

(2013) 10 BOM CK 0081

In the Bombay High Court

Case No : Criminal Writ Petition No. 1325 and 4049 of 2012

Pragyasingh Chandrapalsingh Thakur

APPELLANT

Vs

State of Maharashtra, Anti Terrorist Squad, Mumbai, Union of
India and National Investigation Agency
 Major
Ramesh Upadhyay Vs Union of India and Government of
Maharashtra

RESPONDENT

Date of Decision : 11-10-2013

Acts Referred:

Citation : (2013) 6 ABR 1171 : (2014) ALLMR(Cri) 457 : (2014) 1 BomCR(Cri) 135

Hon'ble Judges : S.C. Dharmadhikari, J;S.B. Shukre, J

Bench : Division Bench

Advocate : Mahesh Jethmalani, Ms. Gunjan Mangla, instructed by, Mr. Ganesh Sovani, for in Writ Petition No. 4049/2012, Ms. Ameeta Kuttikrishnan, appointed for in Writ Petition No. 1325/2012, for the Appellant; D.J. Khambatta, Advocate General, Mrs. P.H. Kantharia and Mr. J.P. Yagnik, for State of Maharashtra, Mr. Kevic Setalwad, A.S.G. of India, Mahek Chheda, Som Sinha, Sumit Patni, instructed by y and Mr. Dhiren Shah, for the Union of India, Mr. A. Mariarputham, Special P.P., Ms. Rohini Salian, Special P.P., Mr. Anand Sakhadeve, Public Prosecutor, for the NIA, Respondent No. 4 in WP/4049/2012 and Respondent No. 1 in WP/1325/2012, for the Respondent

Final Decision : Dismissed

Judgement

S.C. Dharmadhikari, J.—These Writ Petitions raise the issue of constitutional validity of the National Investigation Agency Act, 2008 (Act 34 of 2008) (for short "NIA Act"). Hence, RULE. The Respondents waive service. By consent, Rule is made returnable forthwith.

2. Since both Writ Petitions involve common questions, they are being decided by this common judgment. For properly appreciating the arguments of parties, the facts in Writ Petition No. 4049/2012 are referred to.

3. It is stated that the Petitioner has been arraigned as an accused No. 1 in C.R.

No. I-130/2008 lodged at Azad Nagar Police Station, Malegaon on 30.09.2008 for offences punishable under Sections 302, 307, 324, 326, 427, 153-A, 120-B of the Indian Penal Code r/w. Sections 3, 4, 5, 6 of the Indian Explosive Substance Act, 1908 r/w. Sections 3, 5, 25 of the Arms Act, 1959 r/w. Sections 15, 16, 17, 18, 20 and 23 of the Unlawful Activities (Prevention) Act, 1967 along with ten other accused in the wake of a bomb blast that took place on 29.09.2008 at Malegaon, District: Nashik. The said crime being C.R. No. I-130/2008 was reregistered with ATS Police Station, Kala Chowki, Mumbai as C.R. No. I-18/2008 when the investigation of the same was entrusted to Anti Terrorist Squad, Maharashtra State.

4. It is stated that a sanction was accorded by the DIG, ATS, Mumbai vide his order dated 20.11.2008 to invoke the provisions of Sections 3(1)(i), 3(1)(ii), 3(2), 3(4), 3(5) of the Maharashtra Control of Organized Crime Act, 1999 (for short MCOC Act) to the said crime and subsequently, the prosecution sanction was accorded by the Additional Director General of Police, Railways vide signature and seal on 15.01.2009.

5. It is stated that finally on 20.01.2009 the charge sheet was filed before the learned Special (MCOCA) Court, Mumbai by the investigating agency, Anti Terrorist Squad of Maharashtra State.

6. It is stated that thereafter, on 22.01.2009, the learned Special (MCOCA) Court, Mumbai took the cognizance of the crime and issued process under Sections 3(1)(i), 3(1)(ii), 3(2), 3(4), 3(5) of the MCOC Act along with various other sections of the Indian Penal Code, Arms Act and also under Sections 15, 16, 17, 18, 20 and 23 of the Unlawful Activities (Prevention) Act, 1967 and the matter was numbered as Special Case No. 1/2009 by the Special (MCOCA) Court, Mumbai.

7. According to the Petitioner, while disposing of couple of bail applications filed by some of the Accused of the said case, the Special (MCOCA) Court, Mumbai vide its order dated 31.07.2009 was pleased to discharge all the accused from the provisions of the MCOC Act, 1999. The said order was challenged by the State of Maharashtra vide Criminal Appeal No. 866/2009 filed by invoking Section 12 of the MCOC Act before this Court along with some other connected appeals. The Division Bench of this Court vide its common order dated 19.07.2010 was pleased to strike down the order of discharge dated 31.07.2009 passed by the Special (MCOCA) Court, Mumbai. Thereafter, the affected parties including the present Petitioner has filed SLP (Criminal) No. 8132/2010 of 2010 before the Honourable Supreme Court of India in which the notices have been issued to the Respondents before admission and which is yet to be disposed of.

8. It is stated that the Respondent No. 3/Union of India, by virtue of Act No. 6 of 2009, promulgated the National Investigation Agency Act, 2008 (for short NIA Act) after tabling it in both houses of the Parliament, as it was duly voted for and after obtaining the Presidential assent to the same on 31.12.2008. The NIA Act

has twenty five sections embedded in five chapters, followed by a Schedule which gives a list of eight different categories of offences that can be investigated by the NIA by invoking Sections 6 to 10 of the NIA Act.

9. It is stated that after the arrest of one Aseemanand on or about 19.11.2010 from Haridwar, Uttarakhand and more particularly after his alleged statement u/s 164 of the Code of Criminal Procedure, 1973 recorded before the learned Chief Judicial Magistrate, Panchkula, Haryana on 15.01.2011, that statement came to be retracted by him vide his application dated 08.04.2011 before the learned Chief Judicial Magistrate, Ajmer, Rajasthan, in which he not only retracted the same, but has revealed the manner in which he was asked to depose so by pressure tactics resorted by the investigation agencies. On the basis of his such statement, Swami Aseemanand has been arraigned as an accused in Samjhauta Train bombings of February, 2007, Ajmer blasts and also Hyderabad blasts as well and all these crimes are being re-investigated by the Respondent No. 4/NIA.

10. It is stated that the Respondent No. 4 has taken over the investigation of C.R. No. I-130/2008 lodged at Azad Nagar Police Station in the wake of bomb blast dated 29.09.2008 at Malegaon, which itself was transferred to I-18/2008 lodged at ATS Police Station, Kala Chowki, Mumbai after the Respondent No. 1 handed over the investigation of the said crime to the Respondent No. 2/ATS, Mumbai.

11. According to the Petitioner, by virtue of the Notification dated 01.04.2011 the Union Home Ministry handed over the investigation of Malegaon 2008 blasts which was till then investigated by the ATS, to the Respondent No. 4/NIA, without consent of the Government of Maharashtra.

12. It is stated that the Petitioner who is in custody since 10.10.2008 is greatly aggrieved by the decision of the Respondent No. 3 to hand over the investigation of Malegaon 2008 blast to the Respondent No. 4/NIA and is challenging the legislative competence of the Central Government to enact the NIA Act.

13. It is stated that the NIA Act which received the assent of the President on 31.12.2008 and was published in the Gazette of India, Extraordinary Pt. II Sec. 1, dated 31.12.2008 is unconstitutional and illegal inasmuch as the Union of India lacks legislative competence to enact the legislation on matters contained in List-II, the State List. Both the Preamble and the Statement of Objects and Reasons of the NIA Act disclose the NIA Act as an Act for constitution of an Investigating Agency at the national level to investigate and prosecute offences affecting a host of subjects, expressly or impliedly contained in List-I i.e. Union List. However, crucially the NIA Act is essentially enacted for the purpose of creating a police agency at the national level with powers to investigate and prosecute offences disclosed in the Preamble, wherever such offences occur. While legislation to investigate and prosecute offences pertaining to subjects disclosed in the preamble to the Act are within the legislative competence of the Union of India, the legislative power to create a police agency by virtue of List-II

of the VIIth Schedule of the Constitution of India vests exclusively with the State Governments. Inasmuch as the NIA Act creates a police force at the central level which can investigate offences committed in the States, the NIA Act is manifestly unconstitutional, as it does an encroachment on the legislative powers of the State Governments. In the premises it is the contention of the Petitioner that the NIA Act be struck down as being ultra vires the Constitution of India.

14. According to the Petitioners, the provisions of the NIA Act are beyond the legislative powers of the Union and that is poignantly illustrated by its contrast and comparison with the Delhi Special Police Establishment Act, 1946 (for short DSPE Act) whereby the Central Bureau of Investigation (CBI) was created. The CBI itself is specifically a designated entry in List-I, VIIth Schedule i.e. Entry-8. As per the DSPE Act, the investigative powers of the CBI do not encroach upon the functions of police forces created by the State Governments. Thus, Section 2(1) of the DSPE Act expressly provides that notwithstanding anything in the Police Act, 1861, the Central Government may constitute a special police force to be called the Delhi Special Police Establishment for the investigation in any Union Territory of offences notified u/s 8. Moreover, by virtue of Section 6 of the DSPE Act, the Delhi Special Police Establishment cannot exercise powers and jurisdiction in any areas in a State, not being a Union Territory or Railway areas without the consent of the Government of that State. In other words, the DSPE Act was enacted with the utmost care to ensure that the Centre did not encroach upon the legislative domain of the State Governments. In contrast, the NIA Act manifestly encroaches upon the legislative powers of the State Governments and is beyond the legislative competence of Parliament.

15. It is stated that the NIA Act was passed practically without dissent by Parliament in the wake of the grotesque terrorist acts that were perpetrated in Mumbai for three days in a row from 26th to 29th November, 2008. However, subsequent events that have transpired after the NIA Act came into force on 31.12.2008 till the present day, unambiguously reveal that the expectation of Parliament and the people of the country has been belied and that the NIA far from fulfilling its envisaged role has on the contrary been a manifestly ineffective investigating agency. It has failed to prevent a number of terrorist attacks in various parts of India and it has further failed to subsequently detect the perpetrators of these attacks. On the other hand, it has acted at cross purposes with specialized state police agencies investigating such acts. Most significantly the NIA has obstructed the course of justice in pending investigations and even concluded ones.

16. It is stated that neither the preamble nor the statement of objects and reasons nor the parliamentary debates that preceded the passing of the NIA Act referred to or contemplated that the NIA was to be set up to investigate pending investigations of past terrorist acts or reinvestigate terrorist offences, in cases where charge sheets had already been filed. The operation of the NIA Act was to be prospective. In other words, the NIA was set up to prevent, investigate or

prosecute offences de futuro. The Home Minister pleaded with the Parliament for the enactment of the Bill by exploiting the emotional outrage, generated throughout the country by the massacre of innocent lives in Mumbai between from 26th to 29th November, 2008. Indeed the need for a NIA had never been expressed prior to 26.11.2008. It would not be an overstatement to submit that the NIA Act and the creation by it of the NIA was specifically in response to the events from 26th to 29th November, 2008. In this view of the matter, the use of the NIA to re-investigate terrorist offences committed prior to 2009 is de hors the stated objective of the Act and more seriously is a fraud on the Parliament and the people of this country.

17. It is stated that it is settled law that investigation commenced by an agency authorized in law to investigate certain offences can be transferred to an agency other than those agencies authorized by law to investigate them by a High Court in exercise of its powers under writ jurisdiction under Articles 226 and 227 of the Constitution of India or by the Supreme Court by virtue of its inherent powers. In purported exercise of the powers u/s 6 of the NIA Act, the Central Government has directed the NIA to investigate a cluster of seven cases in which investigations are already underway by specialized state police agencies. The direction by the Central Government to the NIA to investigate the said cases is a fraud on Section 6 of the NIA Act. Under the cloak of Section 6 of the NIA Act, the Central Government has abrogated to itself a power which in law it does not have. A complete reading of Section 6 makes it unambiguously clear that the power of investigation by the NIA does not and cannot apply to pending investigations, whether or not those investigations have concluded by the filing of a charge sheet or not.

18. It is stated that it is settled law that the power of further investigation of a case even after a charge sheet has been filed by an investigating agency can be conducted by that investigating agency in exercise only of its power u/s 173(8) of the Code of Criminal Procedure, 1973. Even so, this power of further investigation has been categorically held by a series of decisions of the Apex Court not to include fresh investigation or reinvestigation. It is only a High Court in its writ or inherent jurisdiction or the Supreme Court in exercise of its inherent power that can order a fresh investigation or reinvestigation, whether before or after the charge sheet is filed. In the seven cases directed to be investigated by the NIA by the Central Government, it is not investigation but a fresh investigation and/or reinvestigation that is being carried out. In other words, under the cloak of Section 6, the Central Government has directed the NIA to conduct a fresh investigation and/or reinvestigation of the said cases. If the legislative intent was to vest in the NIA, a power of fresh investigation and/or reinvestigation, then, express words to this effect would have been used particularly in view of the fact that it is settled law that the power to investigate, does not include without judicial authority, the power to conduct a fresh investigation and/or reinvestigation. For this reason too, the direction by the Central Government to the NIA to investigate the said seven offences is a fraud

on the statute constituting the NIA and a colourable and malafide exercise of power. Section 6 does not authorize the Central Government to direct the NIA to conduct a fresh investigation or reinvestigation of pending investigations or cases where charge sheets have already been filed. Thus, in any view of the matter, the power of the Central Government to direct the NIA to investigate a given offence must be read down, not to include the power of fresh investigation or reinvestigation. Precisely for this reason, the notification issued by the Ministry of Home Affairs bearing No. I-11034/18/20: 1 IS-I dated 01.04.2011 issued by the Joint Secretary to the Government of India, of taking over of the crime bearing C.R. No. I-18/2008 lodged by the Anti Terrorist Squad of Government of Maharashtra at ATS Police Station, Mumbai in the wake of bomb blast taken place at Malegaon on 29.09.2008 deserves to be declared as unconstitutional and ultra vires and same deserves to be quashed.

19. It is in this factual backdrop that the following reliefs are sought by the Petitioners:-

(a) that this Hon"ble Court may be pleased to declare that the National Investigation Agency Act, 2008 is unconstitutional and ultra vires, by issuing a writ of mandamus or any other writ or an appropriate order under Article 226 of the Constitution of India;

(b) the impugned Notification dated 01.04.2011 issued by the Ministry of Home Affairs, New Delhi of suo motu transferring the investigation of C.R. No. I-18/2008 lodged at ATS Police Station, Mumbai in the wake of Malegaon bomb blast dated 29.09.2008 be quashed and set aside;

(c) that the Respondent No. 4/NIA may be restrained by an order of writ from exercising any power in pursuance of the NIA Act for doing "fresh" or "further" investigation of Malegaon 2008 blast;

20. In answer to this Writ Petition, an affidavit has been filed by the Respondent No. 4/NIA through the Superintendent of Police, NIA, New Delhi in which some preliminary objections have been raised. However, on the main issue the stand is that the continuous preservation and promotion of national security is the first and final sovereign function of a country. If it fails in providing this, then, it remains a country no more. Under our constitutional scheme, clearly the Union Parliament is the sovereign power even though it retains this through the popular consent of the public. It can make and unmake anything within its sovereign territory. It bears the final responsibility for anything against the interests of our country. In national security issues, it is obviously the one vested with powers and prerogatives in the fields of policy making and policy implementation. In the constitutional scheme of things, it is very clear that while considerable autonomy and functional prerogatives have been accorded to State Governments, nevertheless clearly the greater powers and prerogatives over a complex range of all encompassing subjects are vested with the Union because the latter bears the first and final responsibility for the performance of the foundational sovereign

function of any political state-the maintenance of a robust security environment. A contextual construction of the provisions in the Constitution of India would show that the sovereign function of maintenance of national security is squarely vested with the Union.

21. It is then stated on behalf of the NIA that in fact the purpose of federalizing some crimes by the Central Government is not to usurp, but only to usefully supplement and add value to the law enforcement duties with local limitations hitherto within the sole preserve of the individual State Governments. This is because the Union Executive alone bears the ultimate responsibility for the protection of the sovereignty of India and is also vested with the powers and prerogatives of best setting out and laying down policies to best achieve this ultimate responsibility. The objectives set out by the Union Parliament in the preamble of the NIA Act makes it amply clear that the said Act is within the provisions set out in the Constitution of India. When one juxtaposes certain subjects that fall within the Union List of the Constitution of India with the preamble of the NIA Act, it would be very clear that the objectives mentioned in such preamble have been derived from the explicit enabling provisions of the Constitution that vest powers and prerogatives within the domain of the Union/Central Government. The primary objective to establish a NIA is to better tackle cross-border crimes with inter-state and international originations and ramifications like terrorism, to ensure that the sovereign duties owed by the Union to the citizenry of protection of life, liberty and property are more properly complied with. One of the Acts mentioned in the Schedule to the NIA Act is the Unlawful Activities (Prevention) Act, 1967 which deals with cross border and international terrorism and measures to combat the same, which extends not only to persons committing the act in India but also beyond India. The confidential and sensitive nature of the information gathered as well as the high security risk that the perpetrators as well as the witnesses come under, cannot make the functioning of the NIA amenable to public knowledge or information. The NIA deals with cross border terrorism related cases having national and international ramifications. Any investigation done by the NIA involves collection of sensitive intelligence and information, which includes design, plan and preparation to commit terrorist acts and the disclosure of which is likely to affect the security of the informant as well as the investigators of the case besides affecting the investigation adversely and may even lead to disastrous consequences affecting public order/national security. In some cases the information is obtained through diplomatic channels and any disclosure of such information can affect friendly relations between countries and would be in breach of diplomatic protocol.

22. It is then stated that terrorism or "the peacetime equivalent of war crimes" as succinctly defined by a UN official Dr. Alex P. Schmid and endorsed by a judgment of the Honourable Supreme Court in *Madan Singh Vs. State of Bihar*, .

23. It is then stated in the NIA's reply that the Central Government is duty

bound to discharge its first sovereign function of providing effective national security at all times. It cannot excuse itself away from this function. It is, therefore, imperative for the Central Government that to empower its executive agents to enable them to be in a better position to detect and investigate these unknown but knowable dangers and threats to its national security, the setting up of the NIA was necessary. It is humbly submitted that the Central Government has just discharged its sovereign duty, and no more, in the creation of the NIA through an Act of Parliament. The NIA Act is intra vires the Constitution and in no manner falls foul of the constitutional scheme.

24. It is stated that from a bare perusal of Sections 6 to 10 (both inclusive) of the NIA Act, the Union Government has not sought to truncate or marginalize the services or the role or involvement or participation of the State Governments and their respective functionaries, in any manner, in the investigation and prosecution of terrorist acts. The role of the States is not sought to be ousted by the NIA Act. This only underlines the fact pointed out above that the purpose of the NIA is to usefully supplement and add value to the counter-terrorist efforts of the States. The NIA Act is an Act of Parliament, which was enacted for a specific purpose, a purpose which the lawmakers and the Government owe to its people, that of National Security.

25. It is stated that the Petitioner is deliberately attempting to raise untenable submissions when the Scheme of the NIA Act is very clear and does not in any way conflict with the provisions of the Code of Criminal Procedure, 1973 much less the Constitution of India. The condition precedent of the coming into effect of the NIA Act is the commission of a schedule offence i.e. any offence which is specified in the Schedule to the NIA Act. Chapter-II of the NIA Act deals specifically with the constitution, superintendence and manner of constitution of the NIA. Section 3 is a non-obstante clause, it excludes any provision in the Police Act, 1861, thus making way for a special agency for the investigation and prosecution of offences under the Acts specified in the Schedule. Sections 3(2) and 3(3) stipulate the powers and authority of the officers under the NIA Act thereby very clearly leaving no room for any adhoc interpretation. The Petitioner is, by way of this Petition, seeking to elucidate a gap where none exists.

26. It is stated that the NIA which took over the investigation of the scheduled offences from the ATS is as contemplated by the Parliament and the Constitution. The NIA Act clearly lays down the procedure and the powers of the NIA thereby leaving very little scope for loopholes. Wherever there are possibilities of an overlap with the Code of Criminal Procedure, 1973 or the Police Act, the Act lays down provisions which either overrule the overlapping/conflicting provisions if any, or adopts the provisions of the Code to that limited extent alone. Hence to say that the NIA Act is unconstitutional is wholly incorrect and it does not, in any manner, undermine the federal structure that is guaranteed under the Constitution.

27. It is stated that Article 246(3) is "subject to" the provisions of Article 246(1),

which contains a non-obstante clause. The exclusive mandate to the State Legislature is not all encompassing. It is exclusive only to that extent. The power and superintendence of the Parliament to make laws is further enumerated in Article 246(4). So while the State Legislature is empowered to pass laws that are enumerated in List-II, the Parliament can, in matters incidental to the entries in List-II, make laws which extend to those subjects. The same is recognized and conferred upon the Parliament by the Constitution. The lawmakers have in fact not resorted to a straight jacket formula. The reason for this being that while the Constitution recognizes the need for every State to have its custom made laws adapted to its own State and people, the Parliament as an overseer must, in arenas which affect the nation as a whole, make such laws which govern the nation uniformly.

