IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION NO.2024 OF 2021

Sudha Bharadwaj
Aged about 59 years,
Currently incarcerated in
Byculla District Prison,
(U.T. No. 177), Clare Road,
Byculla, Mumbai
Otherwise residing at :
F4/216, South End Apartments,
Eros Garden Colony
Surajkund, Faridabad ...Applicant/Accused No.9
Vs.
1. National Investigation Agency
7th Floor, Cumballa Hill,
MTNL Telephone Exchange Building,
Peddar Road, Mumbai 400 026.

2. State of Maharashtra
Through Vishrambaug Police
Station ...Respondents

WITH
CRIMINAL APPLICATION NO.1458 OF 2019
WITH
INTERIM APPLICATION NO.376 OF 2020
IN
CRIMINAL APPLICATION NO.1458 OF 2019

1. Sudhir Prahlad Dhawale
Aged 50 years, Indian Inhabitant,
having address at Sarnath Tower, A-Wing,
7th Floor, Room No. 707, Buddha Nagar
Co-op. Housing Society, Nimonibaug,
Govandi, Mumbai.

2. Rona Jacob Wilson
Aged 48 years, Indian Inhabitant,
having address at G-1, DDA Flats,
Munirka, New Delhi-110067

3. Surendra Pundlik Gadling
Aged 51 years, Indian Inhabitant,
having address at Plot No. 79, Misal Lay
Out Vaishali Primary School, Samrat
Ashok Chowk, Post Jaripatka, Nagpur.

4. Dr. Shoma Kanti Sen
Aged 61 years, Indian Inhabitant,
Having address at S/5, 2nd Floor,
Ruturaj Apartment, Bharat Nagar,
Amravati Road, Nagpur-440033.

5. Maheash Sitaram Raut,
Aged 33 years, Indian Inhabitant,
having address at Plot No. 83,
Dhangavdi, Pimpal Road, Nagpur.

6. P. Varavara Rao,
Aged 80 years, Indian Inhabitant,
having address at 419, Himasai Heights,
Lane No. 6, Jawahar Nagar, Secunderabad

7. Vernon Stanislaus Gonsalves
Aged 62 years, Indian Inhabitant,
having address at C3, New Prem
Vasundhara, Mahakali Caves Road,
Andheri (East), Mumbai.

8. Arun Thomas Ferreira
Aged 46 years, Indian Inhabitant,
401, Sharon C.H.S. Annaji Sundar
Marg, Charai, Thane – 400 601.

All Applicants are at present in
Judicial Custody and lodged at
Yerwada Central Prison, Pune ....Applicants

Versus

1. The State of Maharashtra,
2. The ACP Swargate,
Pune City, Pune.

2A The Director General,
National Investigation Agency,
CGO Complex, Lodhi Road,
New Delhi. ...Respondents

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Dr.Yug Mohit Chaudhary a/w. Ms. Payoshi Roy and Ms.Chandni Chawla for applicant in BA/2024/2021.

Mr.Anil C. Singh, ASG a/w. Mr. Sandesh Patil, Mr. Aditya Thakkar, Mr. Chintan Shah, Ms. Smita Thakur, Mr. Pranav Thakur and Mr. Vishal Gautam for respondent- NIA in APL/2024/2019.

Mr.Sudeep Pasbola a/w. Mr.Barun Kumar, Mr. Karl Rustomkhan and Ms. Susan Abraham i/b Mr. R. Sathyanarayanan for applicants in APL No.1458/2019 and IA/376/2020.

Mr.A.A. Kumbhakoni, Advocate General a/w. Smt. A.S. Pai, PP, Mrs. S.D. Shinde, APP and Mr. Akshay Shinde, “B” Panel Counsel for respondent-State.

Mr.Anil C. Singh, ASG a/w. Mr. Sandesh Patil, Mr. Aditya Thakkar, Mr. Chintan Shah and Mr. Pranav Thakur for respondent-NIA in APL/1458/2019.

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CORAM : S.S. SHINDE &
N. J. JAMADAR, JJ.

RESERVED ON : 1st SEPTEMBER, 2021

PRONOUNCED ON : 1st DECEMBER, 2021

JUDGMENT : (PER N.J. JAMADAR, J.)

1. These applications under section 482 of the Code of Criminal Procedure, 1973 (‘the Code’) seek enlargement of the applicants on bail under section 167(2) of the Code read with

section 43-D(2) of the Unlawful Activities (Prevention) Act, 1967 (UAPA) in National Investigation Agency (NIA) Special Case No. 871 of 2020, arising out of first information report, initially registered with Vishrambaug Police Station, being first information report No.4 of 2018, on the ground that the learned Judge, who extended the period for investigation under section 43-D(2) of UAPA and took cognizance of the offences punishable under sections 120B, 121, 121(A), 124(A), 153A, 505(1)(b), 117, 23 of Indian Penal Code, 1860 ('the Penal Code') and sections 13, 16, 17, 18, 18-B, 20, 38, 39 and 40 of UAPA was not legally empowered to grant such extension and take cognizance.

2. Since the factual backdrop is, by and large, similar and common questions of law arise for consideration, both these applications are determined by this common judgment and order.

3. The background facts leading to these applications can be summarized as under:

CRIMINAL BAIL APPLICATION No. 2024 OF 2021:-

Tushar Ramesh Damgude lodged a report on 8th January, 2018 with Vishrambaug Police Station in connection with a programme organized under the banner "Elgar Parishad" at

Shanivar Wada, Pune on 31st December, 2017 alleging commission of the offences punishable under sections 153A, 505(1)(b), 117 read with 34 of the Penal Code. On 6th March, 2018 an offence punishable under section 120B of the Penal Code came to be added. During the course of investigation, searches were conducted at various places. On 17th May, 2018 the offences punishable under sections 13, 16, 17, 18, 18-B, 20, 38, 39 and 40 of UAPA were added. On 28th August 2018, the applicant, P.Varavara Rao, Gautam Navlakha, Vernon Gonsalves and Arun Ferreira were arrested by the Pune police.

4. The applicant was produced before the Chief Judicial Magistrate, Faridabad, Haryana, who granted transit remand for two days. On the very same day, a Habeas Corpus petition was filed on behalf of the applicant, being Criminal Writ Petition No. 701 of 2018 before the Punjab & Haryana High Court. The applicant was directed to be kept under house arrest under the supervision of Surajkund police. Writ Petition No. 260 of 2018 was filed by Romila Thapar & Others in the Supreme Court. By an order dated 29th August, 2018, the house arrest came to be extended till further orders. Eventually, the said writ petition

came to be dismissed on 28th September, 2018. However, the interim order was continued for a period of four weeks. The bail application preferred by the applicant came to be dismissed by the Sessions Court, Pune, on 26th October, 2018.

5. On 27th October, 2018, the applicant was taken into custody by Pune police. The learned Additional Sessions Judge, Pune (Shri K.D. Vadane), before whom the applicant was produced, remanded the applicant to police custody for ten days.

6. On 22nd November, 2018 the Public Prosecutor filed a report (Exh.33) seeking extension of period for investigation. On 26th November, 2018, the applicant filed an application (Exh.43) for bail under section 167(2) of Code as 90 days period from the date of applicant's arrest and production before the Magistrate expired. The learned Sessions Judge passed an order on the report of the Public Prosecutor (Exh.33) and extended the period of detention by 90 days.

7. Eventually, the charge-sheet was filed against the applicant and the co-accused in the Court of learned Additional Sessions Judge, Pune. By an order dated 21st February, 2019, the learned Additional Sessions Judge (Shri. K.D.Vadane) took cognizance of

the offence and issued process against the applicant and the co-accused.

8. The applicant and the co-accused filed a joint application for default bail (Exh. 164) on 17th May, 2019. Another application (Exh.169) was preferred on 21st June, 2019. By order dated 5th September, 2019, passed by the learned Additional Sessions Judge (Mr. Ravindra Pande), the default bail application (Exh.169) was rejected. Whereas the first and second bail applications (Exh.43 & 164) were rejected by the learned Additional Sessions Judge (Mr. S.R. Navandar) by order dated 6th November, 2019.

9. It would be contextually relevant to note that on 24th January, 2020, the Central Government passed an order under section 6(5) read with section 8 of the National Investigation Agency Act, 2008 ('NIA Act') directing respondent No.1-NIA to take up investigation of first information report No. 4 of 2008 registered with Vishrambaug Police Station. Consequently, NIA registered first information report No. RC-01/2020/NIA/Mum. under sections 153A, 505(1)(b), 117 read with 34 of the Penal Code and sections 13, 16, 18, 18-B, 20, 39 of UAPA on 24th January, 2020.

10. On 14th February, 2020, the learned Additional Sessions Judge, Pune (Mr.S.R. Navander) passed an order directing that the record and proceedings of Special Case (ATS) No. 1 of 2018 and entire muddemal property be sent to Special (NIA) Court, Mumbai. Eventually, on 9th October, 2020, the NIA filed charge-sheet under sections 120B, 121, 121(A), 124(A), 153A, 505(1)(b), 117 and 23 of the Penal Code and sections 13, 16, 17, 18, 18-B, 20, 38, 39 and 40 of UAPA.

11. The applicant has preferred this application for default bail on the ground that Shri K.D.Vadane, learned Additional Sessions Judge, Pune, who passed order on the prosecutor's report under section 43-D(2) of the UAPA extending the applicant's detention by 90 days and took cognizance of the offences by an order dated 21st February, 2019 was not competent to do so as he was not designated as a Special Judge either under section 11 or section 22 of the NIA Act.

12. The applicant asserts that information was obtained under the Right to Information Act to the effect that Shri K.D. Vadane and Shri R.M. Pande were never appointed as Special Judges/Additional Sessions Judges by the Central Government

for the period 1st January, 2018 to 31st July, 2019. Nor Shri S.R. Navandar had been appointed as the Special Judge by the Government of Maharashtra under the NIA Act for the period 5th September, 2019 to 14th February, 2020. It was further informed that Shri Aniruddha Yashwant Thatte, Shri Abhay Narharrao Sirsikar and Shri Shyam Hariram Gwalani, the learned Additional Sessions Judges were appointed as Special Judges/ Additional Special Judges by the Government of Maharashtra for the trial of cases under section 22 of the NIA Act for Pune District vide Notifications, dated 5th March, 2019, 29th June, 2018 and 11th July, 2017.

13. The applicant asserts that, in particular, Shri K.D. Vadane, learned Additional Sessions Judge, who extended the detention of the applicant by order dated 26th November, 2018 and took cognizance of the offences by order dated 21st February, 2019 was not at all appointed as Special Judge/ Additional Special Judge by the Government of Maharashtra under section 22 of the NIA Act or by the Government of India under section 11 of the NIA Act, and, thus, had no jurisdiction to deal with the Scheduled Offences under the NIA Act. Resultantly, the orders dated 26th November, 2018 and 21st February, 2019 passed by Shri K.D.Vadane, learned

Additional Sessions Judge lack jurisdiction and legal authority and thus are null and void. Adverting to the provisions contained in sections 13 and 22 of the NIA Act, applicant asserts that every Scheduled Offence investigated by the investigation agency of the State Government, shall be tried only by the Special Court within whose local jurisdiction it was committed. Since the Special Courts were already constituted by the State Government under section 22 of the NIA Act in Pune District, vide Notifications dated 11th July, 2017, 29th June, 2018 and 5th March, 2019, the orders of extension of period of detention and taking cognizance were non-est in the eye of law.

14. The applicant has averred that the case is covered by the pronouncement of the Supreme Court in the case of ***Bikramjit Singh vs. State of Punjab***[1], wherein Supreme Court held that the Special Court alone had jurisdiction to extend detention upto 180 days under the provisions of section 43-D(2)(b) of UAPA.

15. The applicant asserts that since the applicant had applied for release on default bail under section 167(2) of the Code, prior

1 (2020) 10 Supreme Court Cases 616.

to the filing of the charge sheet, the applicant had a right to be released on default bail and ought to have been so released on 26th November, 2018. Even if the period of house arrest is excluded from consideration, the 90 days period would have expired on 25th January, 2019 and since the charge-sheet was filed on 21st February, 2019 and the bail application of the applicant was pending on that day, the applicant ought to have been released on bail. Hence, this application for quashing and setting aside the orders dated 26th November, 2018 and 21st February, 2019 passed by the learned Additional Sessions Judge and the release of the applicant on bail.

CRIMINAL APPLICATION No. 1458 of 2019 :-

16. The applicants, who have been arraigned as accused Nos. 1 to 8 in Special (ATS) Case No.1 of 2018, arising out of C.R.No. 4 of 2018 registered with Vishrambaug Police Station have preferred this application for quashing and setting aside the order dated 5th September, 2019 passed by the learned Additional Sessions Judge (Mr. Ravindra Pande) on the application (Exh.169) for default bail and declaration that the learned Judge had no power to take cognizance of the offences, and release the applicants on bail on the ground that the cognizance taken by the learned Judge was

bad in law. In the said application (Exh.169), the applicants had averred that the learned Judge had no jurisdiction to take cognizance as a Court of original jurisdiction, since the case was not committed by the learned Magistrate.

17. In the instant application, the applicants assert that the UAPA does not contain any provision for the appointment of a Special Judge or for constitution of Special Courts. Thus, the usurpation of the jurisdiction by the learned Additional Sessions Judges, under a misnomer of Special Judge, was wholly illegal. Consequently, the orders granting remand, authorizing detention of the accused and taking cognizance were all illegal. Referring to the Notifications issued by the State Government under section 22 of the NIA Act, the applicants aver that, well before arrest and detention of the applicants, Special Courts were constituted by the State Government under section 22 of the NIA Act and thus the Courts, other than designated Special Court, could not have entertained any of the proceedings in relation to the Scheduled Offences. The charge-sheet thus cannot be said to have been lodged before a competent Court. Therefore, the applicants, who had preferred application for default bail under section 167(2) of

the Code ought to have been released on bail.

18. An affidavit in reply is filed on behalf of NIA in both the applications.

19. The application preferred by the applicant-Sudha Bharadwaj (Bail Application No. 2024 of 2021) is resisted on the ground that the application is based on a complete misreading of the provisions of the NIA Act, UAPA and the Code. Since UAPA does not contemplate any special procedure for the offences defined therein, much less creation of Special Courts, the jurisdiction of ordinary criminal courts functioning under the Code is kept intact and the procedure prescribed therein is required to be followed.

20. The NIA contends that the Special Court constituted under NIA Act has no jurisdiction to deal with the offences unless the offences are Scheduled Offences, as enumerated under the Schedule to the NIA Act, and those offences are investigated by National Investigation Agency. According to the respondent- NIA, the Special Courts constituted under section 22 of the NIA Act have the jurisdiction to try the Scheduled Offences investigated by the Agency, only when the National Investigation Agency transfers the case to the State Government for investigation and trial of the

offences under section 7(b) of the NIA Act. Since NIA entered into investigation in this case on 24th January, 2020, pursuant to the orders passed by the Central Government, only the Court constituted under section 11 of the NIA Act is the competent court. Since no Court was constituted by the Central Government under section 11 of the NIA Act at Pune, there was no legal impediment for the learned Additional Sessions Judge (Shri Vadane) to entertain the remand and authorize detention of the applicant.

21. The respondent-NIA asserts that pronouncement in the case of ***Bikramjit Singh*** (Supra) is of no assistance to the applicant. In any event, since the applicant is assailing the legality and correctness of the order dated 26th November, 2018 and 21st February, 2019, the proper remedy is to file an appeal under section 21 of the NIA Act. Thus, the application, in the present form, is not tenable. The respondent No. 1 further contends that even if it is assumed that the cognizance of the offences was taken by the learned Additional Sessions Judge, who was not empowered to do so, in view of the provisions contained in section 460 of the Code, the proceeding does not get vitiated on that count alone.

22. In addition to the aforesaid grounds, the application of Sudhir Prahlad Dhawale and Others (Criminal Application No. 1458 of 2019) is contested on the ground that the composite application filed by all the applicants is not maintainable since the cause of application for filing the application is different for all the accused, as they were arrested on different dates. Secondly, the charge-sheet was lodged on 15th November, 2018; whereas the application (Exh.169) was preferred on 21st June, 2019. Thus, the application for default bail under section 167 of the Code presented after filing of the charge-sheet was not tenable and, therefore, rightly dismissed by the learned Additional Sessions Judge. The respondent -NIA reiterated that even if it is assumed, for the sake of argument that, a Court under section 22 of the NIA Act was constituted for Pune district, the said Court would not get jurisdiction unless the investigation was transferred to the State Investigation Agency under section 7(b) of NIA Act and mere existence of the Court would not imply that the said Court would have exclusive jurisdiction.

