC 565, and, therefore, the Courts have to be allowed a little free play in the joints if the conferment of discretionary power is to be meaningful. Laying down the law that judicial discretion must be given some freedom, the Constitution Bench, speaking through Chandrachud, C.J., in *Gurbaksh Singh Sibbia v. State of Punjab* reported in (1982) SCC 565, observed

...life throws up unforeseen possibilities and offers new challenges. Judicial discretion has to be free enough to be able to take these possibilities in its stride and to meet these challenges....

8. We would not also, therefore, like to evolve a legal formula of universal application as to when a person, accused of an offence, can be allowed to go on bail on the ground of his sickness if the law, otherwise, disempowers the Court from allowing a person, accused of an offence, to be released on bail. Notwithstanding the fact that this Court cannot lay down the law of universal application on the question posed before us, we must indicate, as our duty is, as to what would be the minimum parameters of the Court's discretion, while considering the question as to whether to allow or not to allow an accused to go on bail on the ground of sickness in the face of the facts on record and the law relevant thereto. With these prefatory remarks, let us, now, deal with the present appeal.

9. This is an appeal u/s 21(4) of the N.I.A. Act directed against the order, dated 29.01.2010, passed in Misc. Bail Application (N.I.A.) No. 11/2009 (arising out of N.I.A. Case No. 01/2009 under Sections 120B/121/121 Aread with Sections 16, 17, 18, 19 and 20 of the Unlawful Activities (Prevention) Act, 1967) by the Special Court, Guwahati, constituted under the N.I.A., whereby interim directions for bail, passed, on 22.12.2009, in favour of accused-Respondent, Redaul Hussain Khan, has been made absolute.

## BACKGROUND

10. 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-L-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 Code of Criminal Procedure, 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, 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-Respondent, Redaul Hussain Khan, in Central Jail, Kamrup, Guwahati. On the same day, the learned Court rejected the present Respondent's prayer for granting bail.

(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 National Investigation Agency Act, 2008 (in short, "the N.I.A. Act"), directed, on 01.06.2009, investigation of the said case by the National Investigation Agency (in short, "the Agency"). In terms of the directions, so issued by the Central Government, the Agency registered a case under the N.I.A. Act, the Case being N.I.A. Case No. 1/2009.

(vi) Before, however, registration of the case aforementioned by the Agency, three more persons, namely, 1. Mihir Barman @ Jewel Garlossa @ Debojit Sinha, 2. Ahsringdaw Warrisha @ Partha Warisha, and 3. Sameer Ahmed, were arrested by the Assam Police, at Bangalore, in connection with Basistha Police Station case aforementioned, on 30.05.2009 and 03.06.2009. The Agency moved, on 05.06.2009, the Chief Ju-dicial Magistrate, Kamrup, and filed FIR in the N.I.A. 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 N.I.A. Case No. 1/2009 and, on the basis of the application made by the Agency, the Court allowed accused Mohit Hojai and R.H. Khan (i.e., the Respondent herein) to be taken into custody by the Agency for a period of 10 days and the three accused, namely, 1. Mihir Barman @ Jewel Garlossa @ Debojit Sinha, 2. Ahsringdaw Warrisha @ Partha Warisha, and 3. Sameer Ahmed, were remanded, for a period of 14 days, to the custody of the Agency.

(vii) On 11.06.2009, on the prayer of the Agency, the Court of the Chief Judicial Magistrate, Kamrup, added Sections 17/18/19 of the Unlawful Activities (Prevention) Act, 1967, to the N.I.A. Case No. 1/2009 aforementioned and, on the prayer of the Agency, the Court of the Chief Judicial Magistrate, Kamrup, remanded the accused to judicial custody, in purported exercise of its power u/s 167 of the Code of Criminal Procedure, on the ground that no Court has so far been constituted under the N.I.A. Act.

(viii) 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 wdth its factions, wings and front organizations came to be declared as "unlawful organization".

(ix) Three of the accused persons, namely, R.H. Khan, Ahsringdaw Warisa @ Partha Warisha and Sameer Ahmed, then, approached this Court seeking to invoke its jurisdiction u/s 439 Code of Criminal Procedure. 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 Code of Criminal Procedure.

(x) 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 Code of Criminal Procedure to this Court, was as to whether the bail appUcations were maintainable in law.

(xi) Upon a threadbare discussion, the said three bail applications, made u/s 439 Code of Criminal Procedure, 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 N.I.A. 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, imder the N.I.A. 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 Sfjecid 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 Code of Criminal Procedure 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 Code of Criminal Procedure and the provisions, contained in Section 439 Code of Criminal Procedure, 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, die remedy of an agrieved party lies in preferring an appeal to the High Court, in terms of Section 21(4) of the N.I.A. Act, and in not making any application u/s 439 Code of Criminal Procedure. This Court, therefore, held in its order, dated 29.07.2009, that such an appeal 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 N.I.A. 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 N.I.A. 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.

x x x

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 N.I.A. 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 N.I.A. 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 N.I.A. 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.

(xii) Complying with the position of law, as had been laid down, in Redaul Hussain Khan (supra), the Respondent herein (i.e., Redaul Hussain Khan) filed an application before the Sessions Judge (Special Court), Kamrup, Guwahati, seeking bail, but his bail application came to be rejected on 14.08.2009. Thereafter, on an application, made by the N.I.A., on 27.08.2009, the learned Sessions Judge (Special Court), Kamrup, Guwahati, by its order, dated 28.08.2009, extended the period for completion of investigation into the case by a further period of 60 days in terms of Section 43-D(5)(b) of the 1967 Act read with Section 167 Code of Criminal Procedure. The order, dated 14.08.2009, of the learned Sessions Judge (Special Court), Kamrup, Guwahati, rejecting the bail application of the Respondent herein, came to be unsuccessfully challenged by the Respondent herein, namely, Redaul Hussain Khan and some others, before a Division Bench of this Court by way of an appeal u/s 21(4) of the N.I.A. Act. The said appeal came to be dismissed by a Division Bench of this Court on 19.09.2009. In the meanwhile, however, the Special Court, Central Bureau of Investigation, Assam, Guwahati, was notified by the Central Government, in exercise of its power u/s 11(1) of the N.I.A. Act, vide Gazette notification, dated 01.09.2009, issued by the Government of India, Ministry of Home Affairs, as the "Special Court.

(xiii) As against the dismissal of his appeal and rejection of bail by the order, dated 19.09.2009, passed by a Division Bench as mentioned above, the Respondent herein carried the matter, by way of a Special Leave Petition, to the Supreme Court. By its decision, on 09.11.2009, reported in *Redaul Hussain Khan Vs. National Investigation Agency*, the Supreme Court observed, inter alia, that there was little doubt that even on the date, when the Petitioner, Redaul Hussain Khan (i.e., the Respondent herein) was apprehended, DHD(J) had been indulging in terrorist act, although it came to be declared as a "unlawful association" some time later, i.e., on 09.07.2009. The Supreme Court made it clear, in its order, dated 09.11.2009, that having considered the submissions, made before it, it was unable to agree with the submissions, made on behalf of the Petitioner, Redaul Hussain Khan (i.e., the Respondent herein) that to the facts of the case, the provisions of the Unlawful Activities (Prevention) Act, 1967, were not attracted. The Supreme Court further held that it was unable to accept the submissions, made on behalf of the Petitioner, Redaul Hussain Khan (i.e., Respondent herein) that merely because of the fact that DHD(J) had not been declared as an "unlawful organization", when Redaul Hussain Khan was arrested, the said organization could not have been taken to have been indulging in terrorist act, or that the Petitioner could not have been alleged to have the knowledge of such activities of the DHD(J). With the conclusions, so reached, the Supreme Court rejected the present Respondent's application for bail by laying down that the learned Sessions Judge (Special Court), Kamrup, Guwahati, had the jurisdiction to extend the time for completion of investigation in terms of the amended provisions, introduced by way of Section 43-D(5)(b) of the 1967 Act, read with Section 167 Code of Criminal Procedure. The relevant observations, made by the Apex Court, in *Redaul Hussain Khan* (supra), read as under:

15. Mr. Rawal submitted that although Mr. Ghosh had referred to some newspaper reports indicating that there was a possibility of amnesty being granted to the members of DHD(J), the same was yet to materialize, and, on the other hand, it also indicated that the said organization was indulging in terrorist activities. Accordingly, in view of the definition of "terrorist act" in Section 15 of the 1967 Act and the provisions of Sections 13 and 17 thereof, there was little doubt that even on the date when the Petitioner was apprehended, DHD(J) was indulging in terrorist acts, although, it came to be declared as an "unlawful association" sometime later. Mr. Rawal urged that having regard to the above, the Special Leave Petitions filed against the order of the High Court refusing to grant bail were liable to be dismissed.

16. We have carefully considered the submissions made on behalf of the respective parties and we are unable to agree with Mr. Ghosh that the provisions of the Unlawful Activities (Prevention) Act, 1967, would not be attracted to the facts of the case. We are also unable to accept Mr. Ghosh's submissions that merely because DHD(J) had not been declared as an "unlawful association" when the Petitioner was arrested, the said organization could not have indulged in terrorist acts or that the Petitioner could not have had knowledge of such

activities.

17. Accordingly, Mr. Ghosh's submissions regarding the grant of statutory bail have to be rejected since, in our view, the learned Sessions Judge (Special Court) had the jurisdiction to extend the time for completion of the investigation.

(xiv) Thereafter, three more persons, namely, Jayanta Kumar Ghosh, Debasish Bhattacharjee @ Bappi and Sandeep Kumar Ghosh @ Sambhu, came to be arrested on 30.10.2009. On their production before the Special Court, they were remanded to custody.

(xv) A charge-sheet has come to be laid, on 17.11.2009, before the learned Special Court, by the N.I.A. against as many as 14 accused persons, including the Respondent 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 have preferred appeals, u/s 21 of the N.I.A. Act, to this Court, and these appeals have also been heard and are being disposed of by a separate judgment and order. Similarly, accused Ashringdaw Warrisha and accused Samir Ahmed, too, on failing to obtain bail from the learned Special Court, have, after filing of the charge-sheet against them, preferred appeals and these appeals too, having been heard, are being disposed of by separate judgment and order.

(xvi) As far as the Respondent herein, Redaul Hussain Khan, is concerned, he filed, after the charge-sheet stood laid by the N.I.A., an application for bail in the Special Court, at Guwahati, on the ground of his sickness. While resisting the bail application, the N.I.A., in substance, submitted thus:

(a) During the course of investigation, accused Redaul Hussain Khan and Mohit Hojai were arrested on 31.05.2009. During a search conducted at the house of Redaul Hussain Khan, an amount of Rs. 4,00,000/- was recovered in cash. The seizure of huge cash, which had been made, on 01.04.2009, from Phojendra Hojai and Babul Kemprai and also recovery of money, in cash, from Redaul Hussain Khan was part of a large criminal conspiracy to wage war against the State by the accused involved in the case aforementioned including Redaul Hussain Khan. In furtherance of the said criminal conspiracy, which was held in November, 2008, in Guwahati, North Cachar Hills and other places and under the directions of Niranjana Hojai, Commander-in-Chief of DHD(J), Depolal Hojai, the then elected Chief Executive Member (CEM) of North Cachar Hills Autonomous Council (in short, NCHAC), resigned from the office to make way for Mohit Hojai to assume charge as the new CEM. Subsequently, Mohit Hojai and other public servants including Redaul Hussain Khan, some contractors and some others siphoned huge sums of money by threat and extortion from NCHAC and the money collected from various illegal means including extortion, misappropriation, etc., used to be carried to Guwahati, Kolkata and Bangalore

and, then, through channelized hawala operators, sent out of the country and utilized in purchasing and importing arms and ammunitions for carrying on the subversive activities of DHD(J), which has come to be notified as a terrorist organization within the meaning of Section 2(m) of Unlawful Activities (Prevention) Act. The investigation, conducted at Halflong, revealed defalcation of Government funds for the purpose of helping terrorist activities of DHD (J) and the present Respondent, Redaul Hussain Khan, while working as Deputy Director, Social Welfare Department, had the sole control of the finances of the Social Welfare Department inasmuch as he used to keep all cheque books, passbooks and other related papers with him only and used to make payments to the suppliers personally without receiving the materials for which orders were placed and, after obtaining receipts from the suppliers, he gave the receipts, bills, challans and vouchers to the office staff with instruction to process the same for payment and make relevant entries of the office records. The office staff processed the bills for payment and made relevant entries in the office records without actually receiving the articles on stock. The interrogation of the office staff has revealed that they were threatened by Redaul Hussain Khan to do so and that the staff of the said office have been carrying out illegal directions of Redaul Hussain Khan, because of fear and threat to their lives. Accused Redaul Hussain Khan applied for bail at different stages of investigation, but the same came to be rejected by the Special Court, the High Court and also the Supreme Court. In the past, accused Redaul Hussain Khan had cited different reasons for obtaining bail including a plea that he was to appear in MBA examination and the illness of his mother. During pendency of Criminal Appeal No. 148/2009, arising out of an appeal preferred u/s 21(4) by the Respondent, Redaul Hussain Khan, challenging therein the order of the learned Special Court refusing to grant him bail. Redaul Hussain Khan had been allowed by the High Court to meet his mother in the hospital, while being escorted by police; but the accused never met his mother in the hospital, because his mother was not seriously ill as had been misrepresented before the High Court and that she already stood discharged by the hospital. A charge-sheet, in terms of the requirements of Section 173(2)(1) Code of Criminal Procedure, has already been laid, in the Special Court, against as many as 14 accused including Redaul Hussain Khan, who figures as A-4 in the chargesheet. There is ample evidence on record, which suggest deep complicity of Redaul Hussain Khan in the case involving threat to the sovereignty, security and integrity of India.

(b) Considering the fact that Redaul Hussain Khan had earlier, according to the N.I.A., misled the Court citing different reasons for obtaining bail, the N.I.A., in its written objection, submitted, in the Special Court, that Redaul Hussain Khan be examined at All India Institute of Medical Sciences, New Delhi, to get a definite opinion regarding his state of health and also to obtain an opinion as to whether his treatment, if required, is possible, while injudicial custody. The N.I.A. also submitted, in the learned Special Court, that Redaul Hussain Khan was accused of serious charges, his release on bail would jeopardize the case as

there was every likelihood that he would tamper with the evidence, witnesses may be intimidated and harassed and that further investigation may also be hampered.

(xvii) Not with standing the vehement objection, so raised, by the N.I.A. against the prayer for bail made by the Respondent herein, Redaul Hussain Khan, on the ground of his sickness, the learned Special Judge, by its order, dated 22.12.2009, allowed accused Redaul Hussain Khan to go on interim bail on the ground of his ill health subject to condition that he would appear in the Special Court on 11.01.2010 at 10.30 am. Accused Redaul Hussain Khan did not appear in the Court as had been directed and an application was moved, on his behalf, informing the Court, inter alia, that Redaul Hussain Khan had, again, been admitted in hospital, on 07.01.2010, after having been released on bail, on 26.12.2009, with complain of increased backache and other complications. On hearing the parties and on consideration of the relevant medical report, dated 08.01.2010, the interim bail was extended, while calling for a joint up-to-date medical report form the departments of medicine and orthopedic of Gauhati Medical College and Hospital (GMCH) on the ground that Redaul Hussain Khan was being treated by the said departments. On production of the medical report, the prayer for making absolute the interim bail was renewed by accused Redaul Hussain Khan. The N.I.A. filed its objection to the said prayer and, on hearing both sides, the learned Special Court passed, on 25.01.2010, an order directing the Superintendent, Gauhati Medical College and Hospital, to constitute a Medical Board with concerning doctors to examine Redaul Hussain Khan thoroughly and to submit report. The medical report was accordingly submitted and, on hearing the N.I.A. and also accused-Respondent Redaul Hussain Khan, the learned Special Court made, on 29.01.2010, the interim order of bail absolute. It is this order, dated 29.01.2010, which stands impugned, in this appeal, by the N.I.A..

## SUBMISSIONS

11. Appearing on behalf of the Appellant, Mr. D.K. Das, learned Senior counsel, has submitted that in the light of the materials, which had been unearthed during investigation against accused-Respondent Redaul Hussain Khan, particularly, when he was involved in arranging funds for terrorist activities and when his acts posed threats to sovereignty, security and integrity of India, the learned Special Court committed serious error in allowing the accused-Respondent to go on bail. In fact, points out Mr. Das, learned Special Court did not consider at all the incriminating materials, which have surfaced against the accused-Respondent, and allowed him to go on bail entirely basing the grant of bail on the ground of poor state of health of the accused-Respondent.

12. Mr. Das further points out that though the State had come forward to escort Redaul Hussain Khan for appropriate medical examination and treatment to All India Institute of Medical Sciences, New Delhi, (in short, "AIMS"), the learned Special Court, without assigning any reason whatsoever, did not accede to this request of the N.I.A. and got the accused examined at the Gauhati Medical

College and Hospital. According to Mr. Das, since the accused-Respondent had already been under treatment at Gauhati Medical College and Hospital, the investigation agency wanted the accused-Respondent to be examined by a neutral medical institute, such as, AIMS, so that chance of any kind of manipulation of medical opinion could be reduced. Mr. Das has pointed out that even on the face of the medical report, it cannot be said that the accused-Respondent's sickness was so grave that he could not have been provided with requisite medical treatment, while being kept in judicial custody. What the accused-Respondent suffers from, submits Mr. Das, is nothing unusual and the nature of his sickness is not so serious, which would have warranted his release on bail, particularly, when the materials on record clearly show that Redaul Hussain Khan was involved in threatening his staff and others and thereby helped in collection of funds for the terrorist activities. Release of the accused-Respondent on bail, in a case of pre-arrest nature, is against the interest of further investigation and trial inasmuch as accused is capable of tampering with the evidence and intimidating the witnesses from disclosing the truth before the investigating agency and the Court. In these circumstances, particularly, when the medical report, which the learned Special Court has relied upon, does not give any opinion, far less any definite indication, that supervised medical treatment, as suggested by the doctors, was not possible to be given to the accused-Respondent, Redaul Hussain Khan, while keeping him in custody, the order making the interim directions for bail, passed in favour of the accused-Respondent, absolute was wholly illegal and may, therefore, be interfered with.