28. It is then stated that the NIA Act seeks to strike at the root of those offenders who threaten, undermine attack India as a nation. In this mindset there is no scope for each State to start enacting its own laws and methods to deal with what is fast becoming the greatest threat to the nation. The Parliament enacted this law in order to bring under the same umbrella all the far flung states (which incidentally are the most vulnerable as well) so that there is no delay or loophole in tackling with terror. On the contrary, the NIA Act unifies the nation, as the threat of terrorism is to the nation and not to any particular state.

29. Consistent with the above, the stand taken is that the Parliament is competent to enact the NIA Act and it cannot be said to be unconstitutional, null and void.

30. There are affidavits filed by the Union of India and what has been additionally urged in the final affidavit is that the NIA's mandate is to investigate and prosecute offences under the Acts specified in the Schedule to the NIA Act and investigating any other offence which the accused is alleged to have committed if the offence is connected with the Scheduled Offence. It is evident from the various laws specified in the Schedule to the NIA Act that the offences they create relate to the matters specified in the preamble to the NIA Act and therefore, incapable of falling within the domain of the State Legislatures. Illustratively:-

(i) The Atomic Energy Act, 1962 provides for the development, control and use of atomic energy for the welfare of the people of India and for other peaceful purposes.

(ii) The preamble to the Unlawful Activities (Prevention) Act, 1967 indicates that the Act seeks to provide for the more effective prevention of certain unlawful activities of individuals and associations and dealing with terrorist activities and for matters connected therewith. As indicated by the preamble itself, the said Act seeks to implement the Resolution 1373 (2001) dated 28th September 2001 adopted by the Security Council of the United Nations in its 4385 meeting under Chapter VII of the Charter of the United Nations requiring all the States to take

measures to combat international terrorism, as also, Resolutions 1267 (1999), 1333 (2000), 1363 (2001), 1390 (2002), 1455 (2003), 1526 (2004), 1566 (2004), 1617 0(2005), 1735 (2006) and 1822 (2008) of the Security Council of the United Nations requiring the States to take action against certain terrorists and terrorist organizations, to freeze the assets and other economic resources, to prevent the entry into or the transit through their territory. The said Act which implements the Resolutions of the Security Council and makes special provisions for the prevention of, and for coping with terrorist activities and for matters connected therewith or incidental thereto, relates to matters having national/international implications, which have an effect on the sovereignty, integrity and security of India.

(iii) The Anti-Hijacking Act, 1982 gives effect to Convention for the Suppression of Unlawful Seizure of Aircraft and for matters connected therewith, signed at The Hague on 16th December, 1970.

(iv) The Suppression of Unlawful Acts against Safety of Civil Aviation Act, 1982 gives effect to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation signed at Montreal on 23rd September 1971.

(v) The SAARC Convention (Suppression of Terrorism) Act, 1993 gives effect to the South Asian Association for Regional Cooperation Convention on Suppression of Terrorism signed on behalf of the Government of India at Kathmandu on the 4th day of November, 1987.

(vi) The Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002 gives effect to the International Maritime Organization Convention for Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf signed at Rome on 10th March, 1988.

(vii) The Weapons of Mass Destruction and their Delivery Systems (Prohibition of Unlawful Activities) Act, 2005 prohibits unlawful activities in relation to weapons of mass destruction and their delivery systems and has been enacted to safeguard national security as also to furtherance of India's obligations as a State Party to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction and the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction.

(viii) Chapter VI of the Indian Penal Code (Section 121-Section 130) relates to offences against the State including waging war or attempting to wage war or abetting waging of war against the Government of India (Section 121), conspiracy to commit offences u/s 121 (Section 121-A), collecting arms etc. with the intention of waging war against the Government of India (Section 122) etc. Offences under Sections 489-A to 489-E of the Indian Penal Code relate to counterfeiting etc. of currency notes and bank notes relates to major economic

frauds.

31. It is then stated that in Pith & Substance, the NIA Act does not relate to "Public Order" falling under Entry 1 of the State List or "Police" under Entry 2 of the State List. The NIA Act does not fall under any other Entry in the State List. The Petitioner has not even pleaded that the NIA Act falls under the ambit of any another Entry in the State List.

32. It is stated that under Article 245 of the Constitution of India, the Parliament has the power to make laws for the whole or any part of the territory of India and the Legislature of a State may make laws for the whole or any part of the State. Thus, in matters covered by the NIA Act that have national and international ramifications, no Legislature of a State could have made any laws. In fact, State law enforcement agencies, with their limited jurisdictions, cannot alone handle investigations into matters, which have large scale ramifications.

33. It is further stated that having regard to the limitation placed by Article 245(1) of the Constitution of India on the legislative power of the legislature of a State in the matter of enactment of laws having application within the territorial limits of the State only, the ambit of the field of legislation with respect to "public order" under Entry 1 in the State List has to be confined to disorders of lesser gravity having an impact within the boundaries of the State. Activities of more serious nature which threaten the security and integrity of the country as a whole or those which relate to subjects covered by the NIA Act which have national and international ramifications would not be within the legislative field assigned to the States under Entry 1 of the State List.

34. It is stated that if law does not fall in the State List, the Parliament would have the competence to pass the law by virtue of its residuary powers under Article 248 read with Entry 97 of the Union List and it would not be necessary to go into the question whether it falls under any entry in the Union List or the Concurrent List.

35. It is then stated that the NIA Act falls within the ambit of the entries in the Union List viz. (i) Entry 1 of the Union List relating to the "Defence of India"; (ii) Entry 10 of the Union List relating to "Foreign affairs, all matters which bring the Union into relation with any foreign country" and (iii) Entry 14 of the Union List which relates to "Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries" since most of the laws specified in the Schedule to the NIA Act seek to implement various conventions/agreements to which India is a party. In fact under Entry 8 of the Union List, the Parliament can create a "Central Bureau of Intelligence and Investigation". The NIA can be considered to be a Central Bureau of Investigation that the Parliament is exclusively entitled to create.

36. It is stated that the NIA Act is procedural in nature constituting a special agency, namely, NIA for investigation and prosecution of the scheduled offences. The NIA Act does not purport to or create any new offence. No person has a

vested right to procedure. Therefore, even assuming that the NIA Act does not fall within the ambit of the Union List, the NIA Act falls under Entry 2 of the Concurrent List which includes "Criminal Procedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution".

37. It is then stated that the NIA Act relates to entries in the Union List read with Entry 2 (Criminal Procedure) of the Concurrent List which when read in conjunction with Article 355 of the Constitution of India (which provides that it is the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution) and Article 253 of the Constitution (which provides that the Parliament has the power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body), there is sufficient authority to the Union to legislate in this manner. The Petitioner's submission that the NIA Act falls under Entry 1 or 2 of the State List is, therefore, incorrect and fallacious.

38. It is on this material that we have heard the learned Senior Counsel and the learned Additional Solicitor General of India.

39. Mr. Jethmalani, learned Senior Counsel appearing on behalf of the Petitioner has submitted that the NIA Act is beyond the legislative competence of the Parliament. He has invited our attention to the entries in the VIIth Schedule and submitted that as far as the NIA Act is concerned it clearly falls within List-II-State List Entry-2. If it is an Act creating an investigating machinery, then, it is nothing but enacting a law in relation to Police which is covered by the State List. The Parliament cannot legislate in relation to this Entry-2 and the attempt to urge that the subject of this NIA Act falls within the List-I (Union List) is contrary to law. This is not an enactment which could be said to be covered by the List-I Entry-2A. Thus, this is an enactment dealing with the State crimes and Police. The situs of crime is the State. In these circumstances the NIA Act is clearly beyond the powers of the Parliament. Mr. Jethmalani has invited our attention to Article 246 of the Constitution of India and submitted that the NIA Act is nothing but an encroachment and usurpation of the powers of the State to make legislation in respect of Entry-2 in List-II. Even the Doctrine of Pith and Substance will not come to the aid of the Respondents in urging that the law is within the competence of the Indian Parliament.

40. Mr. Jethmalani then submits that the law may be termed as procedural law, but by no stretch of imagination it can be said to be within the competence of the Parliament and no assistance can be derived from Entry-8 of List-I which is entitled as Central Bureau of Intelligence and Investigation. He submits that by creating a National Investigation Agency, the State List is rendered a nullity and a police force is created by the NIA Act. This is naked usurpation of the powers of the State and Mr. Jethmalani, for illustration, relies upon the Delhi Special Police

Establishment Act, 1946 under which the CBI is created and is working. He submits that the Parliament has taken care and exercised extreme caution while enacting this Act and has provided for consent of the State Government so as to enable the CBI to take over investigation in relation to crimes within the State. Such provision is absent in the NIA Act. Therefore, irrespective of the fact that certain aspects of the Police Powers are covered by the Union List, still the Parliament lacks legislative competence to enact the NIA Act. He submits that even the procedural law must be referable to the powers contemplated and conferred by Article 246 of the Constitution of India. There is a clear distinction regarding the subject matters of laws to be made by the Parliament and by the Legislatures of States. In these circumstances the principle that the procedural law does not confer any vested right or there is no vested right in the matters of procedure, cannot be invoked to save the NIA Act from being declared as unconstitutional.

41. Mr. Jethmalani then submitted and in the alternative and without prejudice to the above arguments that assuming without admitting that the Indian Parliament is competent to enact the NIA Act yet Section 6 thereof is the core section. It is the heart of the NIA Act. That section is unconstitutional being ultra-vires Articles 14 and 21 of the Constitution of India. That section enables the Central Government to transfer investigation of the scheduled offences to the NIA. This power can be exercised midway and midstream. Further, the Central Government suo motu can direct the NIA to investigate the scheduled offences. Such power to transfer the investigation cannot be exercised by the Executive/Government of its own. Such powers are vested only in the competent courts. In fact the power to transfer the investigation to any other agency is only with the High Court under Article 226 of the Constitution of India and the Honourable Supreme Court under Article 32 of the Constitution of India. Therefore, transfer of investigation cannot be by a statute, but under the orders and authority of the competent court. In such circumstances if it is held that Section 6 of the NIA Act can apply to the pending investigations, then, it is ex-facie unconstitutional and ultra-vires as above. He submits that if the investigation and prosecution of offences under the Acts specified in the Schedule is transferred to the NIA and by denuding the State of its police powers, then, Section 6 cannot be saved from the voice of arbitrariness, discrimination and for overriding the authority of the superior court. Thereby, right to life and liberty guaranteed by Article 21 of the Constitution of India is violated. Section 6 cannot apply after the investigation is complete and the charge sheet is filed in the competent court. Once the stage envisaged by Section 173(2) of the Code of Criminal Procedure, 1973 is reached, then, the powers u/s 6 cannot be exercised. If that is the only interpretation which can be placed on the provision, namely, Section 6, then, it would mean that the investigation and prosecution of even old criminal cases in relation to the scheduled offences can be transferred or taken over by the NIA. That would disturb and disrupt the investigation and prosecution of these offences. The Central Government by executive direction cannot direct transfer of investigation

in the pending cases and in such a manner. That would mean that the power u/s 6 can be exercised in respect of the scheduled offences even if they have been committed and their investigation and prosecution is commenced prior to the NIA Act coming into force. This being the position and when Section 6 is struck down, then, the whole Act falls being unconstitutional. There is no scope for applying the Doctrine by which the Court is enabled to save the Act from unconstitutionality by taking a provision like Section 6 and construing it in isolation. It cannot be severed from rest of the provisions and sections in the NIA Act.

42. Mr. Jethmalani submits that alternatively, Section 6 should be restricted to the investigation and prosecution of the scheduled offences committed after the NIA Act has been brought into force. That too only in cases where the investigations have not been concluded and are pending. Once the investigations are complete and the charge sheet is filed, then, the power conferred by Section 6 and particularly sub-section (5) thereof cannot be exercised. In the instant matter, the Act has been invoked and made applicable to 07 past cases. Therein, the charge sheet is filed and cognizance is taken by the competent court. The Special Investigation Team of the State Police has carried out the investigation and there is no finding that the investigations carried out till date are in any way incomplete, unfair and partial. In such circumstances such provision conferring blanket power of the nature referred above cannot be saved by reading it down as well.

43. Mr. Jethmalani submits that the NIA can be brought in, in exercise of the powers conferred by Section 6. That power is conferred in the Central Government. There are no guidelines for exercise of that power. Therefore, Section 6 confers arbitrary powers in the State to direct transfer of investigation in regard to the scheduled offences. Sub-sections (2) and (3) of Section 6 cannot be said to be laying down any guideline for exercise of the powers u/s 6(4) and 6(5). In the present case, the NIA is indulging in reinvestigation in at least two criminal cases. He submits that there is vast difference between "further investigation" and "reinvestigation". There has to be an element of unfairness in the previous investigation and which pricks the judicial conscience of the Court. He submits that the prosecuting agency cannot reinvestigate or carry out a denovo investigation on its own. That power is reserved only in the superior court. In these circumstances looked at from any angle the NIA Act cannot be saved from the vice of unconstitutionality and should be declared as such. The Writ Petition, therefore, be allowed.

44. Mr. Jethmalani relies upon the following decisions in support of his submissions:-

(1) Disha Vs. State of Gujarat and Others, .

(2) (2011) 14 SCC 770

State of Punjab v/s. Davinder Pal Singh Bhullar.

(3) (2013) 5 SCC 762

Vinay Tyagi v/s. Irshad Ali @ Deepak.

(4) Divine Retreat Centre Vs. State of Kerala and Others, .

(5) Secretary, Minor Irrigation and Rural Engineering Services, U.P. and Others Vs. Sahngoo Ram Arya and Another, .

(6) State of West Bengal and Others Vs. The Committee for Protection of Democratic Rights, West Bengal and Others, .

(7) Rama Chaudhary Vs. State of Bihar, .

45. On the other hand, Mr. Setalwad, learned Additional Solicitor General of India appearing for the Union of India, has submitted that there is no merit in the challenge raised to the constitutional validity of the NIA Act. It is submitted by him that the Writ Petition proceeds on a total misconception and misreading of the NIA Act. He submits that there is no merit in the contentions of Mr. Jethmalani that the Parliament of India lacks legislative competence and therefore, could not have enacted the said Act. Mr. Setalwad submits that the said Act provides for setting up an investigating agency at central level with powers to probe terrorism and other crimes which have national ramifications such as hijacking of air crafts, bomb blasts, attacks on nuclear installations, etc. Therefore, the backdrop in which this law is enacted cannot be lost sight of.

46. The statement of objects and reasons and the preamble to the NIA Act have been referred by Mr. Setalwad to support his argument that the NIA has been set up to investigate and prosecute the offences affecting sovereignty, security and integrity of India, security of State, friendly relations with foreign States and offences under the Acts enacted to implement international treaties, agreements, conventions and resolutions of the United Nations, its agencies and other international organisations and for matters connected therewith or incidental thereto. The NIA is mandated to investigate and prosecute the offences under the Acts specified in the schedule to the NIA Act, namely, scheduled offences. Therefore, it is only in relation to the scheduled offences that the NIA comes into picture and there is no question of the Parliament, therefore, encroaching upon the field reserved for the States, namely, Police. If the Acts specified in the Schedule are referred to and together with the offences enumerated therein, then, it is clear that they affect the sovereignty, integrity and security of India and ties with friendly States. The offences enumerated in the other enactments specified in the schedule have all India repercussions and affect the nation as a whole. In these circumstances the Parliament alone has power to make laws for whole or any part of territory of India. The acts mentioned in the schedule, namely, scheduled offences arise out of the enactments enacted and legislated by the Parliament of India. The State Legislature has no power to make laws in relation to the subject matters of these enactments. If the State level law enforcement agency with its investigative powers cannot solely probe the

offences which have such large scale ramifications, then, to urge that there is any encroachment on the power of the State is erroneous. There could not be any encroachment on the subjects reserved for the State by the List-II inasmuch as the NIA Act falls within the ambit of entries, namely, Entry-1, Entry-10 and Entry-14 of the Union List. Entry-8 of the Union List can also be safely referred to.

47. It is submitted by Mr. Setalwad that the doctrine of Pith and Substance can be safely invoked because in Pith and Substance the NIA Act is not an Act setting up a police force. It is not providing for any matters for which the State alone can make laws. It is not dealing with public order or police as understood within the State List. Our attention has been invited to the entries in the List-I and it is submitted that a bare perusal of these entries together with Entry-93 would reveal that in matters of sensitive and delicate nature affecting defence of India, Naval, Military and Air Force, Atomic Energy, Mineral Resources, Central Bureau of Intelligence and Investigation, Foreign Affairs, etc., it is the Parliament alone which can make the laws and merely because such laws made by the Parliament envisage and contemplate investigation and prosecution of the offences of the Acts specified in the schedule through the NIA does not mean that a police force is set up. The NIA Act will have to be read as a whole and not in bits and pieces and parts. If so read, it is apparent that only in relation to the scheduled offences that the investigation and prosecution can be taken over by the NIA and not otherwise. Therefore, this is not a case of usurpation of legislative powers of the State far from any naked encroachment thereon.

48. Mr. Setalwad submits that merely because the NIA Act enables the NIA to take over some of powers of the State Police Machinery does not mean that the Parliament is incompetent to enact the NIA Act. It is not a complete displacement of the powers of a State to investigate and prosecute the offences committed within its territory. The State's powers are supplanted and supplemented and not altogether substituted as suggested by the Petitioners. In any event, by taking over the investigation and prosecution of the scheduled offences only, the entire State police force is not disturbed nor its powers curtailed otherwise. The State has power to investigate and prosecute even the scheduled offences and until the NIA steps in and even thereafter as clarified in Sections 6 to 10 of the NIA Act. The Parliament while enacting the law if makes such incidental encroachment, then, the doctrine of Pith and Substance should be applied. If in pith and substance, the legislation is referable to the powers of the Parliament to make laws on any of the entries specified in List-I, then, the question of legislative competence does not arise. In these circumstances it would not be proper to hold that the Parliament lacks legislative competence to enact the NIA Act.

49. Mr. Setalwad also invited our attention to Sections 4 and 5 of the Code of Criminal Procedure, 1973 and submitted that entries in List-III, namely, Concurrent List should also be noted and taken into consideration by us. He submits that as far as the Concurrent List is concerned, both the Parliament and

the State can make laws. He submits that Entry-1 in the concurrent list is entitled "Criminal Law including all matters included in the Indian Penal Code at the commencement of the Constitution, but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power". Entry-2 in the Concurrent List deals with criminal procedure including all matters included in the Code of Criminal Procedure at the commencement of the Constitution of India. Thus, Sections 4 and 5 of the Code of Criminal Procedure, 1973 carve out an exception and it is not as if there cannot be any law in the field providing for investigation and prosecution of specified offences other than the Code of Criminal Procedure, 1973. If any law in the field provides for investigation and prosecution in the manner other than laid down in the Code of Criminal Procedure, 1973, then, to that extent the Code of Criminal Procedure, 1973 becomes inapplicable. Mr. Setalwad submits that these sections would show that the NIA Act overrides the ordinary law. He submits that as far as Section 4 of the Code of Criminal Procedure, 1973 is concerned that provides for trial of offences under the Indian Penal Code and other laws. Sub-section (1) thereof provides that all offences under the Indian Penal Code shall be investigated, inquired into and tried and otherwise dealt with according to the provisions hereinafter contained. Sub-section (2) is in the nature of exception and states that all offences under other laws shall be investigated, inquired into and tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. Mr. Setalwad laid special emphasis on sub-section (2) of Section 4 of the Code of Criminal Procedure, 1973 and submitted that the offences under any other laws can be investigated, inquired and tried and otherwise dealt with by any enactment for the time being in force regulating the manner and place of the same and which enactment can be other than the Code of Criminal Procedure, 1973.

50. Section 5 of the Code of Criminal Procedure, 1973 enacts the saving clause and states that nothing in the Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force or any special jurisdiction or power conferred or any special form of procedure prescribed by any other law for the time being in force. Therefore, the Code of Criminal Procedure, 1973 has to contain a specific provision to the contrary and which would affect any special or local law for the time being in force or any special jurisdiction or power conferred by other law for the time being in force. Mr. Setalwad submits that Mr. Jethmalani has failed to point out any provision in the Code of Criminal Procedure, 1973 which would affect the special law, namely, NIA Act. These arguments of Mr. Setalwad are premised on the fact that the NIA Act is a special law insofar as investigation and prosecution of the scheduled offences. Mr. Setalwad submits that all provisions of the Code of Criminal Procedure, 1973 save and except to the extent indicated in the NIA Act would

apply. As long as there are exceptions and to the contrary then the Code of Criminal Procedure, 1973 would have to give way to the NIA Act and which is a later Act. The Parliament is presumed to be aware of existence of the Code of Criminal Procedure, 1973 and all provisions in the same dealing with inquiry, investigation and trial. In these circumstances to urge that the Parliament is incompetent to carve out exceptions from the Code of Criminal Procedure, 1973 and make a special law for investigation and prosecution of the scheduled offences, would not be correct reading of the constitutional scheme and particularly dealing with legislative powers of the Parliament and the State Legislature. The Parliament has that freedom and it can override the authority of the State to a limited extent, but even that issue will not arise once the wide wording of the entries in the concurrent list is taken into consideration. Hence, there is no substance in the first contention of Mr. Jethmalani.