23. We have heard Dr. Yug Chaudhary, the learned counsel for the applicant in Bail Application No.2024 of 2021, Mr. Sudeep

Pasbola, the learned counsel for the applicants in Criminal Application No.1458 of 2019, Mr. A.A. Kumbhakoni, the learned Advocate General for the Respondent No.2-State and Mr. Anil Singh, the learned Additional Solicitor General for respondent-NIA in both the applications. With the able assistance of the learned counsels for the parties, we have perused the material on record including the impugned orders and the Notifications whereunder the Special Courts have been constituted by the State Government under section 22 of the NIA Act.

24. In the backdrop of the challenge, in the instant applications, before adverting to note the submissions canvassed across the bar, it may be advantageous to note the facts, which are rather uncontroverted. This would facilitate the appreciation of the submissions in correct perspective, and also narrow down the controversy.

25. The facts relevant for the determination of the controversy at hand, can be stated as under :-

(1) On 8th January 2018, Tushar Ramesh Damgude lodged FIR at Vishrambaug Police Station, Pune being FIR No.4 of 2018 for the offences

punishable under sections 153A, 505(1)(b) and 117 read with 34 of the Penal Code alleging, *inter-alia,* that in the programme organized by the members of Kabir Kala Manch under the banner of 'Elgar Parishad', the speeches and performances were provocative and had the effect of creating communal disharmony. It was further alleged that the said programme provoked the incidents of violence near Bhima Koregaon, Pune on 1st January 2018, resulting in the loss of life and property and creation of social disharmony.

(2) On 22nd January 2018, the investigation in FIR No.4 of 2018 came to be entrusted to the Assistant Commissioner of Police, Swargate Division, Pune City.

(3) On 6th March 2018, charge under section 120B of the Penal Code was added.

(4) On 17th May 2018, sections 13, 16, 17, 18-B, 20, 38, 39 and 40 of UAPA were applied. The applicant Nos.1 to 5, namely, Sudhir Prahlad Dhawale, Rona Wilson, Surendra Gadling, Dr. Shoma Sen and Mahesh Raut in Criminal Application No.1458 of 2019

were arrested on 6th June 2018.

(5) The applicant Nos.6 to 8 in Application No. 1458 of 2019, namely P. Varavara Rao, Vernon Gonsalves and Arun Ferreira were arrested on 28th August 2018.

(6) The applicant-Sudha Bharadwaj in Bail Application No. 2024 of 2021 was also arrested on 28th August 2018.

(7) On 15th November 2018, the State Police (Anti-Terrorist Squad) filed a charge-sheet against the applicant Nos.1 to 5 in Application No. 1458 of 2019, leading to Special ATS Case No.1 to 2018.

(8) On 22nd November 2018, the learned Public Prosecutor, Pune filed report (Exh.33) under section 43-D(2) of UAPA read with section 167(2) of the Code for extension of the period for investigation and the consequent detention of the accused.

(9) On 26th November 2018, Sudha Bharadwaj filed an application for default bail asserting *inter-alia* that the statutory period of 90 days for completion of investigation under section 167(2) of the Code from the date of the arrest of the applicant had expired

and thus she deserved to be enlarged on bail.

(10) By an order dated 26th November 2018, impugned herein, the learned Additional Sessions Judge (Shri K.D. Vadane) extended the period of detention of applicant Nos. 6 to 8, P. Varavara Rao, Vernon Gonsalves and Arun Ferreira in Application No.1458 of 2019 and Sudha Bharadwaj, the applicant in Bail Application No.2024 of 2018, by 90 days.

(11) On 21st February 2019, the State Police filed supplementary charge-sheet against the applicant Nos. 6 to 8 and Sudha Bharadwaj. By the order of even date (impugned herein), the learned Additional Judge (Shri K.D. Vadane) took cognizance of the offences alleged against the applicants and issued process.

(12) On 17th May 2019, applicant Nos.6 to 8 and Sudha Bharadwaj filed the second application (Exh.164) for bail under section 167(2) on the premise that investigating agency had filed incomplete charge-sheet based on incomplete investigation and thus the applicants were entitled to be released on bail.

(13) On 21st June 2019, all the applicants preferred application (Exh. 169) for bail under section 167(2) of the Code read with section 43-D(2) of UAPA alleging *inter-alia* that cognizance of the offences was not taken by the competent Court.

(14) On 5th September 2019, the said application (Exh.169) was rejected by another Additional Sessions Judge (Shri Ravindra M. Pande).

(15) On 6th November 2019, the first (Exh. 43) and second (Exh.164) bail applications and another application (Exh.163) were rejected by Additional Sessions Judge, Pune (Shri S.R. Navandar) holding that since charge-sheet came to be filed within the extended period, there was no scope to entertain the applications for default bail.

(16) On 24th January 2020, the Central Government passed an order directing the NIA to take up investigation in C.R. No. 4 of 2018 (ATS Case No. 1 of 2018) under section 6(5) of the NIA Act.

(17) On 14th February 2020, the learned Additional Sessions Judge, Pune (Shri S.R. Navandar)

passed an order directing the transmission of the record and proceedings of Special ATS Case No. 1 of 2018 to Special (NIA) Court, Mumbai.

26. It would be contextually relevant to notice, at this stage itself, the Notifications issued by the State Government constituting the Special Courts under NIA Act. The existence or otherwise of the Special Courts at Pune constituted by the State Government under section 22 of the NIA Act bears upon the issues raised in these applications.

[A] By a Notification dated 11th July 2017, the State Government, by invoking the powers under the NIA Act and Maharashtra Control of Organised Crime Act, 1999 ('MCOC Act') constituted the Court of Special Judge at Pune presided over by Shri Shyam Hariram Gwalani for Pune City/range. Shri Anil Shripati Mahatme was appointed as an Additional Special Judge.

[B] On 29th June 2018, Shri Anil Shripati Mahatme was appointed as a Special Judge for exercising jurisdiction under NIA Act and MCOC Act. Shri Abhay Narharrao Sirsikar was appointed as an

Additional Special Judge.

[C] Subsequently, by a Notification dated 5th March 2019, Shri Aniruddha Yashwant Thatte was appointed as a Special Judge to preside over the Special Court constituted under section 22 of the NIA Act, in the place of Shri A.S. Mahatme.

[D] By a Notification dated 29th August 2008, the State Government, in exercise of the powers under sections 11 and 185 of the Code, designated the Court of Judicial Magistrate, First Class, Anti Corruption, Shivajinagar, Pune and the Court of Sessions, Pune to deal with the proceedings investigated by the Anti-Terrorist Squad, Maharashtra State ('ATS') for areas falling within the limits of Pune Police Commissionerate, Solapur Police Commissionerate, all Districts in Kolhapur region, Ranagiri and Sindhudurg Districts in Kokan Region.

[E] Consequent thereto and in connection therewith, by an order dated 2nd August 2014, the learned Sessions Judge, Pune designated the Court of District Judge-3 and Additional Sessions Judge,

Pune as a Special Judge for trial of offences investigated by ATS, until further orders.

27. In the light of the aforesaid Notifications, Shri Kumbhakoni, the learned Advocate General, in his usual fairness, submitted that the respondents do not contest the fact that Shri K.D. Vadane, Shri R.M. Pande and Shri S.R. Navandar, the learned Additional Sessions Judges, Pune, who passed the orders referred to above, were not appointed as the Special Judges to preside over the Special Courts constituted by the State Government under section 22 of the NIA Act. The fact that in some of the orders referred to above, the learned Additional Sessions Judges have superscribed the designation of Special Judge/Additional Special Judge or Special Judge, UAPA is thus of little consequence.

28. We deem it appropriate to note and consider the submissions on behalf of the counsels for the parties with this clarity that the above-named learned Additional Sessions Judges were not appointed as the Special Judges to preside over the Special Courts constituted under section 22 of the NIA Act.

SUBMISSIONS IN CRIMINAL BAIL APPLICATION NO. 2024 OF 2021 :

29. Dr. Chaudhary, the learned counsel for the applicant-

Sudha Bharadwaj canvassed multi-pronged submission. First and foremost, in view of the provisions contained in NIA Act, the Scheduled Offences can be tried only before a Special Court constituted either under section 11 or section 22 of the NIA Act. Since UAPA is one of the Acts mentioned in the Schedule of the NIA Act, 2008, all the offences punishable under UAPA are Scheduled Offences for the purpose of NIA Act. Since sections 13, 16, 17, 18, 18-B, 20, 38, 39 and 40 of UAPA were added to FIR No.4 of 2018, by the State Police on 17th May 2018, the jurisdiction lay with the Special Court constituted under section 22 of the NIA Act. Secondly, as a corollary to the first submission, Dr. Chaudhary would urge that the Special Court so constituted under section 22 of the NIA Act alone had the power to extend the period of detention under section 43-D(2) of the UAPA.

30. Inviting the attention of the Court to the definition of the 'Court' contained in section 2(d) of UAPA, it was urged that once the Special Court was constituted at Pune under section 22 of the NIA Act, only the said Special Court had jurisdiction to extend the period of detention under section 43-D(2) of the UAPA and no other. To bolster up this submission, a very strong reliance was placed on the judgment of the Supreme Court in the case of

Bikramjit Singh (Supra). Since Shri K.D. Vadane, the learned Additional Sessions Judge, was not a Special Judge to preside over the Special Court under section 22 of the NIA Act, the extension of period of detention beyond 90 days by the impugned order dated 26th November 2018 is non-*est* in the eye of law.

31. Thirdly, the act of taking cognizance of the offences by order dated 21st February 2019, upon presentment of the charge-sheet by the State Police, according to Mr. Chaudhary, was also tainted with the vice of complete lack of jurisdiction, both under the Code and provisions of NIA Act. Amplifying this submission, Mr. Chaudhary strenuously urged that in view of the interdict contained in section 193 of the Code, the learned Additional Sessions Judge, being a Court of Session, could not have taken cognizance of the offences as a Court of original jurisdiction unless the case was committed to him by a Magistrate under the Code.

32. As a second limb, it was submitted that the NIA Act, under section 16(1) creates Court of original jurisdiction, by empowering the Special Court to take cognizance of the offences without the accused being committed for trial. Thus, only the Special Courts

constituted under sections 11 or 22 of the NIA Act, are competent to take cognizance of the offences without the case being committed.

33. Dr.Chaudhary further submitted that the impugned orders passed without jurisdiction are a nullity and non-*est* in law. The exercise of jurisdiction by a Court which is not vested in it prejudices not just the accused but impairs the rule of law as well. All the consequent actions, based on such orders passed without jurisdiction, are devoid of any legal sanctity.

34. In support of these submissions, Dr.Chaudhary placed reliance on the judgments of the Supreme Court in the cases of ***Fatema Bibi Ahmed Patel Vs. State of Gujarat & Anr.*** [2], ***Zuari Cement Limited Vs. Regional Director, Employees' State Insurance Corporation, Hyderabad and Ors.*** [3] and ***Shrisht Dhawan (Smt.) Vs. M/s. Shaw Brothers*** [4]. Dr. Chaudhary would further urge that as the issue of jurisdiction goes to the very root of the matter, it can be agitated at any stage of the proceedings and aspects of delay and latches, estoppel, waiver, and *res-judicata* do not constitute an impediment in considering the plea of want of

2 (2008) 6 SCC 789
3 (2015) 7 SCC 690
4 (1992) 1 SCC 534

jurisdiction divesting the court/tribunal of the authority to pass the order.

35. Mr. Kumbhakoni, the learned Advocate General joined the issue by stoutly submitting that the applications are misconceived and based on an erroneous understanding of the very object of enactment of NIA Act. The learned Advocate General would urge that till the investigation was entrusted to NIA by the Central Government under section 6 of the NIA Act, the provisions of the NIA Act had no application at all to the instant case. Laying emphasis on the Statement of Objects and Reasons of the NIA Act, 2008, namely to make provision for establishment of a National Investigation Agency, in a concurrent jurisdictional framework, it was urged that the submission on behalf of the applicants that the moment a Scheduled Offence was reported, the NIA Act came into play was conceptually flawed. Inviting the attention of the Court to the provisions contained in section 6, the learned Advocate General would urge that twin conditions must be satisfied before the NIA Act came into operation. One, the Central Government upon receipt of the report under sub-section (3) from the State Government must form an opinion that the offence is a Scheduled Offence. Two, the Central Government must be of a

further opinion that it is a fit case to be investigated by the National Investigation Agency and thus direct the agency to investigate the said offence. In the case at hand, indisputably, the Central Government passed an order under section 6(5) on 24th January 2020, and, therefore, according to the learned Advocate General, there was no occasion for the application of the provisions contained in NIA Act, 2008, till the said date, if not till 12th February 2020, the day the State Government passed order to hand over the investigation to NIA.

36. The learned Advocate General urged with a degree of vehemence that the Courts constituted under section 22 of the NIA Act, by the State Government, do not get the jurisdiction to try the Scheduled Offences unless the National Investigation Agency transfers the investigation to the State Government. This submission was premised on the provisions contained in section 7 of the NIA Act which empowers the National Investigation Agency either to request the State Government to associate itself with the investigation or, with the previous approval of the Central Government, transfer the case to the State Government for investigation and trial of the offence. A conjoint reading of the provisions contained in section 7(b) and section 22 of the NIA Act,

make this position abundantly clear. It was urged that this harmonious construction of the provisions contained in sections 7 and 22 of the NIA Act has been resorted to by various High Courts, including this Court.

37. To bolster up this submission, the learned Advocate General banked upon the Division Bench judgments of this Court in the cases of ***Mr.Areeb S/o. Ejaj Majeed Vs. National Investigation Agency***[5] and ***Naser Bin Abu Bakr Yafai Vs. The State of Maharashtra & Anr.***[6] , a Full Bench judgment of Patna High Court in the case of ***Bahadur Kora Vs. State of Bihar*** [7] and a Division Bench judgment of Delhi High Court in the case of ***Aqil Hussain Vs. State of NCT of Delhi and Ors.*** [8]

38. The learned Advocate General laid special emphasis on the definition of the "Court" under section 2(d) of UAPA to canvass the submission that if all Scheduled Offences were held to be triable only by the Special Courts constituted under the NIA Act, the expression "Court" means a Criminal Court having jurisdiction, under the Code, to try offences under this Act", would be rendered

5 2016 SCC OnLine Bom. 5108
6 2018(3) ABR (Cri.) 758
7 2015 Cri.L.J. 2134
8 2021 Cri. L.J. 1405

redundant. It was submitted that the fact that the legislature has employed the device "means and includes" in defining the term "Court" under section 2(d) of the UAPA cannot be lost sight of. If the said provision is construed on the well settled cannon of construction of statute that the legislature does not use any word as surplusage, the 'Court' under section 2(d) of the UAPA does not mean only the Court constituted under the NIA Act. Attention of the Court was invited to a judgment of the Madras High Court in the case of ***Thangaraj @ Thamilarasan & Ors. Vs. State by the Deputy Superintendent of Police*** [9]. To delineate the manner in which an inclusive definition is required to be interpreted, the learned Advocate General relied upon the pronouncement of the Supreme Court in the case of ***P. Kasilingam & Ors. Vs. P.S.G. College of Technology & Ors.*** [10].

39. It was further submitted by the learned Advocate General that the Schedule of the NIA Act contains various enactments under which Special Courts have been constituted and Special Judges have been designated. If the submission on behalf of the applicants is acceded to, then according to the learned Advocate General, the Courts constituted/designated under the special

9 2014 SCC OnLine Mad 6459
10 1995 Supp (2) Supreme Court Cases 348

enactments enlisted in the Schedule would be rendered nugatory. They would be divested of the jurisdiction statutorily conferred. The learned Advocate General thus urged that exclusivity cannot be given to NIA Courts for all the offences and for all times to come.