13. Controverting the submissions, made on behalf of the Appellant, Mr. D.K. Mishra, learned Senior counsel, submits that the first proviso to Section 437 Code of Criminal Procedure empowers the Special Court to grant bail to an accused on the ground of sickness and in the facts and attending circumstances of the present case, the learned Court below was wholly justified in allowing the accused-Respondent to go on bail, particularly, when his condition of health is such that it would threaten his very survival if adequate medical treatment is not provided to him. The accused-Respondent, in the present case, according to Mr. Mishra, requires proper homely atmosphere for improvement and survival. Nothing has been brought on record, points out Mr. Mishra, to show that the doctors of the GMCH are not neutral and the opinion given by them is a manipulated one. In the absence of any such material, the submissions, which have been made on behalf of the N.I.A., may not be given any credit. So contends Mr. Mishra.

14. It is contended by Mr. DK Mishra, learned Senior Counsel, that in the case at hand, apart from the fact that the accused-Respondent has been allowed to go on bail on the ground of his sickness, there is no allegation that the accused-Respondent has, as a matter of fact, interfered with, or attempted to interfere with, the investigation of the case and/or he has, in any manner, misused the liberty of bail. In such circumstances, contends Mr. Mishra, the impugned order, granting bail, is not, according to Mr. Mishra, interfereable in appeal.

15. Resisting this appeal, Mr. Mishra, learned Senior counsel, has also submitted that since charge-sheet has already been sub-mitted, the accused-Respondent, Redaul Hussain Khan, being a resident of Assam, he has his roots in the local society and there is no chance of his absconding, he could have, therefore, been allowed and he has been rightly allowed by the learned Special Court to go on bail. Mr. Mishra further submits that the accused-Respondent, Redaul Hussain Khan, is prepared to abide by any condition or conditions as may be imposed by this Court. This appeal, contends Mr. Mishra, is wholly misconceived and not sustainable in facts and law.

#### RELEVANT LEGISLATIONS

16. In the light of the facts, as have been set out above, leading to the present appeal, materials on record and the submissions made by the learned counsel for the parties concerned, we, now, proceed to determine the question as to whether the impugned order, granting bail to the accused-Respondent, Redaul Hussain Khan, can be sustained. Before we discuss the sustainability of the impugned order, it is worth recalling that when the Terrorists and Disruptive Activities (Prevention) Act, 1987, was repealed, the Prevention of Terrorist Activities Act, 2002, came to be enacted to combat, amongst others, the menace of terrorism. However, even Prevention of Terrorist Activities Act, 2002, came to be repealed in 2004 and when the terror attack took place in Mumbai on 26.11.2008, there was no specific legislation, in force, to help India's fight against terrorism against the national level inasmuch as investigations into the acts of terrorism were to be, ordinarily, carried by the various agencies at the State level. In the aftermath of Mumbai terror attacks. National Investigation Agency Act, 2008, (in short, the N.I.A. Act), therefore, came into force on 31.12.2008. The N.I.A. created Special Courts for trial of scheduled offences. In order to make law more stringent than what it was, the Unlawful Activities (Prevention) Act, 1967 (in short, the "U.A. (P) Act"), too, witnessed significant amendments introduced on 31.12.2008.

17. In the light of the scheme of investigation as perceived by the N.I.A. Act, the trial of scheduled offences, the relevant penal provisions and also the provisions with regard to bail, as have now been incorporated, in the U.A. (P) Act, 1967, the present appeal needs consideration.

18. As terrorism has become a threat to the very existence of human society and terrorist activities have not remained a localized crime, a national investigation agency, which can co-ordinate and oversee investigation into the offences having national and cross-border repercussion, was deemed necessary. It is to meet this requirement that the N.I.A. has been given birth. Whether, under the scheme of our Constitution, the N.I.A. is or is not a valid legislation has not been debated in the present set of cases.

19. Bearing in mind the threat of terrorism and its national and international ramifications, which India has to fight vis-a-vis the limitations on the powers of

the Special Court to grant bail and the High Court's jurisdiction and powers in such matters, the present appeal, seeking to get set aside the order granting bail to the accused-Respondent, Redaul Hussain Khan, needs to be examined.

20. We have already set out above the material facts, which have given rise to this appeal. We are in complete agreement with the propositions of law, laid down in Redaul Hussain Khan and Others Vs. State of Assam and Others, , and we see no reason to discuss, once again, the limitations, which the N.I.A. Act has imposed on the powers of the Special Court in matters of granting of bail to a person, who is accused to have committed scheduled offence(s) as stand embodied in the N.I.A. Act, except pointing out that from a careful reading of the provisions contained in Section 437(1), what becomes transparent is that Section 437(1) gives power to grant bail to a Court "other than the High Court or Court of Session". Admittedly, a Special Court, under the N.I.A. Act, is not a Court of Session and even the Court of Session, while acting as the. Special Court under the N.I.A. Act, does not, as already discussed above, act as a Court of Session. The Special Court is also not a High Court, for, a Special Court, as defined in Section 2(h), is a Court, which is constituted, u/s 11, by the Central Government or, u/s 22, by a State Government. The expression, "a Court other than the High Court, or the Court of Session", has very wide meaning and includes, within its ambit, not only the Magisterial Courts, but all such Courts, including a Special Court, which do not fall within the expressions, "the High Court" or "the Court of Session". A Special Court, under the N.I.A. Act, not being a High Court, or a Court of Session, would obviously fall within the expression "a Court other than the High Court or the Court of Session".

21. We, therefore, hold, in agreement with this Court's decision, in Redaul Hussain Khan and Ors. (supra), that the Special Court constituted, under the N.I.A. Act, is a Court other than the High Court or the Court of Session as envisaged in Section 437 Code of Criminal Procedure. Consequently, the Special Court would have all the limitations, which a Magistrate has, while deciding an application for bail u/s 437 Code of Criminal Procedure.

22. We also agree, as laid down in Redaul Hussain Khan and Others Vs. State of Assam and Others, , that even the High Court, by invoking its powers u/s 439 Code of Criminal Procedure, cannot allow a person to go on bail if he is accused to have committed a scheduled offence under the N.I.A. Act. The High Court's power to grant or refuse bail is traceable to Section 21(4) of the N.I.A. Act inasmuch as Section 21(4) clearly lays down that an appeal shall lie to the High Court against an order of the Special Court granting or refusing bail. As already indicated in Redaul Hussain Khan and Ors. (supra) and we too take the same view that in an appeal u/s 21(4), the High Court will have the power to consider if, in the facts and attending circumstances of a given case and the law relevant thereto, bail could or could not have been granted by the Special Court.

23. Ordinarily, while considering an application for cancellation of bail, the High Court would exercise its power to cancel bail if beneficiary of an order of bail has

violated the conditions of bail or has interfered with or attempted to interfere with further investigation of the case by inducing or threatening a person acquainted with the facts of the case. As against the limited scope within which a High Court, ordinarily, exercises its powers u/s 439 Code of Criminal Procedure, the power, conferred on the High Court u/s 21(4) of the N.I.A. Act, is wider in scope inasmuch as the High Court can, and must, interfere with an order of granting bail if, in the facts and circumstances of a given case, the Special Court ought not to have allowed the accused to go on bail or when the Special Court has not allowed an accused to go on bail, though he deserves to be enlarged on bail. In short, violation of the conditions of bail, interference with the investigation or intimidation or inducement of witnesses are not the only grounds on which bail can be cancelled by the High Court in exercise of its powers u/s 21(4), but the bail, granted to an accused, can also be cancelled by the High Court, while considering an appeal u/s 21(4) against an order granting bail if the High Court is of the view that the accused, in the face of the material on record and the law relevant thereto, did not deserve to go on bail. We must, however, clarify and hasten to add that the High Court's power to grant bail, u/s 21(4), is not derived from Section 439 Code of Criminal Procedure and, further, that the High Court's power to grant bail is co-extensive with a Magistrate's power u/s 437 Code of Criminal Procedure, subject to such further restrictions and limitations, which the N.I.A. Act or any other relevant statute may have placed on the Special Court's power to grant bail. In other words, by invoking its powers u/s 21(4), the High Court cannot grant bail to a person, accused of having committed a scheduled offence, under the N.I.A. Act if bail to such a person could not have been granted, in the facts of a given case, by a Magistrate nor can the High Court grant bail in the cases in which a Magistrate or a Special Court cannot, because of the embargo placed on the Magistrate's power u/s 437(1) Code of Criminal Procedure, grant bail.

24. With the above limitations in view, let us, now, determine as to what factors would, ordinarily, govern granting of bail by a Magistrate in exercise of his powers u/s 437 Code of Criminal Procedure.

#### PRINCIPLES GOVERNING. ORDINARILY. GRANTING OF BAIL

25. Generally, while considering an application for bail in a non-bailable case, the factors, to be considered, are: (i) whether there is any prima facie or reasonable ground, as the case may be, to believe that the accused had committed the offence, (ii) the nature and gravity of the offence, (iii) severity of the punishment if the accused happens to be convicted, (iv) chances of the accused absconding or fleeing away, if given the opportunity of bail, (v) the character, behaviour, antecedents, means, position and standing of the accused in the society, (vi) likelihood of the offence being repeated, (vii) reasonable apprehension of the witnesses being tampered with or the investigation being interfered with. While a vague allegation that the accused may tamper with the evidence or witnesses would not be a ground to refuse bail, the fact remains that when the accused is

of such a character that his mere presence, at large, would intimidate the witnesses or if there is material to show that there is likelihood of the accused using his liberty to subvert justice or tamper with the evidence, then, bail would be refused.

26. Points out the Supreme Court, in *State of Maharashtra Vs. Anand Chintaman Dighe*, , that there are no hard and fast rules regarding grant or refusal of bail, each case has to be considered on its own merits. The matter always calls for judicious exercise of discretion by the Court. Where the offence is of serious nature, the Court has to decide the question of grant of bail in the light of such considerations as the nature and seriousness of offence, character of the evidence, circumstances, which are peculiar to the accused, a reasonable possibility of presence of the accused not being secure at the trial and the reasonable apprehension of witness being tampered with, the larger interest of the public or such similar other considerations. (See also *The State Vs. Captain Jagjit Singh*, ).

27. In the *State Vs. Amarmani Tripathi*, , the Court has summed up the factors, which are, generally, required to be taken into account, while considering an application seeking bail. The relevant observations, made in this regard, read as under:

18. It is well settled that the matters to be considered in an application for bail are (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence: (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction: (iv) danger of the accused absconding or fleeing, if released on bail: (v) character, behaviour, means, position and standing of the accused: (vi) likelihood of the offence being repeated: (vii) reasonable apprehension of the witnesses being tampered with: and (viii) danger, of course, of justice being thwarted by grant of bail (see *Prahlad Singh Bhati Vs. N.C.T. Delhi and Another*, and *Gurcharan Singh and Others Vs. State (Delhi Administration)*, . While a vague allegation that the accused may tamper with the evidence or witnesses may not be a ground to refuse bail, if the accused is of such character that his mere presence at large would intimidate the witnesses or if there is material to show that he will use his liberty to subvert justice or tamper with the evidence, then bail will be refused. We may also refer to the following principles relating to grant or refusal of bail stated in *Kalyan Chandra Sarkar Vs. Rajesh Ranjan @ Pappu Yadav and Another*,

11. The law in regard to grant or refusal of bail is very well settled. The Court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from no-application of mind. It is also necessary for the Court granting bail

to consider among other circumstances, the following factors also before granting bail; they are:

(a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.

(b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.

(c) Prima facie satisfaction of the Court in support of the charge.(See Ram Govind Upadhyay Vs. Sudarshan Singh and Others, and Puran Vs. Rambilas and Another etc. etc., .

(Emphasis is supplied)

## REASONS FOR GRANTING BAIL IMPERATIVES AND LIMITATIONS

28. It needs to be borne in mind that while granting bail, though a detailed examination of the evidence and elaborate documentation of the merits of a given case is not to be undertaken, the Court owes a duty to assign reasons for prima facie concluding as to why bail was being granted. So lays down the Supreme Court, in Puran Vs. Rambilas and Another etc. etc., , in the following words:

8. He submitted that in view of these observations the learned Additional Sessions Judge did not give reasons whilst granting bail. He submitted that in these circumstances the Additional Sessions Judge cannot be faulted. He submitted that the High Court could not cancel bail on this ground. We see no substance in this contention. Giving reasons is different from discussing merits or demerits. At the stage of granting bail a detailed examination of evidence and elaborate documentation of the merits of the case has not to be undertaken. What the Additional Sessions Judge had done in the order, dated 11.9,2000. was to discuss the merits and demerits of the evidence. That was what was deprecated. That did not mean that whilst granting bail, some reasons for prima facie concluding why bail was being granted did not have to be indicated.

(emphasis is supplied)

29. The requirement of the law to assign prima facie reasons for granting bail has been insisted upon in Kalyan Chandra Sarkar Vs. Rajesh Ranjan @ Pappu Yadav and Another, , too, wherein the Court observed, referring to Puran's case (supra), thus:

18. We agree that a conclusive finding in regard to the points urged by both the sides is not expected of the Court considering a bail application. Still one should not forget, as observed by this Court in the case Puran v. Rambilas: (SCC p. 344, para 8)

Giving reasons is different from discussing merits or demerits. At the stage of granting bail a detailed examination of evidence and elaborate documentation of

the merits of the case has not to be undertaken.... That did not mean that whilst granting bail some reasons for prima facie concluding why bail was being granted did not have to be indicated.

19. We respectfully agree with the above dictum" of this Court. We also feel that such expression of prima facie reasons for granting bail is a requirement of law in cases where such orders on bail application are appealable, more so because of the fact that the appellate Court has every right to know the basis for granting the bail.

30. Coupled with the above, the Supreme Court, in Kalyan Chandra Sarkar (supra), has held that the Court shall exercise its discretion to grant bail in a judicious manner and not as a matter of course and though, on the subject of granting of bail, examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate, in such orders, the reasons for prima facie concluding as to why bail was being granted, particularly, when the accused is charged with having committed a serious offence, because the appellate Court has every right to know the reasons as to why bail has been granted. Any order, devoid of such reasons, would suffer from non-application of mind. This apart, reiterated the Supreme Court, in Kalyan Chandra Sarkar (supra), that the Court shall consider, among other circumstances, the following factors too before granting bail, namely, (a) the nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence, (b) reasonable apprehension of tampering with the witness or apprehension of threat to the complainant and (c) prima facie satisfaction of the Court in support of the charge.

31. Cautioning the Courts not to discuss, while considering the question of bail, too minutely, the merit of the materials available so as to avoid causing of prejudice to the parties concerned, the Supreme Court, in Vaman Narain Ghiya Vs. State of Rajasthan, , held as under:

11. While considering an application for bail, detailed discussion of the evidence and elaborate documentation of the merits is to be avoided. This requirement stems from the desirability that no party should have the impression that his case has been prejudged. Existence of a prima facie case is only to be considered. Elaborate analysis or exhaustive exploration of the merits is not required. (See Niranjana Singh v. Prabhakar Rajaram Kharote.) Where the offence is of serious nature, the question of grant of bail has to be decided keeping in view the nature and seriousness of the offence, character of the evidence and amongst others the larger interest of the public.

(Emphasis is supplied)

32. From the discussions, held above, what surfaces is that a Court, while granting or refusing bail, must assign the reasons for its decision. The reasons assigned, however, must not be an elaborate discussion of the materials collected so that the accused is not prejudged and his case must not appear to have been

prejudged. There is, therefore, a need, on the part of the Court, to maintain a balance between the need to assign reasons for refusing or granting bail, on the one hand, and the caution to be applied, on the other, to ensure that the assignment of reasons should not be so elaborate that the case of the accused appears to have been prejudged.

#### DISTINCTION BETWEEN GRANT OF BAIL AND CANCELLATION THEREOF

33. What, now, needs to be taken note of is that the factors, governing grant of bail, are different from the factors, which are, generally, taken into account for the purpose of cancellation of bail. This distinction has been succinctly brought out by the Supreme Court in *Dolat Ram and Others Vs. State of Haryana*, , in the following words:

4. Rejection of bail in a non-bailable case at the initial stage and the cancellation of bail, so granted, have to be considered and dealt with on different basis. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail, already granted. Generally speaking, the grounds for cancellation of bail, broadly (illustrative and not exhaustive) are : interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. The satisfaction of the Court, on the basis of material placed on the record of the possibility of the accused absconding is yet another reason justifying the cancellation of bail. However, bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial.

(emphasis is supplied)

34. From what have been laid down in *Dolat Ram* (supra), it becomes clear that there, indeed, exists a distinction between rejection of bail in a non-bailable case at the initial stage and cancellation of bail so granted. For the purpose of cancellation of bail, cogent and overwhelming circumstances are necessary. Generally speaking, the grounds for cancellation of bail are interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. The satisfaction of the court, on the basis of materials placed on the record, of the possibility of the accused absconding is yet another reason justifying cancellation of bail. However, cautions the Supreme Court, in *Dolat Ram* (supra), that once bail, already granted, should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial.

35. In *Amarmani Tripathi* (supra), the Court has referred to, and relied upon, the case of *Dolat Ram and Others Vs. State of Haryana*, , for the purpose of bringing

out the distinction between the factors, relevant for rejecting bail in a non-bailable case, and the factors, relevant for cancellation of bail, when bail already stands granted.

#### CAN BAIL BE CANCELLED IF ACCUSED HAS NOT ABUSED HIS LIBERTY OF BAIL

36. A microscopic reading of the observations of the Supreme Court, in Dolat Ram's case (supra), as reproduced above, clearly brings out one aspect of law, namely, that the grounds of cancellation of bail, which have been enumerated, in Dolat Ram's case (supra), are general in nature and that these conditions are only illustrative and not exhaustive inasmuch as the Court has observed, in Dolat Ram (supra),

... Generally speaking, the grounds for cancellation of bail, broadly (illustrative and not exhaustive).