51. Mr. Setalwad submits that there is no force in the alternate submission as well. He submits that Section 6 of the NIA Act is a valid piece of legislation. It does not violate the mandate of Articles 14 and 21 of the Constitution of India. Section 6 was necessary because the manner in which investigations have to be handed over to the NIA had to be spelled out or else the enactment would not be complete. Sub-section (1) of Section 6 of the NIA Act provides for forwarding a report to the State Government by the officer in charge of the Police Station after he records the information in relation to the scheduled offences in exercise of his powers u/s 154 of the Code of Criminal Procedure, 1973. After the State Government receives the report from the officer in charge of the Police Station, then in terms of sub-section (2) of Section 6, the State Government can forward a report to the Central Government as expeditiously as possible. On receipt of report from the State Government, the Central Government shall determine on the basis of information made available by the State Government or received from other sources, within 15 days from the date of receipt of the report, whether the offence is a scheduled offence or not and also whether having regard to the gravity of the offence and other relevant factors, it is a fit case to be investigated by the Agency. Mr. Setalwad submits that there is inbuilt guidance for exercise of powers by the Central Government inasmuch as sub-section (3) of Section 6 of the NIA Act itself makes reference to gravity of offence and other relevant factors. Therefore, having regard to the gravity of the offence and other relevant factors, the Central Government has to determine whether the case is fit enough to be investigated by the NIA. It is not as if the power would be exercised as a matter of course or for the asking or on mere receipt of a report. After receipt of the report from the State Government and the information received from other sources, the Central Government has to decide as to whether the offence is a scheduled offence or not and if it has to be investigated by the NIA, then, the Central Government must reach such satisfaction and record that having regard to the gravity of the offence and other relevant factors the case is fit to be investigated by the NIA. Sub-section (4) of Section 6 of the NIA Act is, therefore, enabling the Central Government to issue

directions to the Agency to investigate such offences.

52. Mr. Setalwad submits that the NIA Act will have to be read as a whole in the backdrop of the preamble and the statement of objects and reasons. The NIA Act fulfills a salutary purpose. The Act was enacted so as to constitute an investigating agency at the national level to investigate and prosecute the offences affecting the sovereignty, security and integrity of India, security of State, friendly relations with foreign States, etc. Therefore, only in cases of the scheduled offences the NIA can step in. The NIA cannot step in unless the requisite opinion of the Central Government is recorded and in terms of sub-sections of Section 6 of the NIA Act. Therefore, the well settled rule of interpretation that not only all provisions of an enactment have to be read together and harmoniously, but even sub-sections or parts thereof also have to be read together, should be invoked and applied in this case. So applied, all sub-sections of Section 6 will have to be read together and harmoniously. Sub-section (5) of Section 6, therefore, cannot be seen in isolation, but must be construed and interpreted with the aid of other sub-sections because the opinion that the scheduled offence has been committed and which is required to be investigated under the NIA Act so as to enable the Central Government to suo-motu direct the NIA to investigate the said offence, will have to be recorded. That opinion can be recorded only if the Central Government is satisfied that the scheduled offence has been committed and that having regard to its gravity and other relevant factors that it is a fit case to be investigated by the NIA. Sub-section (5) of Section 6 is incorporated so as to enable the Central Government to issue directions to the NIA to investigate the scheduled offence. The exercise of power by the Central Government should not be confined only to a report from the State Government, but it can in a given case and depending upon the facts and circumstances thereof, act independently and without any report of the State Government, provided it is satisfied that the suo-motu power needs to be exercised. That satisfaction must be reached having regard to the gravity of the offence and other relevant factors. Therefore, this power also cannot be said to be arbitrary or vitiated by absence of any guidelines as urged.

53. Mr. Setalwad then submits that if these sub-sections are read in this manner and together with other provisions and sections of the NIA Act, then, it is clear that there is no merit in the contentions of Mr. Jethmalani that Section 6 of the NIA Act violates the mandate of Articles 14 and 21 of the Constitution of India.

54. Mr. Setalwad submits that there cannot be any impediment or hindrance placed in the way of NIA to investigate and prosecute the offence committed under the Acts specified in the Schedule and that power must be held to be absolute. The argument that the NIA will interfere with or impinge upon the investigations already conducted or straightaway brush them aside and commence reinvestigation in all cases, is without any force. The NIA cannot on its own take over investigation and prosecution of the offences under the Acts specified in the Schedule to the NIA Act. It has to act only on directions of the

Central Government. Ultimately, the power to issue directions to the NIA and to take over the investigation will be exercised by the Central Government. The power is conferred in the highest executive functionary of the country. There is a presumption that the Central Government will act fairly, impartially and in best interest of the nation and this presumption will have to be applied and raised in this case. The Central Government will exercise the powers fairly, reasonably and justly bearing in mind the requirement and need of a particular case. It would not exercise the powers without having regard to the gravity of the offence and other relevant factors. It is presumed that the Central Government has interest of the nation in its mind and would take all steps to investigate and prosecute the offences affecting the sovereignty, security and integrity of India, security of State, friendly relations with foreign States, etc. as is clear from the Preamble to the NIA Act. The Central Government cannot be presumed to act irresponsibly, unjustly, unfairly or unreasonably, rather the presumption is vice-versa and otherwise. The presumption is that the power is conferred in the Central Government and it is coupled with a duty to act fairly and responsibly. The power is in the nature of a trust, confidence and faith reposed in the Central Government by public at large and therefore, the Central Government is bound to act in larger public interest and to uphold it. It is the best Judge of the situation and would act in good faith and for public good. It is for the parties alleging bias and malafides on the part of the Central Government to prove and substantiate them. There is constitutional guarantee that in individual cases, the action of the Central Government can be challenged and the exercise can be scrutinized by the superior courts in the country. The nation has an independent judiciary and in every case where there is threat to life and liberty of a person on account of any unfair, unreasonable, arbitrary and malafide direction of the Central Government, then it is open to him to approach these superior courts and invoke the appropriate jurisdiction to redress his grievance and correct the wrong. However, one cannot start with a presumption that the power of the Central Government will be necessarily abused. The possible abuse of power by the Central Government or the repository in which it is conferred, will not enable this Court to strike down Section 6 of the NIA Act as unconstitutional and ultra-vires Articles 14 and 21 of the Constitution of India. That power is unfettered, uncontrolled, uncanalised and unguided is a fallacious submission and not well founded at all. There are competent courts and equally superior courts which will control the exercise of powers by the Central Government and an individual need not fear that his life and liberty would be in jeopardy merely because a direction to investigate is issued in terms of Section 6 of the NIA Act by the Central Government. However, this Court should not place an interpretation which will unduly restrict or put undue fetters on the exercise of powers by the Central Government or the NIA or else that would frustrate the object and purpose of the NIA Act itself.

55. In these circumstances Mr. Setalwad would submit that there is no scope or warrant for the apprehension that whenever the NIA takes over the investigation

in the pending cases, it will ignore the mandate of law or Act in contravention thereof. Ultimately, the term "Code" has been used in Section 6 of the NIA Act itself. That "Code" is defined to mean the Code of Criminal Procedure. Therefore, to start with an assumption that the NIA would go beyond the Code or act in contravention thereof by commencing a denovo investigation or reinvestigation in all cases in which it has been appointed, will not be proper and rather would be unfair. Once there are checks and balances and none can override the authority, power or jurisdiction of the competent court to interfere at appropriate stages, then, this Court should not entertain and take note of the vague and general assumptions or arguments based thereon. That would not be proper and would be a narrow and restricted reading of the NIA Act itself.

56. Alternatively, Mr. Setalwad submitted that the NIA Act is purely procedural in nature constituting an agency for investigation and prosecution of the scheduled offences. The NIA Act does not purport to or create any new offence. There is no vested right in procedure. The Petitioners cannot claim that the offences have to be investigated only by the State Police or they should be tried only by the ordinary courts and in terms of the Code of Criminal Procedure, 1973. They have no vested rights in matters of procedure or in forums for the trial of cases and offences. All that they have is a right of fair trial and that is not put in peril or jeopardy by the subject enactment. In these circumstances to hold that the Central Government will direct the NIA to take over investigation and prosecution of all pending cases relating to the scheduled offences will not be fair, just and proper reading of the statutory provisions. The terms "investigation" and "prosecution" are used in the NIA Act and they have specific legal connotation and meaning and that cannot be ignored in the case at hand. However, there is no right conferred in law in the Petitioners who are accused and they cannot insist on the offence being investigated by a specific agency or they being tried by a specified or particular criminal court. In such circumstances at their instance the provisions need not be struck down.

57. In support of the above submissions, Mr. Setalwad has relied upon the wording of Articles 245, 246, 253 and 355 of the Constitution of India and equally the following decisions:-

- (1) Maganbhai Ishwarbhai Patel etc. Vs. Union of India (UOI) and Another, .
- (2) State of Maharashtra Vs. Bharat Shanti Lal Shah and Others, .
- (3) Rosiline George Vs. Union of India (UOI) and Others, .
- (4) Anant Brahmachari Vs. UOI and Others, .
- (5) National Investigation Agency Chikoti Garden, Begumpet, Hyderabad Vs. Mohmed Anwar Shak and another, .
- (6) Sengol, Charles and K. Kannan Vs. State, .
- (7) Narcotics Control Bureau Vs. Kishan Lal and others, .

- (8) Nirmal Singh Kahlon Vs. State of Punjab and Others, .
- (9) State Represented by Inspector of Police, Chennai Vs. N.S. Ganeswaran, .
- (10) State rep. by Inspector of Police, Vigilance and Anti-Corruption, Tiruchirapalli, Tamil Nadu Vs. V. Jayapaul, .
- (11) Ram Lal Narang Vs. State (Delhi Administration),
- (12) People's Union for Civil Liberties and Another Vs. Union of India (UOI), .
- (13) Kartar Singh Vs. State of Punjab, .
- (14) Sarbananda Sonowal Vs. Union of India (UOI) and Another, .
- (15) Hitendra Vishnu Thakur and Others Vs. State of Maharashtra and Others, .
- (16) Directorate of Enforcement Vs. Deepak Mahajan and another, .

58. Mr. Mariarputham, learned Senior Counsel appearing for the NIA, submitted that challenge to the validity of the NIA Act on the plea that the Parliament lacks legislative competence in view of Entry-2 "Police" in List-II, is without any merit. The answer is in Article 246 of the Constitution of India itself. Any entry in List-II including the entry "police" has to be read subject to all entries in List-I and all entries in List-III. In other words, the scope and content of an entry in List-II would be excluding any subject matter and whatever aspect of any subject matter, that may be covered in any entry in List-I and List-III. Whereas the power of the Parliament to legislate under List-I is notwithstanding anything in List-II and List-III and similarly the power of the Parliament to legislate in relation to a matter in List-III is notwithstanding anything in List-II, in contrast, the power of the State Legislature to legislate on a matter in List-II is subject to entries in List-I and List-III. In other words, the scope of Entry-2 "police" in List-II is excluding all aspects contained in various entries in List-I such as Defence of India, terrorism etc. and more importantly "Criminal Procedure" in List-III. The entry is actually very wide including all matters in the Code of Criminal Procedure i.e. all aspects relating to investigation, consequential prosecution etc. would be within the scope of this entry and as such within the competence of the Parliament.

59. Mr. Mariarputham submitted that the power to create an offence includes within it a power to create the machinery for investigation and prosecution. The Acts specified in the Schedule are the Acts enacted by the Parliament and are creating offences. They are referable to different entries in List-I as shown by the learned Additional Solicitor General. There is no challenge to the validity of any of the Acts in the Schedule and rightly so. Mr. Mariarputham submitted that the Parliament having validly created the offences has the necessary competence to create the machinery for investigation and prosecution of the offences. It is a necessary and incidental power included in the power to create the offences. The Code of Criminal Procedure, 1973, providing for different aspects relating to investigation of offences and their prosecution, itself is a Parliamentary

legislation. Section 6 provides that offences under IPC would be investigated in accordance with the Code of Criminal Procedure, 1973 and also all other offences would be similarly investigated as per the provisions of the Code of Criminal Procedure, 1973 subject to any special enactments regulating it differently. Section 5 is to the effect that the provisions of the Code of Criminal Procedure, 1973 would not affect any special provisions. In other words, the Code of Criminal Procedure, 1973 itself permits investigation of offences created by separate legislations in accordance with special provisions in separate Acts. It is not a requirement of law that all offences shall be either investigated by the local police or as per the provisions of the Code of Criminal Procedure, 1973 only. For instance, the Prevention of Money Laundering Act, 2002 confers power on the officers of the Enforcement Directorate to prosecute the offences under the Act. The Central Excise Act, 1944 confers on the officers of the Department the power of arrest, search and seizure, investigation and prosecution of the offences. Similarly, the Customs Act, 1962 confers the power on the officers of the Department. Under three of the Acts in the Schedule to the NIA Act, namely, the Anti Hijacking Act, 1982, the Suppression of Unlawful Acts Against Safety of Civil Aviation Act, 1982, the Suppression of Unlawful Acts Against Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002, the power is vested in the Central Government to entrust the investigation to any officer of the Central Government.

60. Mr. Mariarputham submitted that assuming the NIA Act was made a part of the Code of Criminal Procedure, 1973 by way of amendments at appropriate places, it would be a valid piece of legislation and merely because it has been enacted as a separate legislation it would not be invalid. Further, assuming the Acts in the Schedule to the NIA Act were placed in a newly created Schedule-III in the Code of Criminal Procedure, 1973 and Section 5A was enacted providing that the offences in Schedule-III would be investigated by a special investigation agency to be set up by the Central Government and they will be tried in a special court, it would be a valid piece of legislation having regard to the scheme of the Code of Criminal Procedure, 1973 and particularly Section 5. Merely because it is enacted as a separate piece of legislation, it cannot be said to be invalid. Mr. Mariarputham submitted that the plea that the Delhi Special Police Establishment Act, 1946 (for short DSPE Act) has a scheme of requiring consent of the State Government for investigation within the territory of the State, does not in any manner render the NIA Act invalid. That a different scheme was adopted in 1946 by the then Federal Legislature has no bearing on the validity of the present legislation. Different schemes may be adopted under different Acts, but what is relevant to be seen is the legislative competence. If the Parliament has legislative competence for enacting a legislation, then, it would have application throughout the territory of India and no consent of the State Government is required. Article 245 of the Constitution of India is very clear in regard to territoriality of a Parliamentary Legislation inasmuch as it provides that the Parliament may make laws for the whole or any part of the Territory of India.

Article 246 may also be seen in this regard.

61. Mr. Mariarputham has then submitted that for the purpose of deciding whether an enactment is ultra vires the legislative power of the Union Parliament, the pith and substance of the Act has to be seen. Applying the said doctrine also, the NIA Act is within the competence of the Union Parliament and valid. The NIA Act does not create any offence by itself. It only provides for creation of machinery for investigation and prosecution of certain offences validly created. In that sense it would squarely fall under Entry-2 in List-III Criminal Procedure. In pith and substance, it would be within the ambit of this entry. This is apart from the fact that the offences themselves being referable to items in List-I in view of Entry-93 in List-I, they would be within the competence of the Union Parliament. The power to create an offence includes within it the power to create the machinery for investigation and prosecution of those offences. In pith and substance it would be covered by this entry also, apart from other entries in List-I as shown by the learned Additional Solicitor General.

62. Mr. Mariarputham submitted that the argument advanced with respect to the validity of Section 6 of the NIA Act including the plea that Section 6 should be read down, cannot be countenanced as there is no challenge to Section 6 or any specific provision of the Act. The challenge is only to the lack of legislative competence and the specific plea is that in view of Entry-2 in List-II "Police", the Union Parliament could not have created the NIA to investigate and prosecute the offences specified in the Schedule. There is no other prayer in the petition and there is no alternative prayer that even if the NIA Act is held to be within the legislative competence of the Union Parliament, any particular provision of the NIA Act is bad for some other reason or unless it is read down in a particular manner, the same is bad in law. That certain submission is made in one of the grounds, is no answer, in the absence of the same being followed up with a specific prayer. Challenge to any provision of the NIA Act cannot be entertained in the absence of specific prayer in this regard in the Writ Petition. Without prejudice to the above submission on the specific issues relating to Section 6, Mr. Mariarputham submitted that the principles for testing the validity of delegated legislation are not applicable to a provision conferring executive power. Section 6 does not delegate power to the executive to legislate. On the other hand the power is conferred on the executive to take action in terms of the provisions of the NIA Act. Section 6 of the NIA Act is not one delegating legislative powers to the executive but one empowering action to be taken and not of delegation. In such a situation, it is not necessary to lay down guidelines. The action taken could be challenged, if it is not in accordance with the provisions of the NIA Act or contravenes any provision of the Constitution of India. In any case, if guidelines are a prerequisite, necessary guidelines are contained in the NIA Act itself inasmuch as it speaks of "having regard to the gravity of offence and other relevant factors" apart from the Preamble and the State of objects and reasons. In regard to "other relevant factors" by the very nature of things, all situations are not capable of being pre-determined. In such matters there should be some

flexibility as situations and circumstances evolve over the years and in the working of the NIA Act. The plea that Section 6 should be read down as there is a possibility of abuse, is not tenable. The validity of an Act cannot be decided on an assumption that the provision may be abused. Similarly, conferment of a power cannot be held to be bad on a plea that it is likely to be abused.

63. Mr. Mariarputham submitted that the allegations in the Writ Petition relating to investigation, relate to different cases which are not the subject matter of the present proceedings. Even in the said cases it cannot be said that there is any wrong doing or abuse of powers on the part of the NIA. Those cases cannot be prejudged in the present proceedings. The apprehension that once investigation of the case is entrusted to NIA, it may not investigate the case as per the requirements of law and may do denovo investigation etc. and therefore, provisions of Section 6 should be read down, is without any basis. In regard to investigation, except where any specific provision has been made in the Acts in the Schedule, the NIA would act in terms of the provisions of the Code of Criminal Procedure, 1973. In any event, the judgment of the Honourable Supreme Court in Vinay Tyagi Vs. Irshad Ali @ Deepak and Others, provides sufficient guidelines and norms for further investigation etc. which would be binding on the NIA and therefore, no specific directions need to be given by this Court. There is no factual foundation in this case warranting any restriction on the investigation. Further, any issue in regard to further investigation has to be raised before the Trial Court and not in a writ petition challenging the validity of the NIA Act where factual disputes cannot be gone into. There cannot be a blanket order as prayed for in prayer clause "C" restraining the NIA from further investigation. That is a matter to be agitated before and adjudicated upon by the Trial Court and a blanket restraint as prayed for would not be granted by this Court.

64. Referring to the judgment of the Honourable Supreme Court in the case of Vinay Tyagi (supra), Mr. Mariarputham submitted that in paragraph 22 of the said judgment, the Honourable Supreme Court has held that the power of further investigation is vested with the executive and it is the continuation of previous investigation. Again in paragraph 31, the Honourable Supreme Court held that the police has the power to conduct further investigation and that the Trial Court also could direct further investigation. In paragraph 15, the Honourable Supreme Court has held that it is a very wide power. The conclusion is to the effect that it is only as a matter of propriety that the police has to seek the permission of the Court to continue further investigation and file supplementary charge sheet. In other words, there is no prohibition in law on further investigation in any case. As a matter of fact in the present case, permission was taken for conducting further investigation. Therefore, this issue does not call for adjudication in the present proceedings.

65. Mr. Mariarputham submitted that the action would be taken under the NIA Act from the date the NIA Act comes into force. Any investigation pending on

that date can be transferred having regard to the provisions of Section 6. It cannot be said that the NIA Act will apply only to offences committed after the coming into force of the NIA Act. Any investigation that is pending in respect of any offences under any of the Acts in the Schedule, could be transferred to the NIA. Such an action would be prospective in nature and it cannot be said that such an action is retrospective in nature. It is prospective application only. No rights of the accused are affected on account of investigation being transferred to the NIA. There is no vested right in an accused that an offence committed by him shall be investigated by a particular agency or only as per the procedure in existence at the time of the commission of the offence. There is nothing in Articles 20 or 21 of the Constitution of India or any other Articles, which guarantees any such right in an accused or renders any transfer of investigation from one agency to another incompetent and invalid. There are no vested rights in procedural matters. For all these reasons, Mr. Mariarputham submitted that the Writ Petitions be dismissed.

66. In support of his above submissions, Mr. Mariarputham has relied upon the following decisions:-

- (1) AIR 1941 47 (Federal Court) .
- (2) A.S. Krishna Vs. State of Madras, .
- (3) Pandit Ukha Kolhe Vs. The State of Maharashtra, .
- (4) Sudhir Chandra Nawn Vs. Wealth-tax Officer, Calcutta and Others, .
- (5) Indu Bhushan Bose Vs. Rama Sundari Debi and Another, .
- (6) Union of India (UOI) Vs. Shri Harbhajan Singh Dhillon, .
- (7) Kerala State Electricity Board Vs. The Indian Aluminium Co. Ltd., .
- (8) Hoechst Pharmaceuticals Ltd. and Others Vs. State of Bihar and Others, .
- (9) I.T.C. Limited Vs. The Agricultural Produce Market Committee and Others,
- (10) Bharat Hydro Power Corpn. Ltd. and Others Vs. State of Assam and Another, .
- (11) Offshore Holdings Pvt. Ltd. Vs. Bangalore Development Authority and Others, .
- (12) Union of India and Another Vs. Delhi High Court Bar Association and Others, .