40. In the alternative, the learned Advocate General strenuously urged that the Special Courts have been constituted under section 22 of the NIA Act only for 'trial' of the Scheduled Offences as is evident from the text of section 13 of the UAPA. As a necessary corollary, the Special Courts are not empowered to entertain and deal with pre-trial proceedings. Drawing the distinction between 'investigation' and 'trial', in the backdrop of the fact that section 167 of the Code deals with the stage of investigation, it was submitted that in any event, application for extension of time under section 167 of the Code read with section 43-D(2) of the UAPA, could not have been entertained by the Special Courts constituted under the NIA Act as such Courts are not vested with the jurisdiction to decide pre-trial proceedings. Lastly, it was submitted that the term, 'Court' in the first proviso to section 43-D(2) of the UAPA, does not envisage a Court of Magistrate, and, therefore, the application for extension could never have been

made before the Magistrate. The investigating officer had thus no other go but to seek extension of the period of investigation and consequent detention of the accused, before the jurisdictional Sessions Court.

41. Mr.Anil Singh, the learned Additional Solicitor General adopted the submissions of the learned Advocate General. In addition, the learned Additional Solicitor General submitted that the applications for default bail are not at all tenable as the pre-requisites to seek default bail have not been made out, on facts. The applicant Sudha Bharadwaj had made the application for default bail (Exh.43) much before the expiry of the period of 90 days, as the period of house arrest was required to be excluded from consideration. Whereas, the second and third application (Exh.164 and Exh. 169) were filed by the applicants, after the charge-sheet was filed on 21st February 2019. With the filing of the charge-sheet, the right to seek default bail stood extinguished, even if it is assumed that the applicants were entitled to seek default bail since the applicants did not avail the said right. In substance, the applicants did not make a valid application for default bail between the expiry of the period of 90 days and filing of the charge-sheet.

42. The second ground of the alleged jurisdictional defect in the order taking cognizance, according to Mr. Singh, stands on a much weaker foundation. What is material is completion of investigation and filing of the charge-sheet within the stipulated period. The fact that the jurisdictional Court did not take cognizance of the offences within the statutory period is of no relevance and does not confer any right on the accused to seek default bail.

43. To lend support to the above submissions, Mr.Anil Singh placed a strong reliance on the observations of the Supreme Court in the cases of ***Sanjay Dutt Vs. State through C.B.I. Bombay (II)***[11] and ***Suresh Kumar Bhikamchand Jain Vs. State of Maharashtra & Anr.*** [12] . Mr. Anil Singh canvassed a further submission that the applicants submitted themselves to the jurisdiction of the learned Additional Sessions Judge, preferred applications for bail before the said Court and invited the orders from the Court. Mr.Singh urged with tenacity that in the instant applications, there is no whisper of any prejudice having been caused to the applicants on account of the period of detention having been extended and cognizance having been taken by the learned Additional Sessions

11 (1994) 5 SCC 410
12 (2013) 2 SCC 77

Judge. Support was sought to be drawn from the proposition that, in the case at hand, the Sessions Court does not lack inherent jurisdiction. The Special Judges are to be appointed from amongst the Sessions Judges. In the absence of any claim of prejudice, according to Mr.Anil Singh, even if the case of the applicants is taken at par, the applicants do not deserve the relief of bail. A very strong reliance was placed on a Three Judge Bench judgment of the Supreme Court in the case of ***Rattiram and Ors. Vs. State of Madhya Pradesh*** [13] to lend support to this submission.

44. Mr. Kumbhakoni, the learned Advocate General as well as Mr. Anil Singh, the learned Additional Solicitor General made an earnest endeavour to draw home the point that pronouncement of the Supreme Court in the case of ***Bikramjit Singh*** (Supra) does not govern the facts of the case and is of no assistance to the applicant.

SUBMISSIONS IN APPLICATION NO. 1458 OF 2019 :

45. Mr. Sudeep Pasbola, the learned counsel for the applicants would urge that the applicants herein had raised the ground of jurisdiction on the very day, they were first produced before the learned Additional Sessions Judge (Shri A.S.Bhaisare). The very

13 2012(4) SCC 516

authority of the learned Additional Sessions Judge to remand the applicants to custody was questioned. Mr.Pasbola would urge that UAPA does not create any Special Courts, and, thus, the nomenclature assumed by the learned Additional Sessions Judges as Special Judges, UAPA was a complete misnomer. Inviting the attention of the Court to the definition of the 'Court' under section 2(d) of UAPA, which is an inclusive definition, Mr.Pasbola strenuously submitted that the State Police ought to have filed the charge-sheet before the jurisdictional Magistrate and the act of taking cognizance and issue of process by the learned Additional Sessions Judge was wholly without jurisdiction. Since the Special Courts were already constituted at Pune under section 22(1) of the NIA Act, the recourse to sub-section (3) of section 22 of the NIA Act was not warranted. Mr. Pasbola would urge that if the provisions contained in section 13(1) and section 22(2) of the NIA Act are read in juxtaposition, then it becomes abundantly clear that the agency includes the investigation agency of the State by whatever name called. Therefore, in any event, charge-sheet could not have been lodged before the Sessions Court. Mr. Pasbola canvassed a further submission that mere filing of the charge-sheet was of no significance. The charge-sheet was required to be

filed before the competent Court and within the stipulated period. In the case at hand, since charge-sheet was not filed before the competent Court, all the subsequent actions were vitiated.

46. Banking upon the pronouncements of the Supreme Court in the cases of ***State of Tamil Nadu Vs. Paramasiva Pandian*** [14], ***Bikramjit Singh*** (Supra), ***A.R. Antulay Vs. Ramdas Sriniwas Nayak & Anr.*** [15], and ***State of Punjab Vs. Davinder Pal Singh Bhullar and Ors.*** [16], and the judgment of Rajasthan High Court in the case of ***Manohari Vs. State of Rajashtan*** [17], Mr. Pasbola would urge that the applicants are entitled to be enlarged on bail.

47. Per contra, Mr.Singh, the learned Additional Solicitor General vehemently submitted that the arguments sought to be canvassed on behalf of the applicants are beyond the grounds raised in the application. Evidently, the premise of the claim for default bail was the alleged failure to take cognizance of the offences by the jurisdictional Court. In view of the settled legal position that, once charge-sheet is filed the aspect of cognizance or otherwise is of no relevance so far as the entitlement for default

14 (2002) 1 SCC 15
15 (1984) 2 SCC 500
16 (2011) 14 SCC 770
17 1983 RL W 549

bail, the application deserves to be dismissed at the threshold as wholly misconceived.

48. Mr. Kumbhakoni, the learned Advocate General concurred with the submission of Mr.Singh. It does not require any authority to support the proposition that the accused is not entitled to bail on the ground that cognizance is bad in law, urged the learned Advocate General. In the instant case, since the applicants have not at all challenged the extension of time for investigation and detention of the applicants, there is no justifiable reason to entertain the plea for default bail, submitted the learned Advocate General. Mr. Kumbhakoni as well as Mr.Anil Singh relied upon the judgment of the Supreme Court in the case of ***Suresh Kumar Bhikamchand Jain*** (Supra) in support of the aforesaid submissions.

49. Dealing with the submission on behalf of the applicants that the Additional Sessions Judge could not have taken cognizance of the offences, the learned Advocate General invited the attention of the Court to the judgment of the Supreme Court in the case of ***State through Central Bureau of Investigation, Chennai Vs. V. Arul Kumar*** [18]**,** wherein the Supreme Court *inter-alia* observed

18 (2016) 11 SCC 733

that the fact that the Special Court is empowered to take cognizance directly under section 5 of the Prevention of Corruption Act, 1988 does not imply that the normal procedure prescribed under section 190 of the Code empowering the Magistrate to take cognizance of such offences, though triable by the Court of Session, is not given a go-by. Both the alternatives are available.

50. In rejoinder, Mr. Pasbola attempted to join the issue by canvassing a submission that at the heart of the controversy is the fact as to whether the charge-sheet was lodged before, and cognizance was taken by, the competent court.

51. In the backdrop of the nature of the challenge to the prayer of the applicants, in this application, it may be apposite to note the stand of the applicants in the application (Exh.169) before the learned Additional Sessions Judge. The averments in paragraph Nos.4 to 6 of the application make the stand of the applicants abundantly clear.

> *"4 That cognizance of the present offence has not been taken, and that this Hon'ble Court has no jurisdiction to take cognizance of the offence at this stage, as no Court of Session can take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate.*

> *5 That, it is only when the present case is committed to the Court of Session by a Magistrate, and after cognizance of the present offence has been taken that the applicants/accused may be remanded in custody under any provision in law other than Section 167 Cr.P.C.*
>
> *6 That, in the absence of cognizance being taken of the present offence and in the absence of committal by a Magistrate, the applicants/accused, having been in detention for well over one hundred and eight days, are entitled to be released on bail as per the provisions of S.167(2) Cr.P.C. r/w S. 43-D(2) of UAPA."*

52. It becomes evidently clear that it was the stand of the applicants before the learned Additional Sessions Judge that the charge-sheet ought to have been filed before the learned Magistrate, and, thereafter, the case ought to have been committed to the Court of Sessions, and, only thereupon, the cognizance of the offences could have been taken, and that having not been done, according to the applicants, they were entitled to be released on bail.

53. At this juncture, a profitable reference can be made to the judgment of the Supreme Court in the case of ***Suresh Kumar Bhikamchand Jain*** (Supra). In the said case, the Supreme Court was confronted with the question as to whether the accused therein was entitled to be released on default bail under section

167(2) of Criminal Procedure Code for the reason that although charge-sheet had been filed within the time stipulated under section 167(2) of Cr.P.C., sanction to prosecute the petitioner had not been obtained, as a result whereof, no cognizance of the offences was taken.

54. The Supreme Court held that the filing of charge-sheet was sufficient compliance with the provisions of Section 167(2)(a)(ii) of the Code. Whether cognizance is taken or not is not material as far as Section 167 Cr.P.C. was concerned. The right which may have accrued to the petitioner, had charge-sheet not been filed, was not attracted to the facts of the case. Merely because sanction had not been obtained to prosecute the accused and to proceed to the stage of Section 309 Cr.P.C., the Supreme held, it cannot be said that the accused was entitled to grant of statutory bail, as envisaged in Section 167 Cr.P.C.

55. The challenge in the instant Application No.1458 of 2019, thus converges with the challenge in the Application No.2024 of 2021 of Sudha Bharadwaj, namely the charge-sheet was not lodged before the competent Court within the stipulated period.

56. Resultantly, the controversy gets boiled down to the following questions :

> (i) Whether the extension of period for investigation and detention, by invoking the first proviso in the provisions of section 43-D(2) of the UAPA read with section 167(2) of the Code, was by a competent Court?
>
> (ii) Whether the charge-sheet was lodged before, and the cognizance was taken by, the competent Court?
>
> (iii) Whether the applicants are now entitled to default bail, if the answer to the aforesaid questions is in the negative ?

STATUTORY PRESCRIPTION :

57. To begin with, sub-section (2) of section 4 of the Code ordains that all offences under any other law shall be investigated, inquired into, 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. Section 5 of the Code further provides that nothing contained in this 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. In short, if a special enactment provides a procedure which is in derogation of the general provisions prescribed in the Code, the special procedure will prevail.

58. In the context of the controversy, it would be imperative note that section 193 of the Code contains an interdict against a Court of Session taking cognizance of any offence as a Court of original jurisdiction by providing that, except as otherwise expressly provided by the Code, or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code. It implies that a Court of Session can take cognizance of any offence as a Court of original jurisdiction, without a committal order, if it is empowered to take cognizance either by the provisions of the Code or under any special enactment.

59. As the controversy revolves around the construction of the provisions contained in UAPA and NIA Act, the relevant provisions deserve extraction, as under :-

Under UAPA :

Section 2(c), “Code” means the Code of Criminal Procedure, 1973 (2 of 1974).

Section 2(d), “Court” means a Criminal Court having jurisdiction, under the Code, to try offences under this Act [and includes a Special Court constituted under section 11 or under section 21 of the National Investigation Agency Act, 2008] (as it stood before the figure ‘21’ was substituted by figure ‘22’, by Act 28 of 2019).

Section 43-D(2), with which we are materially concerned, reads as under :

> **43-D. Modified application of certain provisions of the Code** —
> (1) ….
> (2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that in sub-section (2),—
> (a) the references to “fifteen days”, “ninety days” and “sixty days”, wherever they occur, shall be construed as references to “thirty days”, “ninety days”, and “ninety days” respectively; and
> (b) after the proviso, the following provisos shall be inserted, namely:—
> “Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Court may if it is satisfied with the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of ninety days, extend the said period up to one hundred and eighty days:

Provided also that if the police officer making the investigation under this Act, requests, for the purposes of investigation, for police custody from judicial custody of any person in judicial custody, he shall file an affidavit stating the reasons for doing so and shall also explain the delay, if any, for requesting such police custody.".

NIA ACT :

The relevant provisions of the National Investigation Agency Act, 2008 before it was amended by Act 16 of 2019, read as under :-

2. Definitions.—(1) In this Act, unless the context otherwise requires,—

(a) "Agency" means the National Investigation Agency constituted under section 3;

(b) "Code" means the Code of Criminal Procedure 1973 (2 of 1974);

....

(f) "Schedule" means the Schedule to this Act;

(g) "Scheduled Offence" means an offence specified in the Schedule;

(h) "Special Court" means a Court of Session designated as Special Court under section 11 or, as the case may be, under section 22;

Section 6 : Investigation of Scheduled Offences.—

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

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

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

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

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

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

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

(8) Where the Central Government is of the opinion that a Scheduled Offence has been committed at any place outside India to which this Act extends, it may direct the Agency to register the case and take up investigation as if such offence has been committed in India.

(9) For the purposes of sub-section (8), the Special Court at New Delhi shall have the jurisdiction.

This clause seeks to provide the manner of investigation of the offences listed in the Schedule to this Act. The police officer in charge of the police station on receipt of the report of the offence shall forward it to the State Government which in turn to the Central Government. If the Central Government is of the opinion that the offence is a Scheduled Offence, it shall direct the agency for investigation of such offence. (Notes on Clauses).

7. Power to transfer investigation to State Government.—While investigating any offence under this Act, the Agency, having regard to the gravity of the offence and other relevant factors, may—

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

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

....

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

11. Power of Central Government to constitute Special Courts.—

(1) The Central Government shall, in consultation with the Chief Justice of the High Court, by notification in the Official Gazette, for the trial of Scheduled Offences, designate one or more Courts of Session as Special Court for such area or areas, or for such case or class or group of cases, as may be specified in the notification.

(2) Where any question arises as to the jurisdiction of any Special Court, it shall be

referred to the Central Government whose decision in the matter shall be final.

(3) A Special Court shall be presided over by a Judge to be appointed by the Central Government on the recommendation of the Chief Justice of the High Court.

....

(6) The Central Government may, if required, appoint an Additional Judge or Additional Judges to the Special Court, on the recommendation of the Chief Justice of the High Court.

(7) A person shall not be qualified for appointment as a Judge or an Additional Judge of a Special Court unless he is, immediately before such appointment, a Sessions Judge or an Additional Sessions Judge in any State.

.....

13. Jurisdiction of Special Courts.—

(1) Notwithstanding anything contained in the Code, every Scheduled Offence investigated by the Agency shall be tried only by the Special Court within whose local jurisdiction it was committed.

....

16. Procedure and powers of Special Courts.—

(1) A Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts that constitute such offence or upon a police report of such facts.

.....

(3) Subject to the other provisions of this Act, a Special Court shall, for the purpose of trial of any offence, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session so far as may be in accordance with the procedure prescribed in the Code for the trial before a Court of Session.

...

22. Power of State Government to constitute Special Courts.—

(1) The State Government may constitute one or more Special Courts for the trial of offences under any or all the enactments specified in the Schedule.

(2) The provisions of this Chapter shall apply to the Special Courts constituted by the State Government under sub-section (1) and shall have effect subject to the following modifications, namely-

(i) references to “Central Government” in sections 11 and 15 shall be construed as references to State Government;

(ii) reference to “Agency” in sub-section (1) of section 13 shall be construed as a reference to the “investigation agency of the State Government”;

(iii) reference to “Attorney-General for India” in sub-section (3) of section 13 shall be construed as reference to “Advocate-General of the State”.

(3) The jurisdiction conferred by this Act on a Special Court shall, until a Special Court is constituted by the State Government under sub-section (1) in the case of any offence punishable under this Act, notwithstanding anything contained in the Code, be exercised by the Court of Session of the division in which such offence has been committed and it shall have all the powers and follow the procedure provided under this Chapter.

(4) On and from the date when the Special Court is constituted by the State Government the trial of any offence investigated by the State Government under the provisions of this Act, which would have been required to be held before the Special Court, shall stand transferred to that Court on the date on which it is constituted.