37. The question, therefore, is as to what the Supreme Court meant when it observed that the grounds, which are generally considered for cancellation of bail, are "illustrative and not exhaustive". This aspect of law, now, needs examination in the present appeal.

38. Having taken into account the general conditions of granting of bail and the principles, governing cancellation of bail, in the sense that bail, if granted, cannot, ordinarily, be cancelled imless there are supervening circumstances making it no longer conducive for effective investigation or for fair trial to allow the accused to enjoy his liberty of bail, it is, now, time to consider as to whether bail, if once granted by a Magistrate, cannot, imder any circumstances, be cancelled by a Court of Session or a High Court by taking resort to the provisions of Section 439 Code of Criminal Procedure unless violation of the conditions of bail or misuse of the liberty of bail by the accused is shown to the satisfaction of the Court. In other words, the question is: when cancellation of bail is sought not on the ground that the accused has misused his liberty of bail, but on the ground that the Magistrate had ignored relevant materials, while granting bail and thereby granted bail in a case, where bail ought not to have granted, whether it is within the ambit of the powers of the High Court, u/s 439(2) Code of Criminal Procedure, to cancel such bail even when there is no accusation that the accused has misused his liberty of bail?

39. To put it a little differently, the question is: Unless an accused has misused his liberty of bail, whether bail, already granted by a Magistrate, can be interfered with by the High Court by invoking the provisions of Section 439(2) Code of Criminal Procedure if the Magistrate, while granting bail, had ignored or not taken into accoimt the relevant materials, which warranted that bail be refused? More than three decades ago, the Supreme Court, in Gurcharan Singh and Others Vs. State (Delhi Administration), , observed:

If, however, a Court of Session had admitted an accused person to bail, the State has two options. It may move the Sessions Judge if certain new circumstances

have arisen which were not earlier known to the State and necessarily, therefore, to that Court. The State may as well approach the High Court being the superior Court u/s 439(2) to commit the accused to custody. When, however, the State is aggrieved by the order of the Sessions Judge granting bail and there are no new circumstances that have cropped up except those already existing, it is futile for the State to move the Sessions Judge again and it is competent in law to move the High Court for cancellation of the bail. This position follows from the subordinate position of the Court of Session vis-a-vis the High Court.

(Emphasis is supplied)

40. From the above observations, made in *Gurcharan Singh* (supra), what clearly transpires is that when the State is aggrieved by an order of a Magistrate granting bail to an accused, where bail ought not have been granted, it is still competent for the State to move the High Court to invoke its powers u/s 439(2) Code of Criminal Procedure for cancellation of such bail even though there is no allegation of misuse of the liberty of bail by the accused or even when no new circumstances warranting cancellation of bail might have arisen. Thus, it is possible for the High Court to cancel bail of an accused, where bail has been granted by a Magistrate or a Court of Session in the circumstances in which bail ought not have been granted. Such cancellation is possible even if there is no new circumstances justifying cancellation of bail in the sense that the accused has misused his liberty of bail. Such cancellation of bail would be, in fact, cancellation of bail on merit by virtue of the provisions of Section 439(2) Code of Criminal Procedure and not because of misuse of liberty on bail.

41. As already indicated above, the Supreme Court, in *Dolat Ram and Others Vs. State of Haryana*, , pointed out, though not explicitly, yet cogently, that in order to cancel bail, though very cogent and overwhelming circumstances are necessary and though, generally speaking, the grounds for cancellation of bail are interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner, these circumstances or factors are merely "illustrative and not exhaustive" meaning thereby that even for reasons other than interference with due course of administration of justice, it is possible to cancel bail.

42. It was contended, in *Puran Vs. Rambilas and Another etc. etc.*, , that once bail has been granted, it should not be cancelled unless there is evidence that the conditions of bail are being infringed. In support of this submission, reliance was placed on the decision of *Dolat Ram* (supra). Pointed out the Supreme Court, in *Puran's* case (supra), that even in *Dolat Ram* (supra), the Court, having held that the general grounds for cancellation of bail are interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner, has, however, clarified that these instances are merely "illustrative and not exhaustive". One of the grounds for cancellation of bail,

according to the Supreme Court, in Puran's case (supra), would be where, ignoring material evidence on record, a perverse order granting bail is passed in a heinous crime and that too, without giving any reasons. Such an order, according to the Supreme Court, in Puran's case (supra), would be against principles of law and the interest of justice would also require that such a perverse order be set aside and the bail be cancelled. Further points out the Supreme Court, in Puran's case (supra), that where bail has been granted arbitrarily and in wrong exercise of discretion by the trial Court, such a decision needs to be corrected by the High Court.

43. A Full Bench of this Court too had, in *In Re: State of Assam and Another*, , the occasion to deal specifically with the question as to whether bail, if granted, can be cancelled, when the Magistrate had ignored relevant materials, while granting bail and thereby granted bail in a case, where bail ought not to have been granted, though, while applying for cancellation of such bail by the State, there is no accusation of misuse of the liberty of bail by the accused.

44. The Full Bench, referring to *Gurcharan Singh* (supra), pointed out that the approach, in such a case, should be whether an order, granting bail, was vitiated by any serious infirmity for which it was right and proper for the High Court to interfere with the interest of justice.

45. What emerges from the above discussion is that it is permissible for the High Court to cancel bail by invoking its jurisdiction u/s 439(2) Code of Criminal Procedure if a Magistrate or Court of Session grants bail to an accused, in a case, by ignoring the relevant materials or on consideration of irrelevant factors and thereby allowed the accused to go on bail in a case, where bail ought not to have been granted. The High Court can cancel such bail even if no new circumstances exist indicating interference with the investigation of the case by the accused by misusing his liberty of bail. DIFFERENCE BETWEEN THE HIGH COURT'S APPELLATE JURISDICTION u/s 21(4) OF THE N.I.A. ACT VIS-A-VIS HIGH COURT'S POWER u/s 439 Code of Criminal Procedure.

46. The question, which is, now, necessary to consider is as to how the provisions, embodied in Sub-section (1) of Section 24 of the N.I.A. Act, conferring appellate jurisdiction on the High Court, against orders granting or refusing bail by a Special Court, needs to be understood. In other words, the question is: How this appellate power, contained in Section 24(1), differs from the power, which the High Court, ordinarily, enjoys to grant or cancel bail u/s 439 Code of Criminal Procedure?

47. In order to clearly bring out the difference between Section 24(1) of the N.I.A. Act vis-a-vis the provisions of Section 439 Code of Criminal Procedure, it is necessary to bear in mind the power of the High Court to grant or cancel bail u/s 439 Code of Criminal Procedure vis-a-vis a Magistrate's power to grant bail u/s 437 Code of Criminal Procedure. For better understanding of the matter, we may point out that Sub-section (1) of Section 437 Code of Criminal Procedure. reads

as under:

437. When bail may be taken in case of non-bailable offence. - (1). When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Sessions, he may be released on bail, but-

(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;

(ii) such person shall not be; so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a cognizable offence punishable with imprisonment for three years or more but not less than seven years:

Provided that the Court may direct that a person referred to in Clause (i) or Clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm:

Provided further that the Court may also direct that a person referred to in Clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason.

Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the Court:

Provided also that no person shall, if the offence alleged to have been committed by him is punishable with death, imprisonment for life, or imprisonment for seven years or more, be released on bail by the Court under this Sub-section without giving an opportunity of hearing to the Public Prosecutor.

48. A careful reading of Section 437(1) Code of Criminal Procedure shows that though a Magistrate may allow and an accused, who is in custody, to go on bail even in a non-bailable case, such a person shall not be released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life. Thus, Section 437(1) imposes limitation on the Magistrate's power to grant bail to a person accused of, or suspected of the commission of, an offence punishable with death or imprisonment for life if there are reasonable grounds for believing that he has been so guilty.

49. What is, however, extremely important to note is that the legislature, while imposing limitation by Section 437(1) on the powers of the Magistrate, has expressly excluded from the purview of this limitation, the Court of Session and

the High Court. Having excluded from the embargo of the limitation, which Section 437(1) imposes on a Magistrate's power to grant bail. Section 439(1) Code of Criminal Procedure confers special powers on the High Court and the Court of Session to grant bail even when there are reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life. In other words, unlike the limitations, which Section 437(1) imposes on the Magistrate's power to grant bail, there is no limitation imposed u/s 439 Code of Criminal Procedure against granting of bail by the High Court or the Court of Session to a person accused of having committed an offence punishable with death or imprisonment for life. Though, ordinarily, it would be legitimately expected that the accused would apply for bail to the Court of Session or the High Court if bail has been rejected by a Magistrate, there is no limitation imposed by Section 439(1) on the power of the Court of Session or the High Court to entertain a bail application by an accused, when he is arrested, without such application for bail having been moved before, and rejected by, the jurisdictional Magistrate. Unfettered though the power to grant bail u/s 439 Code of Criminal Procedure may be, the fact remains that even the High Court, while exercising power to grant bail under Section 439(1) Code of Criminal Procedure, cannot overlook the overriding considerations, which govern grant of bail, in a non-bailable case, such as, the position and the status of the accused with reference to the victim and the witnesses; the likelihood of the accused fleeing from justice; of repeating the offence; of jeopardizing his own life being faced with a grim prospect of possible conviction in the case; of tampering with witnesses; the history of the case as well as of its investigation and other relevant grounds, which cannot be exhaustively set out. This aspect of law clearly surfaces on a careful reading of the following observations made in Gurcharan Singh (supra):

...18 With regard to the first category, Section 437(1) Code of Criminal Procedure imposes a bar to grant of bail by the Court or the officer-in-charge of a police station to a person accused of or suspected of the commission of an offence punishable with death or imprisonment for life, if there appear reasonable grounds for believing that he has been so guilty.

...On the other hand, if to either the officer-in-charge of the police station or to the Court, there appear to be reasonable grounds to believe that the accused has been guilty of such an offence, there will be no question of the Court or the officer granting bail to him.

x x x

21. Section 437 Code of Criminal Procedure is concerned only with the Court of Magistrate. It expressly excludes the High Court and the Court of Session.

22. ... Unless exceptional circumstances are brought to the notice of the Court, which may defeat proper investigation and a fair trial, the Court will not decline to grant bail to a person, who is not accused of an offence punishable with death

or imprisonment for life. It is also clear that when an accused is brought before the Court of a Magistrate with the allegation against him of an offence punishable with death or imprisonment for life, he has, ordinarily, no option in the matter, but to refuse bail subject, however, to the first proviso to Section 437(1) Code of Criminal Procedure and in a case, where the Magistrate entertains a reasonable belief on the materials that the accused has not been guilty of such an offence. This will, however, be an extraordinary occasion since there will be some materials at the stage of initial arrest, for the accusation or for strong suspicion of commission by the person of such an offence.

x x x

24. Section 439(1) Code of Criminal Procedure of the new Code, on the other hand, confers special powers on the High Court or the Court of Session in respect of bail. Unlike u/s 437(1). there is no ban imposed u/s 439(1) Code of Criminal Procedure against granting of bail by the High Court or the Court of Session to persons accused of an offence punishable with death or imprisonment for life. It is, however, legitimate to suppose that the High Court or the Court of Session will be approached by an accused only after he has failed before the Magistrate and after the investigation has progressed throwing light on the evidence and circumstances implicating the accused. Even so, the High Court or the Court of Session will have to exercise its judicial discretion in considering the question of granting of bail u/s 439(1) Code of Criminal Procedure of the new Code. The overriding considerations in granting bail to which we adverted to earlier and which are common both in the case of Section 437(1) and Section 439(1) Code of Criminal Procedure of the new Code are the nature and gravity of the circumstances in which the offence is committed; the position and the status of the accused with reference to the victim and the witnesses; the likelihood, of the accused fleeing from justice; of repeating the offence; of jeopardising his own life being faced with a grim prospect of possible conviction in the case; of tampering with witnesses; the history of the case as well as of its investigation and other relevant grounds which, in view of so many valuable factors, cannot be exhaustively set out.

(Emphasis is added)

50. From the observations, made, particularly, at para 24 in Gurcharan Singh (supra), it becomes clear that unlike the ban, which Section 437(1) imposes on the Magistrate's power to grant bail in a case, where there appear reasonable grounds for believing that the accused has been guilty of an offence punishable with death or imprisonment for hfe, there is no such limitation imposed on the powers of the High Court u/s 439(1) against granting of bail even in a case, where a person is accused of an offence punishable with death or imprisonment for life, though such an application for bail would be, ordinarily, made after the accused has failed to obtain bail from the Magistrate. This shows that, ordinarily, there is no bar for an accused to apply for bail directly to the High Court by invoking the High Court's jurisdiction u/s 439(1) Code of Criminal Procedure

without moving for bail to the Magistrate. Similarly, an aggrieved person may apply for cancellation of bail by invoking the High Court's jurisdiction under Section 439(2) Code of Criminal Procedure. Once, however, the provisions for appeal is made against an order granting or refusing bail, the recourse to Section 439 Code of Criminal Procedure cannot be had for the purpose of either obtaining bail or to get the bail, already granted, cancelled.

51. As indicated by this Court, in *Redaul Hussain Khan and Others Vs. State of Assam and Others*, , the Supreme Court, referring to its earlier decisions in *State v. Capt. Jagjit Singh* AIR 1962 SC 252 and *Gurcharan Singh and Others Vs. State (Delhi Administration)*, , in *State of Gujarat Vs. Salimbhai Abdulgaffar Shaikh and Others*, , observed:

9. The considerations which normally weigh with the Court in granting bail in non-bailable offences have been explained by this Court in *State v. Capt. Jagjit Singh and Gurcharan Singh v. State (Delhi Admn.)* and basically they are the nature and seriousness of the offence; the character of the evidence; circumstances which are peculiar to the accused; a reasonable possibility of the presence of the accused not being secured at the trial; reasonable apprehension of witnesses being tampered with; the larger interest of the public or the State and other similar factors which may be relevant in the facts and circumstances of the case. While hearing an application for cancellation of bail under Sub-section (2) of Section 439 of the Code, the Courts generally do not examine the merits of the order granting bail. What is normally relevant to be examined in such a proceeding is whether the accused is trying to tamper with the evidence subsequent to his release on bail or has threatened the witnesses or has committed any other offence while on bail or is trying to adopt dilatory tactics resulting in delay of trial or has absconded or that the offence committed by him has created serious law and order problem. The Court has to see as to whether the accused has misused the privilege of bail granted to him. Only in exceptional cases where the order granting bail is vitiated by any serious infirmity and in the interest of justice it becomes necessary to interfere with the discretion exercised in granting bail that the order would be interfered with on merits.

52. The scheme of the N.I.A. Act, if analysed carefully, shows that accused has to apply for bail, if he so chooses, to the Special Court and if bail is refused by the Special Court, then and then only, the accused may prefer an appeal to the High Court in terms of Section 21(4) against an order refusing to grant bail. In other words, without having applied for bail and the prayer for bail having been disallowed by the Special Court, a person, who is accused of having committed a scheduled offence covered by the scheme of the N.I.A. Act, cannot directly apply for bail to the High Court u/s 439(1) or Section 21(4) of the N.I.A. Act. Similarly, if the Special Court grants bail, the State may prefer an appeal to the High Court, in terms of Section 21(4), seeking cancellation of such bail. Hence, without applying for bail to the Special Court, an accused, who is arrested, cannot apply for bail to the High Court by taking recourse to Section 439 Code of Criminal

Procedure.

53. An order refusing or granting bail, in a case under the Prevention of Terrorist Activities Act, 1987, too, was an appealable order imder Section 34 thereof. Explaining the power of the High Court, while considering an appeal from an order granting bail and how it differs from an application for bail u/s 439 Code of Criminal Procedure. the Apex Court, in State of Gujarat Vs. Salimbhai Abdulgaffar Shaikh and Others, , observed as under:

10. Sub-section (4) of Section 34 of POTA provides fbr an appeal to the High Court against an order of the Special Court granting or refusing bail. Though the word "appeal" is used both in the Code of Criminal Procedure and the CPC and in many other statutes but it has not been defined anywhere. Over a period of time, it has acquired a definite connotation and meaning which is as under:

A proceeding undertaken to have a decision reconsidered by bringing it to 8 higher authority, especially the submission of a lower Court's decision to a higher Court for review and possible reversal.

An appeal, strictly so-called, is one in which the question is, whether the order of the Court from which the appeal is brought was right on the material which the Court had before it.

An appeal is removal of the cause from an inferior to one of superior jurisdiction for the purposes of obtaining a review or retrial.

An appeal, generally speaking, is a rehearing by a superior Court on both law and fact.

11. Broadly speaking, therefore, an appeal is a proceeding taken to rectify an erroneous decision of a Court by submitting the question to a higher Court, and in view of the express language used in Sub-section (1) of Section 34 of POTA the appeal would lie both on facts and on law. Therefore even an order granting bail can be examined on merits by the High Court without any kind of fetters on its powers and it can come to an independent conclusion whether the accused deserves to be released on bail on the merits of the case. The considerations which are generally relevant in the matter of cancellation ofbail under Sub-section (2) of Section 439 of the Code will not come in the way of the High Court in setting aside an order of the Special Court granting bail. It is, therefore, evident that the provisions of POTA are in clear contradistinction with that of the Code of Criminal Procedure where no appeal is provided against an order granting bail. The appeal can lie only against an order of the Special Court and unless there is an order of the Special Court refusing bail, the accused will have no right to file an appeal before the High Court praying for grant of bail to them. Existence of an order of the Special Court is, therefore, a sine qua non for approaching the High Court.