67. For properly appreciating the rival contentions, a reference will have to be made to some basic facts. The Petitioners in these Writ Petitions are the accused. They are facing trial in criminal case arising out of the C.R. No. 130/2008 lodged at Azad Nagar Police Station, Malegaon on 30.09.2008 alleging offences punishable under Sections 302, 307, 324, 326, 427, 153-A, 120-B of the Indian

Penal Code etc. Once they are accused of such serious offences and are facing trial, we cannot forget that challenge to the constitutional validity of the NIA Act is being raised at their instance. The law is too well settled to require any reiteration and namely that it is not for the accused to decide as to who should investigate and put them to trial. They cannot insist on being investigated by a particular agency or by a particular investigating officer at a particular Police Station. The accused has no right in such matters. In a decision reported in Central Bureau of Investigation and another Vs. Rajesh Gandhi and another, , the Honourable Supreme Court has summarized the principles as follow:-

8. There is no merit in the pleas raised by the first respondent either. The decision to investigate or the decision on the agency which should investigate, does not attract principles of natural justice. The accused cannot have a say in who should investigate the offences he is charged with. We also fail to see any provision of law for recording reasons for such a decision. The notification dated 2.6.1994 is issued by the Government of Bihar (Police Department) by which in exercise of powers u/s 6 of the Delhi Special Police Establishment Act, 1946, Governor of Bihar was pleased to consent and extend the powers and Jurisdiction of the members of the Delhi Special Police Establishment to the whole of the State of Bihar in connection with investigation of the concerned Police Station, on case No. 159 of 9.3.1993 in the District of Dhanbad, under Sections 457, 436, 427, 201 and 120-B, Indian Penal Code and conspiracy arising out of the same and any other offence committed in course of the same. The notification of 26.10.1994 is issued by the Government of India, Ministry of Personnel in exercise of the powers conferred by sub-section (1) of Section 5 read with Section 6 of the Delhi Special Police Establishment Act, 1946 whereby the Central Government with the consent of the State Government of Bihar in their notification dated 2.6.1994 extended the powers and jurisdiction of the members of the Delhi Special Police Establishment to the whole of the State of Bihar for investigation of offences u/s 457, 436, 427 /120-B and 201 I.P.C. and Section 4 of the Prevention Of Damages to Public Property Act, 1984 registered at Dhanbad Police Station, Dhansar, Bihar in their case No. 159 dated 9.3.1933 and any other offences, attempts, abetment and conspiracy in relation to or in connection with the said offence committed in the course of the same transactions or arising out of the same fact or facts in relation to the said case. There is no provision in law under which, while granting consent or extending the powers and jurisdiction of the Delhi Special Police Establishment to the specified State and to any specified case any reasons are required to be recorded on the face of the notification. The learned Single Judge of the Patna High Court was clearly in error in holding so. If investigation by the local police is not satisfactory, a further investigation is not precluded. In the present case the material on record shows that the investigation by the local police was not satisfactory. In fact the local police had filed a final report before the Chief Judicial Magistrate Dhanbad. The report, however, was pending and had not been accepted when the Central Government with the consent of the State

Government issued the impugned notification. As a result, the C.B.I. has been directed to further investigate the offences registered under the said F.I.R. with the consent of the State Government and in accordance with law. u/s 173(8) of the Cr.P.C. 1973 also, there is an analogous provision for further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate.

68. However, Mr. Jethmalani, learned Senior Advocate submits that the accused may not have locus or right in absolute terms, yet they can complain about the investigations being entrusted halfway to another agency on the footing that both the investigations and the trial of the criminal case ought to be fair, just, reasonable and impartial. Mr. Jethmalani submits that that is a facet of Article 21 of the Constitution of India which guarantees life and liberty to the accused. In this behalf, Mr. Jethmalani has relied upon the judgment of the Honourable Supreme Court in the case of Vinay Tyagi Vs. Irshad Ali @ Deepak and Others, read thus:-

47. The scheme of Section 173 of the Code even deals with the scheme of exclusion of documents or statements submitted to the Court. In this regard, one can make a reference to the provisions of Section 173(6) of the Code, which empowers the investigating agency to make a request to the Court to exclude that part of the statement or record and from providing the copies thereof to the accused, which are not essential in the interest of justice, and where it will be inexpedient in the public interest to furnish such statement. The framers of the law, in their wisdom, have specifically provided a limited mode of exclusion, the criteria being no injustice to be caused to the accused and greater public interest being served. This itself is indicative of the need for a fair and proper investigation by the agency concerned.

48. What ultimately is the aim or significance of the expression "fair and proper investigation" in criminal jurisprudence? It has a twin purpose. Firstly, the investigation must be unbiased, honest, just and in accordance with law. Secondly, the entire emphasis on a fair investigation has to be to bring out the truth of the case before the court of competent jurisdiction. Once these twin paradigms of fair investigation are satisfied, there will be the least requirement for the court of law to interfere with the investigation, much less quash the same, or transfer it to another agency. Bringing out the truth by fair and investigative means in accordance with law would essentially repel the very basis of an unfair, tainted investigation or cases of false implication. Thus, it is inevitable for a court of law to pass a specific order as to the fate of the investigation, which in its opinion is unfair, tainted and in violation of the settled principles of investigative canons.

69. In the latest decision in the case of Karan Singh Vs. State of Haryana and Another, , the Honourable Supreme Court has emphasized the need and requirement for fair and impartial investigation of a criminal case in the backdrop of presumption of innocence of the accused. The Honourable Supreme Court

holds thus:-

12. The investigation into a criminal offence must be free from any objectionable features or infirmities which may give rise to an apprehension in the mind of the complainant or the accused, that investigation was not fair and may have been carried out with some ulterior motive. The Investigating Officer must not indulge in any kind of mischief, or cause harassment either to the complainant or to the accused. His conduct must be entirely impartial and must dispel any suspicion regarding the genuineness of the investigation. The Investigating Officer, "is not merely present to strengthen the case of the prosecution with evidence that will enable the court to record a conviction, but to bring out the real unvarnished version of the truth." Ethical conduct on the part of the investigating agency is absolutely essential, and there must be no scope for any allegation of mala fides or bias. Words like "personal liberty" contained in Article 21 of the Constitution of India provide for the widest amplitude, covering all kinds of rights particularly, the right to personal liberty of the citizens of India, and a person cannot be deprived of the same without following the procedure prescribed by law. In this way, the investigating agencies are the guardians of the liberty of innocent citizens. Therefore, a duty is cast upon the Investigating Officer to ensure that an innocent person should not suffer from unnecessarily harassment of false implication, however, at the same time, an accused person must not be given undue leverage. An investigation cannot be interfered with or influenced even by the courts. Therefore, the investigating agency must avoid entirely any kind of extraneous influence, and investigation must be carried out with equal alacrity and fairness irrespective of the status of the accused or the complainant, as a tainted investigation definitely leads to the miscarriage of criminal justice, and thus deprives a man of his fundamental rights guaranteed under Article 21 of the Constitution. Thus, every investigation must be judicious, fair, transparent and expeditious to ensure compliance with the rules of law, as is required under Articles 19, 20 and 21 of the Constitution. (Vide: Babubhai Vs. State of Gujarat and Others,).

70. Mr. Jethmalani would, therefore, submit that not on the point of absolute right or complete locus, but to a limited or minimal extent, this Court can examine the constitutional challenge to the validity of the NIA Act and even at the instance of the present Petitioners. They are not complaining for being put to trial nor are making a grievance on being arraigned as accused, at this stage. All that they are urging is that the Sessions Case arising out of the C.R. is pending. That is pending for long time and duration. Now, when the investigations are concluded, charge sheets are filed and the trial is required to be proceeded further in accordance with law, so also, expeditiously, then, at this belated stage an enactment and statute like the NIA Act has been brought in. That enables the Central Government to direct change of investigating agency or rather taking over the investigations even midway and midstream by the NIA. Such an enactment is drastic in terms and if in exercise of powers conferred by such Act the investigations are taken over now, then, there is serious apprehension that

the said agency, namely, NIA would undertake nothing short of reinvestigation or denovo investigation. It is that apprehension which compels the Petitioners to raise this challenge and therefore, we should not decline to examine it.

71. We are of the opinion that since extensive arguments have been heard by us even on the merits of challenge and from both sides, then, it would not be proper for us not to examine the same. It would also not be proper to decline the request when the issue of the Petitioners' locus and right has not been raised as the only ground to reject this Writ Petition. When the Respondents have also canvassed detailed submissions supporting the constitutional validity of the NIA Act, then, in facts peculiar to this case we are of the view that the issues raised for our consideration need to be examined by us.

(I) Legislative competence of Parliament to enact the NIA Act:-

72. It is, therefore, that we proceed to determine and decide, firstly, as to whether the Parliament was competent to enact the NIA Act. To enable us to decide it, we would have to refer to the NIA Act. It is an Act to constitute an investigating agency at the national level to investigate and prosecute offences affecting the sovereignty, security and integrity of India, security of State, friendly relations with foreign States and offences under Acts enacted to implement international treaties, agreements, conventions and resolutions of the United Nations, its agencies and other international organizations and for matters connected therewith and incidental thereto. The statement of objects and reasons leading to the enactment reads as under:-

The Statement of objects and reasons:-

Over the past several years, India has been the victim of large scale terrorism sponsored from across the borders. There have been innumerable incidents of terrorist attacks, not only in the militancy and insurgency affected areas and areas affected by Left Wing Extremism, but also in the form of terrorist attacks and bomb blasts, etc. in various parts of the hinterland and major cities, etc. A large number of such incidents are found to have complex inter-State and international linkages, and possible connection with other activities like the smuggling of arms and drugs, pushing in and circulation of fake Indian currency, infiltration from across the borders, etc. Keeping all these in view, it has for long been felt that there is need for setting up an Agency at the Central level for investigation of offences related to terrorism and certain other Acts, which have national ramifications. Several experts and Committees, including the Administrative Reforms Commission in its Report, have also made recommendations for establishing such an Agency.

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

proposed to be incorporated in the National Investigation Agency Bill, 2008.

The Bill seeks to achieve the objectives mentioned above.

73. The statement of objects and reasons can be referred at least for the limited purpose of ascertaining the conditions prevailing at the time which actuated the sponsor of the Bill to introduce the same and the extent and urgency of the evil which he sought to remedy. (see M.K. Ranganathan and Another Vs. Government of Madras and Others,). In a further decision of the Honourable Supreme Court reported in Subhash Ramkumar Bind @ Vakil and Another Vs. State of Maharashtra, , this very principle was followed and applied and it was held that the statement of objects and reasons assists the Court in finding out as to the necessity of introduction of the law. (see para 15 at page 276).

74. A perusal of the same would reveal that the Parliament had to step in because of incidents of terrorist attacks not only in the militancy and insurgency affected areas, but the areas affected by Left Wing Extremism and the incidents of bomb blasts and that India has been the victim of large scale terrorism sponsored from across the borders. The terrorist attacks and bomb blasts have occurred throughout India. These incidents were found to have complex inter-State and international linkages. It is, therefore, that the Parliament had to step in to set up an agency at central level for investigation of offences relating to terrorism and certain other acts which have national ramifications.

75. The Constitution of India has carved out the provisions under the heading "Distribution of Legislative Powers" (Part-XI). Article 245 sets out the extent of laws made by the Parliament and by the Legislatures of the States. Article 246 of the Constitution of India reads as follow:-

Article 246: Subject-matter of laws made by Parliament and by the Legislatures of States:-

(1) Notwithstanding anything in clauses(2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").

(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").

(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in the Constitution, referred to as the "State List").

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List.

76. A bare perusal thereof would indicate that the exclusive powers conferred on the Parliament or the State to legislate on a particular matter include the power to legislate in that matter enumerated in the respective Lists.

77. Mr. Jethmalani would argue that VIIth Schedule to the Constitution of India contains List I-Union List and in that one would not find any entry entitled "Police". He submits that it is a subject on which only the State Legislature can make laws. He relies upon Entry-2 in List II entitled "Police (including Railway and Village Police) subject to the provisions of Entry 2A of List I". Mr. Jethmalani submits that the wording of Entry 2A of List I would not enable the Parliament to enact the NIA Act.

78. Entry-2A of List I-Union List reads as under:-

2A. Deployment of any armed force of the Union or any other force subject to the control of the Union or any contingent or unit thereof in any State in aid of the civil power; powers, jurisdiction, privileges and liabilities of the members of such forces while on such deployment.

79. While it is true that this Entry speaks of deployment of any armed force of the Union or any other force subject to the control of the Union or any contingent or unit thereof in any State in aid of the civil power, still we are of the view that there are other entries which would enable the Parliament to step in and legislate. Entry 8 of List I-Union List is entitled "Central Bureau of Intelligence and Investigation". If such Central Bureau of Intelligence and Investigation can be set up by the Parliament, then, we do not see as to how its powers are restricted when it decides to enact a legislation so as to constitute an Investigating Agency at the national level to investigate and prosecute offences affecting the sovereignty, security and integrity of India, security of State, friendly relations with foreign States, etc. This is not akin to setting up a police force. That is covered by Entry 2 of List II i.e. State List.

80. Mr. Jethmalani submits that the NIA Act sets up a police force and that is evident from reading of Entry-2 of the State List and subsection (1) of Section 3 of the NIA Act, 2008. Thus, the argument is that this is nothing but an establishment of another police force. We are unable to accept this argument.

81. A reference to the Police Act, 1861 in sub-section (1) of Section 3 of the NIA Act is only because the Police Act, 1861 enacted on 22.03.1861 is an Act for the regulation of police. There, u/s 2 the entire Police Department under the State Government shall for the purpose of the Police Act, 1861 be deemed to be one police force and shall be formally enrolled and shall consist of such number of officers and men, and shall be constituted in such manner as shall from time to time be ordered by the State Government. Sections 2, 3, 4 and thereafter, Section 5 onwards of the Police Act, 1861 contain the provisions by which the State Government was designated as a supervising or controlling authority of the police force. The provisions of this Act would have posed some difficulties now for the competent Legislature to constitute a NIA in terms of the NIA Act. Therefore,

sub-section (1) of Section 3 of the NIA Act opens with non obstante clause which states that notwithstanding anything in the Police Act, 1861, the Central Government may constitute a special agency to be called the National Investigating Agency for investigation and prosecution of offences under the Acts specified in the Schedule to the NIA Act. It would not have been possible for the Central Government to constitute a special agency for investigation and prosecution of offences under the Acts specified in the Schedule to the NIA Act, unless the sub-section (1) of Section 3 was inserted. There would have been an incongruous and anomalous situation where the scheduled Acts prescribing and carving out offences contain the provisions for investigation and prosecution of the offences under the said Acts by the local Police Station and within the limits of the State. Therefore, to enable the Central Government to set up an agency which would investigate and prosecute offences under the Scheduled Acts despite there being provisions of the above nature in the said Acts, that sub-section (1) of Section (3) and further Sections in Chapter-II of the NIA Act came to be introduced. Further, to enable the NIA to enter the State limits and equally limits of any local Police Station and to investigate the offences under the Acts specified in the Schedule to the NIA Act that non obstante clause and other provisions find place in the NIA Act. There should not be any conflict and confusion with regard to the powers of the State Police and that of the NIA that the provisions clarifying as to when the powers can be exercised to direct the NIA to undertake the investigation and prosecution of the offences, that one finds reference to the Police Act, 1861. Beyond that it is not possible to hold on the strength of the wording of sub-section (1) of Section 3 of the NIA Act or generally by the phraseology of Sections 3 to 5 of the NIA Act that the same is in Pith & Substance constituting or establishing a police force.

82. The then British Government made the Police Act, 1861 on 22.03.1861. However, the Police Act, 1861 is an Act for the regulation of police. The Police Act, 1888 was an Act to amend the law relating to the regulation of police and it extended to whole of India. That contained an identical provision as Section 3 of the NIA Act. For ready reference, Sections 2 and 3 of the Police Act, 1888 may be reproduced:-

2. Constitution of police-forces for special purposes:-

(1) Notwithstanding anything contained in the Madras District Police Act, 1859 (24 of 1959), the Indian Police Act, 1861 (5 of 1861), the Bombay District Police Act, 1890 (Bom. Act 4 of 1890) or any Act relating to the Police in any presidency-town, the Central Government may, by notification in the Official Gazette, create a special police-district embracing parts of two or more States, and extend every part of the said district the powers and jurisdiction of members of a police-force belonging to a State specified in the notification.

(2) Subject to any orders which the Central Government may make in this behalf, members of the said Police-Force shall have, within every part of any State of which any part is included in the said district, the powers, duties,

privileges and liabilities which, as police officers, they have in their own State.

(3) Any member of the police-force whom the Central Government shall generally or specially empower to act under this sub-section may, subject to any orders which the Central Government may make in this behalf, exercise within any State any part of which is included in the said district any of the powers of the officer-in-charge of a police station in that State, and when so exercising any such powers, shall, subject to any such order as aforesaid, be deemed to be an officer-in-charge of a police-station discharging the functions of such an officer within the limits of his station.

(4) A part of a State included in the said district shall not by reason of that inclusion cease, for the purposes of any enactment relating to police, to be part of the State.

3. Employment of police-officers beyond the State to which they belong:-

Notwithstanding anything in any of the Acts mentioned or referred to in the last foregoing section, but subject to any orders which the Central Government may make in this behalf, a member of the police force of any State may discharge the functions of a police-officer in any part of any other State and shall, while so discharging such functions, be deemed to be a member of the police-force of that part and be vested with the powers, functions and privileges and be subject to the liabilities of a police-officer belonging to that police-force.

83. The introduction and the statement of objects and reasons to the Police Act, 1888 read thus:-

Introduction:-

Act 24 of 1859, Act 5 of 1861 and Bombay Act 7 of 1867, which were in force in British India, restricted the employment of police-officers to the presidency, province or place of the police-establishment of which they were members. Even the temporary employment, on an emergency, of police-officers of one province in any part of another province was not permitted which caused great inconvenience. In order to provide for the employment, under the control of one police-authority, of one police force within the limits which were not conterminous with the limits of a Local Administration, the Police Bill was introduced in the Legislature.

Statement of Objects and Reasons:-

Under the provisions of the various Police Acts in force in British India, namely, Act 24 of 1859 and 5 of 1861 and Bombay Act 7 of 1867, the employment of police-officers is restricted to the presidency, province or place of the police-establishment of which they are members. These provisions cause much inconvenience. In the case of a railway system passing through territories under the administration of different Local Governments, they necessitate the employment of a different police-force under the control of a different authority

for each portion of the line which is within the limits of the territories of a different Local Government. On the North Western Railway, for example, there are at present no less than seven different forces of police under the control of various authorities. Again these provisions prevent even the temporary employment, on an emergency, of police-officers of one province in any part of another province. With the object of removing these inconveniences this Bill has been prepared. In order to provide for the employment, under the control of one police authority, of one police force within limits which are not conterminous with the limits of a Local Administration, the Bill empowers the Governor-General in Council to create general police districts embracing parts of two or more provinces and to enroll for service therein a special police force under special police authorities, and it further authorizes the temporary employment of police officers in places beyond the presidency or general police district to which they belong.

84. This Police Act, 1888 was further amended by the Police Act, 1949 and the statement of objects and reasons of that Act also reads as under:-

Introduction:-

Each of the centrally administered area had a separate police force of its own. Owing to the small areas and cadres, the police officers were perforce to continue in the same station or area for a long time and this position was not very satisfactory. To remedy this it became necessary to provide that police officers of centrally administered areas be transferred from one area to another according to the administrative exigencies by creating a common pool of officers and men. To achieve this objective the Police Bill was introduced in the Legislature.

Statement of objects and reasons:-

Each of the centrally administered areas has, at present, a separate police force of its own. Ajmer-Merwara, the Andaman and Nicobar Islands, Coorg and Himachal Pradesh, whose police is in the process of reorganization, has separate cadres of both officers and men. Delhi has a separate cadre of head constables and constables but a common cadre for Assistant Sub-Inspectors and higher ranks with the East Punjab. Owing to the small areas and cadres, the police officers have perforce to continue in the same station or area for a long time and this position is not very satisfactory. To remedy this, it has become necessary to provide that Police Officers of centrally administered areas be transferred from one area to another according to the administrative exigencies by creating a common pool of officers and men which the Chief Commissioner's Provinces may draw upon, thus reducing their dependence upon the Provincial Governments. This common pool of officers may also prove a useful source of supply to the Central Intelligence Bureau in the recruitment of its staff in the lower ranks. As the formation of a common cadre of officers for the police forces in Chief Commissioners' Provinces involves the constitution of a single police force in all

those Provinces under a single Inspector General, this object can be achieved only by enacting new legislation which may take the form either of an amendment to the Indian Police Act of 1861 or of an Independent Act. The latter alternative is considered more suitable for the purpose.

85. Thus, the Police Act, 1949 was enacted to provide for the constitution of a general police district embracing two or more Union Territories and for the establishment of a police force therefor. That is evident by Sections 2 to 7 of this Act. Pertinently, Mr. Jethmalani does not question the competency of the Parliament to make the Act of the above nature and dealing with the police. Therefore, when the Police Act, 1861 was an Act made by the then British Government and it was competent to enact it and thereafter, taking recourse to the further constitutional provisions, this Act came to be amended from time to time, then, mere presence of the entry "police" in List-II will not mean that the NIA Act is an Act to establish and constitute a police force in the garb of an agency called NIA. In these circumstances we are unable to accede to the submission of Mr. Jethmalani that there is any encroachment on the powers of the State to make a law in relation to police and therefore, the Parliament is incompetent to enact the NIA Act.