60. In the light of the aforesaid fasciculus of the provisions, the answer to the questions formulated above, is required to be explored, keeping in view the submissions canvassed by the

learned counsels for the parties. First question which crops up for consideration is the stage at which the provisions contained in the NIA Act come into play. Is it on the registration of the FIR in respect of the Scheduled Offences or only after NIA is entrusted with the investigation by the Central Government, as was sought to be urged on behalf of the respondents.

61. The thrust of the submission on behalf of the respondents was rested on the provisions contained in section 6 of the NIA Act. Under Chapter III, which deals with investigation by the National Investigation Agency, two modes are prescribed by sub-sections (4) and (5) of section 6 for directing the agency to investigate the Scheduled Offence. Under sub-section (4), upon consideration of the report, submitted by the State Government under sub-section (3), the Central Government is enjoined to determine whether the offence is the 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.

62. Evidently, the assessment of the State Government and its investigating agency as regards the offence being Scheduled Offence is not the be all and end all of the matter. The Central

Government has to determine independently as to whether the offences reported are Scheduled Offence or not. Only when the Central Government forms the opinion that the offence is a Scheduled Offence and it is a fit case to be investigated by the agency under sub-section (4) of section 6, it is empowered to direct the Agency to investigate the said offence. The second mode is the exercise of a *suo-motu* power, irrespective of a report by the State Government under sub-section (3) of section 6. The only condition which is required to be satisfied is that the Central Government is of the opinion that a Scheduled Offence has been committed which warrants investigation by the Agency.

63. The above provisions indicating the modes in which the National Investigation Agency can be entrusted with the investigation do not appear to be the repository of the entire legislative mandate to determine whether the provisions contained in the NIA Act get attracted once the Scheduled Offence is reported. The other provisions contained in the NIA Act weigh in. For the removal of doubts, sub-section (7) of section 6 itself declares, that till the NIA 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. Section 10 of the NIA Act sheds further

light on the legislative intent. It declares in emphatic terms that, save as otherwise provided under the said Act, nothing contained in the said Act shall affect the powers of the State Government to investigate and prosecute any Scheduled Offence or other offences under any law for the time being in force.

64. Two factors are of salience. One, the legislature has taken care to use the expression, "Scheduled Offence" in addition to "other offences". Two, under sub-section (7) of section 6, a duty is cast on the officer-in-charge of the police station to continue the investigation into the offences till the Agency takes up the investigation. In contrast, section 10 saves the power of the State Government to investigate Scheduled Offence, save as otherwise provided by the NIA Act. The intendment to the contrary is to be found in sub-section (6) of section 6 which ordains that where any direction is 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.

65. A conjoint reading and harmonious construction of the provisions contained in section 6 and section 10 of the NIA Act lead to a legitimate inference that till the National Investigation Agency takes up the investigation of the case (necessarily involving a Scheduled Offence), the State Government is not divested of the authority to investigate and prosecute any Scheduled Offence. However, once the National Investigation Agency takes up the investigation, the authority of the State and its investigating agency to investigate into and prosecute said offences ceases.

66. Another provision, which bears upon this issue is the power of the State Government under section 22(1) of the NIA Act to constitute Special Courts. It provides that the State Government may constitute one or more Special Courts for the trial of offences under any or all the enactments specified in the Schedule. Sub-section (2) further provides that the provisions of Chapter IV, which prescribes special procedure, within the meaning of section 4(2) of the Code, shall apply to the Special Courts constituted by the State Government subject to following modifications :

(i) references to "Central Government" in sections 11 and 15 shall be construed as references to State Government;

(ii) reference to "Agency" in sub-section (1) of section 13 shall be construed as a reference to the "investigation agency of the State Government";

(iii) reference to "Attorney-General for India" in sub-section (3) of section 13 shall be construed as reference to "Advocate-General of the State".

67. If the provisions of section 22(1) of the NIA Act are read in conjunction with the provisions contained in section 10 of the NIA Act which empowers the State Government to investigate Scheduled Offences, the intent of the legislature to not only empower the State Government to investigate and prosecute any of the Scheduled Offence but also to constitute Special Courts for the trial of offences under any or all the enactments specified in the Schedule, becomes explicitly clear. If we keep in view the legislative object as reflected in the statement of objects and reasons namely, establishment of a National Investigation Agency in a concurrent jurisdictional framework, then the aforesaid proposition gains credence. The scheme of the NIA Act evinces a clear intendment that the investigation into the Scheduled Offences was not envisaged as the exclusive domain of the

National Investigation Agency trampling upon the powers of the State Government to investigate and prosecute the Scheduled Offences, for the States have the legislative competence under List II Entry 2 of the Seventh Schedule. Undoubtedly, where, the NIA takes up the investigation of a Scheduled Offence, the State power must yield to the wisdom of the Parliament.

68. For the foregoing reasons, we are afraid to accede to the submission on behalf of the respondents that the provisions contained in NIA Act come into play only when the NIA takes up the investigation.

69. As indicated above, the respondents draw support and sustenance to the aforesaid submissions from the provisions contained in section 7 of the NIA Act and number of pronouncements of the High Courts, including this Court, based thereon.

70. We thus propose to deal with the submission that the Special Court constituted by the State Government under section 22(1) of the NIA Act gets jurisdiction only when a case is

transferred to the State Government by the NIA for investigation and trial under section 7(b) of the NIA Act.

71. A Full Bench judgment of the Patna High Court in the case of ***Bahadur Kora*** (Supra) constitutes the linchpin of the aforesaid proposition, sought to be canvassed on behalf of the respondents. ***Bahadur Kora*** (Supra) arose in the backdrop of a judgment rendered by a Division Bench of the Patna High Court in the case of ***Asif P.K. Vs. State of Bihar*** [19] to the effect that wherever an allegation referable to the provisions of UAPA is made against the accused, the procedure prescribed under the NIA Act must be followed and even if the cognizance of offences was taken in accordance with the provisions of the Code and the investigation was carried out by the State Investigating Agencies, and not by the National Investigation Agency (NIA), the trial of such offences shall be conducted by the Court of Sessions, as provided for under sub-section (3) of section 22 of the NIA Act, even if no Special Court is constituted by the State under sub-section-(1) thereof.

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72. Doubting the correctness of the aforesaid view, the matter came to be referred to the Full Bench. After adverting to the Statement of objects for enactment of the NIA Act and the provisions contained in the NIA Act, especially sections, 6, 7, 10, 13 and 22 of the NIA Act, the Full Bench observed *inter-alia* that the Division Bench lost sight of section 7 of the NIA Act, which is the only provision that provided the link between the NIA on the one hand, and the investigating agency of the State on the other hand. The Full Bench endeavoured to elucidate the purpose behind incorporating section 22 of the NIA Act which enables the State Government to constitute Special Courts. Observations in paragraphs 28 to 31 are material and hence extracted below :

> *"28 It has been mentioned at the threshold itself that the objective of the Act is not to make the offences punishable under the Acts mentioned in the schedule thereof, triable, invariably and exclusively by the N.I.A., or for that matter, the special courts constituted under it. It is only when the offences are entrusted for investigation to the N.I.A. that they become triable by the special courts. A serious doubt may arise that if N.I.A. alone is the competent authority to investigate the scheduled offences, albeit entrusted to it by the Central Government, under Section 6 of the Act, where is the occasion for the State Government to create special courts under Section-22 of the Act, or for that matter, to equate the investigating agency of the State with the N.I.A. under Sub-section (2) thereof. The answer is readily available in Section-7 of the N.I.A. Act. It reads:*
>
> > *" 7. While investigating any offence under this Act, the Agency, having regard to the gravity of the offence and other relevant factors, may--*

> *(a) if it is expedient to do so, request the State Government to associate itself with the investigation;*
>
> *or*
>
> *(b) with the previous approval of the Central Government, transfer the case to the State Government for investigation and trial of the offence."*

29 We have already observed that Section-6 happens to be the fulcrum, or basis to bring any particular case within the ambit of the Act, and for entrustment of its investigation to the N.I.A. It is then, that the special courts come into picture. The N.I.A. is not given the freedom, much less conferred with the power, to investigate any case of its choice. It is only when the Central Government entrusts such cases to it, that the agency, i.e. the N.I.A., can investigate the cases. In other words, the N.I.A. does not have the power to investigate by itself, a case, even if it involves a scheduled offence referable to the Acts mentioned in the schedule. It has to wait till the case is entrusted to it by the Central Government.

30 Section 7 deals with situation, posterior to the entrustment of the case to N.I.A. under Section 6 of the Act. Once a case is entrusted to it, the N.I.A. may undertake the investigation, exclusively, by itself, or may request the State Government, to associate with it. It may also transfer the case to the State Government for investigation, depending on the facts of the case and with the previous approval of the Central Government. It is then, and then alone, that the State Government comes into picture for conducting investigation of the cases under the N.I.A. Act. Barring that, the State Government or its investigating agency does not have any authority, or discretion to choose or pick up cases in which offences under the enactments mentioned in the schedule are alleged; for investigation under the N.I.A. Act.

31 Once a case is "transferred" under Clause-(b) of Section 7 of the Act, by the N.I.A. to the investigating agency of the State Government, the later gets equated to the former, under Section-22(2)(ii) and acquires the power to investigate such matters under the Act. It is only for trial of such cases, that were initially entrusted to the N.I.A., under Section 6 by the Central Government and the N.I.A. in turn "transfers" the

> *investigation of the case to the investigating agency of the State Government, under Section 7(b) of the Act, that the constitution of special court under Section-22 of the N.I.A. Act is provided for.*
>
> (emphasis supplied)

73. Observing thus, the Full Bench answered the reference, *inter-alia,* as under :

> *"46 We, therefore, hold that, (A) the judgment in Aasif"s case (supra), insofar as it held that investigating agency of the State Government can investigate and try offences in accordance with the provisions of the N.I.A. Act, in the cases where offences punishable under the Unlawful Activities (Prevention) Act are alleged, and that such cases must be tried by the Courts of Sessions under Sub- section (3) of Section-22 of the N.I.A. Act, cannot be said to have laid the correct law;*
>
> *(B) the cases even where offences punishable under the provisions of U.A.P. Act are alleged shall be tried by the courts as provided for under the Cr.P.C. and not in accordance with the special procedure, under the Act unless (i) the investigation of such cases is entrusted by the Central Government to the N.I.A. and (ii) the N.I.A. transfers the same to the investigating agency of State Government."*
>
> (emphasis supplied)

74. Evidently, the Full Bench has laid down in unambiguous terms that the offences punishable under the provisions of UAPA shall be tried by the Court, as provided for under the Code and not in accordance with the special procedure under the NIA Act unless, (i) the investigation of such cases is entrusted by the Central Government to the NIA; and (ii) the NIA transfers the same to the investigating agency of State.

75. The judgment in the case of ***Bahadur Kora*** (Supra) was followed with approval by a Division Bench of this Court in the case of ***Naser Bin Abu Bakr Yafai*** (Supra). Since a very strong reliance was placed by both Mr. Kumbhakoni and Mr. Anil Singh, on the proposition enunciated in the case of ***Naser Bin Abu Bakr Yafai*** (Supra), it may be advantageous to note the factual backdrop to appreciate the enunciation correctly.

76. In the said case, the petitioner, Naser was arraigned for the offences punishable under sections 120B, 471 of the Penal Code and sections 13, 16, 18, 18-B, 20, 38 and 39 of the UAPA and sections 4, 5 and 6 of the Explosive Substances Act 1908 which arose out of C.R. No. 8 of 2006, registered with Kala Chowki Police Station, Mumbai, pursuant to the FIR lodged by Police Inspector ATS, Nanded Unit, Nanded. The petitioner was arrested by the ATS (State Investigation Agency). Post completion of investigation, the ATS filed charge-sheet before the learned Chief Judicial Magistrate, Nanded, on 7th October 2016. Cognizance of the offence was taken by the learned Chief Judicial Magistrate, and the case was committed to the Court of Additional Sessions Judge and Special Judge, ATS, on 18th October 2016. In the meanwhile,

on 8th September 2016, the Central Government, in exercise of powers under section 6(4) of the NIA Act, directed NIA to take over further investigation into the said case. Pursuant thereto, on 14th September 2016, the NIA renumbered the said crime as RC-03/16/NIA/Mumbai. By a communication dated 23rd November 2016, the NIA sought transfer of the case papers in the said crime and those were handed over to the NIA on 8th December 2016.

77. During the period of the said transition, the petitioner filed an application before the Special Judge, ATS, Nanded seeking his release on the ground that the offences under UAPA, being Scheduled Offences under the NIA Act, the Magistrate had no jurisdiction to pass remand order or to take cognizance of the offence. The jurisdiction of the learned Special Judge, ATS, Nanded to try the case was also called in question. The learned Special Judge, ATS, Nanded dismissed the application opining that since NIA had not taken over the investigation from ATS, the latter was competent under section 6(7) of the NIA Act to investigate the crime and file the charge-sheet in the Court of Chief Judicial Magistrate, Nanded.

78. In the backdrop of the aforesaid facts, the Division Bench, after adverting to the provisions contained in sections 6 and 7 of the NIA Act, enunciated the legal position as under :

> *"16 Once the Central Government entrusts the investigation of the scheduled offences to the NIA, and the NIA chooses to exercise the option of investigating the offence by itself or in association with the State Government, then such offence is exclusively triable by Special Court constituted by the Central Government under Section 11 of the NIA Act. Whereas, the cases transferred to the State Government in exercise of powers of Section 7(b) of the NIA Act are triable by a Special Court constituted under Section 22 of the NIA Act. Until the State Government constitutes such a Special Court, by virtue of Sub-section (3) of Section 22, the jurisdiction conferred by this Act on a Special Court shall be exercised by the Court of Sessions within whose jurisdiction the offence is committed and it shall have all the powers and follow the procedure provided under Chapter 4 of the Act. However, once the State Government constitutes the Special Court, the trial of the offences investigated under the provisions of the Act would stand transferred to that court on the date on which it is constituted.*
>
> *....*
>
> *23 It is therefore evident that the NIA had taken over the investigation on 8.12.2016. Till such taking over of the investigation, in terms of subsection (7) of Section 6 the ATS was under obligation to continue with the investigation. It is not in dispute that the ATS Mumbai had obtained remand, continued with investigation, and filed chargesheet prior to 8.12.2016 i.e. prior to taking over investigation by NIA. Suffice it to say that by virtue of provisions under sub Section (7) of Section 6 the ATS had jurisdiction to continue with the investigation till 8.12.2016.*

79. The Division Bench adverted to another aspect, which bears upon the controversy at hand. Whether the offences under the UAPA, being Scheduled Offences, are exclusively triable by a Special Court constituted by the State under section 22 of the NIA

Act. The Division Bench answered the question in the negative, observing as under :

> *"24. The next question that falls for our determination is whether the offences under the UAP Act, being scheduled offences are exclusively triable by a special court constituted by the State under section 22 of the NIA Act. It may be noted that UPA Act was enacted in the year 1967 and the scope of this Act was enlarged by amendment of the years 2004, 2008 and 2013 to provide for the more effective prevention of certain unlawful activities of individual and associations and dealing with terrorists activities and for matters connected therewith. Under this Act, the State and Central Government are conferred with the powers to declare certain associations whose activities are found to be a threat to the sovereignty of the State as unlawful. The acts undertaken by such prohibited associations are made punishable under this Act. Chapter 3 and 4 of the UAP Act prescribes the punishment for the offences mentioned therein. It is to be noted that this Act does not prescribe any special procedure to be followed for trial of the offence defined therein. Unlike NIA Act, it does not provide for creation of any special Court. Thus, the essential difference between NIA Act and UAP Act is that NIA Act does not classify any act as an offence, but only creates a separate agency for investigation and a special court for trial of scheduled offences, whereas UAP Act, which is also listed in the schedule of NIA Act, defines certain acts as offences but does not prescribe special procedure and creation of special court.*
>
> *25. A reading of both these enactments particularly Section 10 of the NIA Act would show that there is no embargo on the State Investigation Agency to investigate the scheduled offence, which would include offences under UAP Act. In fact, the NIA would have no power to investigate the scheduled offence until and unless the Central Government takes a decision and directs the NIA to take over the investigation. In the absence of such decision and entrustment, it is primarily the duty of the State Investigation Agency to investigate the scheduled offence including offences under UAP Act.*

> *26. Furthermore, the provisions of both the enactments, particularly Section 2(d) of the ULP Act, which defines "Court", makes it clear that the offences under UAP Act which are investigated by the State Investigation Agency are triable by the criminal courts having jurisdiction under the Code, in accordance with the procedure provided under the Code. It is only when the Central Government takes a decision and entrusts the investigation to the NIA, that the jurisdiction of the criminal court shall stand excluded and the Special Court constituted under the NIA Act will get jurisdiction to try such scheduled offences.*
>
> (emphasis supplied)

80. The support was sought to be drawn to the aforesaid view by placing reliance on the Full Bench judgment of the Patna High Court in the case of ***Bahadur Kora*** (Supra). It was thus enunciated that in the absence of any decision and direction of the Central Government to the NIA to investigate the Scheduled Offence, the State Investigation Agency was competent to investigate the said offence in accordance with the procedure prescribed under the Code and the Criminal Court had jurisdiction to try the offences in accordance with the procedure prescribed under Code.