54. Referring to the above observations, made in Salimbhai Abdulgaffar Shaikh (supra), this Court, in Redaul Hussain Khan (supra), held as under:

98. In the light of the observations made above, it becomes clear that an appeal is a proceeding to rectify an erroneous decision of a Court both on facts as well as on law. An order, granting or refusing bail, could have been, in the light of the provisions of Section 34(4), examined on merit by the High Court without any other fetters and while considering a question of cancellation of bail the general principles, governing Section 439(2) of the Code, would not come in the way. The Apex Court, in *Salimbhai AbdulgaflFar Shaikh (supra)*, while laying down that the scheme for appeal, under the POTA, is in contradistinction to that of the Code, pointed out that an appeal can lie only against an order of the Special Court and unless there is an order of the Special Court refusing or granting bail, the accused cannot prefer appeal to the High Court seeking bail. What, further, follows from the above discussion is that even a High Court could not have invoked its power, under the Section 439, to grant bail to a person, accused of an offence under the POTA. Consequently, in order to obtain release on bail, an accused person, arrested under the POTA, was required to, first, apply for bail to the Special Court, where the Special Court was constituted, or to the Court of Session, where the Special Court was not constituted, and, if his application for bail was rejected, then and then only he could have preferred an appeal against the order refusing bail. Similarly, even the State could have preferred an appeal if the Special Court or the Court of Session, as the case may be, happened to grant bail to such an accused person in exercise of powers u/s 437 of the Code.

99. Though it was contended, in *Salimbhai Abdulgaffar Shaikh (supra)*, that TADA had not taken away the High Court's power u/s 439, the Supreme Court, referring to *Usmanbhai Dawoodbhai Memon (supra)*, held that there was complete exclusion of the jurisdiction of the High Court, under the TADA, to entertain a bail application made u/s 439 and that this view was reiterated in *Brij Mohan and Others Vs. Sugra Begum and Others*, . The Apex Court concluded, at para 14, in *Salimbhai Abdulgaffar Shaikh (supra)*, thus:

14. That apart, if the argument of the learned Counsel for the Respondents is accepted, it would mean that a person whose bail under POTA has been rejected by the Special Court will have two remedies and he can avail any one of them at his sweet will. He may move a bail application before the High Court u/s 439 Code of Criminal Procedure in the original or concurrent jurisdiction, which may be heard by a Single Judge or may prefer an appeal under Sub-section (4) of Section 34 of POTA which would be heard by a Bench of two Judges. To interpret a statutory provision in such a manner that a Court can exercise both appellate and original Jurisdiction in respect of the same matter will lead to an incongruous situation. The contention is therefore fallacious.

55. We, therefore, in the light of the discussions held by this Court, in *Redaul Hussain Khan and Others Vs. State of Assam and Others*, , agree with the views expressed therein that once the investigation, under the scheme of the N.I.A. Act, is taken over by the Agency, it is the Special-Court, which can authorize further detention of an arrested accused. When such an arrested accused applies

for bail to the Special Court, the source of power to consider such an explication for bail lies in Section 437 and not Section 439 of the Code. Even a High Court cannot invoke its powers, under Section 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, by resorting to its power u/s 439, cancel bail if bail has been granted to such an accused by the Special Court. If the bail has been refused or granted by the Special Court, the aggrieved party may, however, prefer an appeal, in terms of Section 21(4), 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.

56. The merit of the order would, obviously, mean that it would be possible for the High Court, as the appellate Court, u/s 24(1), to cancel bail if bail has been granted ignoring relevant materials on record or the law relevant thereto. When a bail order suffers from non-application of mind or perversion in the sense that relevant factors were not taken into account and/or irrelevant factors were taken into account for granting bail or when bail is granted ignoring the law relevant thereto, such a bail can be cancelled.

57. From what has been observed, in *Salimbhai Abdulgaffar Shaikh* (supra), it becomes clear that an appeal, u/s 34(4), same as an appeal u/s 24(1) of N.I.A. Act, is distinct and different from an application u/s 439 inasmuch as the High Court, as an appellate Court, in such an appeal, can examine even the merit of the order granting bail without any kind of fetters on its powers and it can come to a conclusion different from, and independent of, the conclusion reached by the Special Court that the accused deserves to be released on bail on the merits of the case. The limitations, which are generally relevant, while considering an application seeking cancellation of bail by invoking Section 439(2), such as, the question as to whether the accused, on having received the liberty of bail, has interfered with or attempted to interfere with due course of administration of justice or evaded or attempted to evade due course of administration of justice or has abused or attempted to abuse the concessions of bail and/or that there must be overwhelming materials and supervening circumstances in order to warrant cancellation of bail, would not come in the way of the High Court's conclusion that the order of the Special Court, granting bail, needs to be set aside. In no uncertain words, points out the Supreme Court, in *Salimbhai Abdulgaffar Shaikh* (supra), that the provisions of POTA (read as N.I.A.) are in clear contradistinction with that of the Code of Criminal Procedure, where no appeal is provided against an order granting bail.

58. In *Dighe's* case (supra), which arose out of the Terrorist and Disruptive Activities (Prevention) Act, 1987, there were provisions for appeal to the Supreme Court against an order granting or refusing bail. *Dighe's* case (supra) arose out of such an appeal, where the Designated Court had granted bail. While noting that an appellate Court would not, ordinarily, interfere with the discretion of the lower Court in granting or refusing bail, the Supreme Court nevertheless

pointed out that when bail has been granted on irrelevant considerations, such as, the status or influence of the person accused, regardless of the nature of the accusation and relevancy of materials on record, the appellate Court has a duty to step in and pass appropriate order in the interest of justice. The relevant observations, made in this regard, read as under:

6. This Court would not ordinarily interfere with the discretion of the lower court in granting or refusing bail but in cases where bail has been granted on irrelevant considerations, such as the status or influence of the person accused and regardless of the nature of the accusation and relevancy of materials on record, this Court would not hesitate to interfere for the ends of justice.

x x x

9. In the backdrop of such assertions, it was necessary for the Court to consider the further materials collected by the investigating agency by recording statements of witnesses. The Court below misdirected itself in refusing to look into such statements and concluding that it is a case for granting bail taking into account only the position held by the Respondent in the party. The Court clearly erred in disposing of the application for bail.

(Emphasis is supplied)

59. The above observations, made in Dighe's case (supra), further show that while considering an appeal against an order granting or refusing bail (as is the case at hand), it is the duty of the appellate Court to determine (when granting of bail is impugned, in an appeal, by the State), as to whether, in the face of the materials on record and the law relevant thereto, the Special Court could have granted bail. If the Special Court, while granting bail, is found to have failed to take into account any relevant material or is found to have passed an order granting bail by ignoring a relevant material or the law relevant thereto, the appellate Court has the duty to move in and pass appropriate order. Extended logically, it would mean that even when an accused is allowed to go on bail by Special Court on ground of sickness, it would remain open to the appellate Court to examine and determine for itself if, in the facts and attending circumstances of a given case, the accused was so sick that he could not have been treated, while being kept in custody, even when his detention in custody was, otherwise, necessary in the interest of investigation or trial.

60. In view of the fact that in the present case, the accused-Respondent has been allowed to go on bail on the ground of his sickness, it is necessary to determine if the Special Court, constituted under the N.I.A. Act, has the power to grant bail to an accused on the ground of his sickness even when there may be, otherwise, materials on record involving the accused in the offences alleged to have been committed by him, particularly, viz. the impugned order, granting bail, has been passed solely on the ground of sickness of the accused-Respondent and, admittedly, without taking into consideration, at all, the materials on record appearing against the accused-Respondent.

61. The question, posed above, brings us back to the provisions of Section 437 Code of Criminal Procedure In the case of Redaul Hussain (supra), this Court has pointed out, on analyzing the scheme of the N.I.A. Act, at Para 42, concluded as follows:

42. On a close reading of Section 16 of the N.I.A. Act, what becomes clear is that notwithstanding the fact that, according to Section 16(3) of the N.I.A. Act, a Special Court, for the purpose of trial of a scheduled offence, has all the powers of a Court of Session and shall try such offence "as if it were a Court of Session", the Special Court does not become a Court of Session inasmuch as it is only the power of trial of a Court of Session that the Special Court, by virtue of Section 16(3), entitled to exercise. In other words, the expression, "as if it were a Court of Session", which occur in Section 16(3), really reflects that it is only the procedure for trial of a Sessions case, which a Special Court can follow; but it is, otherwise, not a Court of Session.

43. may pause here to point out that Section 16(3) of die N.I.A. Act states, "Subject to tiie other provisions of fliis Act, a Special Court shall, for the purpose of trial of any offence, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session so far as may be in accordance with the procedure prescribed in the Code for the trial before a Court of Session." Similar provisions existed in Section 14(3) of TADA. Both the provisions were, thus *pari materia*. The Supreme Court had the occasion to interpret Section 14(3) in *Usmanbhai Dawoodbhai Memon* (supra). Referring to the expression "as if it were", appearing in Section 3 of the TADA, the Supreme Court pointed out, in *Usmanbhai Dawoodbhai Memon* (supra), that though the Parliament has vested, by using the words "as if it were", in the Designated Court, the status of a Court of Session, yet this legal fiction, contained in Section 14(3), must be restricted to the procedure to be followed for trial of an offence under the TADA, i.e., trial must be in accordance with the procedure prescribed, by the Code, in respect of a trial before a Court of Session in so far as it is applicable. The relevant observations, made in this regard, Which appear at para 18, read as under:

18. No doubt, the legislature by the use of the words "as if it were" in Section 14(3) of the Act vested a Designated Court with the status of a Court of Session. But, as contended for by Leamed Counsel for the State Government, the legal fiction contained therein must be restricted to the procedure to be followed for the trial of an offence under the Act i.e. such trial must be in accordance with the procedure prescribed under the Code of the trial before a Court of Session, insofar as applicable.

44. The above impression gets strengthened from the fact that Section 16(1) provides that a Special Court may take cognizance of offence, without the accused being committed to it for trial, which, in turn, implies that a Special Court takes cognizance of an offence as a Court of original jurisdiction and does not have the trappings of a Court of Session, which cannot, ordinarily, take, in

the light of Section 193 of the Code, cognizance of an offence, unless the case, in terms of Section 209 of the Code, is committed to it, for. Section 193 states that a Court of Session cannot take cognizance of an offence as a Court of original jurisdiction except when the Code or the special law provides otherwise. Thus, a Court of Session could not have taken cognizance of an offence, under the N.I.A. Act, without the case having been committed to it; but, as the N.I.A. Act provides for taking cognizance of an offence by a Court of Session, without the case being committed to it, the Court of Session can take cognizance of offence, under the N.I.A. Act, as the Court of original jurisdiction. Such a deviation is possible even in respect of a specified offence under the Indian Penal Code. For instance, Sub-section (2) of Section 199 of the Code provides that when an offence, falling under Chapter XXI of the IPC, is alleged to have committed against a person, who, at the time of such commission, is the President of India, Vice-President of India, Governor of a State, the Administrator of a Union territory or a minister of the Union or of a State or of a Union territory, or any other public servant employed in connection with the affairs of the Union or of a State in respect of his conduct in the discharge of his functions, a Court of Session may take cognizance of such an offence, without the case being committed to it, upon a complaint, in writing, made by the Public Prosecutor.

62. This Court, in *Redaul Hussain Khan* (supra), also pointed out, at para 65, 66 and 74, as under:

65. It is also well to remember that merely because of the fact that a Court of Session can function as a Special Court if Special Court is not constituted under a special law, it does not follow that the Court of Session, which exercises the powers of the Special Court, would become a Court of Session. In the given scheme of a "special law", a Court of Session, as already pointed out in *AR Antulay* (supra), may become a Court of original jurisdiction with no frappings of the Court of Session. In such circumstances, merely because of the fact that a Sessions Judge exercises the jurisdiction of a Special Court, the Special Court would not be treated, or would not be deemed, to have become, a Court of Session. When the Special Court, in the case at hand, falls within the expression, "a Court other than the High Court or the Court of Session", which appears in Section 437(1), it logically follows that a Special Court would run all the limitations, which are imposed by Section 437 on the powers of a Court, covered by Section 437, in respect of granting of bail. Logically extended, this will mean that, amongst other limitations, as specified by Sub-section (1) of Section 437, a Special Court would not be able to release a person on bail if there appears a reasonable ground for believing that he has been guilty of offences punishable with death or imprisonment for life except when a case is covered by the proviso to Section 437(1), which says that even such an accused person may be released, if the accused person is a woman or is sick or is infirm or if, for any other special reason, the Special Court considers it just and proper to release such a person.

66. Unlike, therefore, the powers, which a Court of Session enjoys, while considering a bail application, u/s 439, the Special Court runs the limitations, which are imposed by Section 437. Resultantly, therefore, a Special Court cannot enlarge a person on bail except to the extent as provided in Section 437. Apart from the limitations imposed on the powers of a Special Court as are prescribed by Section 437, even the special statute, which creates the Special Court, can impose additional limitations. No wonder, therefore, that the power to grant bail, in the case of N.D.P.S., is much more restricted than what Section 437 provides inasmuch as Section 37 of the N.D.P.S. imposes further limitations, on the Special Court, in matters of granting bail and such limitations would apply to a Sessions Judge even if he acts as a Special Court under the N.D.P.S. Act, for, while exercising the powers of a Special Court, the Session Judge does not act or function as a Court of Session, but as a Court of ordinary criminal jurisdiction.

\* \* \*

74. Having held that the source of power of a Designated Court, under the TADA, to grant bail is traceable to Section 437 inasmuch as the Designated Court falls within the expression "a Court other than the High Court or Court of Session", the Apex Court further clarified that the Designated Court's power to grant bail is not contained in Section 20(8); rather, Section 20(8) places only limitations on such power in addition to the limitations, which the Code has already imposed, on a Designated Court, by making it a Court within the ambit of Section 437. This was made explicit by Section 20(9), which provided that the limitations on the granting of bail, specified in Sub-section (8), are in addition to the limitations under the Code or any other law for the time being in force.

63. Apart from the fact that the conclusions on the questions of law indicated above, reached in the case of Redaul Hussain (supra), are not disagreed in this appeal, we are, on a reconsideration of the whole scheme of the N.I.A. Act read with the provisions for bail in the Code of Criminal Procedure, agree with the view that the above proposition of law, governing the powers of the Special Court, as regards the granting of bail, or refusal to grant bail, is wholly correct.

64. Agreeing, thus, with the position of law as mentioned above, let us, now, determine as to what limitations the Special Court ran, in the present case, in the matter of granting of bail to the accused-Respondent. While considering this aspect of the bail, it needs to be noted that the Respondent herein is an accused of having committed offences under Sections 120(B)/121/121(A) IPC read with Sections 25(1b)(a) of the Arms Act and Sections 17/18/19 of the Unlawful Activities (Prevention) Act, 1967. As already pointed out above, the U.A. (P) Act, 1967, has undergone several amendments by the Unlawful Activities (Prevention) Amendment Act, 2008. By these amendments Sections 43A, 43B, 43C, 43D, 43E and 43F have been added under Chapter VII. Sub-section (1) of Section 43D, makes every offence, punishable under the U.A. (P) Act, 1967, a "cognizable offence". Sub-section (2) of Section 43D clarifies that the references to "fifteen days", "ninety days" and "sixty days", whenever they occur, shall be

construed as references to "thirty days", "ninety days" and "ninety days" respectively. Sub-section (5) of Section 43D, which is of utmost importance, reads as under:

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

Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made 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)

65. A bare reading of Sub-section (5) of Section 43D shows that apart from the fact that Sub-section (5) bars a Special Court from releasing an accused on bail without affording the Public Prosecutor an opportunity of being heard on the application seeking release of an accused on bail, the proviso to Sub-section (5) of Section 43D puts a complete embargo on the powers of the Special Court to release an accused on bail by laying down that if the Court, on perusal of the case diary or the report made imder Section 173 of the Code of Criminal Procedure, is of the opinion that there are reasonable grounds for believing that the accusation, against such person, as regards commission of offence or offences under Chapter IV and/or Chapter VI of the U.A. (P) Act is prima facie true, such accused person shall not be released on bail or on his own bond.

66. Thus, if the Special Court, on perusal of the case diary, forms an opinion that there are reasonable grounds for believing that the accusation, against an accused person, of the commission of offence or offences under Chapter IV and/or Chapter VI is prima facie true, it will not remain within the powers of the Court to grant bail in such a case. This position is further made clear by Sub-section (6) of Section 43D, which lays down that the restrictions, on granting of bail specified in Sub-section (5), are in addition to the restrictions under the Code of Criminal Procedure or any other law for the time being in force on grating of bail. The logical conclusion would, therefore, be that in a case, investigated by the agency, if the Special Court forms an opinion that there are reasonable grounds for believing that the accused has committed an offence punishable with death or imprisonment for life, the Special Court would have no jurisdiction to grant bail to such an accused except as may be provided by law.

67. The question, therefore, is this: whether an accused can be released on bail on the ground of his sickness, if the Special Court has reason to form an opinion that there are reasonable grounds for believing that the accusation against the accused as regards an offence punishable under Chapter IV and VI of the U.A. (P) Act, 1967, is prima facie true, or when the Special Court has reasons to beUeve that the accused has been guilty of an offence punishable with death or

imprisonment for life or the offence is a cognizable offence and the accused had been previously convicted of an offence punishable with death or imprisonment for life or if the accused had been previously convicted on two or more occasions of a cognizable offence punishable with imprisonment for three years or more, but not less than three years?

68. To put it a little differently, the important question, which arises for determination, is: whether the Proviso to Sub-section (1) of Section 437 Code of Criminal Procedure. Would be available to a person if he is an accused of an offence punishable under Chapter IV or VI of the U.A. (P) Act, 1967, and the Special Court forms, on perusal of the case diary or the report made u/s 173 Code of Criminal Procedure, an opinion that there are reasonable grounds for believing that the accusation against the accused person is prima facie true or that the Special Court forms the view that there are reasonable grounds for believing that the accused has been guilty of an offence punishable with death or imprisonment for life or that he has committed a cognizable offence and the accused had been previously convicted of an offence punishable with death or imprisonment for life or if the accused had been previously convicted on two or more occasions of a cognizable offence punishable with imprisonment for three years or more, but not less than three years?