86. What the argument of Mr. Jethmalani overlooks is that while examining the legislative competence of the Parliament to make a law, what is required to be seen is whether the subject matter falls in the State List with which the Parliament cannot enter. If the law does not fall in the State List, then, the Parliament would have legislative competence to enact a law by virtue of the residuary powers under Article 248 read with Entry 97 of the Union List and it would not be necessary to go into the list whether it falls in entry of the Union List or any concurrent list. Somewhat similar argument was being considered by the Constitution Bench of the Honourable Supreme Court in the case of Naga People's Movement of Human Rights Vs. Union of India (UOI), and the Honourable Supreme Court held as under:-

20. While examining the legislative competence of parliament to make a law what is required to be seen is whether the subject matter falls in the State List which Parliament cannot enter. If the law does not fall in the State List, Parliament would have legislative competence to pass the law by virtue of the residuary powers under Article 248 read with Entry 97 of the Union List and it would not be necessary to go into the question whether it falls under any entry in the Union List or the Concurrent List. [See: Union of India (UOI) Vs. Shri Harbhajan Singh Dhillon, ; S.P. Mittal v. Union of India, 1983 (1) SCR 729 at pp. 769-770: (AIR 1983 SC 1 at pp. 18-19) and Kartar Singh Vs. State of Punjab,]. What is, therefore, required to be examined is whether the subject matter of the Central Act falls in any of the entries in the State List.

87. Mr. Mariarputham, learned Senior Counsel is right in urging that Article 246 of the Constitution of India, which we have reproduced above, speaks of subject matters of laws made by the Parliament and Legislatures of the States. The

Parliament's exclusive power to make laws with respect to any of the matters enumerated in List-I in the VIIth Schedule is set out in clause (1) of Article 246. Clause (2) refers to the Concurrent List, namely, List-III in the VIIth Schedule and in the matters enumerated in List-III, both the Parliament and subject to Clause (1), the Legislature of any State also has power to make laws with respect to any of the matters enumerated in List-III in the VIIth Schedule. Clause (3) states that subject to Clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List-II in the VIIth Schedule. Therefore, there is substance in his argument that Clauses (1) and (2) of Article 246 open with non obstante clause whereas Clause (3) thereof is worded subject to clauses (1) and (2). If one peruses Entry-2 in List-II entitled "police" that is not an entry worded in absolute terms, but it includes Railway and Village Police. But, while including Railway and Village Police, it is subject to provisions of Entry-2A of List-I and it is importantly excluding a entry in List-III, namely, "criminal law and criminal procedure" which are enumerated in Entry 1 and Entry 2 of the Concurrent List and in regard to which both the Parliament and the States can make laws. Therefore, when it comes to defence of India and matters relating to Naval, Military and Air Force, any other Armed Forces of the Union, Atomic Energy and mineral resources, so also, Central Bureau of Intelligence and Investigation, then, in relation to the same the Parliament is not incompetent to make any law. Therefore, assuming that the State has power to make a law in relation to Police, still going by the wide wording of Entry-1 and Entry-2 of List-III, namely, Concurrent List, it is clear that the Parliament is competent to enact the NIA Act, 2008.

88. It is by now well settled that various entries in three lists are not powers of legislation, but fields of legislation. The power to legislate is given by Article 246 and other Articles of the Constitution of India. The entries in the Lists are mere legislative heads and are of an enabling character. They are designed to define and delimit the respective areas of legislative competence of the Union and State Legislatures. They neither impose any implied restrictions on the legislative power conferred by the Article nor prescribe any duty to exercise that legislative power in any particular manner. The language of these Entries should be given the widest scope of which their meaning is fairly capable because they set up a machinery of Government and each general word should be accordingly held to extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it.

89. In these circumstances we are of the view that when in matters of police, the Parliament was not wholly incompetent to enact a law and at least in relation to constitution, establishment and regulation of the police force in Union Territories, then, for the Nation and Country as a whole, it cannot be said to be incompetent to set up a NIA particularly when such agency is restricted to investigation and prosecution of the offences under the Acts specified in the Schedule to the NIA Act. That would mean that an interpretation, which is unduly restrictive of

powers of the Parliament, is placed on the entries in List-I and List-III and particularly in matters of investigation and prosecution of crimes. When the entries in the Concurrent List are so widely worded, then, to hold that the Parliament does not have power to set up an agency, namely, NIA by enacting the NIA Act would be unnecessarily and unduly restricting and fettering the powers of the Parliament.

90. It is also well settled that there is no prohibition against the Legislature enacting a single statute in exercise of powers conferred by several entries in the list which is within its competence. [see *Hari Krishna Bhargav Vs. union of india (UOI) and Another*, and *Union of India (UOI) Vs. Shri Harbhajan Singh Dhillon*,].

91. Further, in case of apparent overlapping between two entries, the doctrine of Pith & Substance has to be applied to find out the true nature and character of the legislation and the entry within which it would fall. The NIA Act does not create any offence by itself. It only provides for creation of a machinery for investigation and prosecution of certain offences and which are carved out in the laws made by the Parliament. Pertinently the Acts in the schedule to the NIA Act are the Acts of the Parliament. They are referable to different entries in List-I. Therefore, if the doctrine of Pith & Substance is applied, the NIA Act would squarely fall under Entry-2 in List-III of the Concurrent List, namely, Criminal Procedure including all matters included in the Code of Criminal Procedure at the commencement of the Constitution. Further, reliance by Mr. Mariarputham on Entry-93 of List-I is also appropriate in the context of competence of the Parliament to enact the NIA Act. If the offences under the Acts specified in the Schedule to the NIA Act, are under the Acts of the Parliament and when the Parliament was competent to create offence under or by virtue of the provisions of the Scheduled Acts, then, all the more those powers would take within their fold and import the power to create a machinery for investigation and prosecution of these offences. Therefore, apart from the entries relied upon by the learned Additional Solicitor General, we find that in addition thereto, Entry-93 also could be taken assistance of.

92. In this regard, a reference can be usefully made to Entry 94 in List-I which is entitled "Inquiries, Surveys and Statistics for the purpose of any of the matters in this List". In a judgment reported in *State of Karnataka Vs. Union of India (UOI) and Another*, , while construing and interpreting this entry, so also, Entry 45 in List-III which is entitled "Inquiries and Statistics for the purposes of any of the matters specified in List-II and List-III", the Honourable Supreme Court held as under:-

65. Entry 94 in List I of exclusively Central subjects of legislation reads as follows:

94. Inquiries, surveys and statistics for the purpose of any of the matters in this list.

It true that matters affecting relations between the Union Government and the State Government are not found mentioned specifically anywhere in the Union

List. It was, therefore, urged that "inquiries" mentioned here, even if they extend beyond surveys and statistics, must, nevertheless, be confined to "matters in this list." It was submitted that such "inquiries" could not embrace the conduct of Ministers exercising governmental powers as such conduct does not fall under any item in the list but should, properly speaking, have found a place in the Chapter on "administrative relations." It was suggested that the Union Government was really trying to exercise a kind of unwarranted disciplinary authority and control over the conduct of Ministers in the States in the performance of governmental functions by setting up a Commission of inquiry—a subject, it is submitted, that could properly be dealt with only as a part of "Constitutional law" and should have found a mention explicitly in some part of our Constitution so as to be unmistakably identifiable there as such control exercisable through the means adopted for it.

72. Item 97 corresponds to the residuary legislative powers of Parliament under Art. 248. It reads as follows:

97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those lists.

It gives effect to Art. 248. No doubt resort to art. 248, read with Item 97 of List I, could not overcome any specific constitutional bar against legislation on investigation of conduct of Ministers of any State Government in the discharge of their duties had there been one. There is certainly no such express and specific bar in our Constitution. And, it is difficult to see how one can arise by some necessary implication of provisions dealing with entirely different topics. There is no indication anywhere in our Constitution that, while enacting the provisions from which we are asked to infer a bar against or limitation upon legislation on such a topic as inquiries, that our Constitution-makers had any such bar or limitation even remotely in their minds. There seems no legal or rational nexus between such a supposed bar or limitation and the subjects dealt with in the articles relied upon. As already indicated above, the Constitution-makers cannot always mention and exhaust every conceivable topic. We think that it is in order to meet precisely such a situation that Art. 248 read with Entry 97 was inserted. Hence, we think that Art. 248 read with Entry 97 of List I will fully cover Section 3 of the Act even if Item 94 of List I does not.

73. Alternatively, Entry 45 of the Concurrent List III of the Seventh Schedule was relied upon on behalf of the Union. This item reads as follows:

45. Inquiries and statistics for the purposes of any of the matters specified in List II or List III.

To fall under Item 45 of List III the topic of inquiry must relate to one of those specified in List II or List III. If neither Items 94 and 97 of List I nor Item 45 of List III which refers to inquiries relating to topics in List II as well, could cover Section 3 of the Act, it would necessarily follow that such an enactment, assuming that Section 3 was meant to cover an inquiry against a State Minister's

conduct in the exercise of powers enjoyed by him by virtue of his office, was not contemplated at all by our Constitution-makers. If such an argument was correct, Section 3 would, on the assumption made, fall entirely outside the legislative competence of both Parliament and State Legislatures because there would be no legislative power conferred upon any Legislature to deal with such a subject as it could not be covered by any entry in any list. Indeed, if we have correctly understood the argument of learned counsel for the plaintiff in the form it finally took, this is precisely what is submitted to us for acceptance. It was contended that this was so because the conduct of governmental affairs by State Governments and their Ministers is subject exclusively to the control by State Legislature and those of the Union Government by Parliament alone by reason of the constitutional provisions we have already examined and explained.

74.

75. To determine whether there is a prima facie case for a criminal offence facts have to be necessarily investigated or inquired into. But, if every type of inquiry and investigation except one by the House of the Legislature of which he is a member is barred, the very first step towards a prosecution for any serious crime would be shut out in limine. No question of any further legal proceedings would arise under any enactment. Such a consequence of the constitutional provisions relied upon by learned counsel for the plaintiff could not, in our opinion, be possibly within the contemplation of our Constitution-makers. Indeed, such a view would clearly violate the express and very salutary provisions of Art. 14.

76. We prefer to infer and hold that the term "inquiries", as used in Item 94 of List I and Item 45 of List III, without any limitations upon their nature or objects, is wide enough to embrace every kind of inquiry, whether a criminal offence by anyone is disclosed or not by facts alleged. Entry 45 in List III must include inquiries to cover allegations against all persons which bring them within the sphere of Entry I of List III relating to criminal law. All that "inquiries" covered by Item 45 require is that they must be "for the purpose of any of the matters specified in List II or List III". The language used-"any of the matters specified"-is broad enough to cover anything reasonably related to any of the enumerated items even if done by holders of ministerial offices in the States. Other subjects will be found in State List II. And, even assuming that neither Entry 94 of List I nor Entry 45 of List III, would cover inquiries against ministers in the States, relating to acts connected with the exercise of ministerial powers, we think that Art. 248, read with Entry 97 of List I, must necessarily cover an inquiry against Ministers on matters of public importance whether the charges include alleged violations of criminal law or not. A contrary view would, in our opinion, have the wholly unacceptable consequence of placing Ministers in State Governments practically above the law. We must lean against an interpretation which has consequences which, had they flowed from an express, enactment of Parliament or of a State Legislature, would have invalidated the provision for conflict with Art. 14.

103. In an earlier part of this judgment, it is held that legislative power to enact a provision such as Section 3 of the Act could be found, in any event, in Art. 248 read with Entry 97 of List I, even if it could possibly be urged that it is not covered by Entries 94 of List I and 45 of List III, which seem to exhaust the three lists in so far as the subject-matters of enquiries are concerned. Learned counsel for the plaintiff tried to introduce some doubts on the ground that there is no specific entry in any of the lists to cover the conduct of Ministers in State Governments in relation to governmental functions. And, it was submitted, reference to subjects specified in the lists would exclude those which are unspecified. It could be urged in reply that, as indicated in *Union of India (UOI) Vs. Shri Harbhajan Singh Dhillon*, a legislative entry only indicates the field of operation of the power, but the sources of ordinary legislative power are to be found in one of the Arts. 245, 246, 247, 248, 249, 250, 252 or 253 of the Constitution, and, so far as the field of operation of the legislative power is concerned, both Entry 94 of List I and Entry 45 of List III are so widely worded as to embrace inquiries touching any of the fields indicated by any of the entries in the lists. A Minister must necessarily exercise governmental powers in relation to one of these fields. It is not necessary to specify which that field is. The field of power to legislate about inquiries is indicated in wide enough terms to make it unnecessary to specify the field, in the law made itself, to which the inquiry must relate. It is enough if the enquiry set up relates to a matter of "public importance". Again, it is not a necessary part of entry in a legislative list, which only roughly indicates a field of legislation, that it must also specify the classes of persons who may be affected by the legislation. That is neither a constitutional nor a reasonable requirement.

104. This Court has already held that overlapping of fields of operation of legislative power does not take away the legislative power. Indeed, as we have said, both Entries 94 of List I and 45 of List III must necessarily be related to a variety of fields of operation of legislative power. And, in any case, even if an inquiry on a matter of "public importance" relates to an unspecified field, it should be covered by Entry 97 of List I itself. Therefore, it is immaterial whether we hold that Entry 97 of List I by itself singly or that entry, read with Entry 94 of List I, could be deemed to cover the field of operation of such legislation. What is material and important is that the three entries-Nos. 94 and 97 of List I and 45 of List III are bound to cover, between them, legislation authorising inquiries such as the one entrusted to the Grover Commission. If the subject of inquiries against ministers in State Governments is not mentioned specifically either in any of the articles of the Constitution or in the legislative lists it does not follow from it that legislation covering such inquiries is incompetent except by means of a constitutional amendment. On the contrary, such a subject would be *prima facie* covered by the wide terms of Art. 248 for the very reason that the Constitution contains no express or implied bar which could curtail the presumably plenary powers of legislation of our Parliament.

105. Once we have located the legislative power in one of the articles of the

Constitution, authorising ordinary legislation by Parliament for inquiries covered by Sec. 3 of the Act, and we find also the appropriate entries in legislative Lists I and III indicating the fields of operation of that legislative power of Parliament, the well recognised principle which would apply and exclude an implied bar against the exercise of that plenary power has been stated by this Court and also by other Courts in Commonwealth countries on several occasions. That principle follows logically from *R v. Burah* (1878) 3 AC 889 which is the locus classicus on the subject. The general principle laid down in *Burah's* case was that once what is conferred upon a Parliament or other Legislature is legislative power its plenary character must be presumed so that, unless the instrument conferring the power to legislate itself contains some express limitation on the exercise of legislative power, the ambit of that power cannot be indirectly cut down by supposed implications. The cases on this subject were comprehensively considered by this Court in *His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala*, where the majority view was that there can be no merely implied limitations on expressly conferred legislative powers. This Court there referred to and adopted the principles laid down in *Burah's* case (*supra*). Palekar J. quoted the following passage from it (in *Kesavananda Bharati's* case at p. 607) (of SCR): (at pp. 1811-12 of AIR):

The established Courts of Justice when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions.

In that case, Judges of this Court also relied upon *Attorney General for the Province of Ontario v. Attorney General for the Dominion of Canada*, 1912 AC 571 where Earl Loreburn had said (at p. 583):

In the interpretation of a completely self-governing Constitution founded upon a written organic instrument such as the British North America Act, if the text is explicit the text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous, as for example when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act."

106.

107. In *Victoria's* case (45 Aus LJR 251) (*supra*) Barwick C.J., although not in entire agreement with the way in which Sir Owen Dixon, C.J., had expressed himself in *West v. Commr. of Taxation (N.S.W.)* (1937) 56 Comm. LR 657 at p. 682 opined that it was only another way of putting what had been consistently

laid down as the principle of interpretation of Constitutions of British self-governing Dominions since *Burah's case* ((1878) 3 AC 889) (*supra*). The passage thus explained was:

..... the principle is that whenever the Constitution confers a power to make laws in respect of a specific subject-matter *prima facie* it is to be understood as enabling the Parliament to make laws affecting the operations of the States and their agencies. The *prima facie* meaning may be displaced by considerations based on the nature or the subject-matter of the power or the language in which it is conferred or on some other provisions in the Constitution.

181. It is clear from these provisions and the general scheme of the Act that a Commission of Inquiry appointed under the Act is a purely fact-finding body which has no power to pronounce a binding or definitive judgment. It has to collect facts through the evidence led before it and on a consideration thereof it is required to submit its report which the appointing authority may or may not accept. There are sensitive matters of public importance which, if left to the normal investigational agencies, can create needless controversies and generate an atmosphere of suspicion. The larger interests of the community require that such matters should be inquired into by high-powered commissions consisting of persons whose findings can command the confidence of the people. In his address in the Lionel Cohen Lectures, Sir Cyril Salmon speaking on "Tribunals of Inquiry" said:

In all countries, certainly in those which enjoy freedom of speech and a free Press, moments occur when allegations and rumours circulate causing, a nation-wide crisis of confidence in the integrity of public life or about other matters of vital public importance. No doubt this rarely happens, but when it does it is essential that public confidence should be restored, for without it no democracy can long survive. This confidence can be effectively restored only by thoroughly investigating and probing the rumours and allegations so as to search out and establish the truth. The truth may show that the evil exists, thus enabling it to be noted (rooted?) out, or that there is no foundation in the rumours and allegations by which the public has been disturbed. In either case, confidence is restored." A police investigation is, at its very best, a unilateral inquiry into an accusation since the person whose conduct is the subject-matter of inquiry has no right or opportunity to cross-examine the witness whose statements are being recorded by the police. Section 8-C of the Act, on the other hand, confers the right of cross-examination, the right of audience and the right of representation through a legal practitioner on the appropriate Government, on every person referred to in S. 8-B and with the permission of the Commission, on any other person whose evidence is recorded by the Commission. Clauses (a) and (b) of S. 8-B refer respectively to persons whose conduct the Commission considers it necessary to inquire into and persons whose reputation, in the opinion of the Commission, is likely to be prejudicially affected by the Inquiry. It is undeniable that the person whose conduct is being inquired into and if he be a Chief Minister

or a Minister, the doings of the Government itself, are exposed to the fierce light of publicity. But that is a risk which is inherent in every inquiry directed at finding out the truth. It does not, however, justify the specious submission that the inquiry constitutes an interference with the executive functions of the State Government or that it confers on the Central Government the power to control the functions of the State executive. After all, it is in the interest of those against whom open allegations of corruption and nepotism are made that they should have an opportunity of repelling those allegations before a trained and independent Commission of Inquiry which is not hide-bound by the technical rules of evidence. "It is only by establishing the truth that the purity and integrity of public life can be preserved" and that is the object which the Commissions of Inquiry Act seeks to achieve.

187. The first question which one must tackle is whether Parliament has the legislative competence to enact the Commissions of Inquiry Act, 1952. This question, in my opinion, is concluded by a judgment of a Constitution Bench of this Court in *Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others*, in which the validity of the very Act was challenged in a matter in which a notification was issued by the Central Government under S. 3 of the Act for inquiring into the affairs of certain companies. It was held by this Court that Parliament had the legislative competence to pass the law under Entry 94 of List I and Entry 45 of List III of the Seventh Schedule of the Constitution. Entry 94 of List I relates to "Inquiries, surveys and statistics for the purpose of any of the matters" in List I, while Entry 45 of List III relates to "Inquiries and statistics for the purposes of any of the matters specified in List II or List III." It is well established that entries in the legislative lists must receive not a narrow or pedantic but a wide and liberal construction and, considered from that point of view, the word "inquiries" which occurs in the two entries must be held to cover the power to pass an Act providing for appointment of Commissions of Inquiry. It is in the exercise of this power that the Parliament has passed the Commissions of Inquiry Act, 1952. Since the power to appoint a Commission to inquire into the conduct of sitting Ministers of State Governments which is comprehended within S. 3(1) of the Act does not offend against the principle of collective responsibility of the State's Council of Ministers or against the privileges of the Legislative Assembly and since it does not also confer on the Central Government the power of control over the State executive, the provision must be held to be a valid exercise of the legislative competence of the Parliament.

188. *Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others*, in so far as it decides that the Commissions of Inquiry Act, 1952 falls within the legislative competence of the Parliament in view of Entry 94 of List I and Entry 45 of List III must, with respect, be affirmed and accepted as good law. I may, however, add that if for any reason it were to appear, which it does not, that these entries do not justify the passing of the Act, the residuary Entry 97 of List I will in any event support the legislative validity of the Act. That entry confers on Parliament the power to legislate on "Any other matter not enumerated in List II or List

III...". Entry 97 is in the nature of a residuary entry and the words "Any other matter" which appear therein mean "Any matter other than those enumerated in List I." If Entry 94 does not cover the impugned Act, "Inquiries" of the nature contemplated by the Act, will fall within the description "Any other matter"; and if Entry 45 of List III and, admittedly, the whole of the State List are to be kept out of consideration, the Act will relate to "a matter not enumerated in List II or List III". Shri Sinha objected to recourse being had to Entry 97 of List I on the ground that it cannot, any more than other entries in Lists I and III, confer on Parliament the power to make a law vesting in the Central executive. That contention having been rejected, Entry 97 will in any event sustain the legislative validity of the Act.