81. We must note that during the course of the submissions, we were informed that a challenge to the aforesaid decision in the

case of ***Naser Bin Abu Bakr Yafai*** (Supra) was subjudice before the Supreme Court. We will advert to the judgment of the Supreme Court in the case of ***Naser Bin Abu Bakr Yafai Vs. The State of Maharashtra*** [20], which was delivered on 20th October 2021, a little later.

82. The learned Advocate General next relied upon the judgment of the another Division Bench in the case of ***Mr.Areeb S/o Ejaj Majeed*** (Supra). In the said case, the petitioner therein was arrested on 29th November 2014 in connection with FIR No.RC-01/2014/NIA/MUM, registered by NIA for the offences punishable under sections 16, 18 and 20 of UAPA and section 125 of the Penal Code. Since the investigation could not be completed within 90 days of the date of the first remand, on 16th February 2015, the NIA preferred an application before the Special Court NIA under section 43-D(2) of UAPA. On 24th February 2015, when the petitioner was produced before Court, the Special Judge presiding over that Court was on leave and the the application seeking extension of the period of detention was placed before the Additional Sessions Judge and the application came to be allowed and the period of detention came to be extended by 30 days from

20 Criminal Appeal No. 1165 of 2021 with
Criminal Appeal No. 1166 of 2021, dt. 20th October 2021.

26th February 2015. The petitioner preferred an application for default bail under section 167(2) of the Code read with section 43-D(2)(b) of the UAPA contending that since the Special Court was constituted under section 11 of the NIA Act, the ordinary Court of Session could not have entertained the application for extension of the period of detention, and, thus, the detention of the petitioner beyond 25th February 2015 was illegal.

83. In the light of the aforesaid fact-situation, the Division Bench posed unto itself a question as to whether the various powers exercised by a Court during the stage of information to the police and investigation of the offence could, in the said case, be only exercised by a Special Court or even a Court of Session was empowered to exercise them? The Division Bench, after considering the provisions of the Code and UAPA, drew a distinction between the proceedings at 'pre-trial stage' and the 'trial', and observed that the exercise of powers at pre-trial stage, i.e. remand of the accused and extension of the period of custody pending filing of a charge-sheet, which are pre-trial powers, are exercised by the Court both, under the provisions of the Code and by virtue of the provisions of the UAPA. UAPA defines "Court" as a

"Criminal Court having jurisdiction, under the Code, to try offences under that Act and includes a Special Court constituted under Section 11 or under Section 22 of the National Investigation Agency Act, 2008". The offences with which the Division Bench was concerned therein, namely, offences punishable under sections 16, 18 and 20 of the UAPA and Section 125 of Penal Code, being triable under the Code by a Court of Session, the latter was empowered to exercise all the aforesaid powers.

84. The learned Advocate General laid emphasis on the observations made by the Division Bench in paragraph Nos. 8 and 9, which read as under :

> *"8. Now the question is, because a scheduled offence under the UAP Act investigated by NIA is triable exclusively by a Special Court constituted under the NIA Act, is an ordinary Court of Session prohibited from exercising the powers of detention, remand and extension of custody for filing of a charge-sheet under the UAP Act read with the Code so far as the Petitioner is concerned. In the first place, as of the date of the application for extension of time for filing of the charge-sheet, the investigation was not accomplished. There is no warrant for concluding that the offence was one which was investigated by NIA and thus, exclusively triable by the Special Court. At this stage, NIA itself has an option, under Section 7 of the NIA Act, to investigate the offence and prosecute the accused or transfer the case to the State Government for investigation and trial of the offences. Then, of course, the State Government itself has powers to investigate and prosecute the offences, which are*

not affected by anything contained in the NIA Act save as otherwise provided by that Act. The matter is, in other words, in flux and it cannot be said with any certainty that the offences are triable only by the Special Court constituted under Section 11 of the NIA Act. Secondly, powers under the UAP Act, which include the pre-trial power of extension of the custody of the accused for filing of the charge-sheet beyond the statutory period of ninety days under the proviso to Section 167(2) of the Code, can be exercised by 'Court' defined as a 'criminal court having jurisdiction, under the Code, to try offences under this Act' (i.e. the UAP Act). Merely because such court includes a Special Court constituted under the NIA Act, there is nothing in the UAP Act to prevent an ordinary criminal court, which could try the offences under the Code, from exercising these powers. Thirdly, when the State Government itself has power to investigate the offence and prosecute the accused and in that case a Special Court appointed by the State Government under Section 22 of the NIA Act would have the jurisdiction to do everything including trying and finally convicting the accused, the jurisdiction of such Special Court can under sub-section (3) of Section 22 be exercised by the Court of sessions until such Special Court is constituted by the State Government under sub-section (1) of Section 22. (The State Government has not constituted such Special Court as of date.)

9. Considering this position, the Sessions Judge, who was actually holding the charge of the Special Court (constituted by the Central Government under Section 11 of the NIA Act), was well within his powers to act under Section 43-D(2)(b) of the UAP Act read with Section 167(2) of the Code and extend the custody of the Petitioner beyond the statutory period of ninety days.

(emphasis supplied)

85. Our attention was also invited to a Division Bench judgment of Delhi High Court in the case of ***Aqil Hussain Vs. State of NCT of Delhi and Ors.*** (Supra). In the said case, the Division Bench repelled the submission on behalf of the petitioner therein that only a Special Court constituted under section 11, or under section 22 of the NIA Act is the Criminal Court having jurisdiction to try offences under the UAPA. The Delhi High Court enunciated the position as under :

> *"23 Special Court" is defined in Section 2(1)(h) to mean "a Court of Session designated as Special Court under section 11 or, as the case may be, under section 22." Section 22 of the NIA Act empowers the State Government to designate one or more Courts of Session as Special Courts for the trial of offences under any or all the enactments specified in the Schedule. Thus, the submission is that the Special Courts constituted either under Section 11, or Section 22 of the NIA Act alone can try scheduled offences which are "investigated by the Agency". It does not follow that even those scheduled offences which are not assigned to the NIA by the Central Government, would be tried by the Special Courts constituted either under Section 11 or Section 22 of the NIA Act. Mr. Lekhi submits the "Court" defined in Section 2(1)(d) of the UAPA means a criminal court having jurisdiction, under the Code, to try offences under this Act "and includes a special court constituted under section 11 or under section 21 of the National Investigation Agency Act, 2008 (34 of 2008)". Therefore, it is not correct for the petitioner to claim that only a Special Court constituted under Section 11, or under Section 22 of the NIA Act is the Criminal Court having jurisdiction to try offences under the UAPA.*
>
> *....*
>
> *34. Reliance placed by Mr. Pracha on the NIA Act is completely misleading and is a red herring. As we have noticed hereinabove, the NIA Act primarily is an Act to constitute the National Investigation Agency, and to provide for trial of cases entrusted to and investigated by the NIA in*

> *respect of scheduled offences, by a Special Court. In the present case, it is not even the petitioner's submission that the Central Government has entrusted the investigation of the case registered against the detenue Gulfisha Fatima under UAPA to the NIA. The UAPA does not state that all cases under the said act necessarily have to be investigated by the NIA. ....”*

86. As is evident, the pronouncements in the aforesaid cases were made in diverse sets of facts. However, two common threads are discernible in this line of decisions. One, Courts constituted under section 22(1) of the NIA Act, by the State Government, do not get jurisdiction to try the Scheduled Offences, unless the NIA transfers the investigation under section 7(b) of the NIA Act and until the NIA takes over the investigation or after being entrusted with investigation subsequently transfers the investigation to the State Investigation Agency (NIA), all the Scheduled Offences shall be tried by the Courts having jurisdiction under the Code. Two, in view of the definition of the Court under section 2(d) of the UAPA, the Criminal Courts having jurisdiction under the Code, to try the offences are competent to extend the period of detention under the first proviso in sub-section (2) of section 43-D of UAPA.

87. At this juncture, the reference to the judgment of the Supreme Court in the case of ***Bikramjit Singh*** (Supra) assumes significance. Bikramjit was arraigned for the offences punishable

under sections 302, 307, 452, 427, 341 read with 34 of the Penal Code, section 25 of the Arms Act, 1959, sections 3, 4, 5 and 6 of the Explosive Substances Act, 1908, and section 13 of the UAPA. The Punjab State Police apprehended him on 22nd November 2018. The 90 days period of detention expired on 21st February 2019. The appellant applied for default bail in the Court of Sub-Divisional Judicial Magistrate, Ajnala. The said application was dismissed on 25th February 2019 on the ground that the learned Sub-Divisional Judicial Magistrate had already extended time from 90 days to 180 days under Section 167 of the Code read with section 43-D(2) of UAPA, by an order dated 13th February 2019. In a revision preferred against the said order of extension of period of detention, the learned Additional Sessions Judge, who was presiding over the Special Court, constituted under the NIA Act, set aside the order of learned Magistrate extending the period of detention, by a judgment and order dated 25th March 2019. On the very next day, i.e., 26th March 2019, a charge-sheet was filed before the learned Special Judge. In the meanwhile, the revision petition preferred by the petitioner against the order dated 25th February 2019 passed by learned Magistrate, declining to release the petitioner on default bail, was dismissed by the learned

Special Judge on 11th April 2019 opining that, since the charge-sheet had already been presented, the revision petitioner lost his right for default bail under section 167 (2) of the Cr.P.C. The Punjab Haryana High Court found no merit in the petition in which the aforesaid order was assailed. The High Court observed *inter-alia* as under :

> *"23 A joint interpretation of Section 167 (2) Cr.P.C. read with Section 43 (d) UAP Act, Section 6, 13 & 22 of NIA Act would show that in case the investigation is being carried out by the State police, the Magistrate will have power under Section 167 (2) Cr.P.C. read with Section 43 (a) of UAP Act to extend the period of investigation upto 180 days and then, commit the case to the Court of Sessions as per provisions of Section 209 Cr.P.C., whereas in case the investigation is conducted by the agency under the NIA Act, the power shall be exercised by the Special Court and challan will be presented by the agency before the Special Court.*
>
> *....*
>
> *25 It is not case of the petitioner that the investigation was conducted by the agency under Section 6 of the NIA Act and till committal of the case to the Court of Sessions, as per Section 22 (3) of NIA Act, it cannot be said that the Magistrate has no power and therefore, the order dated 25.03.2019 suffers from illegal infirmity."*

(extracted in Paragraph No.5 of the judgment of Bikramjit)

88. The Supreme Court adverted to the relevant provisions of UAPA, especially the definition of 'Court' under section 2(d) and section 43-D(2) and observed that a cursory reading of those provisions would show that offences under the UAPA under

sections 16, 17, 18, 18-A, 18-B, 19, 20, 22-B, 22-C and 23, being offences which contain maximum sentences of over 7 years, would be exclusively triable by a Court of Session when read with Part II of the First Schedule to the Code. It is only after the NIA Act was enacted that the definition of "Court" was extended to include Special Courts that were set up under section 11 or section 22 of the NIA Act.

89. The Supreme Court, thereafter, analyzed the provisions of the NIA Act and postulated in explicit terms that scheme of NIA Act is that the offences under the enactments contained in the Schedule to the Act are now to be tried exclusively by Special Courts set up under that Act. These may be set up by the Central Government under section 11 or by the State Government under section 22 of the NIA Act.

90. Since in the said case, like the case at hand, the Special Courts were constituted by the State of Punjab under section 22 of the NIA Act, the Supreme Court expounded the consequences which emanate from the said fact of constitution of Special Courts by the State Government under section 22. The observations of

the Supreme Court in paragraphs 23 to 26 are instructive and hence extracted below :

> *"23 It will be seen that the aforesaid notification has been issued under Section 22(1) of the NIA Act. What is important to note is that under Section 22(2)(ii), reference to the Central Agency in Section 13(1) is to be construed as a reference to the investigation agency of the State Government – namely, the State police in this case. Thereafter, what is important to note is that notwithstanding anything contained in the Code, the jurisdiction conferred on a Special Court shall, until a Special Court is designated by the State Government, be exercised only by the Court of Sessions of the Division in which such offence has been committed vide sub-section (3) of Section 22; and by sub-section (4) of Section 22, on and from the date on which the Special Court is designated by the State Government, the trial of any offence investigated by the State Government under the provisions of the NIA Act shall stand transferred to that Court on and from the date on which it is designated.*
>
> *24 Section 13(1) of the NIA Act, which again begins with a non-obstante clause which is notwithstanding anything contained in the Code, read with Section 22(2)(ii), states that every scheduled offence that is investigated by the investigation agency of the State Government is to be tried exclusively by the Special Court within whose local jurisdiction it was committed.*
>
> *25 <u>When these provisions are read along with Section 2(1)(d) and the provisos in 43-D(2) of the UAPA, the Scheme of the two Acts, which are to be read together, becomes crystal clear.</u> Under the first proviso in Section 43-D(2)(b), the 90 day period indicated by the first proviso to Section 167(2) of the Code can be extended up to a maximum period of 180 days if "the Court" is satisfied with the report of the public prosecutor indicating progress of investigation and specific reasons for detention of the accused beyond the period of 90 days. <u>"The Court", when read with the extended definition contained in Section 2(1)(d) of the UAPA, now speaks of the Special Court constituted under Section 22 of the NIA Act. What becomes clear, therefore, from a reading of these provisions is that for all offences under the UAPA, the Special Court alone has exclusive jurisdiction to try such offences. This becomes even clearer on a reading of Section 16 of the NIA Act which makes it clear that the Special Court may take cognizance of an offence without the accused being committed to it for trial upon receipt of a complaint of facts or upon a police report of such facts.</u> What is equally clear from a*

reading of Section 16(2) of the NIA Act is that even though offences may be punishable with imprisonment for a term not exceeding 3 years, the Special Court alone is to try such offence – albeit in a summary way if it thinks it fit to do so. On a conspectus of the abovementioned provisions, Section 13 read with Section 22(2)(ii) of the NIA Act, in particular, the argument of the learned counsel appearing on behalf of the State of Punjab based on Section 10 of the said Act has no legs to stand on since the Special Court has exclusive jurisdiction over every Scheduled Offence investigated by the investigating agency of the State.

26 Before the NIA Act was enacted, offences under the UAPA were of two kinds – those with a maximum imprisonment of over 7 years, and those with a maximum imprisonment of 7 years and under. Under the Code as applicable to offences against other laws, offences having a maximum sentence of 7 years and under are triable by the Magistrate's Courts, whereas offences having a maximum sentence of above 7 years are triable by Courts of Sessions. This Scheme has been completely done away with by the 2008 Act as all scheduled offences i.e. all offences under the UAPA, whether investigated by the National Investigation Agency or by the investigating agencies of the State Government, are to be tried exclusively by Special Courts set up under that Act. In the absence of any designated Court by notification issued by either the Central Government or the State Government, the fall back is upon the Court of Sessions alone. Thus, under the aforesaid Scheme what becomes clear is that so far as all offences under the UAPA are concerned, the Magistrate's jurisdiction to extend time under the first proviso in Section 43-D(2)(b) is non-existent, "the Court" being either a Sessions Court, in the absence of a notification specifying a Special Court, or the Special Court itself. The impugned judgment in arriving at the contrary conclusion is incorrect as it has missed Section 22(2) read with Section 13 of the NIA Act. Also, the impugned judgement has missed Section 16(1) of the NIA Act which states that a Special Court may take cognizance of any offence without the accused being committed to it for trial inter alia upon a police report of such facts."