69. It is worth reiterating that under Clause (i) of Section 437(1), the Magistrate (read Special Court) is barred from releasing an accused if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life. Under Clause (ii) of Section 437(1), the Magistrate (i.e., the Special Court) is barred from releasing an accused if there are reasonable grounds for believing that he has committed an offence, which is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he has been previously convicted, on two or more occasions, of a cognizable offence punishable with imprisonment for three years or more, but not less than seven years.

70. In the backdrop of Clause (i) and (ii) of Section 437(1) Code of Criminal Procedure, when one reverts to Section 43D(5), what surfaces is that the proviso to Sub-section (5) of Section 43D, (which lays down that notwithstanding anything contained in the Code of Criminal Procedure, no person accused of an offence, punishable under Chapter IV and VI of the N.I.A. Act shall, if in custody, 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 Code of Criminal Procedure is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true), can be treated to be, and can be read, by legal fiction, as Clause (iii) of Section 437(1). If, by such a legal fiction. Clause (iii) is added to Section 437(1), the question would be: whether the first proviso (which empowers a Magistrate to allow an accused to go on bail, if such person is sick), would be available to even a person, who is covered by legally created fiction of

Clause (iii)?

71. A microscopic reading of the 1proviso to Section 437 shows that this proviso creates an exception to Clause (i) as well as Clause (ii) of Section 437(1). There is no reason as to why the 1st proviso be not held to be creating an exception even in respect of a case, which is covered by the legally created fiction of Clause (iii). If the proviso to Section 437(1) can be treated to create an exception to the proviso to Sub-section (5) of Section 43D, it would fall within the ambit of the power of the Special Court to allow an accused to be released on bail on the ground of his sickness even though the proviso to Sub-section (5) of Section 43D imposes restrictions on such release as indicatal hereinbefore.

72. We need to bear in mind that Article 21 guarantees that no person shall be deprived of his life or personal liberty except in accordance with the procedure established by law. Personal liberty of a person being one of the basic rights, any restriction or fetter, on such liberty, has to be strictly construed. The law, therefore, which deprives a person ofhis personal liberty, has to be interpreted in such a maimer, which make such law fair, just and reasonable.

73. "Bail" is a term, which has not been defined in the Code of Criminal Procedure. In fact, in none of the statutes, in force, the term "bail" has been defined. Conceptually, "bail" is understood as an assertion of a right of the accused to be freed against the State's act of imposing resfraint. "Bail", as a concept, finds place in the U.N. Declaration of Human Rights of 1948 and India, being a signatoiy thereto, "bail" becomes an important facet of human rights. According to the dictionary meaning, "bail" signifies security for the presence of a person against his release.

74. As regards the origin of the word, "bail", there is no uniformly accepted view. According to some, the word, "bail", is derived from a Latin term, Baiulare, wiicch means to bear a burden. The other view, etymologically speaking, is that the word "bail" is derived from a French word. Bailer, which means to give or to deliver.

75. At any rate, "bail" is a conditional liberty. Liberty of a citizen is, undoubtedly, his basic right; but this liberty cannot, beyond a reasonable limit, override, or be allowed to prevail upon, the interest of the security of the State. A balance is, therefore, required to be maintained between personal liberty of an accused, on the one hand, and the right of the investigating agency, on the other, to investigate the case against the accused effectively. The investigation must, however, cast minimum interference with the personal liberty of the accused and the right of the investigating agency, to investigate the case, cannot be allowed to prevail upon the personal liberty of the accused unless so sanctioned by law. Even, while seeking bail, an accused has to be presumed as innocent unless the law requires otherwise. Bail is not to be denied to an accused with the object of punishing him on the assumption ofhis guiU. Nevertheless, bail must be rejected if the law provides that the accused be not allowed to remain free, when the

investigation into the crime, alleged to have been committed by him, remains under investigation. Restraint on personal liberty, or refusal to grant bail, must, however, be kept as little as possible.

76. In *Shri Gurbaksh Singh Sibbia and Others Vs. State of Punjab*, , which Mr. Goswami relies upon, the Court has pointed out that grant of bail is the rule and refusal is the exception inasmuch as an accused person, who enjoys freedom, is in a much better position to look after his case and to properly defend himself than if he were in custody. Presumed as an innocent person, as he must be, he is, according to what Gurbaksh Singh (*supra*), lays down, entitled to freedom and every opportunity to look after his own case. This, however, is the general principle, which may be subject to such restraint as may be deemed necessary to be imposed by the State, in this regard, by making a law. Such restrictions, on the liberty of the accused, must, of course, be narrowly construed. The present one is one of the cases, wherein, if true, the sovereignty and security of the State demand placing of such embargo on the freedom of the accused, as the law so permits, when offences are alleged to have been committed by him threatening the security and sovereignty of the State.

77. Though, in the case at hand, the legality of the proviso to Section 43D(5), imposing limitations on the Special Court's power to release an accused on bail, is not under challenge, this Court has nevertheless a duty cast on it to construe the limitations, so imposed, not so restrictively, in the context of the I proviso to Section 437(1), that the restrictions make the right to life, guaranteed under Article 21, meaningless.

78. A careful reading of the scheme of the provisions contained in Section 437 clearly bring out the fact that the Legislature, having taken away the power of a Court, other than the High Court and the Court of Sessions, to grant bail in the cases, which are covered by Clauses (i) and (ii) of Section 437(1), has allowed even an accused, who is, otherwise, covered by restrictions contained in Clauses (i) and (ii), to be released on bail on the ground, amongst others, of sickness. This shows that the legislature wants to ensure that when the restrictions, imposed on the liberty of an accused, are pitted against his right not to be deprived of his life (except as may be provided by law), such restrictions do not drive a person to death or cause such damage to his well being that he suffers irreparably. After all, the entire aim of investigation and trial is to bring a guilty to book. If the person, who faces the accusation of being guilty, is not, ultimately, brought to trial due to the fact that he does not survive or survives in such a shape and condition that he cannot be tried at all, the whole purpose of having a lively scheme of investigation and trial would stand defeated.

79. There is, therefore, no manner of doubt, in our mind, that notwithstanding the limitations, which have been imposed by the proviso to Section 43D(5), it would still remain open for a Special Court, under the N.I.A. Act, to release an accused on bail, on the ground of sickness, by taking resort to the powers conferred on it by the first proviso to Section 437(1) Code of Criminal Procedure

However, while considering release of a person on bail on the ground of sickness, the materials, appearing against him, would be relevant inasmuch as the Court may, in a given case, allow an accused to remain on bail even if his sickness is not of the degree, which would threaten his life provided that the Court is assured of the availability of the accused for further investigation or trial coupled with the reasonable assurance that the accused would, if granted bail, not abuse his liberty. When, however, in the cases of serious nature, there is likelihood of the accused fleeing away from justice or there is reasonable possibility of the accused intimidating witnesses, threatening them and thereby adversely affecting the investigation or trial, the Court would have to be cautious in releasing the accused on bail on the ground of sickness unless the Court forms the view that it is impossible for the accused to receive requisite medical treatment, while remaining in custody. The ground of sickness can mandatorily become a ground for releasing an accused on bail, where the choice is really between protecting the investigation or trial, on the one hand, to advance the course of justice and protecting the life of the accused, on the other, even where there remains a reasonable element of apprehension that the accused might not remain available for further investigation or trial and similar such other considerations.

80. Analyzing the scheme of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short, "N.D.P.S. Act"), which imposes limitations on the Court's power to release an accused on bail, J.S. Verma, J (as his Lordship then was), pointed out, in the case of Union of India (UOI) Vs. Thamisharasi and Others, , at Para 12 and 13, as under:

The limitation on the power to release on bail in Section 437 Code of Criminal Procedure is in the nature of a restriction on the power, if reasonable grounds exist for the belief that the accused is guilty. On the other hand, the limitation on this power in Section 37 of the N.D.P.S. Act is in the nature of a condition precedent for the exercise of that power, so that, the accused shall not be released on bail unless the Court is satisfied that there are reasonable grounds to believe that he is not guilty. u/s 437 Code of Criminal Procedure it is for the prosecution to show the existence of reasonable grounds to support the belief in the guilt of the accused to attract the restriction on the power to grant bail; but u/s 37 N.D.P.S. Act it is the accused who must show the existence of grounds for the belief that he is not guilty, to satisfy the condition precedent and lift the embargo on the power to grant bail. This appears to be the distinction between the two provisions which makes Section 37 of the N.D.P.S. Act more stringent.

13. Accordingly, provision in Section 37 to the extent it is inconsistent with Section 437 of the Code of Criminal Procedure supersedes the corresponding provision in the Code and imposes limitations on granting of bail in addition to the limitations under the Code of Criminal Procedure as expressly provided in Sub-section (2) of Section 37. These limitations on granting of bail specified in sub-section (1) of Section 37 are in addition to the limitations u/s 437 of the

Code of Criminal Procedure and were enacted only for this purpose; and they do not have the effect of excluding the applicability of the proviso to Sub-section (2) of Section 167 Code of Criminal Procedure which operates in a different field relating to the total period of custody of the accused permissible during investigation.

81. From what has been concluded, in Para 13, in *Thamisharasi's* case (*supra*), it becomes clear that the limitation, imposed by Section 37 of the N.D.P.S. Act, would, to the extent that it is inconsistent with the provisions of Section 437 Code of Criminal Procedure, prevail upon the corresponding provisions of the Code of Criminal Procedure and the limitation, so imposed on granting bail, would be in addition to the limitation, vMch the Code of Criminal Procedure already places. Thus, the limitation, unposed by the proviso to Section 43D(5), shall, to the extent that it is inconsistent with Section 437, would supersede Section 437 and if it is not inconsistent, then, it would be in addition to the limitations imposed by Section 437.

82. There is nothing, in the language of Section 43D(5), to show that the proviso thereto supersedes the 1st proviso to Section 437(1); rather, the proviso to Section 43D(5) imposes a limitation in addition to the limitations, in addition to the limitation which Clauses (i) and (ii) of Section 437(1) impose on the Court's power to release an accused on bail. Thus, the proviso to Section 43D(5) is an additional restriction on the Court's power to grant bail. This limitation, being of the same nature and extent as the limitations imposed by Clauses (i) and (ii) of Section 437(1) Code of Criminal Procedure, do not affect, and keep intact, the 1st proviso to Section 437(1) enabling thereby the Special Court to allow an accused to go on bail on the ground of sickness.

83. Having settled that when a case is registered and investigated, imder the N.I.A. Act, for commission of scheduled offences, the Special Court would be competent to deal with not only the scheduled offences, but also other offences under any law for the time being in force. Such a law would obviously include offences under the Indian Penal Code. We have also settled that the powers of the Special Court, constituted under the N.I.A. Act, to grant bail is covered by, and shall remain confined, within the ambits of Section 437 Code of Criminal Procedure and, as an appellate Court, the High Court's power, u/s 24(1) of the N.I.A. Act, would be coextensive with the powers of the Special Court. We have fiurther settled that the ban, imposed on the power of the Court o release an accused, if a case falls within the proviso to Section 43D(5), is in addition to the limitations imposed on the powers of Special Court (same as magisterial courts) by Clauses (i) and (ii) of Section 437(1).

#### CONCEPT OF PROVISIO TO SECTION 43-D(5)

84. Before proceeding ftirther, 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.

85. 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.

86. 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 as an evidence that is sufficient to establish a fact or to raise a presumption of the truth unless controverted.

87. 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.

88. 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.

89. The meaning of the word, "prima facie", given in *Marlin Bum 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*, .

90. 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.

91. 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.

92. 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.

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

94. 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.

95. 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.

96. In the case of State of Gujarat v. Gadhvi Rambhai Nathabai reported in (1994) 5 SCC 3, 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.

97. 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 dis-empowered 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 so 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 U.A. (P) Act, are prima facie true, such materials would be enough to attract the bar imposed by the proviso to Section 43-D(5).

98. 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.

99. 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 Code of Criminal Procedure, 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 Code of Criminal Procedure, 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, ).

100. 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 U.A. (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.

101. 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.

102. There are no corresponding provisions, in the N.I.A. 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 N.I.A. Act, the fact remains that even under the scheme of the N.I.A. 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 Code of Criminal Procedure, 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 an 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.

103. Thus, while the Special Court, constituted under the N.I.A. Act, does not suffer from the limitations, which the TADA Courts had by virtue of the provisions of Section 20(8), read with Section 20(9) thereof, the fact remains that the Special Court, not being a Court of Session or of the High Court, cannot exercise the powers of the Court of Session or High Court u/s 439 Code of Criminal

Procedure. Hence, while dealing with the scheduled offences, covered by the proviso to Sub-section (5) of Section 43-D, Special Court, constituted under the N.I.A. Act, would suffer not only from the limitations imposed by Clauses (i) and (ii) of Sub-section (1) of Section 437, but also by the proviso to Sub-section (5) of Section 43-D of the U.A. (P) Act, 1967, wherever the provisions, contained in the proviso to Section 43-D(5), would be applicable.

104. What crystallizes from the above discussion is that when a case is registered and investigated, under the N.I.A. Act, for commission of scheduled offences, the Special Court would be competent to deal with not only the scheduled offences, but also other offences under any law for the time being in force. Such a law would obviously include offences under the Indian Penal Code. We have also settled that the powers of the Special Court, constituted under the N.I.A. Act, to grant bail is covered by, and shall remain confined, within the ambits of Section 437 Code of Criminal Procedure and, as an appellate Court, the High Court's power, u/s 24(1) of the N.I.A. Act, would be coextensive with the powers of the Special Court. We have further settled that the ban, imposed on the power of the Court to release an accused, if a case falls within the proviso to Section 43D(5), is in addition to the limitations imposed on the powers of Special Court (same as magisterial Courts) by Clauses (i) and (ii) of Section 437(1).

#### MERIT OF THE APPEAL

105. In the backdrop of the above position of law, let us, now, consider the merit of the present appeal. Before, however, dealing with the present appeal, let us understand as to what the case of the prosecution, in general, is.

106. Broadly speaking, the prosecution's case, in brief, is thus:

(i) DHD(J) is an unlawful association within the meaning of Section 2(p) of the U.A. (P) Act, 1967, inasmuch as DHD( J) indulges in unlawful activities as defined in Section 2(o) of the U.A. (P) Act, 1967, and has been declared as an unlawful association after accused Phojendra Hojai and Babul Kemprai were arrested on 1st of April, 2009, with an amount of Rs. 1 (one) crore, in cash, and some weapons, which gave rise to the present case. Accused Niranjan Hojai (since absconder) is the Commander-in-Chief of DHD(J), who operates from outside India; whereas accused Jewel Garlosa is the Chairman of DHD(J), who, earlier, operated from Nepal, but established, later on, a hideout, at Bangalore, in conspiracy with accused-Appellant, Ashringdaw Warisa @ Partho Warisa, who has, in tum, taken help of. and support from, accused-Appellant, Samir Ahmed.

(ii) The ASDC, which is apolitical organization, came, with the support of DHD(J), to power in NCHAC in alliance with another national party. On coming to power, Dipolal Hojai was elected as the Chief Executive Member (in short, "CEM") of the NCHAC. When, however, Niranjan Hojai found that Dipolal Hojai was not proving to be as useful as was needed and promised, a tele-conference was, in the presence of Dipolal Hojai, held between Niranjan Hojai and those executive members of the NCHAC, who belong to ASDC and their said alliance partners. In

this tele-conference, Niranjana Hojai asked Dipolal Hojai to resign from the office of the CEM and elect Mohit Hojai as the CEM of NCHAC. Dipolal Hojai accordingly resigned on the pretext of ill-health and accused Mohit Hojai became the CEM.

(iii) Thereafter, Mohit Hojai, an active member of the DHD(J), made full use of his office in helping the activities of DHD(J) in close contact with Niranjana Hojai and their other associates. For the purpose of running the affairs of DHD(J) as an unlawful association and also for carrying out its terrorist acts, fund was needed and this fund was obtained not only by kidnapping, abduction, extortion, murder, etc, but also by dishonest misappropriation of Government funds made available by the State Government to run the administrative affairs of the NCHAC.

(iv) For the purpose of facilitating collection of funds for advancing the unlawful activities of the DHD(J) as an unlawful association and for committing terrorist acts, Mohit Hojai got supplies for materials invited and payments made at highly inflated rates to the contractors, such as, Jayanta Kumar Ghosh alias Dhrubo Ghosh, Debasish Bhattacharjee and Sandip Ghosh (whose appeals too we would, now, decide) and for the purposes aforesaid, Mohit Hojai also got accused Redaul Hussain Khan (i.e., the Respondent herein), the Deputy Director, Social Welfare Department, appointed as the Liaison Officer of the NCHAC. Instead of using the funds for administration of the said Council, accused Redaul Hussain Khan, in league with Mohit Hojai and some contractors and suppliers, indulged in criminal misappropriation of huge sums of money by raising false bills by either not supplying at all the materials ordered for or by supplying materials less than what had been ordered to be supplied, and, then, under intimidation and threat, such bills were forced to be passed by the concerned officers, money was realized and a substantial amount thereof was siphoned off, through hawala operators, outside India, for the purpose of purchase of arms and ammunitions so as to carry out subversive activities of the DHD(J). In fact, false and fictitious bills were prepared by manipulation of records and such manipulations were done by intimidating and threatening people to sign almost on dotted lines.

107. Thus, the prosecution's case rests substantially on the theory of criminal conspiracy. It deserves to be pointed out that there may not be direct evidence of criminal conspiracy inasmuch as existence of criminal conspiracy can be inferred from circumstantial evidence too if such evidence, direct or indirect, is based on acts or omissions indicating existence of such criminal conspiracy. When the prosecution's case is, to a large extent, based on the theory of criminal conspiracy, these five appeals cannot be considered independent of each other and must, therefore, be considered in the light of the entire materials, which have been collected by the investigating agency. Such materials would, obviously, include not only the acts or omissions of the Respondent herein, namely, Redaul Hussain Khan, but also other co-accused persons including Niranjana Hojai (since absconder), Mohit Hojai, Jewel Garlosa, and other activists of DHD(J).