189. It is unnecessary to consider the implications of Art. 248 because that may require an examination of the question, which is needless here in view of the decision in *Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others*, , whether that article confers power which is not to be found in Art. 246(1) read with Entry 97 of List I and whether an affirmative answer to this question will render Entries 1 to 96 of List I otiose. One, may sum up the discussion on the question of Parliament's legislative competence by stating that adopting "the construction most beneficial to the widest possible amplitude" of powers conferred by the Constitution and interpreting the legislative entries in "a broad and liberal spirit", the impugned Act cannot be held to suffer from want of legislative competence in the Parliament to enact it. Entry 94 of List I, Entry 97 45 of List III and failing these, Entry 97 of List I must sustain the Act.

223. But in order to appreciate as to whether the Act or the action taken by the Centre under S. 3 thereof has gone against the Constitution either expressly or by necessary implication, one has to appreciate the nature of the provisions made and the scope and functions of the Commission in question. The extent of the executive power of the Union is co-extensive with the legislative power of the Parliament. The position in respect of the executive power of the State is identical (vide Arts. 73 and 162 respectively). Entry 94 in the Union List empowers the parliament to legislate concerning inquiries for the purpose of any of the matters in that List, that is to say, if any kind of inquiry is necessary for any kind of purpose connected with any of the matters in List I then the Parliament is empowered to make a law for the setting up of a machinery or a Tribunal for the purpose of the said inquiry. List II does not contain any such entry. Then comes Entry 45 in List III which has already been alluded to. This authorises both the Central and the State Legislatures, of course subject to the other provisions of the Constitution e.g. Art. 254, to enact law for the purpose of providing for the machinery of inquiry for the purpose of any of the matters specified in List II and List III. It has been so held in the case of *Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others*, where Das C.J. has lucidly discussed the matter, if we say so with great respect, at pp. *Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others*, .

224. Empowering the Central Legislature to make a law for the purpose of inquiry in regard to the matters specified in List II is in no sense empowering it to legislate vis-à-vis such matters. It is only for the purpose of achieving the object of the inquiry to be set up in List II. The purpose may be as a matter of policy in relation to the legislation proposed to be passed by the various States or may be with regard to their executive actions taken apropos such matters. We may just illustrate our view by referring to Entry 6 of List II. The State Legislature has the exclusive authority to legislate on "public health and sanitation; hospitals and dispensaries"; of course, within the territory of that State. The executive power being co-extensive, the hospitals may be established and doctors appointed therein by the State Government either in accordance with the law made in that regard or even in pure exercise of the executive power. If there has been corruption, nepotism, favouritism or maladministration in connection with the said executive action of the State Government, the law made under Entry 45 of the Concurrent List can undoubtedly cover an inquiry in such matters. It neither interferes with the legislative power of the State nor with its executive action. A mere inquiry under the Act by a Commission appointed thereunder which is a fact-finding body, is for the purpose of finding the facts. No body is a prosecutor; no body is an accused; all are invited and welcomed by the Commission to assist it to find the necessary facts within the scope of the inquiry set up.

225. In passing we may also refer to Entry 8 of List I in the Seventh Schedule to the Constitution. It is in respect of "Central Bureau of Intelligence and Investigation". The Central Parliament is therefore competent to legislate on this topic and the Central Government can make an executive order asking the Central Bureau of Intelligence and Investigation to make any enquiry in relation to the acts of commission and omission whether amounting reasonably to say that the Commission appointed by the Central Government under the Act cannot be appointed for finding facts in relation to the allegations made against the Minister of a State? Obviously not.

93. In this regard, reliance placed by the learned Additional Solicitor General on a judgment of the Honourable Supreme Court in the case of People's Union for Civil Liberties and Another Vs. Union of India (UOI), , is apposite. The Honourable Supreme Court held thus:-

9. Terrorist acts are meant to destabilize the nation by challenging its sovereignty and integrity, to raze the constitutional principles that we hold dear, to create a psyche of fear and anarchism among common people, to tear apart the secular fabric, to overthrow democratically elected government, to promote prejudice and bigotry, to demoralize the security forces, to thwart the economic progress and development and so on. This cannot be equated with a usual law and order problem within a State. On the other hand, it is inter-state, international or cross-border in character. Fight against the overt and covert acts of terrorism is not a regular criminal justice endeavour. Rather it is defence of our

nation and its citizens. It is a challenge to the whole nation and invisible force of Indianness that binds this great nation together. Therefore, terrorism is a new challenge for law enforcement. By indulging in terrorist activities organized groups or individuals, trained, inspired and supported by fundamentalists and anti-Indian elements were trying to destabilize the country. This new breed of menace was hitherto unheard of. Terrorism is definitely a criminal act, but it is much more than mere criminality. Today, the government is charged with the duty of protecting the unity, integrity, secularism and sovereignty of India from terrorists, both from outside and within borders. To face terrorism we need new approaches, techniques, weapons, expertise and of course new laws. In the above said circumstances Parliament felt that a new anti-terrorism law is necessary for a better future. This parliamentary resolve is epitomized in POTA.

10. The terrorist threat that we are facing is now on an unprecedented global scale. Terrorism has become a global threat with global effects. It has become a challenge to the whole community of civilized nations. Terrorist activities in one country may take on a transnational character, carrying out attacks across one border, receiving funding from private parties or a government across another, and procuring arms from multiple sources. Terrorism in a single country can readily become a threat to regional peace and security owing to its spillover effects. It is therefore difficult in the present context to draw sharp distinctions between domestic and international terrorism. Many happenings in the recent past caused the international community to focus on the issue of terrorism with renewed intensity. The Security Council unanimously passed resolutions 1368 (2001) and 1373 (2001); the General Assembly adopted resolution 56/1 by consensus, and convened a special session. All these resolutions and declarations inter alia call upon Member States to take necessary steps to "prevent and suppress terrorist acts" and also to "prevent and suppress the financing of terrorist acts." India is a party to all these resolves. Anti-terrorism activities in the global level are mainly carried out through bilateral and multilateral co-operation among nations. It has thus become our international obligation also to pass necessary laws to fight terrorism.

13. Parliament has passed POTA by taking all these aspects into account. The terrorism is not confined to the borders of the country. Cross-border terrorism is also threatening the country. To meet such a situation, a law can be enacted only by Parliament and not by a State Legislature. Piloting the Prevention of Terrorism Bill in the joint session of Parliament on March 26, 2002 Hon"ble Home Minister said:

...The Government of India has been convinced for the last four years that we have been here and I am sure even the earlier Governments held that terrorism and more particularly, State-sponsored cross border terrorism is a kind of war. It is not just a law and order problem. This is the first factor, which has been responsible for Government thinking in terms of an extraordinary law like POTO.

..So, first of all, the question that I would like to pose to all of you and which we

have posed to the nation is: "Is it just in Jammu and Kashmir an aggravated law and order situation that we are facing or is it really when we say it a proxy war, do we really believe that it is a proxy war?"...But when you have terrorist organizations being trained, financed by a State and it becomes State-sponsored terrorism and all of them are enabled to infiltrate into our country, it becomes a challenge of a qualitatively different nature...

18. Therefore, Rehman Shagoo is distinguishable and cannot be used as an authority to challenge the competence of Parliament to pass POTA. The problems that prevailed in India immediately after independence cannot be compared with the menace of terrorism that we are facing in the twenty first century. As we have already discussed above, the present day problem of terrorism is affecting the security and sovereignty of the nation. It is not State specific but transnational. Only Parliament can make a legislation to meet its challenge. Moreover, the entry "Public Order" in the State List only empowers the States to enact a legislation relating to public order or security insofar as it affects or relates to a particular State. Howsoever wide a meaning is assigned to the Entry "Public Order", the present day problem of terrorism cannot be brought under the same by any stretch of imagination. Thus, Romesh Thaper, Dr. Ram Manohar Lohia and Madhu Limaye (all cited earlier) cannot be resorted to read "terrorism" into "Public Order". Since the Entry Public Order or any other Entries in List II do not cover the situation dealt with in POTA, the legislative competence of Parliament cannot be challenged.

22. Another issue that the Petitioner has raised at the threshold is the alleged misuse of TADA and the large number of acquittals of the accused charged under TADA. Here we would like to point out that this Court cannot go into and examine the "need" of POTA. It is a matter of policy. Once legislation is passed the Government has an obligation to exercise all available options to prevent terrorism within the bounds of the Constitution. Moreover, we would like to point out that this Court has repeatedly held that mere possibility of abuse cannot be counted as a ground for denying the vesting of powers or for declaring a statute unconstitutional. (See: *State of Rajasthan and Others Vs. Union of India and Others*, , *The Collector of Customs, Madras Vs. Nathella Sampathu Chetty and Another*, , *His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala*, ; *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*,).

94. Pertinently, Mr. Jethmalani has not been able to controvert the above legal position by pointing out any decision to the contrary. Apart therefrom, we would proceed on the footing that the legal principles summarized above are binding on us. The decisions of the Honourable Supreme Court proceed on the footing that any incidental transgression on the power of the competent legislature, namely, State Legislature in this case cannot be said to be violative of the constitutional mandate flowing from Article 246 of the Constitution of India. There is sufficient indication to this effect in the constitutional scheme and particularly distribution of legislative powers. The Parliament has power to make laws in respect to any

matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List. [see Article 246(4)]. Further, Article 249 of the Constitution of India also puts in the forefront a matter in the State List which is in the national interest and confers the power on the Parliament to legislate with respect thereto. Further, the constitutional theme going from Article 250 to Article 253 also enables us to hold that the Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body. In such circumstances we are not inclined to accept the contention of Mr. Jethmalani that the Parliament was incompetent to legislate and enact the NIA Act.

95. The matter has been looked by us in very broad and wide perspective and by applying the principles laid down in the decision of the Honourable Supreme Court in the State of Karnataka v/s. Union of India (supra). We have noted not only the entries in List-I, but in List-III and having perused them, we are of the opinion that reading them together and harmoniously would lead us to the conclusion that the Parliament was competent to enact the NIA Act. It cannot be declared as unconstitutional and vitiated for lack of legislative competence in the Indian Parliament.

96. Further, the matter of investigation and prosecution of offence is but a facet of and flows from right to create an offence. A complete regime can be set up in the very Act which creates an offence so that the enactment is complete. Once an offence is created to subserve larger public interest, then, in furtherance thereof the enactment can set out a complete scheme so that the said offence is investigated and prosecuted. A logical extension of the right to create that offence is its investigation and prosecution. That Agency or Agencies can be prescribed for such investigation and prosecution is but part of this wholistic scheme. A competent legislature can, in the very Act creating an offence, provide for a mechanism for investigation and prosecution thereof or make applicable the provisions of a General Law already enacted in that behalf to the investigation and prosecution of the created or new offence. If this is the accepted basis, then, the competent legislature can also enact another law for investigation and prosecution of the newly created offence by a named agency. If both laws are traceable to the powers of such competent legislature as enumerated in the Primary Instrument, namely, a written Constitution, then, that legislature is empowered to enact both laws. In the present case, the Parliament could have either in the Scheduled Acts, while creating the offences, made provisions for investigation and prosecution thereof by applying the General Law (Cr.P.C.) or by making provisions enabling departure from the General Law. If it could have made such provisions in the existing laws under which the offence is created, we fail to see how it is prohibited from making a new law for establishing a Specialized Agency like NIA operating at the National Level and conferring it with wide powers enabling it to investigate and prosecute the newly created and

specific offences. The Parliament could also have, as suggested by Shri Mariarputham learned Senior Counsel, amended the General Law, namely, the Code of Criminal Procedure, 1973 to create and establish the NIA. It is not disputed that the Parliament is competent to amend the law enacted by it and in this case that was permissible because the Acts referred in the Schedule to the NIA Act and the Code of Criminal Procedure, 1973 are made by the Parliament in terms of its powers under the Union List and Concurrent List.

97. If the investigating agencies are set up, but there is no prohibition against the investigations being carried out or handed over to any agency other than a named agency, then, we do not see how by mere change or shifting of the agency the Parliament can be seen as encroaching upon the powers of the State Legislature. Even in matters confined to the State the investigations can be handed over or taken over by a Central Investigation Agency like CBI and in exceptional circumstances. If that does not violate or contravene the constitutional provisions and particularly dealing with distribution of legislative powers, then, all the more the NIA Act cannot be declared as unconstitutional. In other words, by a wholistic approach and harmonious reading of the constitutional provisions and entries in the schedule, it will be permissible to hold that the Parliament was competent to enact the NIA Act, 2008.

(II) Constitutional validity of Section 6 of the NIA Act:-

98. Then, we must deal with the other argument of Mr. Jethmalani that assuming that the Parliament was competent to enact the NIA Act, Section 6 thereof is unconstitutional and ultra-vires Articles 14 and 21 of the Constitution of India. In this regard as well, we must apply the principle of statutory interpretation which is so very well settled, namely, that the Statute must be read as a whole. It must be read and understood in the backdrop of its preamble and the object and purpose it seeks to achieve. No provision or no word must be seen and read in isolation, but all the provisions must be read together and harmoniously so as to make a consistent whole of the enactment. Leaving out or omitting something or reading some provisions not in their entirety or in isolation would do violence to the legislative intent and would not be a proper reading of the statute. Mr. Jethmalani submits that Section 6 is the heart of the present enactment and if that is bad in law, unconstitutional, then, the whole enactment must fall. The doctrine of severance cannot be applied to save the rest of enactment is his submission.

99. We are unable to accept these submissions for more than one reason. Firstly, as is the settled rule of the construction and interpretation, we must see the statute as a whole. So seen and construed in this case, neither there is any substance in the contentions of Mr. Jethmalani that Section 6 is the heart of the statute nor that it is unconstitutional and therefore, the statute as a whole must fall.

100. The NIA Act enables the Central Government to constitute an investigating

agency at the national level to investigate and prosecute offences of the nature referred in the preamble and the statement of objects and reasons. Section 1 thereof is entitled "short title, extent and application" and the Act extends to the whole of India and it applies also to citizens of India outside India, to persons in service of the Government wherever they may be, and to persons on ships and aircrafts registered in India wherever they may be. Section 2 contains definitions and the term "agency" is defined in Section 2(1)(a) to mean the National Investigating Agency constituted u/s 3. The "Code" means the Code of Criminal Procedure, 1973 as per Section 2(1)(b). Then there are definitions of the term "schedule" in Section 2(1)(f) to mean the schedule to the NIA Act and the term "scheduled offence" is defined in Section 2(1) (g) as an offence specified in the Schedule. Then comes a crucial provision in Section 2(1)(i), namely, the words and expressions used but not defined in the NIA Act and defined in the Code shall have the meaning respectively assigned to them in the Code. Section 2(2) is also relevant and which provides that any reference in the NIA Act to any enactment or any provision thereof shall, in relation to an area in which such enactment or such provision is not in force, be construed as a reference to the corresponding law or the relevant provision of the corresponding law, if any, in force in that area.

101. Section 3 falling in Chapter-II provides for constitution of a national investigating agency and reads as under:-

3. Constitution of National Investigation Agency:-

(1) Notwithstanding anything in the Police Act. 1861 (5 of 1861), the Central Government may constitute a special agency to be called the National Investigation Agency for investigation and prosecution of offences under the Acts specified in the Schedule.

(2) Subject to any orders which the Central Government may make in this behalf, officers of the Agency shall have throughout India in relation to the investigation of Scheduled Offences and arrest of persons concerned in such offences, all the powers, duties, privileges and liabilities which police officers have in connection with the investigation of offences committed therein.

(3) Any officer of the Agency of, or above, the rank of Sub-Inspector may, subject to any orders which the Central Government may make in this behalf, exercise throughout India, any of the powers of the officer-in-charge of a police station in the area in which he is present for the time being and when so exercising such powers shall, subject to any such orders as aforesaid, be deemed to be an officer-in-charge of a police station discharging the functions of such an officer within the limits of his station.

102. Once the special agency to be called NIA can be constituted for investigation and prosecution of offences under the Acts specified in the Schedule to the NIA Act, then, it is not possible to agree with Mr. Jethmalani that Section 6 must be seen as a stand alone or a focal provision or heart of the statute. Had

there been no provision empowering constitution of NIA, there would not be any warrant for insertion of Chapter-III in the NIA Act enabling investigation by the NIA. Therefore, Sections 3, 4, 5, 6 to 10 are all matters pertaining to constitution of the NIA and enabling investigation by the NIA. Each section must be, therefore, noted and seen with other and read together, so also, harmoniously. If one reads in this context Section 6, then, it would be consistent with the statutory framework. Section 6 reads as under:-

6. Investigation of Scheduled Offences:-

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

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

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

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

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

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

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

103. A bare perusal thereof would reveal that it is on receipt of information and recording thereof u/s 154 of the Code of Criminal Procedure, 1973 relating to any scheduled offence that the officer-in-charge of Police Station shall forward a report to the State Government forthwith. What is to be done on receipt of a report under sub-section (1) is then provided by sub-section (2). Thus, receipt of information and report to the State Government by the officer in-charge of the Police Station is one step. The second is receipt of a report under sub-section (1)

and thereafter, forwarding that report to the Central Government as expeditiously as possible. Both are thus mandatory. Thereafter, the Central Government shall determine on the basis of the information made available by the State Government or received from other sources within 15 days from the date of receipt of the report, whether, the offence is scheduled offence or not and also having regard to the gravity of the offence and other relevant factors, whether it is a fit case to be investigated by the agency.

104. Thus, sub-section (3) of Section 6 enables the Central Government to take a decision in terms thereof, on receipt of the report from the State Government and the information contained in same or received from other sources, whether the offence is scheduled offence or not and also whether, having regard to the gravity thereof and other relevant factors it is fit enough to be investigated by the NIA.

105. We are not in agreement with Mr. Jethmalani that Section 6 of the NIA Act confers absolutely arbitrary, unbridled and unguided powers. It is his submission that there are no guidelines for exercise of this power, therefore, this power is absolutely unguided, unchecked and unrestricted. That is not the position because it will be necessary for the Central Government to determine for itself by recording its opinion that the offence, which is committed and mentioned in the report from the State Government or with regard to which an information received from other sources, is scheduled offence or not. Merely because it is a scheduled offence, the Central Government will not be in a position to direct that it shall be investigated by the agency. It will have to apply its mind to the gravity of the offence and other relevant factors. "Gravity of the offence and other relevant factors" are not words of inexactitude. They cannot be termed as vague either. The ordinary meaning of the term "grave" is serious. It is also understood as severe, all important, significant, momentous, vital, crucial, critical, dangerous, threatening, hazardous, menacing and a matter of life and death. Therefore, the words in the subsection are indicative of the intent of the Law Makers. They reflect that the offences, being grave and serious, may also have an impact and in relation to the matters enumerated in the Preamble to the NIA Act. The word "gravity" is used advisedly because the scheduled offence is grave enough for the NIA to step in, it is because it is not only grave and serious, but because it has such repercussions and ramifications which affect the sovereignty, security and integrity of India, security of State, friendly relations with foreign States and offences under the Acts enacted to implement international treaties, agreements, conventions and resolutions of the United Nations, its agencies and other international organizations and for matters connected therewith or incidental thereto. Thus, as spelled out in the statement of objects and reasons, if the offences are grave and other relevant factors have to be taken into account it is then alone the Central Government can arrive at and record a satisfaction that it is a fit case to be investigated by the NIA. Thus, there are inbuilt checks and safeguards and it is not as if uncanalized, unbridled or totally arbitrary powers have been conferred in the Central Government by sub-sections (3), (4)

and (5) of Section 6 of the NIA Act.

106. Apart from gravity of offence and other relevant factors, the Central Government will also have to satisfy itself that it is a fit case to be investigated by the agency and then alone it can direct the agency to investigate the said offence. Further, if such satisfaction of the Central Government is vitiated inasmuch as if any order and direction violates the constitutional mandate flowing from Articles 14 and 21, then, depending upon the facts and circumstances of a given case, it would be always open for an aggrieved party to invoke the powers of superior courts, namely, High Courts and the Honourable Supreme Court. Just because the Central Government is conferred with the power to direct that investigation of the scheduled offences be carried out by the NIA that the constitutional mandate is not violated or breached as suggested by Mr. Jethmalani. The powers conferred in the Central Government including suo motu have to be exercised consistent with the object and purpose sought to be achieved by the NIA Act. The powers cannot be exercised merely for the asking or in a routine manner. The powers can be exercised only if the requisite satisfaction is reached and in the manner permissible in law. That satisfaction will have to be recorded and for recording the same, reasons will have to be assigned. It is not as if on receipt of the report from the State Government or information from other sources that the Central Government is obliged to handover the investigation to the NIA or direct the NIA to take over investigation of the scheduled offences. Everything depends upon the facts and circumstances in each case. Once the requisite satisfaction is recorded on both counts as noted above, then the Central Government can direct the agency to investigate the offences. However, before that happens there are pre-checks and balances in the form of recording an opinion and by having regard to the gravity of the offence and other relevant factors. If the power flowing from such provision is exercised for extraneous reasons or by taking into account irrelevant factors or is vitiated by malafides, then, in all such matters, depending upon the facts and circumstances in each case, it could be said that the power is misused or abused. Such abuse or misuse can be corrected at the instance of an aggrieved party by the superior courts under their constitutional and inherent powers. Therefore, by mere conferment of the powers, one cannot assume that there will be misuse or abuse. In this context, it must be remembered that the power is conferred in the highest functionary in the federal set up, namely, Central Government. There is a presumption that the power will be exercised fairly, reasonably and bonafide. That presumption can be rebutted by an aggrieved person and after discharging the burden and proving that it has been misused and abused, then, in an appropriate case the superior courts will exercise their inherent powers and issue prerogative writs so as to prevent such abuse or misuse. However, the burden will be on those who allege such misuse or abuse. So long as the power is conferred in the Central Government and there are inherent and inbuilt checks and balances, then, the provision cannot be declared as unconstitutional and ultra vires Articles 14 and 21 of the Constitution of India.