(emphasis supplied)

91. The aforesaid enunciation of law, in our understanding, is based on a conjoint reading of the provisions contained in

sections 13, 16, and 22 of the NIA Act, on the one hand, and the reading of the provisions contained in section 2(1)(d) and section 43-D(2) of UAPA in juxtaposition with the provisions of NIA Act, on the other hand. The Supreme Court further considered the scheme of the two Acts together and culled out the legal position.

92. In our view, the following propositions emerge from the aforesaid pronouncement in the case of ***Bikramjit Singh*** (Supra):

> (1) Once the State Government constitutes the Courts in exercise of the enabling power under section 22(1) of the NIA Act, the provisions contained in Chapter IV of the NIA Act dealing with Special Courts apply to such Court with modifications referred to in clauses (i) to (iii) of sub-section (2) of section 22. Resultantly, every Scheduled Offence investigated by the State Investigation Agency, shall be tried by the Special Courts set up by the State Government under section 22(1).
>
> (2) The non-obstante clause contained in section 13(1) of the NIA Act which confers exclusive jurisdiction on the Special Courts constituted by the

Central Government under section 11 of the NIA Act applies with equal force to the Court constituted by the State Government under section 22 with the change that the Scheduled Offence being investigated by the State Investigation Agency.

(3) The non-obstante clause contained in sub-section (3) of section 22 of the NIA Act mandates that notwithstanding anything contained in the Code, until a Special Court is designated by the State Government under sub-section (1), the jurisdiction conferred by the said Act on a Special Court shall be exercised by the jurisdictional Court of Session.

(4) Once a Special Court is constituted by the State Government under section 22(1) of the NIA Act, the trial of nay offence investigated by the State Investigation Agency under the provisions of the NIA Act, shall stand transferred to the Special Courts so constituted under section 22(1) on and from the date on which it is constituted.

(5) The 'Court' defined under section 2(1)(d) of the UAPA now refers to the Special Court constituted under section 22 of the NIA Act and for all offences under UAPA, the Special Court alone has exclusive jurisdiction to try such offences.

(6) The regime which prevailed under the UAPA, before the NIA Act, namely, the jurisdiction to try the offences punishable with maximum imprisonment of more than 7 years vested with the Court of Sessions and for the offences punishable with maximum imprisonment of not more than 7 years vested with the Magistrate, has been completely done away with under NIA Act, 2008 as all Scheduled Offences are to be tried exclusively by the Special Courts under the NIA Act, whether investigated by the National Investigation Agency or the investigation agency of the State Government.

(7) In view of the provisions contained in section 13(1) of the NIA Act, if the Scheduled Offence is investigated by the NI Agency, it must be tried only

by the Special Court set up by the Central Government under section 11 of the NIA Act.

(8) In case the investigation is carried out by the State Investigation Agency into a Scheduled Offence, the trial shall be held by the Special Court constituted by the State Government under section 22(1) of the NIA Act, if available.

In the absence of such Special Court constituted under section 22(1) of the NIA Act, the trial shall be held before a Court of Session under section 22(3) of the NIA Act.

(9) Lastly, so far as all offences under UAPA, the Magistrate has no jurisdiction to extend the period of detention under the first proviso to section 43-D(2) of UAPA. The Court competent to do so is the Special Court set up either under section11 or 22 of the NIA Act and, in the absence thereof, the jurisdictional Court of Session.

93. It is imperative to note that in the case of ***Bikramjit Singh*** (Supra), a submission was sought to be canvassed on behalf of the State Government that in view of the provisions contained in

section 10 of the NIA Act, the power of the State Government to investigate into a Scheduled Offence was intact and, therefore, the learned Magistrate had the jurisdiction to extend the period of detention. The Supreme Court repelled the aforesaid submission holding that on a conspectus of the provisions of NIA Act and UAPA, section 13 read with section 22(1)(ii) of the NIA Act, in particular, the argument on behalf of the learned counsel appearing on behalf of the State of Punjab based on section 10 of the said Act has no legs to stand on since the Special Court has exclusive jurisdiction over every Scheduled Offence investigated by the investigating agency of the State. ***Bikramjit Singh*** (Supra) thus constitutes a complete answer to the submission on behalf of the respondents that the Court envisaged by the provisions contained in section 43-D(2) read with section 2(d) of UAPA, continues to be the Court having jurisdiction under the Code. The overriding provisions contained in section 13 of the NIA Act, which gets implanted under section 22(2)(ii) of the NIA Act, and thereby equates the State Investigation Agency with the National Investigation Agency, for the purpose of conferring exclusive jurisdiction to a Court constituted under section 22(1) of the NIA Act coupled with the overriding provisions of section 22(3) of the

NIA Act constituting the Court of Session as a residuary Court in the absence of a Special Court under section 22(1), completely divest the jurisdiction of ordinary criminal courts under the Code. To put it in other words, the expression, "a Criminal Court having jurisdiction under the Code" stands subjugated by the overriding provisions contained in sections 13, 22(2)(ii) and (3) of the NIA Act.

94. Mr. Kumbhakoni, the learned Advocate General made a strenuous effort to persuade us to hold that the pronouncement in the aforesaid case of ***Bikramjit Singh*** (Supra) does not govern the facts of the case. A painstaking effort was made to draw distinction on the factual score. It was submitted that the order passed by the learned Special Judge in the case of ***Bikramjit Singh*** (Supra), dated 25th March 2019, setting aside the order passed by the Magistrate extending the period of detention was never challenged by the State Government. Secondly, the challenge before the High Court was on the premise that despite setting aside the order passed by the Magistrate extending the period of detention, the application for default bail was rejected for the reason that charge-sheet was lodged in the intervening period.

These facts, according to Mr. Kumbhakoni, make a significant difference.

95. It was thus urged that the decision in the case of ***Bikramjit Singh*** (Supra) is required to be construed in the backdrop of the attendant facts and the proposition therein cannot be readily imported. Our attention was invited to the decisions of the Supreme Court in the cases of ***Union of India & Ors. Vs. Dhanwanti Devi and Ors.*** [21] and ***Ashwani Kumar Singh Vs. U.P. Public Service Commission and Ors.*** [22] to bolster up the submission that what is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in the judgment.

96. There can be no qualm over the aforesaid proposition. However, we are afraid to accede to the submission on behalf of the respondents that the factual backdrop in ***Bikramjit Singh*** (Supra) is so distinct that the pronouncement therein can be said to have been rendered in the peculiar facts. On the contrary, as indicated above, the Supreme Court has considered and analyzed the provisions of the Code, UAPA and NIA Act elaborately, and,

21 (1996) 6 SCC 44
22 (2003) 11 SCC 584

thereafter, expounded the legal position. What is of salience, in the backdrop of the controversy at hand, is the fact that in the case of ***Bikramjit Singh*** (Supra) also, the State Government had constituted Special Courts under section 22(1) of the NIA Act, like the case at hand. The only distinctive feature that can be discerned is the extension of period of detention by the Magistrate and not the Court of Session, like the case at hand.

97. At this juncture, it is necessary to record that during the course of the hearing, the Court was informed that the pronouncement in the ***Bikramjit Singh*** (Supra) was under consideration before another three Judge Bench in the case of ***Sadique and Ors. Vs. State of Madhya Pradesh*** [23]**.**

98. We have the benefit of the decision in the case of ***Sadique and Ors.*** (Supra). In the said case also, the period of detention was extended by the learned Chief Judicial Magistrate invoking the power under section 43-D(2) of the UAPA. The application preferred by the accused seeking default bail for not filing the charge-sheet within the stipulated period was rejected by the learned Magistrate. Revision application before the learned

23 Criminal Appeal No. 963/2021 dt.7-09-2021

Sessions Judge and a petition under section 482 of the Code met the same fate.

99. The Supreme Court, adverted to the pronouncement in the case of ***Bikramjit Singh*** (Supra), especially the observations in paragraph No.26, extracted thereinabove, and concurred with the conclusion arrived at in ***Bikramjit Singh*** (Supra), "so far as all offences under the UAPA are concerned, the Magistrate's jurisdiction to extend time under the first proviso in Section 43-D (2)(b) is non- existent".

100. Consequently, it was held that so far "extension of time to complete investigation" is concerned, the Magistrate would not be competent to consider the request and the only competent authority to consider such request would be "the Court", as specified in the proviso in Section 43-D(2)(b) of the UAPA. Resultantly, it was held the accused were entitled to be released on default bail.

101. The proposition in ***Bikramjit Singh*** (Supra) that so far as the offences under UAPA are concerned, the Magistrate's jurisdiction to extend the time under the first proviso to section

43-D(2) is non-existent, the Court being either a Sessions Court, in the absence of a notification specifying a Special Court, or the Special Court itself', thus, stands reaffirmed by another three Judge Bench in the case of ***Sadique and Ors*** (Supra), by enunciating in no uncertain terms that the only competent authority to consider such request for extension of time to complete investigation would be "the Court" as specified in the proviso to Section 43-D(2)(b) of the UAPA. Thus construed, it stands reinforced that where a Special Court is constituted under section 22 of the NIA Act, by the State Government, the jurisdiction to extend the period of detention exclusively vests with the Special Court so constituted.

102. It would be contextually relevant, at this stage, to consult the judgment of the Supreme Court in the case of ***Naser Bin Abu Bakr Yafai Vs. The State of Maharashtra & Anr.***[24] which affirmed the judgment and order of the Division Bench in the case of ***Naser Bin Abu Bakr Yafai Vs. The State of Maharashtra & Anr.*** (Supra). After analysis of the provisions of UAPA and NIA Act, the Supreme Court, in the facts of the said case (which we have extracted above), considered the challenge based on the judgment

24

of ***Bikramjit Singh*** (Supra) to the effect that even if the ATS, Nanded had the power to continue with its investigation and file a charge-sheet, it could only be before a Special Court under the NIA Act since the appellant had been charged under the UAPA.

103. The Supreme Court referred to the facts in the case of ***Bikramjit Singh*** (Supra) and extracted the observations in paragraph Nos. 25 and 26 (extracted above), and explained as to what was held by the Supreme Court in the case of ***Bikramjit Singh*** (Supra) a under :

> *"44 ....The above narration would indicate that the power to extend the 90 days period, indicated by the first proviso to Section 167(2) of the CrPC, up to a maximum of 180 days was vested with "the Court". "The Court", read with the definition contained in Section 2(1)(d) of the UAPA, was held to refer to the Special Court constituted under Section 22 of the NIA Act. Hence, this Court held that the Special Court constituted under Section 22 of the NIA Act had exclusive jurisdiction over every Scheduled Offence under the NIA Act investigated by the investigating agency of the State."*

104. Applying the proposition in ***Bikramjit Singh*** (Supra) to the facts of the case in ***Naser Bin Abu Bakr Yafai*** (Supra), the Supreme Court held that the principles enunciated in the case of ***Bikramjit Singh*** (Supra) would not apply to the said case as there existed no Special Courts in the State of Maharashtra designated under section 22 of the NIA Act, at the relevant point of time.

The observations in paragraph 47 make this position abundantly clear :

> *"47 In the present case, the appellants were arrested on 14 July 2016. The charge-sheet was submitted on 7 October 2016. The 90 days period of remand would have been completed on 14 October 2016. Applying the principles enunciated in Bikramjit Singh (supra) (in relation to the power of the CJM to extend investigation up to 180 days) to the present case (in relation to the jurisdiction of the CJM in relation to remand and committal of case to trial), the first consideration would be whether there existed a Special Court under Section 22 of the NIA Act to divest the CJM, Nanded of its jurisdiction. The appellants have produced before us various notifications issued by the Government of Maharashtra designating Special Courts under Section 22 for trial of schedules offences under the NIA Act. The earliest of those notifications is dated 13 April 2017. In its counter-affidavit before this Court, the State of Maharashtra has stated that:*
>
> > *"8...the present Crime No. i.e. 08/2016 has been registered against accused/Petitioner on 14/07/2016. As per record of the office of deponent it appears that till the date of registration of Crime No. 08/2016, the State Government has not established Special Court under Section 22 National Investigation Act, 2008 at Nanded."*
>
> *Hence, the principle enunciated by this Court in Bikramjit Singh (supra) would not apply to the present case since there existed no Special Courts in the State of Maharashtra designated under Section 22 of the NIA Act (since the investigation was being conducted by the ATS Nanded, which had the jurisdiction over the case).*
>
> (emphasis supplied)

105. The crucial distinction between the facts in the case of ***Naser Bin Abu Bakr Yafai*** (Supra) and the instant case, is the indubitable position that Special Courts constituted by the State Government under section 22 of the NIA Act, did exist at Pune

when the application for extension of period of detention was entertained by the learned Additional Sessions Judge (Shri K.D. Vadane). Thus, the judgment of the Supreme Court in the case of ***Naser Bin Abu Bakr Yafai*** (Supra) or for that matter the observations of the Division Bench of this Court in the case ***Naser Bin Abu Bakr Yafai*** (Supra) do not govern the facts of the case at hand with equal force.

106. Another facet which deserves consideration is the correctness of the enunciation by the Division Bench of this Court in the case of ***Naser Bin Abu Bakr Yafai*** (Supra) that the Special Court constituted under section 22 of the NIA Act by the State Government gets jurisdiction only when the investigation is transferred by the National Investigation Agency to the State Investigation Agency under section 7(b) of the NIA Act. In our understanding, with respect, the Supreme Court in the case of ***Naser Bin Abu Bakr Yafai*** (Supra) has not delved into the aspect of correctness of the view of the Division Bench based on the premise of the Special Court getting jurisdiction only after transfer of investigation by the NIA under section 7(b) of the NIA Act.

107. Dr.Chaudhary, the learned counsel for the applicant invited our attention to an order passed by a Full Bench of Madras High Court in the case of ***Jaffar Sathiq @ Babu Vs. The State*** [25]**,** wherein the Madras High Court had held that the pronouncement in the case of ***Bahadur Kora*** (Supra) must be taken to be impliedly overruled by the decision of the Supreme Court in the case of ***Bikramjit Singh*** (Supra). The observations in paragraph No.12 are material, and hence, extracted below :

> *"12 In Bahadur Kora (supra), the Full Bench of the Patna High Court had steered clear of a literal reading of the Act, and had resorted to a purposive interpretation of Sections 7, 13 and 22 of the NIA Act, 2008, to hold that the provisions of Chapter IV would apply only when the NIA had transferred the investigation to the State police under Section 7(b) of the Act. Though the logic and reasoning of the Full Bench did appeal to us, we are, however, of the considered view that in view of the authoritative pronouncement of the Supreme Court in Bikramjit Singh (supra), the applicability of the NIA Act, 2008 for offences under the UAPA, 1967, is no longer open to doubt. Consequently, the judgment of the Full Bench of the Patna High Court must be taken to be impliedly overruled by the decision of the Supreme Court in Bikramjit Singh (supra).*
>
> (emphasis supplied)

108. It is true that ***Bikramjit Singh*** (Supra) also does not expressly refer to and deal with the provisions contained in section 7(b) of the NIA Act. However, it must be noted that by construing the provisions contained in sections

25 Cri.M.P. No. 13123 of 2020 dt.12-07-2021

13, 16(1) and 22(2) of the NIA Act, the Supreme Court in the case of ***Bikramjit Singh*** (Supra) has expressly ruled that all Scheduled Offences i.e. all offences under the UAPA, whether investigated by the National Investigation Agency or by the investigating agencies of the State Government, are to be tried exclusively by Special Courts set up under that Act. In the absence of any designated Court by notification issued by either the Central Government or the State Government, the fall back is upon the Court of Sessions alone.

109. In this view of the matter, the submission that the Special Courts to be constituted by the State Government under section 22(1) of the NIA Act were conceived as "transferee" Court only, to take up the trial of the cases only when the investigation was transferred by the National Investigation Agency to the State Government, does not appear to be in consonance with law. The said proposition, even otherwise, is fraught with irreconcilable infirmities. First and foremost, the stated object of establishment of the National Investigation Agency, in a concurrent jurisdiction framework, is required to be lost sight of. Secondly, the power of the State Government under section 10 of the NIA Act to investigate and prosecute any Scheduled Offence, of course

subject to the power of the National Investigation Agency to investigate into a Scheduled Offence, cannot be given effect to fully. Thirdly, the interplay between section 13(1) which confers exclusive jurisdiction on the Special Court (notwithstanding anything contained in the Code), and section 22 of the NIA Act is required to be ignored. Fourthly, had the intention of the legislature been to make the Special Courts, to be constituted by the State Government under section 22 of the NIA Act, as only the transferee Court, there was no need to make elaborate provisions especially under section 22 of the NIA Act, whereby the Special Court constituted by the State Government and the State Investigation Agency are equated with the Special Court constituted under section 11 and National Investigation Agency, respectively, subject to primacy of NIA and the Special Court constituted under section 11 of the NIA Act.