108. We must, therefore, first, take into account, not only those incriminating

materials, which allegedly exist against DHD(J) as an unlawful association, and its terrorist acts, but also those materials, which allegedly exist against accused Niranjan Hojai (since absconder). Jewel Garsola, Chairman, DHD(J), and Mohit Hojai. It may, now, be noted that the prosecution's case, in this regard, as set out in the charge-sheet, reads as under:

17.1 Dima Halim Daogah (DHD) is a splinter group of the former armed insurgent group of Assam called Dimasa National Security Force (DNSF), which had surrendered enmasse in 1995, except for its self-styled Commander-in-Chief Jewel Garlosa. Subsequently said Jewel Garlosa launched the DHD. Its declared objective is to create a separate State of "Dimaraj" for the Dimasas ("Sons of the Great River") tribe, comprising Dimasa-dominated areas of the North Cachar Hills and Karbi Anglong districts of Assam and parts of Dimapur district of Nagaland.

17.2 Pranab Nunisa, who rose to become the Commander-in-Chief of DHD, and the head of the outfit's armed wing, the Dima National Army, took over the command of DHD by ousting its President accused Jewel Garlosa on charges of anti-DHD activity. DHD, headed by Nunisa, forged a cease-fire with the Government in the year 2003 and surrendered. Jewel Garlosa, however, had gone ahead and formed a separate outfit on 31 March, 2003, which, according to him, was the official DHD. Militants belonging to Hmar People's Convention Democrats (HPCD) abducted 23 Dimasa tribal men from two villages within Sonai Police Station in Cachar district after torching about 450 dwellings on 31 March 2003 and later killed all of them. Among those killed, 17 men had families and these 17 widows called themselves Black Widows and vouched to take revenge on the Hmars. DHD (Jewel Garlosa) faction also adopted the name Black Widows and stepped up their acts of violence and terror mainly in Cachar, N.C. Hills and Nagaon districts of Assam. It has also a strong presence in the Dimasa dominated Dhansiri area of Karbi Anglong district.

17.3 DHD(J) is also reported to have linkages with the National Socialist Council of Nagaland - Isak- Muivah (NSCM - IM) and the National Democratic Front of Bodoland (NDFB), two of the most dreaded militant groups currently active in the North-East.

17.4 The main activity of the DHD (J) after 2006 was to siphon off Government funds through extortion and with the help of elected members of the Council, Contractors and Government servants in order to finance their subversive activities mainly targeted at major infrastructure projects in that area. Two Government projects badly affected by the acts of terror and violence by DHD (J) are the "East West Corridor Project" and the Broad Gauge Conversion Project between Lumding and Silchar, DHD (J) has also indulged in several attacks on the security forces - notable ones are the ambush on the Central Reserve Police Force (CRPF) personnel in which seven men were killed and the ambush on the Assam police party in which six men lost their lives. In the past two years, DHD (J) have laid three major ambushes on the security forces besides other killings.

The violence levels by the group have increased significantly after 2006. It was revealed in investigation that some of the weapons were obtained from DHD (J). Thus it is evident that the DHD(J) has been indulging in terrorist acts within the meaning of Section 15 of the U.A. (P) Act. 1967.

17.7 It is further revealed that the elections to NCHAC was last held in 2007 and Autonomous State Demand Committee (ASC Ki;) party was elected to power in alliance with the BJP, ASDC and BJP alliance won 21 seats and Independents won 4 seats. ASDC had the tacit support of DHD (J). Shri Dipolal Hojai became the CEM. Dipolal Hojai was not able to fulfill the demands of the DHD(J) regarding supply of funds for procurement of Arms and for carrying out the terror activities which was not liked by the DHD(J) leadership.

17.8 Investigation further disclosed that on 26 November 2008 Nirranjan Hojai, A-11 [ Com-mander-in Chief of DHD(J) called P.W. Shri Bijoy Sengyung on phone when the latter was at the residence of Shri Dipolal Hojai (the then CEM). Nirranjan Hojai A-11 had earlier directed Shri Dipolal Hojai to convene a meeting of all the Executive Members of the Council. Accordingly Shri Dipolal Hojai convened the meeting of the members of the Council at his residence in the evening on 26 November 2008. It was at the meeting that the accused Nirranjan Hojai called Executive Member Shri Bijoy Sengyung. Since the speaker phone of Bijoyendra Sengyung was not good, he called on the phone of PW Kulendra Daulagupu and went on the address the Executive Members on the speakerphone (of the mobile-phone of Shri Kulendra Daulagupu). He directed Shri Dipolal Hojai to resign from the position as CEM by the very next day. He nominated Mohit Hojai A-3 to be elected as the new CEM and also threatened Dipolal Hojai "if you don't listen, you will have the same fate as Pumendu Langthasa,". [ Suspected DHD(J) militants killed former Chief Executive Member of the North Cachar Hills Autonomous Council, Pumendu Langthasa and former executive member of the Council, Nindu Langthasa at Langlai Hasnu village in the NC Hills district in June 2007. Both were candidates of the ruling Congress party for the ensuing Council election. The militant group has been warning and demanding an amount of Rs one crore from the victims for their safety for the elections. A few members of DHD(J) are facing trial in the said case of double - murder.] These directions were complied with without any protest. Shri Dipolal Hojai resigned his position as CEM citing health reasons on 27 November 2008. His resignation was accepted by the Government in the last week of December 2008. Mohit Hojai A-3 was elected unopposed to be the CEM. He took over charge as the new CEM on 2 January 2009. He retained with him as CEM the portfolio of Finance, General Administration. Land Revenue, Information and Public Relations, Sports and Youth Welfare and Cultural Affairs.

17.9 It is evident that that there was a tacit understanding between Nirranjan Hojai A-11, and Mohit Hojai A-3 regarding governance of NCHAC, especially regarding illegally channelizing funds of NCHAC to DHD(J).

17.10 It was revealed during investigation that on 30 March 2009 Mohit Hojai

A-3 and Phojendra Hojai A-1 met at the residence of Mohit Hojai A-3 for giving money to DHD(J). In pursuance thereof, money was to be delivered on 31<sup>st</sup> March 2009. The Call data Report of the mobile phones of Mohit Hojai and Phojendra Hojai reveals frequent telephonic contact between Mohit Hojai A-3 and Phojendra Hojai A-1 in this regard. On the next day (31<sup>st</sup> March 2009) Phojendra Hojai A-1 received a call on his mobile: IxhnNiranjan Hojai A-11 of DHD(J), who, after introducing himself, asked him to follow the orders of Mohit Hojai A-3 told him that Rs. One crore was to be delivered to someone from DHD(J). The DHD(J) cadre would establish telephonic contact with Phojendra Hojai A-1 and he should get the money delivered as per the instructions of DHD(J) cadres. He further told him to get in touch with Babul Kemprai A-2 and that he should be ready to leave by 12 noon, the next day.

17.11 Investigation disclosed that on 1<sup>st</sup> April, 2009, Phojendra Hojai A-1 and Babul Kemprai A-2 carried Rs. One crore given by Mohit Hojai A-3 to Babul Kemprai A-2 and traveled in two different vehicles i.e. one Scorpio and one TATA SUMO and proceeded towards Shillong. During their journey, Niranjan Hojai A-11 and Mohit Hojai A-3 made end their movement.

17.12 It is also disclosed that while Phojendra Hojai A-1 was being brought to the police station, he also received many phone calls. One such call was that of Mohit Hojai A-3 who enquired about whether he was caught by the Police or whether he has delivered the money. Immediately after that Niranjan Hojai A-11 called him up and asked whether he had delivered the money. He also asked as to whom he had delivered the money and how many vehicles had come. He asked as to whether he was safe and whether the police had arrested him. There two calls were found recorded in the phone of Phojendra Hojai A-1. At the time of being taken for production at the Court, Phojendra Hojai A-1 and Babul Kemprai A-2 were surrounded by media personnel who questioned them on their involvement in the case. Both the accused replied that the money was being sent by Mohit Hojai A-3 and they were carrying it to be delivered as per his instructions. The statements made to the pressmen by accused Phojendra Hojai A-1 and Babul Kemprai A-2 were aired in the local TV news channels the next day.

17.13 During investigation by Basistha Police it is revealed that after the arrest of Phojendra Hojai A-1 and Babul Kemprai A-2, Assam Police recorded the statements of the accused and the police personnel who were involved in the seizure of Rs. One crore. The two drivers of the vehicles were not arraigned as accused as they were not found involved and were therefore not arrested. The two pistols seized by the police were sent to the Armourer of Assam police for firearm examination and identification. Phojendra Hojai A-1 and Babul Kemprai A-2 were taken on police remand for interrogation. Later they were transferred to judicial custody and both of them were enlarged on bail by the Hon'ble Gauhati High Court. Assam Police also arrested Mohit Hojai A-3 and R.H. Khan A-4 on 31<sup>st</sup> May 2009 and searched their houses. From the House of R.H. Khan A-4, cash amounting to Rs 4 lakhs was recovered. This amount was a part of the

huge amount of money siphoned by RH Khan as a part of the criminal conspiracy to supply funds for the DHD(J). Investigation revealed that Mohit Hojai A-3 was sending money to Niranjan Hojai A-11 of the DHD(J) and that the Rs 70 lakhs had been sent by Jayanta Kumar Ghosh A-12 and the rest Rs. 30 Lakhs by R.H. Khan A-4 who was the Deputy Director in the Social Welfare Department in NCHAC. R.H. Khan A-4 was made the Liaison Officer of NCHAC in addition to his responsibility as Deputy Director, Social Welfare Department on the recommendations of Shri A.K. Barua, Principal Secretary (in additional charge) of NCHAC. As Liaison Officer, he used to get the funds budgeted for NCHAC released by the State Government and in pursuance to said criminal conspiracy, provided the funds to the DHD(J) by fraudulently channelizing the funds of NCHAC.

109. In the light of the prosecution's case, as broadly set out above, in their charge-sheet, it needs to be, now, noted that in Redaul Hussain Khan (supra), it was submitted before the Supreme Court that DHD(J) cannot be held to have been indulging in terrorist acts inasmuch as it has been notified as an unlawful association after the occurrence, leading to the registration of the present case, had already taken place. Turning down this argument, the Supreme Court held that there was little doubt that even on the day, when R.H. Khan (i.e., the Respondent herein) was apprehended, DHD(J) was indulging in terrorist acts, although it came to be declared as an unlawful association sometime later and, hence, the provisions of the U.A. (P) Act, 1967, would be attracted to the facts of the present case. The relevant observations, made, in this regard, in Redaul Hussain Khan (supra), read as under:

15. Mr. Rawal submitted that although Mr. Ghosh had referred to some newspaper reports indicating that there was a possibility of amnesty being granted to the members of DHD(J), the same was yet to materialize, and, on the other hand, it also indicated that the said organization was indulging in terrorist activities. Accordingly, in view of the definition of "terrorist act" in Section 15 of the 1967 Act and the provisions of Sections 13 and 17 thereof, there was little doubt that even on the date when the Petitioner was apprehended, DHD(J) was indulging in terrorist acts, although, it came to be declared as an "unlawful association" sometime later. Mr. Rawal urged that having regard to the above, the Special Leave Petitions filed against the order of the High Court refusing to grant bail were liable to be dismissed.

16. We have carefully considered the sub-missions made on behalf of the respective parties and we are unable to agree with Mr. Ghosh that the provisions of the Unlawful activities (Prevention) Act, 1967, would not be attracted to the facts of the case. We are also unable to accept Mr. Ghosh's submissions that merely because DHD(J) had not been declared as an "unlawful association" when the Petitioner was arrested, the said organization could not have indulged in terrorist acts or that the Petitioner could not have had knowledge of such activities.

(Emphasis is supplied)

110. Coupled with what have been indicated above, it also needs to be noted that the charge-sheet has already been laid, in the present case, and the accused-Respondent has already been furnished with the copies of the materials, on which the prosecution relies. Hence, the materials, which have already been furnished to the accused-Respondent, can be taken note of, and discussed, in order to ascertain whether the accused-Respondent deserved to be granted bail or not.

111. It is, indeed, necessary to pause here and note that Section 437(1) Code of Criminal Procedure imposes (as already discussed above) restrictions on the power of the Special Court and, consequently, on the powers of the High Court too, to release an accused on bail if there are reasonable grounds for believing that he has committed an offence punishable with death or imprisonment for life. This apart, as already discussed above, the proviso to Section 43D(5) of the U.A. (P) Act, 1967, imposes yet another limitation on the Special Court's power as well as on the power of the High Court, while considering an application for bail u/s 24(1) of the N.I.A. Act, the limitation being that if there are reasonable grounds for believing that the accusations made against an accused involving him in the commission of an offence under Chapter IV and/or Chapter VI of the U.A. (P) Act, 1967, are prima facie true, the accused cannot be allowed to go on bail.

112. However, determination of the question as to whether there are reasonable grounds for believing or not would obviously invite the Court to assign reasons so as to make it clear as to why this Court has taken the view that no reasonable grounds to believe exist or as to why reasonable grounds to believe exist. In either way, therefore, the reasons are necessary to be assigned and that is what invites and compels us to discuss, albeit as briefly as possible, the materials on record, which, to our mind, are relevant for the purpose of deciding this appeal and some of these materials even the learned counsel for the Appellants have freely referred to.

113. Let us, now, take into account as to what materials exist against DHD(J) as an unlawful association, and against the terrorist acts of its activities. While considering this aspect of the case, it needs to be pointed out that PW 161, a former DHD(J) activists, states that he had joined DHD (J), in the year 1996, when Jewel Garlosa (A-5) was the Chairman of DHD(J) with Dilip Nunisa as its Vice-Chairman and Pranab Nunisa as its Commander-in-Chief. This witness's statement is, in effect, thus: The administrative power of DHD(J) was in the hands of Jewel Garlosa, who used to organize procurement of weapons and training of members of DHD and, for weapons, he used to extort money from businessmen, contractors and Council Members. In 2003, DHD declared ceasefire and though Jewel Garlosa was a signatory to the ceasefire, he did not attend the first meeting of the Joint Monitoring Group, which was held in March, 2003. Jewel Garlosa was a dominating character and did not listen to any one, he started

staying with his own cadre with 10/12 men and full arms, he did not join the Designated Camp, where the surrenderees were staying. Jewel Garlosa started recruitment of his own men; but when the DHD ceasefire group came to know that Jewel had started a new group, the worker of DHD ceasefire group went to Jewel Garlosa's camp, they found Jewel's group armed. Jewel's group had Rs. 26 lakhs in cash and other items. On coming to know that his secret had been revealed. Jewel ran away; but his cadre had taken training in Manipur with Kuki organization. Re-turning to Karbi Anglong, Jewel started operating from the area, where his cadre stayed and that is how DHD(J) was born. Money collection was started and armed action took place. They, first, attacked three Dimas Auto Drivers of Manipur. In 2005, Jewel did not have much strength; but in the last Council Election, in 2007, they killed two persons, who had gone for canvassing. In fact, on the same day. Jewel's group killed one Ajit Boro, at Kalachand, after taking out his eyes, when he was still alive. By the election time. Jewel had a cadre of 60 persons armed with weapons. After the election. Jewel announced, in the constituency, to vote for ASDC and BJP, and threatened voters not to vote for the Congress. Jewel Garlosa entered into an agreement with Mohit Hojai regarding providing of money after the latter wins election. Mohit Hojai was on ASDC ticket and the Deputy Commandant-in-Chief of Black Widow (Jewel's Group) is the cousin of Mohit Hojai. After election, Dipulal Hojai was made C.E.M and Mohit Hojai was EM along with other EMs. When Jewel's Group asked for money from Dipulal Hojai, Dipulal could not give the desired amount of money. That is why, Dipulal Hojai was removed and Mohit Hojai was made CEM in the year 2009.

114. P.W. Kulendra Daulagupu (whose statement appears at Document No. 168 and who was an Executive Member of the NCHAC from February, 2008, to November, 2009), has stated that in the month of November, 2008, the Executive Members of the NCHAC, who belong to ASDC and their alliance partner, held a tele-conference with Niranjana Hojai, Commander-in-Chief, DHD(J), at the official residence of the then CEM, Dipulal Hojai, which was attended by this witness too. In this conference, according to this witness, he kept the speaker of his mobile phone on speaker mode so that the other Members could hear what was being spoken in the conference; and that in this teleconference, Niranjana Hojai asked Dipulal Hojai to resign from the post of the CEM, as he had failed to resolve many of the issues, and he (Niranjana Hojai) also asked those, who were attending the conference, to elect Mohit Hojai as the CEM and, on the following day, Dipulal Hojai resigned showing health problem and Mohit Hojai was elected as the CEM without any opposition. This witness has also given statement to the effect that he had gone, with accused Mohit Hojai, to Kuala Lumpur, where they met Niranjana Hojai and that after Niranjana Hojai had talked to this witness, Mohit Hojai took Niranjana Hojai to his room for talking to Niranjana Hojai separately. This witness's statement shows, apart from everything else, not only a close connection, but also a deep association between Mohit Hojai and Niranjana Hojai (since absconder).