107. Even if a suo-motu exercise of the above noted power is permitted even then the Central Government is not discharged or relieved from its obligation and duty of recording the requisite opinion and satisfaction. To enable it to exercise the suo motu power as well, the Central Government must have material before it. That the suo motu power is unfettered and will not be guided by sub-sections (3) and (4) of Section 6 of the NIA Act, is not a proper and correct reading of the statute and its scheme. Even for suo motu power to be exercised, the Central Government must have before it some definite material and which would enable it to hold that the offence is scheduled offence and having regard to its gravity and other relevant factors it is fit to be investigated by the NIA. Merely because suo motu power can be exercised without any report from the State Government does not mean that the same can be exercised without any material or information at all. Further, the information that is made available to the Central Government and from varied sources will enable and guide the exercise of the suo motu power, still the Central Government is obliged to record an opinion that the scheduled offence has been committed which is required to be investigated under the NIA Act. That opinion will have to be recorded by taking into consideration the gravity of the offence and other relevant factors. Besides that the Central Government will have to record that it is fit enough to be investigated by the NIA. Therefore, the exercise of suo motu power will also be guided by what has been stated and provided in sub-sections (3) and (4) of Section 6 of the NIA Act. That is the interpretation which will have to be placed on the words "if the Central Government is of the opinion that the scheduled offence has been committed which is required to be investigated under this Act". Once we are of the opinion that even sub-sections or parts of a section or parts of sub-sections have to be read together and harmoniously, then, there is no room for the apprehension voiced by Mr. Jethmalani that the Central Government will exercise suo motu powers vide Section 6(5) by ignoring and brushing aside the mandate flowing from the NIA Act or from sub-sections (3) and (4) of Section 6. To our mind, there are enough provisions in the statute in question which controls the exercise of powers under the same. There is presumption of constitutionality of the statute and not otherwise. It is for a person who alleges unconstitutionality to establish and prove, so also, substantiate his allegations, but in the present case, we find that beyond voicing some apprehensions which have no basis, the Petitioners have miserably failed to prove that Section 6 of the NIA Act is unconstitutional or that it is a stand alone provision. Sections 6 to 10 contained in Chapter-III will have to be read together with Chapter-II and in the light of the preamble and the statement of objects and reasons to the NIA Act. In these circumstances we do not find there is any basis for the submission that Section 6 is unconstitutional.

108. The argument of unconstitutionality is built on the foundation that Section 6 of the NIA Act would enable the Central Government and in turn the NIA to step in and take over the investigations in any pending case and at any stage. It is urged by Mr. Jethmalani that the NIA is indulging in reinvestigation and of at

least two cases. Mr. Jethmalani has relied upon the judgments of the Honourable Supreme Court outlining the difference between "further" and "additional investigation" and "reinvestigation/denovo investigation". Therefore, he submits that the investigation carried out in the pending cases till date would be brushed aside and the NIA would embark upon reinvestigation or denovo investigation in the garb of a fresh investigation. Mr. Jethmalani submits that the Central Government by executive direction cannot direct reinvestigation or denovo investigation and that is a power only conferred in superior courts. In such circumstances when the charge sheet is filed and cognizance is also taken by the competent criminal court of the criminal cases on the basis of the investigation carried out by the Anti Terrorist/Special Squad of the State Police, then, all the more we should not permit the NIA to step in this manner.

109. Mr. Setalwad, however, cautioned that in the garb of such an interpretation, the power of the Central Government to direct suo motu investigation and equally the NIA taking over investigation in the pending cases should not be unduly restricted or curbed. This power is not going to be exercised arbitrarily after the Court has clarified that there are adequate statutory safeguards. In any event it is not going to be exercised except in the cases of scheduled offences. Therefore, Mr. Setalwad submits that the Court should not accept the contention of Mr. Jethmalani and tie the hands of the Central Government or the NIA.

110. Mr. Setalwad distinguished the judgments relied upon by Mr. Jethmalani and submitted that reinvestigation by the same agency is a matter which is dealt with by the Honourable Supreme Court in these judgments. Once the power of investigation is absolute and it is a matter of procedure, then, there is no vested right created in the accused to object to the course permitted by the statute.

111. We see much substance in the contentions of Mr. Setalwad and Mr. Mariarputham has been more emphatic in urging that there is no need to read down Section 6 of the NIA Act as suggested by Mr. Jethmalani because mere possibility of abuse of the power is no ground to give a restrictive meaning and when the words and language of the statute is plain and clear.

112. We have no specific instances and we have refrained from going into the factual aspects because what we find is that ultimately the investigation in a criminal case and in terms of the definition includes all proceedings for collection of evidence, conducted by the Police Officer or any other person other than the Magistrate who is authorized in this behalf. There is no vested right of any person in the matter of procedures and he has only the right of prosecution or defence in the manner prescribed. (See *Anant Gopal Sheorey Vs. The State of Bombay*,).

113. In the case of *Ramesh Kumar Soni Vs. State of Madhya Pradesh*, , the Honourable Supreme Court held as under:-

9. Having said so, we may now examine the issue from a slightly different angle. The question whether any law relating to forum of trial is procedural or substantive in nature has been the subject matter of several pronouncements of

this Court in the past. We may refer to some of these decisions, no matter briefly. In *New India Insurance Co. Ltd. Vs. Smt. Shanti Misra, Adult*, this Court was dealing with the claim of payment of compensation under the Motor Vehicles Act. The victim of the accident had passed away because of the vehicular accident before the constitution of the Claims Tribunal under the Motor Vehicles Act, 1939, as amended. The legal heirs of the deceased filed a claim petition for payment of compensation before the Tribunal after the Tribunal was established. The question that arose was whether the claim petition was maintainable having regard to the fact that the cause of action had arisen prior to the change of the forum for trial of a claim for payment of compensation. This Court held that the change of law operates retrospectively even if the cause of action or right of action had accrued prior to the change of forum. The claimant shall, therefore, have to approach the forum as per the amended law. The claimant, observed this Court, had a "vested right of action" but not a "vested right of forum". It also held that unless by express words the new forum is available only to causes of action arising after the creation of the forum, the general rule is to make it retrospective. The following passages are in this regard apposite:

On the plain language of Sections 110-A and 110-F there should be no difficulty in taking the view that the change in law was merely a change of forum i.e. a change of adjectival or procedural law and not of substantive law. It is a well established proposition that such a change of law operates retrospectively and the person has to go to the new forum even if his cause of action or right of action accrued prior to the change of forum. He will have a vested right of action but not a vested right of forum. If by express words the new forum is made available only to causes of action arising after the creation of the forum, then the retrospective operation of the law is taken away. Otherwise the general rule is to make it retrospective. The expressions "arising out of an accident" occurring in sub-section (1) and "over the area in which the accident occurred", mentioned in sub-section (2) clearly show that the change of forum was meant to be operative retrospectively irrespective of the fact as to when the accident occurred. To that extent there was no difficulty in giving the answer in a simple way. But the provision of limitation of 60 days contained in sub-section (3) created an obstacle in the straight application of the well established principle of law. If the accident had occurred within 60 days prior to the constitution of the tribunal then the bar of limitation provided in subsection (3) was not an impediment. An application to the tribunal could be said to be the only remedy. If such an application, due to one reason or the other, could not be made within 60 days then the tribunal had the power to condone the delay under the proviso. But if the accident occurred more than 60 days before the constitution of the tribunal then the bar of limitation provided in sub-section (3) of Section 110-A on its face was attracted. This difficulty of limitation led most of the High Courts to fall back upon the proviso and say that such a case will be a fit one where the tribunal would be able to condone the delay under the proviso to sub-section (3), and led others to say that the tribunal will have no jurisdiction to entertain such an

application and the remedy of going to the civil court in such a situation was not barred u/s 110-F of the Act. While taking the latter view the High Court failed to notice that primarily the law engrafted in Sections 110-A and 110-F was a law relating to the change of forum.

6. In our opinion in view of the clear and unambiguous language of Sections 110-A and 110-F it is not reasonable and proper to allow the law of change of forum give way to the bar of limitation provided in sub-section (3) of Section 110-A. It must be vice versa. The change of the procedural law of forum must be given effect to. The underlying principle of the change of law brought about by the amendment in the year 1956 was to enable the claimants to have a cheap remedy of approaching the claims tribunal on payment of a nominal court fee whereas a large amount of ad valorem court fee was required to be paid in civil court."

10. In *Hitendra Vishnu Thakur and Others Vs. State of Maharashtra and Others*, , one of the questions which this Court was examining was whether clause (bb) of Section 20(4) of Terrorist and Disruptive Activities (Prevention) Act, 1987 introduced by an Amendment Act governing Section 167(2) of the Cr.P.C. in relation to TADA matters was in the realm of procedural law and if so, whether the same would be applicable to pending cases. Answering the question in the affirmative this Court speaking through A.S. Anand, J. (as His Lordship then was), held that Amendment Act 43 of 1993 was retrospective in operation and that clauses (b) and (bb) of sub-section (4) of Section 20 of TADA apply to the cases which were pending investigation on the date when the amendment came into force. The Court summed up the legal position with regard to the procedural law being retrospective in its operation and the right of a litigant to claim that he be tried by a particular Court, in the following words:

26. xxx xxx

(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.

(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.

(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication.

11. We may also refer to the decision of this Court in *Sudhir G. Angur and Others Vs. M. Sanjeev and Others*, where a three-Judge Bench of this Court approved the decision of the Bombay High Court in *Shiv Bhagwan Moti Ram Saraoji Vs. Onkarmal Ishar Dass and Others*, and observed:

12....It has been held that a Court is bound to take notice of the change in the law and is bound to administer the law as it was when the suit came up for hearing. It has been held that if a Court has jurisdiction to try the suit, when it comes on for disposal, it then cannot refuse to assume jurisdiction by reason of the fact that it had no jurisdiction to entertain it at the date when it was instituted. We are in complete agreement with these observations...

(emphasis supplied)

12. In *Shiv Bhagwan Moti Ram Saraoji's* case (*supra*) the Bombay High Court has held procedural laws to be in force unless the legislatures expressly provide to the contrary. The Court observed:

...Now, I think it may be stated as a general principle that no party has a vested right to a particular proceeding or to a particular forum, and it is also well settled that all procedural laws are retrospective unless the Legislature expressly states to the contrary. Therefore, procedural laws in force must be applied at the date when a suit or proceeding comes on for trial or disposal...

(emphasis supplied)

18. Reference may also be made upon the decision of this Court in *Anant Gopal Sheorey Vs. The State of Bombay*, where the legal position was stated in the following words:

4. The question that arises for decision is whether to a pending prosecution the provisions of the amended Code have become applicable. There is no controversy on the general principles applicable to the case. No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner prescribed for the time being by or for the Court in which the case is pending and if by an Act of Parliament the mode of procedure is altered he has no other right than to proceed according to the altered mode. See *Maxwell on Interpretation of Statutes* on p. 225; *The Colonial Sugar Refining Co. Ltd. v. Irving* (1905) A.C. 369, 372). In other words a change in the law of procedure operates retrospectively and unlike the law relating to vested right is not only prospective.

114. Therefore, when the NIA comes into picture for the purpose of investigation and prosecution of the scheduled offence, then, that very object and purpose will be defeated if one accepts the argument of Mr. Jethmalani on the basis of the

principle of reading down of the statute. Ordinarily, the term "prosecution" signifies the procedure for obtaining the adjudication of a Court of justice with respect to acts and omissions punishable by penal or criminal sanction, as action or suit describes the procedure for obtaining civil remedies for the alleged infraction of civil rights. It is also a judicial proceeding before a Court or legal tribunal. Hence, it is not as if the investigation and for the purpose of prosecution before the competent criminal court will be without any control or supervision of the court. Ultimately, the investigation culminates into filing of a report before the competent criminal court and it is that court which exercises the powers in relation to prosecution of the case. The NIA, therefore, will have to file these reports and in terms of Section 173 of the Code of Criminal Procedure, 1973 in the competent criminal court. It is for that court then to consider the matter. If there is grievance in relation to the investigation that can be voiced before the competent criminal court. If there is abuse of the powers conferred in that behalf, then, that issue can be raised by the aggrieved parties or persons before the competent criminal court. If the competent criminal court does not take cognizance thereof and refuses to redress that grievance, then, the jurisdiction of superior courts can always be invoked. Thus, there is control on the power to investigate and prosecute and none including the NIA can ignore that position in law. Ultimately, the competent criminal court will have an opportunity not only to peruse the reports of the investigation, but consistent with the law and equally procedure the reports would be accepted or otherwise by the competent criminal court. In all such matters, therefore, the jurisdiction and authority of the competent criminal courts and equally that of superior courts cannot be said to be taken away. Thus, there is no warrant for reading down the provision in question and once the settled principle of harmonious construction is applied.

115. We will be failing in our duty if we do not notice the legal principles in this regard. In the case of Ashok Kumar Todi Vs. Kishwar Jahan and Others, , the Honourable Supreme Court held thus:-

23) Section 2(h) of the Code defines investigation which reads as under:

(h) "investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf.

Under the scheme of the Code, investigation commences with lodgment of information relating to the commission of an offence. If it is a cognizable offence, the officer-in-charge of the police station, to whom the information is supplied orally has a statutory duty to reduce it to writing and get the signature of the informant. He shall enter the substance of the information, whether given in writing or reduced to writing as aforesaid, in a book prescribed by the State in that behalf. The officer-in-charge has no escape from doing so if the offence mentioned therein is a cognizable offence and whether or not such offence was committed within the limits of that police station. But when the offence is non-cognizable, the officer-in-charge of the police station has no obligation to record

it if the offence was not committed within the limits of his police station. Investigation thereafter would commence and the investigating officer has to go step by step. The Code contemplates the following steps to be carried out during such investigation:

(1) Proceeding to the spot; (2) ascertainment of the facts and circumstances of the case; (3) discovery and arrest of the suspected offender; (4) collection of evidence relating to the commission of the offence which may consist of--(a) the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit, (b) the search of places or seizure of things considered necessary for the investigation and to be produced at the trial; and (5) formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and, if so, to take necessary steps for the same by the filing of a charge-sheet u/s 173. [Vide H.N. Rishbud and Inder Singh Vs. The State of Delhi, ; The State of Madhya Pradesh Vs. Mubarak Ali, and Navinchandra N. Majithia Vs. State of Meghalaya and Others,].

24. When the final report is laid after conclusion of the investigation, the Court has the power to consider the same and issue notice to the complainant to be heard in case the conclusions in the final report are not in concurrence with the allegations made by them. Though the investigation was conducted by the CBI, the provisions under Chapter XII of the Code would apply to such investigation. The police referred to in the Chapter, for the purpose of investigation, would apply to the officer/officers of the Delhi Police Establishment Act. On completion of the investigation, the report has to be filed by the CBI in the manner provided in Section 173(2) of the Code. [Vide Hemant Dhasmane Vs. Central Bureau of Investigation and Another,].

116. This legal position was reiterated in the case of Narmada Bai Vs. State of Gujarat and Others, . The Bench in both judgments comprised of the same Honourable Judges. Paragraph 38 of the judgment in Narmada Bai reiterates the same legal position. In a latest judgment reported in Samaj Parivartan Samudaya and Others Vs. State of Karnataka and Others, the Honourable Supreme Court held as under:-

18. Once the investigation is conducted in accordance with the provisions of the CrPC, a police officer is bound to file a report before the Court of competent jurisdiction, as contemplated u/s 173 CrPC, upon which the Magistrate can proceed to try the offence, if the same were triable by such Court or commit the case to the Court of Sessions. It is significant to note that the provisions of Section 173(8) CrPC open with non-obstante language that nothing in the provisions of Section 173(1) to 173(7) shall be deemed to preclude further investigation in respect of an offence after a report under sub-Section (2) has been forwarded to the Magistrate. Thus, u/s 173(8), where charge-sheet has been filed, that Court also enjoys the jurisdiction to direct further investigation into the offence. {Ref., Hemant Dhasmane Vs. Central Bureau of Investigation

and Another, }. This power cannot have any inhibition including such requirement as being obliged to hear the accused before any such direction is made. It has been held in Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwandadha Maharaj Vs. State of Andhra Pradesh and Others, that the casting of any such obligation on the Court would only result in encumbering the Court with the burden of searching for all potential accused to be afforded with the opportunity of being heard.

19. While the trial Court does not have inherent powers like those of the High Court u/s 482 of the CrPC or the Supreme Court under Article 136 of the Constitution of India, such that it may order for complete reinvestigation or fresh investigation of a case before it, however, it has substantial powers in exercise of discretionary jurisdiction under Sections 311 and 391 of CrPC. In cases where cognizance has been taken and where a substantial portion of investigation/trial have already been completed and where a direction for further examination would have the effect of delaying the trial, if the trial court is of the opinion that the case has been made out for alteration of charge etc., it may exercise such powers without directing further investigation. {Ref. Sasi Thomas Vs. State and Others, }. Still in another case, taking the aid of the doctrine of implied power, this Court has also stated that an express grant of statutory power carries with it, by necessary implication, the authority to use all reasonable means to make such statutory power effective. Therefore, absence of statutory provision empowering Magistrate to direct registration of an FIR would not be of any consequence and the Magistrate would nevertheless be competent to direct registration of an FIR. {Ref. Sakiri Vasu Vs. State of U.P. and Others, }.

20. Thus, the CrPC leaves clear scope for conducting of further inquiry and filing of a supplementary charge sheet, if necessary, with such additional facts and evidence as may be collected by the investigating officer in terms of sub-Sections (2) to (6) of Section 173 CrPC to the Court.

25. The Court is vested with very wide powers in order to equip it adequately to be able to do complete justice. Where the investigating agency has submitted the charge sheet before the court of competent jurisdiction, but it has failed to bring all the culprits to book, the Court is empowered u/s 319 Cr.P.C. to proceed against other persons who are not arrayed as accused in the chargesheet itself. The Court can summon such suspected persons and try them as accused in the case, provided the Court is satisfied of involvement of such persons in commission of the crime from the record and evidence before it.

32. A suspect has no indefeasible right of being heard prior to initiation of the investigation, particularly by the investigating agency. Even, in fact, the scheme of the Code of Criminal Procedure does not admit of grant of any such opportunity. There is no provision in the CrPC where an investigating agency must provide a hearing to the affected party before registering an FIR or even before carrying on investigation prior to registration of case against the suspect. The CBI, as already noticed, may even conduct pre-registration inquiry for which

notice is not contemplated under the provisions of the Code, the Police Manual or even as per the precedents laid down by this Court. It is only in those cases where the Court directs initiation of investigation by a specialized agency or transfer investigation to such agency from another agency that the Court may, in its discretion, grant hearing to the suspect or affected parties. However, that also is not an absolute rule of law and is primarily a matter in the judicial discretion of the Court.....

33. In the case of Narmada Bai Vs. State of Gujarat and Others, , this Court was concerned with a case where the State Government had objected to the transfer of investigation to CBI of the case of a murder of a witness to a fake encounter. The CBI had already investigated the case of fake encounter and submitted a charge sheet against high police officials. This Court analyzed the entire law on the subject and cited with approval the judgment of the Court in the case of Rubabbuddin Sheikh Vs. State of Gujarat and Others, . In that case, the Court had declared the law that in appropriate cases, the Court is empowered to hand over investigation to an independent agency like CBI even when the charge-sheet had been submitted. In the case of Narmada Bai, the Court had observed that there was a situation which upon analysis of the allegations it appeared that abduction of Sohrabuddin and Kausarbi their subsequent murder as well as the murder of the witnesses are one series of facts and was connected together as to form the same transaction u/s 220 of the Code of Criminal Procedure and it was considered appropriate to transfer the investigation of the subsequent case also to CBI.

36. Now, we shall proceed on the assumption that the illegalities, irregularities and offences alleged to have been committed by the affected parties are the subject matter, even in their entirety, of previous investigation cases, sub-judice before various Courts including the writ jurisdiction of the High Court. It is a settled position of law that an investigating agency is empowered to conduct further investigation after institution of a charge-sheet before the Court of competent jurisdiction. A magistrate is competent to direct further investigation in terms of Section 173(8) Cr.P.C. in the case instituted on a police report. Similarly, the Magistrate has powers u/s 202 Cr.P.C. to direct police investigation while keeping the trial pending before him instituted on the basis of a private complaint in terms of that Section. The provisions of Section 210 Cr.P.C. use the expression "shall" requiring the Magistrate to stay the proceedings of inquiry and trial before him in the event in a similar subject matter, an investigation is found to be in progress. All these provisions clearly indicate the legislative scheme under the Cr.P.C. that initiation of an investigation and filing of a chargesheet do not completely debar further or wider investigation by the investigating agency or police, or even by a specialized investigation agency. Significantly, it requires to be noticed that when the court is to ensure fair and proper investigation in an adversarial system of criminal administration, the jurisdiction of the Court is of a much higher degree than it is in an inquisitorial system. It is clearly contemplated under the Indian Criminal Jurisprudence that an investigation

should be fair, in accordance with law and should not be tainted. But, at the same time, the Court has to take precaution that interested or influential persons are not able to misdirect or hijack the investigation so as to throttle a fair investigation resulting in the offenders escaping the punitive course of law. It is the inherent duty of the Court and any lapse in this regard would tantamount to error of jurisdiction.