110. This propels us to the next limb of the submission assiduously canvassed on behalf of the respondents that under section 11 of the NIA Act, the Special Courts are to be constituted for the trial of Scheduled Offences. The Special Courts so constituted or designated under either section 11 or section 22 of the NIA Act, are not meant for conduct of pre-trial proceedings.

Since the extension of period of detention, pending completion of investigation, is squarely in the realm of investigation, the ordinary criminal Courts are not divested of the jurisdiction to deal with pre-trial proceedings, including the extension of period of detention, was the thrust of the submission on behalf of the respondents.

111. Indeed, there is a marked difference between the stages of investigation, inquiry and trial envisaged by the Code. However, in the light of the controversy at hand, the distinction sought to be drawn between "pre-trial" and "trial" proceedings and the jurisdiction of the Court qua those proceedings, is not of much assistance to the respondents. The reason is not far to seek. The first proviso in section 43-D(2)(b) expressly confers the power to extend the period of detention of the accused upto 180 days upon the 'Court', which in turn is defined in section 2(d) as 'a criminal court having jurisdiction to try offences' under the said Act. The legislature has vested the authority to extend the period of detention in the Court which is competent to try the offences under UAPA. We have seen that, ***Bikramjit Singh*** (Supra) lays down in emphatic terms that it is only the Special Courts

constituted either under sections 11 or 22 of the NIA Act which are competent to try the Scheduled Offences.

112. In this view of the matter, looking from any angle, 'the Court referred to in the proviso in section 43D(2)(b) of the UAPA would be the Court competent to try those offences, which are primarily the Special Courts constituted under sections 11 or 22 and, in the absence of designation of such Courts, the Court of Session.

113. Indisputably, in the case at hand, the Special Courts under section 22 of the Act were constituted at Pune. The question that now crops up for consideration is, whether in the face of existence of a Court constituted under section 22 of the NIA Act, the learned Additional Sessions Judge could have entertained the prayer for extension of period of detention under section 43-D(2)(b) of UAPA ?

114. Dr. Chaudhary, the learned counsel for the applicant would urge that the fact that the period of detention was extended by the learned Additional Sessions Judge is as irrelevant and inconsequential as the extension of the period of detention by the

learned Magistrate, which has been held to be without jurisdiction, by the Supreme Court in the case of ***Bikramjit Singh*** (Supra). According to Dr. Chaudhary, the question of existence of jurisdiction goes to the very heart of the matter. Reiterating that an order passed without jurisdiction is non-est in law, Dr. Chaudhary would urge, no matter such an order is passed by a Sessions Judge. It was further urged that when the statute provides a certain thing to be done in a particular way, it must be done in that way alone. The submission based on lack of prejudice to the applicant, according to Dr. Chaudhary, does not deserve countenance.

115. As a strong case of absence of prejudice to the applicants was pressed into service on behalf of the respondents, especially by Mr.Anil Singh, the learned Additional Solicitor General, we deem it appropriate to record that the aspect of prejudice operates in different spheres qua twin challenges, namely, the challenge to the authority to grant the extension of period of detention and competence to take cognizance. The former, in our view, stands on higher pedestal. By a catena of decisions, it has been held that the right of the accused to be released on bail, if the investigation is not completed and charge-

sheet is not filed within the period prescribed under section 167 of the Code and as extended by special enactments, is indefeasible and also partakes the character of fundamental right flowing from 'the procedure established by law' under Article 21 of the Constitution of India. The aspect of competence to take cognizance, on the other hand, is a matter which does not necessarily entail the consequence on personal liberty.

116. The matter can be looked at from another perspective. The legislature consciously chose to vest the power to extend the period of detention upto 180 days in the Court which is competent to try the offence under UAPA. The said power is further regulated by providing that it should be exercised only when the Court is satisfied with the report of Public Prosecutor indicating the progress of the investigation and the specific reasons for the further detention of the accused beyond the intial period of 90 days. The exercise of the power to extend the period of detention is thus not envisaged as a matter of routine. The Court is expected to apply its mind to the necessity of further detention and extension of period of investigation. This implies that the said power shall be exercised only by the Court which is vested with special jurisdiction by the statute.

117. The fact that the Special Judges are to be appointed from amongst the Sessions Judges does not carry the matter any further. It is not the mere hierarchial equivalence of the presiding officers of the Special Court and the Court of Sessions, which is decisive. The pivotal question is of existence of jurisdiction to extend the period of detention, which takes away the otherwise indefeasible right of the accused to be enlarged on bail, for default in completion of investigation and filing of the charge-sheet. From this stand point, in our view, the fact that in the cases of ***Bikramjit Singh*** (Supra) and ***Sadique*** (Supra), the period of detention was extended by the Magistrate makes no qualitative difference in the application of the principle of law expounded therein. The test is whether the Court which extended the period of detention had the jurisdictional competence? If not, it is of no relevance whether that Court was of inferior or superior rank.

118. Had the Special Court under section 22 of the NIA Act been not constituted at Pune, totally different consideration would have come into play. In that event, in view of the provisions of section 22(3) read with section 13(1) and section 16 of the NIA Act, the Court of Session would have the necessary jurisdiction to try the Scheduled Offence. However, in the face of indubitable

position of the existence of the Special Court, the extension of period of detention by the Additional Sessions Judge, can only be said to be without jurisdiction.

119. A profitable reference in this context can be made to the judgment of the Supreme Court in the case of ***Fatema Bibi Ahmed Patel Vs. State of Gujarat & Anr.*** (Supra), wherein in the context of extra-territorial operation of the Penal Code and exercise of jurisdiction under section 188 of the Code, the Supreme Court held that where the actions taken by the Court were without jurisdiction, those actions were nullities. The observations in paragraph Nos. 20 to 22 read as under :

> *"20 The learned counsel submitted that as in the earlier application, the appellant merely complained of the absence of any sanction, this application should not be entertained. We do not agree. Principles analogous to res judicata have no application with regard to criminal cases. An accused has a fundamental right in terms of Article 21 of the Constitution of India to be proceeded against only in accordance with law. The law which would apply in India subject of course to the provisions of Section 4 of the Indian Penal Code and Section 188 of the Code of Criminal Procedure is that the offence must be committed within the territory of India. If admittedly, the offence has not been committed within the territorial limits of India, the provisions of the Indian Penal Code as also the Code of Criminal Procedure would not apply. If the provisions of said Acts have no application as against the appellant, the order taking cognizance must be held to be wholly illegal and without jurisdiction. The jurisdictional issue has been raised by the appellant herein. Only because on a mistaken legal advise, another application was filed, which was dismissed, the same by itself, in our opinion, will not come in the way of the*

appellant to file an appropriate application before the High Court particularly when by reason thereof her fundamental right has been infringed.

21 This Court, in a matter like the present one where the jurisdictional issue goes to the root of the matter, would not allow injustice to be done to a party. The entire proceedings having been initiated illegally and without jurisdiction, all actions taken by the court were without jurisdiction, and thus are nullities. In such a case even the principle of res judicata (wherever applicable) would not apply."

22 In Chief Justice Of Andhra Pradesh And Others v. L. V. A. Dixitulu And Others [AIR 1979 SC 193 at 198], this Court held:

> *"24. If the argument holds good, it will make the decision of the Tribunal as having been given by an authority suffering from inherent lack of jurisdiction. Such a decision cannot be sustained merely by the doctrine of res judicata or estoppel as urged in this case."*

120. In the case of ***Zuari Cement Limited Vs. Regional Director, Employees' State Insurance Corporation, Hyderabad and Ors.*** (Supra), the Supreme Court adverted to the principle enunciated in the celebrated case of ***Nazir Ahmad Vs. King Emperor*** [26] and reiterated that, where there is want of jurisdiction, the order passed by the Court is a nullity or non-est. The following paragraphs are material :

"15 In Babu Verghese and Others vs. Bar Council of Kerala and Others, (1999) 3 SCC 422, it was held as under:

> *"31. It is the basic principle of law long settled that if the manner of doing a*

26AIR 1936 1936 PC 253

> *particular act is prescribed under any statute, the act must be done in that manner or not at all. The origin of this rule is traceable to the decision in Taylor v. Taylor, (45 LJCH 373) which was followed by Lord Roche in Nazir Ahmad v. King Emperor, (AIR 1936 PC 253) who stated as under:*
>
> *"Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all."*
>
> *32. This rule has since been approved by this Court in Rao Shiv Bahadur Singh v. State of V.P., (AIR 1954 SC 322 and again in Deep Chand v. State of Rajasthan (AIR 1961 SC 1527). These cases were considered by a three- Judge Bench of this Court in State of U.P. v. Singhara Singh (AIR 1964 SC 358) and the rule laid down in Nazir Ahmad case (AIR 1936 PC 253) was again upheld. This rule has since been applied to the exercise of jurisdiction by courts and has also been recognised as a salutary principle of administrative law."*
>
> *16. Where there is want of jurisdiction, the order passed by the court/tribunal is a nullity or non-est. What is relevant is whether the Court had the power to grant the relief asked for..........."*

121. As regards the aspect of taking cognizance by the learned Additional Sessions Judge by the orders dated 15th November 2018 and 21st February 2019, consistent with the pronouncement of the Supreme Court in the case of ***Bikramjit Singh*** (Supra), in our view, the Special Court, having been constituted under section 22 of the NIA Act, was the Court competent to take cognizance of the Scheduled Offence. This leads us to the question : What consequence emanate from the fact that

cognizance of the offences was taken by the learned Additional Sessions Judge, though a Special Court under section 22 of the NIA Act was in existence at Pune ?

122. For an answer, it is necessary to appreciate as to what is the jurisdictional connotation of the term, "cognizance". The Code does not define the term, "cognizance". In the context of the proceedings before the Court, it connotes, 'to take the judicial notice of the matter placed before the Court'. In a criminal prosecution, it implies that the Judge or Magistrate has taken judicial notice of the offences alleged, in order to initiate further action in accordance with the governing provisions of the Code and/or procedure prescribed under a Special enactment.

123. In the case of ***S.K. Sinha, Chief Enforcement Officer Vs. Videocon International Ltd. & Ors.*** [27]**,** the Supreme Court expounded the juridical connotation of the term "Cognizance", as under :-

> *"19 The expression "cognizance" has not been defined in the Code. But the word (cognizance) is of indefinite import. It has no esoteric or mystic significance in criminal law. It merely means "become aware of " and when used with reference to a Court or a Judge, it connotes, "to take notice of judicially". It indicates the point when a Court or a Magistrate takes judicial notice of an offence with a view to*

27 (2008) 2 SCC 492

initiating proceedings in respect of such offence said to have been committed by someone.

20 "Taking cognizance" does not involve any formal action of any kind. It occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance is taken prior to commencement of criminal proceedings. Taking of cognizance is thus a sine qua non or condition precedent for holding a valid trial. Cognizance is taken of an offence and not of an offender. Whether or not a Magistrate has taken cognizance of an offence depends on the facts and circumstances of each case and no rule of universal application can be laid down as to when a Magistrate can be said to have taken cognizance."

124. In the light of the uncontroverted facts of the case at hand, the question which wrenches to the fore is whether the act of taking cognizance of the Scheduled Offences by the learned Additional Sessions Judge (Shri K.D. Vadane) entails the consequence of nullifying the presentment of the charge-sheet by the Investigating Agency, post completion of investigation. To put it in other words, whether the act of taking cognizance by a Judge who is not legally empowered to do so, vitiates the entire proceedings?

125. To begin with, the Code declares it to be an irregularity which does not vitiate the proceedings. Clause (e) of section 460 of the Code, declares that if any Magistrate, not empowered by law, erroneously in good faith, takes cognizance under clause (a) or clause (b) of sub-section (1) of section 190, his proceedings shall

not be set aside merely on the ground of his not being so empowered. From the expression “merely on the ground of his not being so empowered” used in section 460, the element of prejudice on account of irregular proceeding becomes explicit. Mere irregularity without resultant prejudice which has the propensity to lead to failure of justice is of no consequence.

126. In our view, Mr. Anil Singh, the learned Additional Solicitor General was justified in advancing the submission as regards lack of prejudice in the context of the cognizance having been taken by the learned Additional Sessions Judge, and placing reliance on the judgment of the Supreme Court in the case of ***Rattiram and Ors.*** (Supra). ***Rattiram and Ors.*** (Supra) arose in the context of the cleavage of opinion in the judgments of the Supreme court in the cases of ***Moly & Anr. Vs. State of Kerala*** [28]and ***Vidyadharan Vs. State of Kerala***[29], on the one hand, wherein, it was held that conviction by the Special Court is not sustainable if it had *suo moto* entertained and taken cognizance of the complaint under the provisions of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 without the case being committed to it, and in the case of ***State of Madhya***

28 AIR 2004 SC 1890
29 (2004) 1 SCC 215

Pradesh Vs. Bhooraji [30]***,*** on the other hand, wherein it was opined that when a trial has been conducted by a Court of competent jurisdiction and a conviction has been recorded on proper appreciation of evidence, the same cannot be erased or effaced merely on the ground that there had been no committal proceeding and cognizance was taken by the Special Court inasmuch as the same does not give rise to failure of justice.

127. A three Judge Bench in the case of ***Rattiram & Ors*** (Supra), after adverting to the provisions contained in section 465 of the Code to the effect that no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under the Code, or any error, or irregularity in any sanction for the prosecution unless in the opinion of that court, a failure of justice has in fact been occasioned thereby, approached the controversy on the premise that 'failure of justice' has been treated as the sine qua non for setting aside the conviction. The Supreme Court

30 AIR 2001 SC 3372

referred to a number of pronouncements which dealt with the aspect of failure of justice, and concluded as under :-

> *"65 We may state without any fear of contradiction that if the failure of justice is not bestowed its due signification in a case of the present nature, every procedural lapse or interdict would be given a privileged place on the pulpit. It would, with unnecessary interpretative dynamism, have the effect potentiality to cause a dent in the criminal justice delivery system and eventually, justice would become illusory like a mirage. It is to be borne in mind that the Legislature deliberately obliterated certain rights conferred on the accused at the committal stage under the new Code. The intendment of the Legislature in the plainest sense is that every stage is not to be treated as vital and it is to be interpreted to subserve the substantive objects of the criminal trial.*
>
> *66 Judged from these spectrums and analysed on the aforesaid premises, we come to the irresistible conclusion that the objection relating to non-compliance of Section 193 of the Code, which eventually has resulted in directly entertaining and taking cognizance by the Special Judge under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, does not vitiate the trial and on the said ground alone, the conviction cannot be set aside or there cannot be a direction of retrial and, therefore, the decision rendered in Bhooraji (supra) lays down the correct law inasmuch as there is no failure of justice or no prejudice is caused to the accused.*
>
> *67 The decisions rendered in Moly (supra) and Vidyadharan (supra) have not noted the decision in Bhooraji (supra), a binding precedent, and hence they are per incuriam and further, the law laid down therein, whereby the conviction is set aside or matter is remanded after setting aside the conviction for fresh trial, does not expound the correct proposition of law and, accordingly, they are hereby, to that extent, overruled."*

(emphasis supplied)

128. The aforesaid pronouncement, thus, exposits the law that the fact that cognizance was taken by a Special Court, despite the interdict in section 193 of the Code (which was the

position under the un-amended SC and ST Act, 1989), and held the trial resulting in a conviction, does not necessarily lead to setting aside of the conviction on the ground of defect in taking cognizance unless the failure of justice could be demonstrated.

129. It is true that in the case at hand, the applicants had made an endeavour to question the jurisdiction of the Additional Sessions Judge, at the initial stage. However, the foundational premise was that the applicants ought to have been produced before the learned Magistrate and not the Additional Sessions Judge. In this view of the matter, the fact that the Additional Sessions Judge took cognizance of the Scheduled Offences, despite the existence of a Special Court at Pune, in the absence of material to demonstrate that there was resultant failure of justice, cannot be exalted to such a pedestal as to hold that the very presentment of the charge-sheet by the investigating agency is non-est in the eye of law.