115. P.W. 162 too supports, in substance, the statements made by P.W. 161. Apart from giving history of various armed actions of DHD(J), this witness too has stated that it was Niranjana Hojai, who threatened and made Dipulal Hojai resign and he (Niranjana Hojai) made Mohit Hojai the CEM. Mohit Hojai and R.H. Khan (Liaison Officer of Autonomous Council) helped the DHD(J) by siphoning off the development fund of the Council and they gave the fund to the DHD(J), headed by Jewel Garlosa. Many contractors like Babulal Kemprai, Phojendra Hojai and others of Haflong were in collaboration with them. P.W. 162 further states that the DHD(J) group used to procure weapons from international market. With the help of this money, since Niranjana Hojai stays abroad quite frequently, Phojendra Hojai, a contractor, (i.e., the accused, who was on bail, when the N.I.A. had not taken over the case), does the works for Niranjana Hojai. Phojendra Hojai earlier was a labourer; but after aligning with Niranjana Hojai, he became a wealthy man. One Executive Member, Bijoy, is in direct touch with Niranjana Hojai and during Council's sessions, he puts his mobile number on spoken mode and talks to Niranjana Hojai and he gives directions to the Council Members and gets money transaction through Phojendra Hojai and Babulal Kemprai, the other accused (who was already on bail, when the N.I.A. took over the case). Partha Warisa (i.e. accused Ahshringdao Waris, Appellant in Criminal Appeal No. 35/2010), is the middle man for all money transactions from companies and contractors and he did all these for Jewel Garlosa. In April, 2009, Rs. 1 Crore was seized by the police (i.e., the seizure, which gave rise to the present case). Before that also, some members were caught, while taking money for Niranjana Hojai for his DHD group. This one crore was also going to Niranjana Hojai with the help of R.H. Khan, who was the Chief Liaison Officer with Mohit Hojai. This witness has clarified that he knows Jewel Garlosa by face and also other persons, namely, Mohit Hojai, R.H. Khan, Phojendra Hojai, Babulal Kemprai, Partho (Ahshringdao) Warisa. This witness has also clarified that when Jewel Garlosa was underground, the others, namely, Mohit Hojai, R.H. Khan, Babulal Kemprai and Phojendra Hojai were often seen together in various functions.

116. Apart from what have been indicated above, we find, on perusal of the relevant case diary and the report, submitted u/s 173 Code of Criminal Procedure, that there are enough materials implicating among others, (i) Niranjana Hojai, Commander-in-Chief, DHD(J), presently an absconder, (ii) Jewel Garlosa, Chairman, DHD(J) and (iii) Mohit Hojai, who headed NCHAC as the CEM. The materials, so collected, and until shown otherwise, reveal, in tune with what the N.I.A. alleges, thus: Dipulal Hojai, the then elected Chief Executive Member (CEM), North Cachar Hills Autonomous Council (NCHAC), resigned from the post of CEM, N.C. Hills, to make way for Mohit Hojai. Dipulal Hojai's statement, recorded, u/s 164 Code of Criminal Procedure, in this regard, is of great importance, which clearly reveals that the DHD(J) was indulging in terrorist acts. In fact, the statement of Kulendra Daulagupu, recorded u/s 164 Code of Criminal Procedure, shows that the members of the NCHAC had a telephonic conference

with Niranjan Hojai, Commander-in-Chief, DHD(J) and in the said conference, Niranjan Hojai asked Dipulal Hojai, the then CEM, NCHAC, to elect Mohit Hojai, as the CEM, because Dipulal Hojai had failed, as CEM, to resolve many issues. Following the direction, so received in the said telephone conference, Dipulal Hojai resigned pretending his resignation to be on health ground and Mohit Hojai got elected as the CEM without any opposition.

117. Coupled with the above, from the confessional statement of the co-accused, Subrata Thaosen alias Paiprang Demasa, recorded u/s 164 Code of Criminal Procedure, what transpires is that he joined DHD(J) in June, 2005 and since then, he has been working as the said outfit's Publicity Secretary having acquired requisite training from the said organisation. According to this accused, he knew that Rs. 1,50,35,000/- had come to the hands of the said organisation by way of tax and, out of this fund, he sent Rs. 75,00,000/- to some of his associates and, further, as much as Rs. 4.5 crores was obtained by their organisation from a merchant by kidnapping him and keeping him in jungle for about 15 days. The confession of this accused also shows that an amount of Rs. 10,00,000/- was paid to another banned outfit, namely, NSCN(IM), and that a part of the sum has also been spent for providing medicine to the members of their own cadre. According to this accused person's confessional statement, other outfits, who are involved in the acts of terrorism, have given shelter to the members of the DHD (J) and also worked with them. This accused has confessed that Ex-CEM (former Chief Executive Member) in NCHAC, Pumendu Langthasa, and Ex-Executive Member, Ajit Bodo, Dy. Chairman, NCHAC, were among the members, who have been killed by the members of the DHD(J), on the instructions of, amongst others, Niranjan Hojai, Commander-in-Chief of DHD(J). The reason for killing is that in terms of the assurance given, agreed number of seats, in the said Council, had not been given to the over ground associates of the DHD(J). This accused confesses that arms and ammunitions, which are used by this outfit, are supplied by Lallian Mizo, a smuggler of arms. This accused also described various other incidents of killings, and arson and getting news publicized through television.

118. It has also surfaced from the said confession that the leaders of the NCHAC gave, in terms of their assurance, which they had given before the election of the said Council, rupees two crores. According to his confession, the DHD(J) campaigned, in the election, for its alliance partner, which is a national party, but not for another national political party and restrained voters, by threatening them not to cast votes, in favour of a particular political party, by telling them that they would face dire consequences if they voted for the said political party. The confession of this accused further shows that an understanding was reached before the last election with this outfit and a national political party that if their alliance came to power, Dipulal Hojai must be made the Chief Executive Member (CEM) of the NCHAC. His confession also reveals that the DHD(J) urged the labourers to stop work in a particular cement factory; but the labourers did not listen to them and that is why, there was mass killing of the labourers. The

confession shows that DHD(J) indulges in collection of illegal tax and one of the senior citizens of Haflong was kidnapped by the "tax commander", because of the former's refusal to pay tax and was released on payment of ransom. From the confession of this accused, it also transpires that DHD(J) collects huge amount of money by unlawful means and the money, so procured, is utilized for, amongst others, purchase of arms and ammunitions and that the said group had also killed some of those labourers, who were involved in the project of conversion of extension of broad gauge line from Lumding to Badarpur.

119. Thus, on the basis of the materials on ground, and unless shown, otherwise, at the trial, there are reasonable grounds to believe that the DHD(J) runs, or attempts to run, almost a parallel Government, kills with impunity those, who do not abide by what is directed to be done, they indulge in extortions, kidnappings, siphoning off the Government fund for purchase of arms and ammunitions.

120. We may pause here to point out that we are alive to the position of law that the confession of one accused cannot be treated as substantive evidence against his co-accused. We are also conscious of the fact that keeping excluded the confession of a co-accused, when the evidence, adduced on record, otherwise, satisfy the Court of the guilt of the accused, the confession of the co-accused can be used as an aid for strengthening the conclusion, which the Court may have, independent of the confession of the co-accused, already reached. Whether the confessions, recorded in the present case, are voluntary or involuntary, is a question, which would be determined at the trial. What is, however, relevant and material is that the confessions, recorded in the present case, support the statements of the witoesses given to the effect that DHD(J) collects tax without being authorized by law; it is involved in running a racket of kidnapping, extortion and murder of those, who may not agree with the philosophy of, or carry on the directions of DHD(J). The DHD(J) is also involved in ethnic killing. The DHD(J) interferes with free and fair elections and force people, by threat and intimidation, to cast vote in favour of such a party, who may agree to support the cause of the DHD(J). Hence, the acts of DHD(J) amounts to terrorist acts within the meaning of Section 15 of the U.A. (P) Act.

121. Thus, until shown, otherwise, at the trial, the acts of the DHD(J) and its members must be inferred to amount to "terrorist acts" within the meaning of Section 15 of the U.A. (P) Act, particularly, because their acts are calculated, as the materials in the case diary reflect, to threaten the unity, integrity, security and sovereignty of India and they strike terror in the people, in general, and, at times, even in a given section of the people, such as, the labourers, by use of criminal force. Obviously, those, who help and aid the terrorist acts of the DHD(J) and its members, would be abettors of such offence(s). As the DHD(J) runs, or attempts to run, almost a parallel Government, thereby shaking the very foundation of the constitutional scheme of governance, in India, its actions and the actions of its activists, such as, Niranjan Hojai, Mohit Hojai and Jewel Garlosa

do amount to, unless can be shown otherwise, at the trial, the offence of waging war against the State within the meaning of Section 121 IPC and is punishable by death or imprisonment for life in terms of the penal provisions of Sections 121 of IPC and, those, who help the DHD(J) and/or its activists in carrying out the activities of the DHD(J), would be, if not members of the DHD(J), be responsible as abettors of the offence of waging war against the State and their acts of abetment too would be punishable to the same extent as do the acts of the chief perpetrators of such offences. This art, whoever commit a terrorist act is punishable by Section 16 of the U.A. (P) Act, which falls under Chapter IV thereof A person, who commits a terrorist act, cannot be allowed to go on bail, because of the proviso to Section 43D(5).

Keeping in view the activities of DHD(J) and the close association of Niranjana Hojai (since absconder). Jewel Garlosa and Mohit Hojai, we, now, revert to the role of the Respondent herein, Redaul Hussain Khan.

123. Bearing in mind the activities of DHD(J) and the materials, collected during investigation, as have been discussed above, when we turn to the materials on record as against accused Redaul Hussain Khan, we notice that in tune with each other, P.Ws. 80, 81 and 82, who work as Supervisors of ICDA Projects, have stated that their duty, as Supervisor, includes distribution of food items to the Anganwadi Centres under their respective supervision. The procedure, earlier followed for the supply, was that on receipt of food items from the department, they used to distribute the same to the Anganwadi Work Centres and, the recipients thereof used to, in turn, sign the challans in token of having received the items. All these witnesses also state that since the beginning of 2007, the usual procedure was not being followed as the Deputy Director, Md. R.H. Khan, had specially told them not to fill up the quantities of the food items given to the Anganwadi Centres and R.H. Khan obtained their signatures on the blank challans and, during the said period, no one, in the office, had the courage to refuse any orders of Md. R.H. Khan.

124. Coming to the statement of P.W. 101, who is an UDA in the Department of Social Welfare, we notice that according to his statement, during 2007-09, he was allotted accounting work in respect of Jatinga valley ICDS Project and though his duties did not include receiving supplies, Md. R.H. Khan, on many occasions, had directed him to process the bills/challans in respect of the supplies received and even without receiving the articles or checking the same, he had to process the bills as none in the office could say no to R.H. Khan. Referring to certain vouchers and receipts, this witness has also stated that the vouchers, along with the concerned receipts, were given to him by Md. R.H. Khan, who asked him to write the certificate of receipt of the articles and to pass the bills for payments. This witness has reiterated that he had to comply with the instructions of R.H. Khan as neither he nor any of his colleagues could dare to say no to Md. R.H. Khan.

125. P.W. 155 is a Financial Advisor, in the Department of Social Welfare, Hill

Areas, etc.. Departments, Assam, whose main duty is to advise Government Department on their financial aspects so as to maintain financial discipline in the functioning of the Departments. This witness has stated that as per the Assam Finance Rules, it is the fundamental rule that no work shall be commenced unless a detailed design and estimate have been sanctioned, allotment of fund have been made and orders for its commencement is issued by the competent authority. This witness has also stated that since there is no separate Financial Rules for N.C. Hills Council, the Assam Finance Rules also apply to N.C. Hills Council.

126. P.W. 158 is the UDA-cum-Accountant and he has stated that in March, 2007, he was posted in Mahur ICDS and R.H. Khan, the then Dy. Director Social Welfare, used to ask him to put his signature as recipient of materials/articles on the challans of different suppliers and he had to do so at the behest of the then Dy. Director, Md. R.H. Khan, without receiving any article/material and, similarly, between December, 2007, and March, 2008, he has put his signatures, as a recipient of articles/materials, on the challans of different suppliers without receiving any article/material. P.W. 158 has also stated that Md. R.H. Khan, sometimes, threatened him that if he refused to sign those challans. then, he would have to face dire consequences and may even be released from the district. P.W. 158 has further stated that R.H. Khan and other activists of tribal groups always threatened him and that he had to spend sleepless nights due to tension so created by R.H. Khan and his men.

127. As regards R.H. Khan, P.W. 161 (whose statement we have already considered above about the activities of DHD(J), Niranjana Hojai, Jewel Garlosa, Mohit Hojai and others), has stated that Mohit Hojai used R.H. Khan as the Liaison Officer for the Council, all Assam State Govt, funds were siphoned off with the help of R.H. Khan and it used to go to Mohit Hojai and that Niranjana Hojai and one Daniel of DHD (J) group used to be in direct touch with Mohit Hojai over phone and used to demand money through Mohit Hojai.

128. Regarding R.H. Khan, PW 164, who used to be a Member of Rajya Sabha, from April 1996 to 2002, has this to say, "There is a person called R.H. Khan, who is the Deputy Director of the Social Welfare Department, for the past ten years and is also the in-charge CDPO of four divisions. He is the liaison officer for the Council. He is entrusted with the responsibility to ensure that funds are allotted as per the budget and released in time. He is into a lot of embezzlement and is the favorite man for Mohit Hojai.

129. P.W. 169 has stated, as regards RH Khan, thus, "One R.H. Khan was made the Liaison Officer by A.K. Barua (Principal Secretary). A.K. Barua made an official note certifying his good work, good character, etc., in order to justify the making of R.H. Khan as the liaison officer. R.H. Khan was the Liaison Officer for all departments, although he was a Dy. Director of Social Welfare. He used to manipulate budget allotments and, sometime, diverted funds from P.W.D. to other departments at the time of allocation."

130. Broadly in tune with other witnesses, P.W. 173, has stated, "In the Council, the CEM has got finance portfolio. R.H. Khan was made the liaison officer. He is the person, who arranges for allotment of budget funds from Dispur (i.e., the Capital). He pays a percentage. Funds are released by the CEM through the Principal Secretary. The Principal Secy, and Khan (Dy. Dir. Social Welfare) released funds only to those departments, which were capable of paying money. Sometimes, tendering is done; but on many times, work is directly allotted on the recommendation of the CEM. There is a lot of bungling in all the departments. Only 20% of the work is done.

131. Regarding the role of R.H. Khan, Dipolal Hojai (who had to resign from the office of the CEM to make way for Mohit Khan as the CEM), has stated that R.H. Khan is like the king of N.C. Hills and he (Dipolal Hojai), on coming to power as the CEM, thought of getting rid of R.H. Khan, but Mohit Hojai said that since he was the EM of the Social Welfare Department, he wants to try out R.H. Khan for three months and that the Governor, Shri Ajay Singh, called him (Dipolal Hojai) and told him that R.H. Khan should be made the Nodal Officer or the Liaison Officer and that R.H. Khan was an efficient officer and it is only he, who can get funds from the State and the Centre. It is in the statement of Dipolal Hojai that though he still resisted and made an AEE of Agriculture Department, by the name of Hazarika, as the nodal officer, Hazarika could not get any funds at all and in a desperate move, he made R.H. Khan as the Liaison Officer after discussing with senior members of the Council, namely, Prakanta Warisa and Mohit Hojai, and they too said that only R.H. Khan can manage funds for the Council. Dipolal Hojai has further stated that R.H. Khan was the favourite of the Governor and as the nodal officer, he used to move, in a helicopter, to N.C. Hills.

132. Close on the heels of the other witnesses and concerning Mohit Hojai, Niranjana Hojai, R.H. Khan and the Appellant, Jayanta Ghosh, and Phojendra (who was caught with rupees one crore, in cash, and weapon), P.W. 170 has stated that Mohit Hojai was very close to Niranjana Hojai and provided large sums of money to him for procurement of arms, he siphoned away money with the help of R.H. Khan, Phojendra Hojai and others, and that one of the main contractors, who provided money, was Dhrubo Ghosh (i.e., the Appellant in Criminal Appeal No. 12/2010) and the amount of Rs. 1 crore, which was seized by police and gave rise to the present case, was actually being carried for DHD(J) out of the development funds, which were diverted by R.H. Khan and Mohit Hojai.

133. P.W. 178, who has been the Executive Member of the Council and was Chairman of the Coimcil, has stated, as regards R.H. Khan, thus, "R.H. Khan was a key member of the Council. All the budget of NC Hills and release of funds were being organized by R.H. Khan. He was the liaison officer of the Council. He used to give a 10% cut for any budget allotment and allotment of additional funds for the Council. Among the contractors, Pabitra Nunisa, Dhrubo Ghosh (i.e., the Appellant in Criminal Appeal No. 12/2010) and Turdad Ali and Phojendra Hojai were the main contractors.

134. The materials, as they are, (collected during the investigation), thus, reveal that Mohit Hojai, with the help of the Respondent herein, namely, Redaul Hussain Khan, some contractors, and others, collected huge sums of money by threat and extortion and by committing acts of misappropriation. The said organization was involved in ethnic killing and sent out money, collected through such illegal means, to foreign countries and utilized the money, so sent, in purchasing and importing arms and ammunitions for carrying on, as contended by the N.I.A., subversive activities. The case diary reflects, until shown otherwise, that the Respondent herein had substantial control on the finance of the Social Welfare Department, under the NCHAC, and he has made payments to suppliers without receiving materials for which orders were placed. The perusal of the case diary also reflects, until shown otherwise, that the Respondent herein, namely, Redaul Hussain Khan, by posing threats, made his office staff cooperate with him in clearing the bills without receiving the supply of the materials.

135. Thus, the case diary contains sufficient materials for forming, at this stage and until shown otherwise, an opinion that there are grounds for believing that the accusations, made against the accused-Respondent herein, of his involvement in "unlawful activities" and "terrorist acts", as defined under the U.A. (P) Act, 1967, are prima facie true. This apart, the Respondent herein is also shown to be involved, as a public servant, in acts of manipulation and fabrication of papers, documents and records, such as, bills, receipts, etc. and with the help of such manipulated and fabricated papers, documents and records, etc., committed dishonest misappropriation of Government fund purportedly making payment to suppliers against supply of materials, though no such materials were ever supplied. Thus, there are cogent incriminating materials against Redaul Hussain Khan giving rise to a reasonable belief, at this stage, that he has committed an offence, which is punishable, u/s 409 IPC, by even imprisonment for life. He could not have, therefore, been granted bail by the learned Special Court u/s 437(1) Code of Criminal Procedure inasmuch as a person, against whom materials exist giving rise to a reasonable belief that he has committed an offence punishable by imprisonment for life, cannot be held, unless his case falls within the proviso to Section 437(1) Code of Criminal Procedure. The fact that charge-sheet has been submitted against the accused-Respondent herein does not automatically entitle him to be allowed to go on bail, particularly, when the charge-sheet has been submitted before the expiry of the statutory period as is applicable to the case at hand. In the present case, as already indicated above, the accused-Respondent has already been furnished the copies of the materials, which the prosecution relies upon, and, hence, his bail application has to be, obviously, considered in the light of the powers and limitations of the Special Court.