37. In the case of Rama Chaudhary Vs. State of Bihar, , this Court was considering the scope of Sections 173(8), 173(2) and 319 of the CrPC in relation to directing further investigation. The accused raised a contention that in that case, report had been filed, charges had been framed and nearly 21 witnesses had been examined and at that stage, in furtherance to investigation taken thereafter, if a supplementary charge-sheet is filed and witnesses are permitted to be summoned, it will cause serious prejudice to the rights of the accused. It was contended that the Court has no jurisdiction to do so. The Trial Court permitted summoning and examination of the summoned witnesses in furtherance to the supplementary report. The order of the Trial Court was upheld by the High Court. While dismissing the special leave petition, a Bench of this Court observed:

14. Sub-section (1) of Section 173 CrPC makes it clear that every investigation shall be completed without unnecessary delay. Sub-section (2) mandates that as soon as the investigation is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government mentioning the name of the parties, nature of information, name of the persons who appear to be acquainted with the circumstances of the case and further particulars such as the name of the offences that have been committed, arrest of the accused and details about his release with or without sureties.

15. Among the other sub-sections, we are very much concerned about sub-section (8) of Section 173 which reads as under:

173. (8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2).

A mere reading of the above provision makes it clear that irrespective of the report under subsection (2) forwarded to the Magistrate, if the officer in charge of the police station obtains further evidence, it is incumbent on his part to forward the same to the Magistrate with a further report with regard to such evidence in the form prescribed. The abovesaid provision also makes it clear that

further investigation is permissible, however, reinvestigation is prohibited.

16. The law does not mandate taking of prior permission from the Magistrate for further investigation. Carrying out a further investigation even after filing of the charge-sheet is a statutory right of the police. Reinvestigation without prior permission is prohibited. On the other hand, further investigation is permissible.

18. Sub-section (8) of Section 173 clearly envisages that on completion of further investigation, the investigating agency has to forward to the Magistrate a "further" report and not a fresh report regarding the "further" evidence obtained during such investigation.

19. As observed in *Hasanbhai Valibhai Qureshi Vs. State of Gujarat and Others*, the prime consideration for further investigation is to arrive at the truth and do real and substantial justice. The hands of the investigating agency for further investigation should not be tied down on the ground of mere delay. In other words

[t]he mere fact that there may be further delay in concluding the trial should not stand in the way of further investigation if that would help the court in arriving at the truth and do real and substantial as well as effective justice.

38. Reference can also be made to the judgment of this Court in the case of *National Human Rights Commission Vs. State of Gujarat and Others*, wherein the Court was dealing with different cases pending in relation to the communal riots in the State of Gujarat and the trial in one of the cases was at the concluding stage. In the meanwhile, in another FIR filed in relation to a similar occurrence, further investigation was being conducted and was bound to have a bearing even on the pending cases. The Court, while permitting inquiry/investigation, including further investigation, completed stayed the proceedings in the Trial Court as well and held as under:

10. We make it clear that SIT shall be free to work out the modalities and the norms required to be followed for the purpose of inquiry/investigation including further investigation. Needless to say the sole object of the criminal justice system is to ensure that a person who is guilty of an offence is punished.

11. Mr. K.T.S. Tulsi, learned Senior Counsel had submitted that in some cases the alleged victims themselves say that wrong persons have been included by the police officials as accused and the real culprits are sheltered. He, therefore, suggested that trial should go on, notwithstanding the inquiry/investigation including further investigation as directed by us. We find that the course would not be appropriate because if the trial continues and fresh evidence/materials surface, it would require almost a de novo trial which would be not desirable.

117. If in the garb of a fresh investigation or additional investigation, the NIA proceeds to reinvestigate or undertakes a denovo investigation, then, it is not as if parties like the Petitioners are remedyless. They can bring to the notice of the competent criminal court all their grievances and complain about the manner in

which the investigation is carried out and extent thereof. They can also seek intervention of the superior courts by approaching them. There is adequate protection and it is not as if the investigations are found to be unfair or partial and improper that the Petitioners or persons similarly situate are prevented from invoking appropriate powers of the competent court. There is a guarantee flowing from the constitutional provisions and particularly of an independent judiciary. So long as this guarantee is intact and the power, authority and jurisdiction of the competent courts are untouched leave alone taken away, we cannot proceed on the footing that the NIA will necessarily brush aside all investigations carried out in the pending cases till date and embark upon reinvestigation necessarily.

118. Similarly, the apprehension of Mr. Jethmalani, that in the pending criminal cases against the Petitioners the NIA without in any manner apprising the competent criminal court has commenced investigation and which jeopardizes their rights, can be taken care of by clarifying that in individual cases all such matters can be brought to the notice of the said court. If the Court refuses to take note of them or passes any order which may amount to infringing the constitutional right of life and liberty or impinging upon it in any manner, then, such orders and directions of the competent criminal court are always open to challenge in the superior or higher courts by invoking their appropriate powers and jurisdiction. All such matters can be brought before the competent court or higher court at an appropriate stage and in appropriate proceedings. Such individual grievances and without proper pleadings and particulars, need not be taken care of by us. They cannot be relevant and germane factors while considering the challenge to the constitutional validity of the NIA Act. Suffice it to indicate that such apprehensions of possible abuse of powers by the authorities will not enable us to hold that the Act is, in any way, unconstitutional or a particular provision, namely, Section 6 violates the constitutional mandate of Articles 14 and 21 of the Constitution of India. It is well settled that wherever and whenever the State fails to perform its duties, the Court shall step in to ensure that Rule of Law prevails over the abuse of the process of law. Such abuse may result from inaction or even arbitrary action of protecting the true offenders or failure by different authorities in discharging statutory or legal obligations in consonance with the procedural and penal statutes. (See paragraph 44 at page 2341 of the judgment in *Samaj Parivartan* (supra)).

119. Mr. Jethmalani's argument overlooks the fact that the NIA Act does not rule out applicability of the Code of Criminal Procedure, 1973 in totality. It applies except indicated and provided to the contrary in the NIA Act, 2008. Once the Code is referred to in Section 2(1)(b) of the NIA Act to mean the Code of Criminal Procedure, 1973 and there is every indication in the Act itself that the investigation and prosecution of the offences under the Acts specified in the Schedule to the NIA Act will have to be carried out by the NIA in terms of the powers conferred by the Code, then, we do not see how Mr. Jethmalani can urge that the NIA will necessarily flout the requisite provisions of the Code of Criminal

Procedure, 1973 in relation to investigation and prosecution. There is no warrant for the apprehension that Section 173 of the Code of Criminal Procedure, 1973 would be brushed aside by the NIA or competent criminal court. Save and except, there is a departure made in the NIA Act and in specific matters, the Code continues to apply. In these circumstances we do not see how any argument based on individual cases or generally complaining of violation of Section 173 of the Code of Criminal Procedure, 1973 can be taken note of.

120. Lastly, the argument built on the provisions of the Delhi Special Police Establishment Act, 1946 (for short DSPE Act) is entirely misplaced. Firstly, that Act cannot be said to be comparable in all respects with the NIA Act. That is an Act to make provisions for the constitution of a special police force in Delhi for the investigation of certain offences in the Union Territories, for the superintendence and administration of the said force and for the extension to other areas of the power and jurisdiction of the members of the said force in regards to the investigation of the said offences. Thus, the DSPE Act constitutes the Delhi Special Police Establishment. It also contains identical provisions as Section 5 of the NIA Act. (see Sections 2 and 3 of the DSPE Act).

121. By virtue of the enactment of the Central Vigilance Commission Act, 2003, certain provisions of the DSPE Act had to be amended and that is how superintendence and administration of this Special Police Establishment vests in the Central Government. Thereafter, by Section 5, the DSPE Act can be extended by the Central Government to any area including railway areas in a State, not being a Union Territory for investigation of any offences or classes of any offences specified in a notification u/s 3. Pertinently, a reference to this Act by Mr. Jethmalani would falsify his argument about the NIA Act enabling taking over of investigation and prosecution of the scheduled offences midway or midstream. By virtue of Section 5 of the DSPE Act, such power was always available and conferred in the Central Government.

122. Apart therefrom, the argument of Mr. Jethmalani is that by virtue of Section 6 of the DSPE Act the powers u/s 5 cannot be exercised by the Central Government without the consent of the Government of that State wherein the Act is to be extended. In other words, the Notification in that behalf could not enable the Central Government to exercise the powers without the consent of the State Government being obtained. Such provision is absent in the NIA Act and particularly in Section 6 and therefore, the NIA Act is unconstitutional being ultra vires Articles 14 and 21 of the Constitution of India.

123. This argument cannot be accepted, firstly for the reasons assigned above and secondly, because the NIA Act enables the Central Government to constitute a special agency to be called NIA for investigation and prosecution of the offences under the Acts specified in the Schedule. That is not to be found in the DSPE Act. Therefore, the offences of all types and nature and committed across the country can be specified in the Notification u/s 3 of the DSPE Act. Therefore, when the offences even under the Indian Penal Code, 1860 could be said to be

covered and can be included in the Notification, then, the legislature thought it fit to enact Section 6 providing for consent of the State Government to enable the Special Police Force under the DSPE Act to exercise its power and jurisdiction. The NIA Act applies only to investigation and prosecution of the offences under the Acts specified in the Schedule to the NIA Act. Further, by virtue of Section 6(7) of the NIA Act it has been clarified that till the NIA takes investigation of the case by virtue of the directions issued under sub-sections (4) and (5) of Section 6, it shall be duty of the officer in-charge of Police Station to continue with the investigation.

124. By Section 7 of the NIA Act, it is clear that while investigating any offence under the NIA Act, the NIA having regard to the gravity of the offence and other relevant factors, may if it is expedient to do so, request the State Government to associate with the investigation or by previous approval of the Central Government transfer the case to the State Government for investigation or trial of the offence. The State Government is thus not displaced and this aspect is clarified by Sections 9 and 10 of the NIA Act. In these circumstances we do not see how the absence of a provision like Section 6 of the DSPE Act would, in any manner, render Section 6 of the NIA Act or any of its sub-sections unconstitutional, null and void. Rather, not displacing the State Government altogether, but enabling the Central Government to associate with the State Government or transfer the case to the State Government for investigation and trial of the scheduled offences as well, so also, otherwise keeping the State Government's power to investigate and prosecute any scheduled offence intact, the Parliament has not, in any manner, usurped the powers of the State or displaced it altogether as suggested by Mr. Jethmalani. Any argument, therefore, based on comparison with Section 6 of the DSPE Act and of the above nature cannot be accepted. In *A.C. Sharma Vs. Delhi Administration*, the Honourable Supreme Court held thus:-

12. Turning to the D.S.P.E., Act it extends to the whole of India. For the constitution and powers of the establishment we have to turn to Section 2 of this Act which reads:-

2. Constitution and powers of special Police establishment:

(1) Notwithstanding anything in the Police Act, 1861, the Central Government may constitute a special Police force to be called the Delhi Special Police Establishment for the investigation in any Union territory of offences notified u/s 3.

(2) Subject to any orders which the Central Government may make in this behalf, members of the said Police establishment shall have throughout any Union territory in relation to the investigation of such offences and arrest of persons concerned in such offences, all the powers, duties, privileges and liabilities which Police officers of that Union territory have in connection with the investigation of offences committed therein.

(3) Any member of the said Police establishment of or above the rank of Sub-Inspector may, subject to any orders which the Central Government may make in this behalf, exercise in any Union territory any of the powers of the officer in charge of a Police Station in the area in which he is for the time being and when so exercising such powers shall, subject to any such orders as aforesaid, be deemed to be an officer in charge of a Police Station discharging the functions of such an officer within the limits of his Station.

Section 3 which empowers the Central Government to specify the offences to be investigated by the D.S.P.E. has already been set out. The notification dated November 6, 1956 referred to earlier specifies numerous offences under various enactments including a large number of ordinary offences under I.P.C. Clauses (a) to (j) of this notification take within their fold offences under a number of statutes specified therein. Clause (k) extends the sweep of this notification by including in its scope attempts, abetments and conspiracies in relation to or in connection with the offences mentioned in Clause (a) to (h) and also any other offence committed in the course of those transactions arising out of the same facts. It may also be stated that after 1956 in a number of further notifications the list of the offences specified u/s 3 has increased manifold. We consider it unnecessary to refer to them in detail. According to Section 4 the superintendence of D.S.P.E. vests in the Central Government and Section 5 empowers the Central Government to extend to any area in a State not being a Union territory the powers and jurisdiction of members of this establishment for the investigation of any offences or classes of offences specified u/s 3, Subject to the orders of the Central Government the members of such Establishment exercising such extended powers and jurisdiction are to be deemed to be members of the Police force of that area for the purpose of powers, functions, privileges and liabilities. But the power and jurisdiction of a member of D.S.P.E. in such State is to be exercised with the consent of the Government of the State concerned. The scheme of this Act does not either expressly or by necessary implication divest the regular Police authorities of their jurisdiction, power and competence to investigate into offences under any other competent law. As a general rule, it would require clear and express language to effectively exclude as a matter of law the power of investigation of all the offences mentioned in this notification from the jurisdiction and competence of the regular Police authorities conferred on them by Criminal Procedure Code and other laws and to vest this power exclusively in the D.S.P.E. The D.S.P.E. Act seems to be only permissive or empowering, intended merely to enable the D.S.P.E. also to investigate into the offences specified as contemplated by Section 3 without impairing any other law empowering the regular Police authorities to investigate offences.

125. Somewhat similar position emerges even under the NIA Act. Once we have taken care of all the arguments of Mr. Jethmalani, learned Senior Counsel appearing for the Petitioners, then, we are of the view that there is no merit in any of these petitions and they deserve to be dismissed.

126. Before parting, it is necessary to deal with the judgments cited by Mr. Jethmalani. He has invited our attention to several judgments. However, he premised his argument on unconstitutionality of Section 6 of the NIA Act by heavily relying upon the judgment of the Honourable Supreme Court in the case of Vinay Tyagi Vs. Irshad Ali @ Deepak and Others, . In that case, Irshad Ali, Respondent No. 1 in the Appeal before the Supreme Court was working as an Informer of the Special Cell of Delhi Police in the year 2000 and he was also working in similar capacity for the Intelligence Bureau (IB). He was earning his livelihood by working as a rickshaw puller. He had heated conversations with the I.B. Officers for whom he was working. The allegation was that the IB demanded that he should join a militant camp in Jammu & Kashmir in order to give information with respect to their activities to the I.B.. However, he refused to do the job and claims that he has been falsely implicated in the present criminal case. A report was lodged about disappearance of the Respondent No. 2 by his family members at Police Station Bhajanpura, Delhi. Not only that the brother of Respondent No. 2 also sent a telegram to the Honourable Prime Minister, Home Minister and the Police Commissioner. There was report published in the newspaper seeking help of general public to trace the Respondent No. 2. On that very evening it is stated that both Respondents were implicated as accused in First Information Report No. 10/2006 and they were described as terrorists. The fact that they were working as informers was not stated in the First Information Report. After referring to the First Information Report allegations, what the Honourable Supreme Court refers is to the proceedings in the Delhi High Court seeking transfer of investigation, but the High Court did not grant any interim stay, therefore, the charge sheet was filed. The High Court order passed on this Writ Petition is reproduced in paragraph 5 of the judgment. Thereafter, the CBI's report filed in the High Court is referred to. After a detailed investigation, the CBI filed a closure report stating that the accused were working as informers. After filing of the report by the CBI, the Respondent No. 2/accused filed an application before the Trial Court in terms of Section 227 of the Code of Criminal Procedure, 1973 praying that in view of the closure report he should be discharged. That application was opposed by the Special Police, Delhi and the CBI stood by its report and stated that it has no objection for the accused being discharged. Thereafter, the Honourable Supreme Court referred to the Trial Court's order dated 13.02.2009 and in paragraph 9 it referred to a petition by the Respondent No. 2 in the Delhi High Court being a petition u/s 482 of the Code of Criminal Procedure, 1973 praying that the proceedings before the Court of Additional Sessions Judge, Delhi pertaining to the First Information Report No. 10/2006 be quashed. Upon that Criminal Miscellaneous Petition, the High Court observed that once the report was filed by the CBI, that agency has to be treated as an Investigating Agency in the case and the closure report ought to have been considered by the Trial Court and it remanded the case to the Trial Court, but passed an order and which was essentially assailed before the Supreme Court. It is in that context, the Honourable Supreme Court has scanned all provisions and examined the scheme of the Code of Criminal Procedure, 1973 in relation to filing

of a report before the Court of competent jurisdiction and the extent of its power to examine that report and pass appropriate orders. It is in that context, the Honourable Supreme Court made the distinction, namely, initial investigation, further investigation, fresh or denovo or re-investigation.

127. While all such observations as have been made and relied upon by Mr. Jethmalani are pertinent and extremely relevant, but in the matter before us and at hand, it is not necessary for us to refer to these judgments in great detail. Suffice it to state that with regard to a fresh or denovo or reinvestigation the power vests only in the superior courts. In the event the Petitioners before us apprehend that the scheme of the Code of Criminal Procedure, 1973 is not being abided by or flouted, then, nothing prevents the Petitioners from invoking jurisdiction of the superior courts and as enumerated in this judgment. For the purpose of constitutional validity of the provision, we do not deem it fit to refer to all these judgments and which are on the point of ambit and scope of the powers conferred in the Police and Criminal Courts. Section 173 of the Code of Criminal Procedure, 1973 having been noted by us and further having found that it is not displaced nor its application is ruled out in relation to the offences investigated and prosecuted by the NIA, then, it is not necessary to refer to each and every judgment relied upon by Mr. Jethmalani. Each one of them is essentially on the point of ambit and scope of investigation and the orders that can be made in that behalf by the competent criminal court and superior courts.

128. While all these judgments are binding on us, but their application of course will depend on facts and circumstances in each case. We cannot, as a matter of general rule, lay down that the NIA is prohibited from carrying out a fresh investigation or reinvestigation and in appropriate cases. However, the assumption that the NIA will necessary embark on such course is baseless because there is no material produced in that behalf. Further, it is a matter to be decided in the backdrop of facts and circumstances in each case and which is handled by the NIA. Once again we clarify that if the NIA embarks upon the course apprehended, namely, a fresh or denovo or re-investigation and without adhering to the requisite legal mandate, then, it will be open to the Petitioners and such other accused in the offence investigated and prosecuted by the NIA to approach not only the competent criminal court, but superior courts as well and complain about the action of the NIA or orders and directions made in that behalf. It would be then for the courts to decide and permit the NIA to carry out investigation and in what manner.

129. For the purpose of the present Writ Petitions, we cannot hold that the NIA is prevented in any manner to take recourse to such provisions enabling it to carry out investigations as are permissible in law and equally nature thereof. By tying hands of the NIA unduly, we would be failing in our duty to give full effect to the legislative mandate and which is expressed in plain and clear terms by the NIA Act. Any interpretation which goes contrary to the legislative intent and particularly as enshrined in the Preamble and the statement of objects and

reasons to the NIA Act cannot be placed on the provisions of the NIA Act. The reason is obvious. The NIA comes into picture in relation to the scheduled offences and for their investigation and prosecution in national interest. The offences that are carved out by these provisions and created therein have such repercussions and ramifications as ordinarily result in destabilizing the nation itself. It is in order to ensure that sovereignty, integrity and security of the State is not threatened and if threatened by the acts of the terrorism or insurgency, then, that can be put down by heavy hands that the Parliament enacted the NIA Act. Once this aspect is not lost sight of, then, we are unable to accept the argument of Mr. Jethmalani and to the contrary. The presumptions and assumptions on the basis of which the arguments are based could safely be termed as conjectures and surmises.

130. The learned Additional Solicitor General and Mr. Mariarputham, both are right in their contentions that the NIA Act must be allowed its full force and the Central Government must be given full play in order to achieve larger public interest and the object and purpose of enacting the NIA Act. The broad spectrum and nature of the offences to be dealt with by a premiere investigating agency like the NIA should be borne in mind and the NIA must then be given complete powers to investigate and prosecute the offences so that all guilty persons are brought to book and expeditiously. Of course, the NIA cannot in the guise of its absolute powers indulge in such acts which would violate the constitutional guarantees enumerated above. Any such violation and subversive of the rule of law even by the NIA is open to question and challenge as indicated above by us. Therefore, it is false to assume that the NIA will hound the Petitioners and some persons placed in similar situation or unduly harass or pressurize them. There is a rule of law and which even binds the NIA.

131. With the above clarification, we do not deem it fit and proper to deal with all the cases cited before us by the Senior Counsel of either side. Suffice it to say that we are mindful of the observations and findings therein and consistent therewith we have negated the challenge, but by appropriate clarifications. As a result of the above detailed discussion, we do not find any merit in each of these Writ Petitions. They are dismissed. Rule is discharged in both petitions.