136. We may also pause here to point out that though the case, against the accused-Respondent and his other co-accused, was registered u/s 409 IPC too, the charge-sheet has not been submitted for prosecution of offence u/s 409 IPC. Notwithstanding the fact that the charge-sheet has not been submitted u/s 409

IPC, there can be no dispute that it is, eventually, for the Court to decide, while considering his application for bail, as to what offences, if any, an accused can be reasonably believed to have committed.

137. Be that as it may, even if, for the moment, we keep excluded from the purview of our consideration the fact that the materials on record disclose commission of offence u/s 409 IPC, what cannot be ignored and must be pointed out is that the materials, collected by the investigating agency, reveal, at this stage, that the accused-Respondent was involved, as a close associate of the activists of the DHD(J) and, in collusion with them, misappropriated government funds and such misappropriated funds, or part thereof, were being utilized for "terrorist acts", the accused cannot be allowed to go on bail, because of the bar imposed by the proviso to Section 43-D(5).

138. In the case at hand, there is nothing placed before this Court to show that the accusations, made against the accused, are inherently improbable nor can the accusations be said to be intrinsically unbelievable. In such circumstances, the materials on record, so long as they remain what they are, speak that the accusations are prima facie true. We have already pointed out above that the prosecution case is based on the theory of criminal conspiracy. In the case at hand, there are serious incriminating materials showing, at this stage and, until the contrary is shown, that the accused-Respondent was a part of the criminal conspiracy, whereunder the terrorist acts, attributed to the accused-Respondent and his co-accused, have been committed, though these acts might have been committed at different places and at different points of time by different persons.

139. In short, thus, in the face of the incriminating materials, as indicated above, the Respondent was not entitled to bail under the proviso to Section 43(D)(5). In fact, the learned Special Court, in the impugned order, has made it clear that the bail has been granted not because of the fact that there was no material against the Respondent herein, but on the grounds of his sickness and also for the reason that the co-accused had been granted bail, the accused had remained in custody for a long time and that his liberty, on bail, was necessary not only for his treatment, but also for preparing his defence. When there was reasonable ground to believe that the accused had indulged in commission of offences, under Chapter IV and VI of the U.A. (P) Act, 1967, and other offences, including one u/s 409 IPC, which is punishable with imprisonment for life, the Respondent could not have been released on bail unless his case called for invoking the Special Court's power under the 1st proviso to Section 437(1).

140. The State had pointed out, while objecting to the grant of bail, that the report, dated 16.01.2010, of the doctor of orthopedic and medicine shows that the accused was being treated as an outdoor patient. In his petition, dated 18.01.2010, the accused prayed for making the bail absolute on the ground that the accused require specialised treatment. Reacting to his submissions, the State pointed out that the accused may be sent to AIMS for thorough examination by a neutral Board and definite opinion may be obtained about the seriousness of the

Respondent's illness along with the opinion whether his treatment is possible by producing him (the accused-Respondent) from jail.

141. What the learned Court did by its order, dated 25.01.2010, was to direct the Superintendent, GMCH, to constitute a Board of "concerning doctors" to examine the accused thoroughly and to report. When the State had sought for examination of the accused by a Board consisting of doctors, who had not examined and treated him in the past, the Court ought to have assigned some reasons as to why it had not acceded to the request of the State and decided that the Board shall consist of those doctors, who are concerned with the treatment of the accused and who had already been examining and treating the accused. There was no harm if the Court had obtained the opinion of the doctors, from AIIMS, as to what really the state of health of the accused was and whether treatment of the accused was possible, while keeping him in custody, specially when the N.I.A. authority promised to escort Respondent R.H. Khan to AIMS for appropriate medical examination.

142. The proviso to Section 43D(5) does not permit release of an accused on bail if the case is found to be prima facie true. The order, dated 29.01.2010, whereby interim order was made absolute, shows, if read carefully, that the learned Court below treated as if the accused-Respondent had all along been an indoor patient of the hospital, though it was not true inasmuch as the accused, as revealed from the materials on record, was discharged from the hospital on 26-12-2009, he was to appear in the Special Court on 08-01-2010, he remained in his house till 06-01-2010, he was re-admitted, as an indoor patient, in the said hospital, on 07-01-2010 and did not or could not, therefore, appear, in the Special Court, on 08-01-2010.

143. The findings of the medical Board read:

The medical report of the Medical Board constituted with Dr. A.K. Mahanta, Professor and HOD of Orthopedics, Dr. A.K. Adhikary, Professor and HOD of Medicine and Dr. B.D. Goswami, HOD of Gastroenterology, was submitted by the said hospital. Supdt through his office memo dtd MCH/82/87/Pt. III/83 dtd 27.01.2010 which states as under:

Mr. R.H. Khan, 35 years Male HOSP No. 320510/09, Regd. No. INR MPC 4/2010 was admitted in Gauhati Medical College Hospital on 7.1.2010 under the Department of Medicine. He is an old treated patient of the Department of Medicine who was admitted in GMCH from 07.12.09 to 26.12.09 for analgesics (NSAID) induced gastro intestinal bleeding.

On 07.01.2010 Mr Khan was seen by orthopedics consultant. Clinically patient had low back pain and radiculopathy of L2 L3 roots. Radiological investigations including MRI revealed degenerated lumbar and cervical spine impingement. He was kept under medical and supervised physiotherapy.

Mr Khan is undergoing active physiotherapy namely Short wave Diathermy,

intermittent traction and exercises with required medication in the GMCH. During the course of treatment he complained of pain abdomen and subsequent investigations revealed bulky pancreas on USG and raised Amylase and Lipase on blood examination.

Under the circumstances, the Board is of the opinion that supervised medical management for the patient should continue.

(Emphasis is supplied)

144. A careful reading of the findings of the Board and its opinion clearly show that the accused had not been suffering from such ailments that it was not possible for him to receive treatment, while being kept in custody. In fact, even if the Board had opined that the case of the accused-Respondent required "supervised medical management", it did not mean that the accused must be allowed to go on bail and/or that his treatment was not possible, while remaining in custody. In fact, in the circumstances of the present case, it cannot be said that the accused could not have been treated properly, while being kept detained in custody. Even by keeping the accused in the hospital, as an indoor patient, but in custody of the poHce," supervised medical treatment" could have been made available to him and the apprehensions of the N.I.A. that the accused was likely to misuse his liberty could have been taken care of.

145. The learned Special Court has observed,

The consideration of the bail prayer on the merits of the case whatsoever against R.H. Khan apart, his bail prayer is being considered only the ground of his said health and it appears that he is sick. The ground of sickness is beyond the purview of the restrictions imposed by Section 437 Code of Criminal Procedure, 1973, or by Section 43(D)(5)(6) of the U.A. (P)Act, 1967, in so far as the consideration of a bail prayer thereunder is concerned. There is nothing at this stage to find that the said sickness of R.H. Khan is otherwise than a genuine one. Although improving due to treatment, R.H. Khan is reportedly requires treatment at home with periodical checkup.

146. In fact, the learned Court below had observed, even in its interim order, dated 25.01.2010, that despite the fact that merit of the case warranted that the accused be not released on bail, he was being allowed to go on bail solely on the ground of his health. Was this permissible? In a case of serious nature, the accused could not have been allowed to go on bail on the ground of his ill-health unless there was a finding reached by the learned Court below that keeping him in custody, it was not possible for the accused to have adequate medical treatment.

147. The learned Special Court has dealt with the Respondent's bail application in a manner as if no other factor will govern release of an accused on bail if he is found to have been suffering from sickness. A woman can be released on bail, under the 1 proviso to Section 437(1), even when there are reasonable grounds

for believing that she is guilty of an offence punishable with death or imprisonment for life. This does not mean that every woman, who is accused of an offence u/s 302 IPC, must be released on bail. The 1 proviso to Section 437(1) has to be read, construed and treated as an exception to the limitations imposed by Clauses (i) and(ii) of Section 437(1). The Legislative will, thus, clearly is that when a person-man or woman-applies for bail and a Magistrate is of the view that there appear reasonable grounds for believing that the accused is guilty of an offence punishable with death or imprisonment for life, such a person shall not be released on bail except in the circumstances, which are provided in the 2nd proviso to Section 437(1). This proviso, being an exception to the general rule, cannot be used in a routine manner and must be invoked only in befitting cases. Neither, therefore, on the ground that an accused is sick or on the ground that the accused is woman, the accused would be released on bail in a routine manner and unless the Court is satisfied that the state of health of the accused so warrants and/or that the female accused person's release on bail is needed in the interest of justice. In either case, however, the Court must also be satisfied that his or her release would not adversely affect investigation and trial, if an accused has to be released on bail on the ground of sickness, the Court must be satisfied, in such a case, that the treatment of the accused would not be possible if he is kept confined in custody. Unless such a finding is reached, it is difficult to perceive as to how, in a present case of serious nature, the accused-Respondent could be allowed to go on bail.

148. It needs to be noted that the prime concern of a Court shall be that the accused, if granted bail, would be available for interrogation during investigation and trial if the case ends in charge-sheet. Further indispensable condition is that the Court must have reasonable assurance that the accused would not temper with the evidence or hamper investigation by intimidating, coercing or inducing persons, acquainted with the facts of a given case, from disclosing truth to the investigating agency and/or to the Court. If the release of an accused on medical ground is likely to have an adverse effect on investigation, the accused cannot be released on the ground of his ill-health unless the Court also takes the view that treatment of the accused is impossible if he is kept in detention. In the absence of such a categorical finding having been reached and when the materials on record show that the accused is likely to interfere with the investigation and/or is likely not to be available for trial or investigation, his release on bail cannot be acceded to.

149. While considering the above aspect of the case, it needs noticing that in the present case, the N.I.A. had also sought for rejection of bail of the Respondent herein on the ground that release of the accused would jeopardize the case inasmuch as there is possibility of accused-Respondent harassing the witnesses and adversely affecting thereby the investigation. The learned Court below, however, assigned no reason as to why the factors, which the State had so indicated, were not germane for consideration of bail.

150. The accused, as the impugned order, dated 29.01.2010, shows, was released from hospital on 26.12.2009 and he got re-admitted in the hospital on 07.01.2010, when he was to appear, in Court, on 08.01.2010. Though the learned trial Court has noted that it was submitted, on behalf of the accused, that he needs homely atmosphere and free mental set up in order to medically improve, no such opinion had been expressed by the doctors in their report. There is absolutely no iota of material to show that keeping of the accused-Respondent, in custody, was posing threat to his life or his well-being.

151. Though it had been submitted, on behalf of N.I.A., that the accused would influence the witnesses, the Court expressed no opinion at all as to the correctness of these statements. This apart, the materials, in the case diary, reveal, until shown otherwise, that the accused-Respondent had, by posing threats to the lives of the members of his staff, forced them to prepare and pass bills and make payments against supplies, which were never received. In such circumstances, the capacity of the accused, to influence the witnesses by posing threat to them, is substantial and ought not to be ignored. Without commenting on the question as to whether the accused-Respondent, if granted bail, would or would not influence the witnesses, the learned Court below granted bail to the accused-Respondent. In fact, the Court's finding is as under:

In order to know about his latest health status and to pass necessary order thereon leading to the consideration of the bail prayer on the contest, the report of a Medical Board was called for and accordingly the same had reached this Court as reproduced hereinafter in these orders.

Although the seriousness of the said diseases could not be properly understood by barely going through the medical terminologies contained in the report, it has been understood therefrom that R.H. Khan being an in-patient at the GMCH has been undergoing necessary treatment due to his said maladies and the related complications and he will require continued "supervised medical management" with the said recent complications arisen as to his pancreas and the blood.

Considering the above medical aspects in particular and the facts including that of the release of the said two co-accused at the early stage of the case and that of the duration of R.H. Khan's detention since 30.05.09, in general, it is deemed fit and justified that he should get homely and congenial atmosphere for his early recovery as well as for preparing his defence consulting with his lawyer(s) freely with a view to fairly facing the case against him since there appears no likelihood of his abscondance under the stated circumstances and it would not be a just judicial approach to allow a sick accused in him to be detained for indefinite period, when appearance itself of the accused in the case with one Niranjana Hojai yet to appear, is not complete, on the plea that R.H. Khan's release might jeopardize the trial of the case.

(Emphasis is added)

152. The observations made above clearly indicate that the learned Court below

could not determine the seriousness of the diseases, which, according to the medical report, the accused-Respondent had been suffered fixim. Without determining the seriousness of the disease or the degree of sickness, the question of granting bail on the ground of sickness, in a case of present nature, could not have logically arisen, particularly, when the "supervised medical treatment" did not mean, and could not have been stretched to mean, supervised medical treatment" outside jail and/or outside hospital and/or within the precincts of the house of the accused.

153. The learned Court below has also taken into consideration the fact that two accused had released on bail, on 30.05.2009, at the early stage of the investigation. It appears to have escaped attention of the learned Court below that one of the accused, who had been released, had already absconded. This apart, when the clear provisions of Section 43D(5) of the U.A. (P) Act, 1967, do not permit the Court to allow an accused to go on bail, the fact that a co-accused had been released on bail could not have been made a ground for release of the present accused too. Discrimination must arise out of a valid consideration inasmuch as the co-accused had been released, when the case had not been registered under the N.I.A. Act and the investigation had not been taken over by the N.I.A.; whereas the present Respondent's bail application was considered after the N.I.A. had already taken over the investigation and had collected sufficient materials against the accused-Respondent involving him in the offences as alleged to have been committed by him.

154, We are unable to appreciate the fact that though the State had offered to get the accused-Respondent examined by a board of doctors, at AIMS, in order to consider the possibility of his treatment, while keeping him in custody, and when the State had expressed its apprehension with regard to the fairness of the medical examination, at GMCH, by contending that the accused-Respondent be examined by a neutral board of doctors, who had not treated him earlier, the learned Special Court did not accept the submissions so made. Why the submissions, so made, were not accepted by the learned Special Court is neither mentioned in the order, dated 25.01.2010, whereby the learned Court below had constituted the Medical Board, nor is there anything discernible, in this regard, from the materials on record to show as to why these apprehensions of the State, in a case of such serious nature, as the one at hand, had not been accepted.

155. When a Court is not assured that an accused would be available for further investigation or trial or that he will not interfere with the investigation by tampering with evidence or by intimidating or inducing the witnesses acquainted with the facts of the case, he cannot be allowed to go on bail; more so, when the statute disempowers a Court from releasing an accused on bail by laying down that where there are reasonable grounds for believing that the accused has committed offence(s) under Chapter IV and/or VI of the U.A. (P) Act, 1967, he shall not be released on bail.

156. Even on the ground of sickness, such an accused cannot be released on bail if the Court does not take the view that while remaining under detention, he cannot have adequate medical treatment or that his condition is so serious that his detention in custody in itself, would threaten his life. This apart, before the accused is released on the ground of sickness, the Court must be satisfied and must ensure that the liberty of the accused would not adversely affect investigation and that the accused would not abscond. If there are reasonable materials, collected during the investigation, to show that the accused, in all likelihood, would abscond or would interfere with investigation or trial, he cannot be released on the ground that he is sick unless the Court takes the view that he cannot be provided with adequate treatment if he is kept in custody or unless the Court forms the view that the very act of keeping the accused in custody would endanger his life. When the State (as in the present case) offers to provide all such treatment, which an accused needs, by keeping him in custody, in order to ensure that the accused does not interfere with the investigation, the Court cannot allow the accused to go on bail on the ground of his sickness unless the Court takes the view that while remaining in custody, the accused cannot be provided with required treatment.

157. In the case at hand too, when the N.I.A. had offered the accused-Respondent, Redaul Hussain Khan, to be examined and treated at ABMS or in any other medical centre or hospital by keeping him in custody and when the N.I.A. had also brought sufficient materials on record to show that the accused had earlier threatened and/or intimidated witnesses to process false bills to collect money and when there are materials, in the case diary, showing that the accused had indulged in collection of money, which has been used by terrorist outfits in their subversive activities including purchase of arms and ammunitions, he could not have been allowed to go on bail on the mere ground that he (the accused) is sick, particularly, when the medical report, as rightly contended the N.I.A., did not give any categorical opinion, far less any definite indication, that his treatment was not possible if he were to be kept in custody. The medical opinion, which the learned Court below has relied upon, goes only to the extent that the accused needs "supervised medical treatment". Supervised medical treatment does not imply that such treatment can only be made available outside the custody of the Court.

158. Because of what have been discussed, as a whole, above, we are of the considered view that in the facts and circumstances of the present case, we must interfere with the impugned order, whereby the Respondent's prayer for bail has been granted. This appeal is, therefore, allowed. The impugned order is set aside, the Respondent's bail is hereby cancelled, his surety shall stand discharged and he is directed to surrender, within 2 (two) days from today, into the custody of the learned Special Court, Assam, Guwahati. On being taken into custody, the Appellant-Respondent, Redaul Hussain Khan, shall be medically examined and he shall be provided with such medical treatment as he may need.

159. Before parting with this appeal, we make it clear that whatever views and opinions we have expressed with regard to the facts discernible from the relevant case diary and the records are tentative in nature and these are meant for the purpose of deciding whether the Respondent, at this stage, deserves to remain on bail or not. Our views and opinions shall not be taken as final views and opinions of this Court as regards the guilt or otherwise of the accused-Respondent.

160. With the above observations and directions, this appeal shall stand disposed of.