130. We are thus not persuaded to accede to the submission on behalf of the applicants that the fact that the charge-sheet was lodged in the Court of Additional Sessions Judge and cognizance of the Scheduled Offences was taken by the

learned Additional Sessions Judge would entail the consequence of no charge-sheet at all having been filed by the investigating agency on the given dates.

131. For the foregoing reasons, we answer the question Nos. (i) and (ii) formulated at paragraph No.56 as under :-

> (i) Extension of period of investigation and detention of the applicants by order dated 26th November 2018 by invoking the first proviso under section 43-D(2) of UAPA, by the learned Additional Sessions Judge was not by a Court of competent jurisdiction.
>
> (ii) Consistent with the enunciation in the case of ***Bikramjit Singh*** (Supra) and in the face of undisputed position of existence of Special Court at Pune, the charge-sheet ought to have been lodged before the Special Court. However, the act of taking of cognizance, by the learned Additional Sessions Judge (Shri K.D.Vadane), does not entail the consequence of the vitiation of the entire proceedings.

132. This propels us to the answer to the third and moot question : whether the applicants are now entitled to default bail?

133. We have noted the facts in detail, on purpose. The challenge to the application of Sudha Bharadwaj is on the ground that it was presented at a premature stage, i.e., before the completion of period of 90 days of detention. Whereas, the application presented by all the applicants (Exh. 169) dated 21st June, 2019 was assailed on the ground that it was presented after the supplementary charge-sheet came to be filed on 21st February 2019. Thus, none of the applications were presented after the expiry of initial period of 90 days and before lodging of the charge-sheet, even if the order of extension of period of detention is held to be without jurisdiction and thus eschewed from consideration.

134. In the light of significant distinction on the factual score, the claim of the applicants in both the applications warrants independent consideration. Before we proceed to delve into the facts, we deem it appropriate to note the legal position, which is almost crystallized, as regards the right to be released on bail under section 167(2) of the Code, by a catena of decisions. In the context of the controversy at hand, we are of the view that, it would be suffice to refer to the recent judgment of the Supreme

Court in the case of ***M. Ravindran Vs. The Intelligence Officer, Directorate of Revenue Intelligence***[31]

135. In the case of ***M. Ravindran*** (Supra), a three Judge Bench of the Supreme Court took survey of the authorities on the right of the accused to be enlarged on bail under section 167(2) of the Code. The Supreme Court culled out the propositions in paragraph 25 of the said judgment. They read as under :

> *"25 Therefore, in conclusion:*
>
> *25.1 <u>Once the accused files an application for bail under the Proviso to Section 167(2) he is deemed to have 'availed of' or enforced his right to be released on default bail, accruing after expiry of the stipulated time limit for investigation.</u> Thus, if the accused applies for bail under Section 167(2), CrPC read with Section 36A (4), NDPS Act upon expiry of 180 days or the extended period, as the case may be, the Court must release him on bail forthwith without any unnecessary delay after getting necessary information from the public prosecutor, as mentioned supra. Such prompt action will restrict the prosecution from frustrating the legislative mandate to release the accused on bail in case of default by the investigative agency.*
>
> *25.2 <u>The right to be released on default bail continues to remain enforceable if the accused has applied for such bail, notwithstanding pendency of the bail application; or subsequent filing of the chargesheet or a report seeking extension of time by the prosecution before the Court; or filing of the chargesheet during the interregnum when challenge to the rejection of the bail application is pending before a higher Court.</u>*
>
> *25.3 <u>However, where the accused fails to apply for default bail when the right accrues to him, and subsequently a chargesheet, additional complaint or a report seeking extension of time is preferred before the Magistrate, the right to default bail would be extinguished.</u> The Magistrate would be at liberty to take cognizance of the*

31 (2021) 2 SCC 485

case or grant further time for completion of the investigation, as the case may be, though the accused may still be released on bail under other provisions of the CrPC.

25.4 Notwithstanding the order of default bail passed by the Court, by virtue of Explanation I to Section 167(2), the actual release of the accused from custody is contingent on the directions passed by the competent Court granting bail. If the accused fails to furnish bail and/or comply with the terms and conditions of the bail order within the time stipulated by the Court, his continued detention in custody is valid."

(emphasis supplied)

136. A profitable reference can also be made to the observations of the Supreme Court in the case of ***Bikramjit Singh*** (Supra), wherein the aspect of entitlement to default bail in the backdrop of wrongful rejection of the application and the subsequent filing of the charge-sheet, was also considered. The principles are enunciated in paragraph 36 as under :

"36 A conspectus of the aforesaid decisions would show that so long as an application for grant of default bail is made on expiry of the period of 90 days (which application need not even be in writing) before a charge sheet is filed, the right to default bail becomes complete. It is of no moment that the Criminal Court in question either does not dispose of such application before the charge sheet is filed or disposes of such application wrongly before such charge sheet is filed. So long as an application has been made for default bail on expiry of the stated period before time is further extended to the maximum period of 180 days, default bail, being an indefeasible right of the accused under the first proviso to Section 167(2), kicks in and must be granted."

(emphasis supplied)

137. Amplifying the challenge to the claim of applicant-Sudha Bharadwaj, the leaned Additional Solicitor General would urge that the period during which the applicant was ordered to be kept under house arrest, i.e., 28th August 2018 to 27th October 2018, (the day, the applicant was taken into custody by Pune Police) cannot be counted as the period of detention, under the orders of the Court under section 167 of the Code. Thus, the application preferred by the applicant for default bail, i.e., 26th November 2018, on the ground that 90 days' period from the date of her initial production before the learned Magistrate expired, cannot be said to have been made after the expiry of 90 days as the period of house arrest was required to be excluded therefrom. Thus, the application presented on 26th November 2018 (Exh.43) was premature.

138. The aforesaid submission was based on the enunciation of law in the case of ***Gautam Navlakha Vs. National Investigation Agency*** [32]. In the backdrop of the fact that the case of a similarly circumstanced co-accused was considered by the Supreme Court and the claim of the accused that the period of house arrest was required to be reckoned as the period of

32 2021(7) SCALE 379

detention was not accepted by the Supreme Court, in the light of the order passed by the Supreme Court on 29th August 2018 in Romila Thapar & Others Vs. Union of India & Others, Writ Petition No. 260 of 2018, in our view, it would be suffice to extract paragraphs Nos.134 and 141 of the judgment in the case of ***Gautam Navlakha*** (Supra). They read as under :

> *"134 We would think that the reality of the situation is explained by the said Order. Upon being informed that the appellant and another were kept under house arrest, on the suggestion of the Counsel for the petitioners in the Public Interest Litigation before this Court, that he had no objection in three others, if arrested, they be kept under house arrest, at their own homes, it was so ordered. It is not a case where this Court even had in its mind the duty to go through the entries in the case diaries relating to them, leave alone actually going through them. Quite clearly, in respect of those persons, house arrest even was the result of the choice exercised by the Senior Counsel for the Writ Petitioners, who were not the persons to undergo the house arrest. No doubt, the Public Interest Litigation was launched to have an impartial enquiry regarding their arrests. It is thereafter that it was ordered that the house arrest of appellant and other (Sudha Bharadwaj), may be extended in terms of the order. House arrest was, undoubtedly, perceived as the softer alternative to actual incarceration. It was in that light that the Court proceeded in the matter. That house arrest, in turn, involved, deprivation of liberty and will fall within the embrace of custody under Section 167 of the CrPC, was not apparently in the minds of both this Court and the High Court of Delhi. This is our understanding of the orders passed by the court."*
>
> ....
>
> *141 In view of the fact that the house arrest of the appellant was not purported to be under Section 167 and cannot be treated as passed thereunder, we dismiss the appeal. There will be no order as to costs."*

139. The Supreme Court has thus held in clear and explicit terms that the house arrest of the appellant therein, who was similarly circumstanced with the applicant, was not to be equated with the detention within the meaning of section 167 of the Code. Thus, the submission of the learned Additional Solicitor General that the period for which the applicant was under house arrest cannot be considered in computing the period of 90 days is well grounded in facts and law. However, the further submission that the application (Exh.43) preferred by the applicant on 26th November, 2018, was premature, and, thus, could not form the basis of accrual of right of default bail, in our view, does not merit equal acceptance.

140. The aforesaid submission, if given full play, cuts the other way too. Even before the expiry of the period of 90 days, from the date of initial arrest of the applicant (computing the period of house arrest as well) i.e. on 22nd November 2018 itself, the learned Public Prosecutor filed report (Exh.33) under section 43-D(2) of UAPA read with section 167(2) of the Code for extension of the period of detention, presumably on the premise that the initial period of 90 days would expire on 25th November 2018. Secondly, what is of critical significance is the fact that the

application for default bail, preferred by the applicant (Exh.43) on 26th November 2018 was not decided alongwith the report (Exh.33) filed by the Public Prosecutor. The said application was very much pending on the day, the period of 90 days, excluding the duration for which the applicant was under house arrest, expired on 25th January, 2019 and eventually came to be dismissed by the learned Additional Sessions Judge on 6th November 2019. The supplementary charge-sheet against the applicant-Sudha Bharadwaj was filed on 21st February 2019.

141. In the backdrop of the view which we have taken that, the order passed by the learned Additional Sessions Judge on the report (Exh.33) on 26th November 2018, was without jurisdiction, the respondents cannot be now permitted to draw mileage from the said order passed by learned Additional Sessions Judge and, thus, the situation which obtained on 25th January, 2019, was that the period of 90 days, excluding the period for which the applicant was under house arrest, expired and the application preferred by the applicant for default bail (Exh.43) was still pending. Can the applicant be not said to have availed the right to be enlarged on bail?

142. In the light of the pronouncement of ***M. Ravindran*** (Supra) and ***Bikramjit Singh*** (Supra), once the period of detention expired and the accused manifested the intent to avail the right by making an application, no subterfuge to defeat the said indefeasible right can be countenanced. The factors like the bail application was not decided, or wrongly decided, or subsequently charge-sheet came to be filed, or a report seeking extension of period of detention came to be filed and allowed, are of no significance. Such attempts of defeating the indefeasible right have been consistently repelled by the Courts. Once, the twin conditions of default in filing the charge-sheet, within the prescribed period, and the action on the part of the accused to avail the right are satisfied, the statutory right under section 167(2) of the Code catapults into a fundamental right as the further detention falls foul of the personal liberty guaranteed under Article 21 of the Constitution.

143. In the case at hand, with the declaration that the learned Additional Sessions Judge (Shri K.D. Vadane) had no jurisdictional competence to extend the period of detention under section 43-D(2)(b) of UAPA, the very substratum of the prosecution case that the right to default bail did not ripe into an

indefeasible right, as the period of detention was extended, gets dismantled. The hard facts which thus emerge so far as the application of Sudha Bharadwaj are : (i) that the period of detention of 90 days (excluding the period of house arrest) expired on 25th January, 2019; (ii) no charge-sheet was lodged; (iii) there was no lawful order of extension of period of detention; and (iv) an application preferred by Sudha Bharadwaj for default bail awaited adjudication.

144. The matter can be looked at from a slightly different perspective. As the period of detention was extended by the learned Additional Sessions Judge by 90 days, the applicant-Sudha Bharadwaj could not have applied for default bail after 25th January 2019 till the filing of the charge-sheet. Therefore, it cannot be urged that the applicant-Sudha Bharadwaj did not make an application during the said period and thus she did not avail the right of default bail. On the touchstone of the guarantee of personal liberty under Article 21 of the Constitution, in our view, to deprive the applicant-Sudha Bharadwaj of the indefeasible right on the premise that the application preferred on 26th November 2018 (Exh. 43) was premature, would be taking a too technical and formalistic view of the matter. In our view, all

the requisite conditions to release the applicant-Sudha Bharadwaj on default bail stood fully satisfied.

145. As regards the entitlement of the applicant Nos.1 to 8 in Application No.1458 of 2019 for default bail, a brief revisit to the facts would be in order.

> (i) The applicant Nos.1 to 5, namely, Sudhir Prahlad Dhawale, Rona Wilson, Surendra Gadling, Dr. Shoma Sen and Mahesh Raut were arrested on 6th June 2018.
>
> (ii) Charge-sheet against applicant Nos. 1 to 5 was filed on 15th November 2018.
>
> (iii) Applicant Nos. 6 to 8, namely P. Varavara Rao, Vernon Gonsalves and Arun Ferreira were arrested on 28th August 2018.
>
> (iv) Charge-sheet against the applicant Nos. 6 to 8 in Criminal Application No.1458 of 2019 and Sudha Bharadwaj Bharadwaj, applicant in Criminal Bail Application No. 2024 of 2021, was filed on 21st February 2019.

146. Evidently, neither applicant Nos.1 to 5 claimed to have filed an application for default bail under section 167(2) of the Code, after the expiry of initial period of 90 days from the date of their production before the learned Additional Sessions Judge on 7th June 2018 till the filing of the charge-sheet on 15th November

2018. Nor the applicant Nos.6 to 8 preferred such application till the filing of the supplementary charge-sheet, qua them on 21st February 2019, after the expiry of initial period of 90 days.

147. The applicants have, however, approached the Court with a case that the applicants were detained beyond the period of 180 days without the cognizance of the offences having been taken by the competent Court. We have extracted the averments in paragraph Nos. 4 to 6 of the application. The applicants premised their claim for default bail on the aspect of defect in taking cognizance of the offences. For the applicants, the learned Additional Sessions Judge could not have taken cognizance without the case having been committed by the learned Magistrate.

148. In the aforesaid view of the matter, the learned Advocate General and the learned Additional Solicitor General were on a firm ground when they urged that the applicants in Application No.1458 of 2019 did not 'avail of' the right of default bail, by filing an application, within the meaning of section 167(2) of the Code. We have seen that where the accused fails to apply for default bail when the right accrues to him and subsequently a

charge-sheet is filed before the Magistrate, the right to default bail would get extinguished as it cannot be said that the accused 'availed of' his right to be released on default bail.

149. In this view of the matter, so far as the applicant Nos. 1 to 5 in Application No.1458 of 2019, the aspect of legality or otherwise of the extension of period of detention is of no relevance as the applicants did not avail of the said right to be released on default bail before the charge-sheet was filed against them on 15th November 2018. In the case of applicant Nos. 6 to 8, though we have held that the order passed by the learned Additional Sessions Judge on the report (Exh.33) on 26th November 2018 was without jurisdiction, yet the said declaration is of no assistance to the applicant Nos.6 to 8 as they did not avail of the right to be released on default bail by filing an application, after the expiry of the initial period of 90 days and before the lodging of the charge-sheet on 21st February 2019. Resultantly, a crucial condition of 'availing of' the right so as to cement it as an indefeasible right, has not been fulfilled and the right stood extinguished by the filing of the charge-sheet on 21st February 2019. Failure to take cognizance or defect in jurisdiction in taking cognizance, once the

charge-sheet was laid, does not entail the consequence of default bail.

150. The conspectus of aforesaid consideration is that the Application No.1458 of 2019 preferred by Sudhir Prahlad Dhawale and 7 others is liable to be rejected. Whereas the Bail Application No. 2024 of 2021 preferred by Sudha Bharadwaj deserves to be allowed.

151. Hence, the following order :

O R D E R

(i) Criminal Application No.1458 of 2019 stands rejected.

(ii) Criminal Bail Application No.2024 of 2021 stands allowed.

(iii) It is declared that Sudha Bharadwaj, the applicant in Criminal Bail Application No. 2024 of 2021 is entitled to be released on default bail under section 167(2) read with section 43-D(2) of UAPA.

(iv) The applicant Sudha Bharadwaj be produced before the Special Court, NIA, Mumbai on 6th December 2021 and the learned Special Judge shall pass an order

releasing the applicant-Sudha Bharadwaj on default bail on such terms and conditions as may be found suitable in the circumstances of the case.

(v) In view of the disposal of Criminal Application No. 1458 of 2019 and Criminal Bail Application No.2024 of 2021, all pending interim applications therein shall stand disposed of.

All concerned to act on an authenticated copy of this order.

[N. J. Jamadar, J.] **[S.S. Shinde, J.]**

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At this stage, Mr. Anil Singh, the learned learned Additional Solicitor General for respondent-NIA seeks stay to the execution, operation and implementation of this order as the pure question of law arose in this matter and the decision in this case may have repercussions on the other cases.

Mr.Chaudhary, the learned counsel for the applicant – Sudha Bharadwaj opposed the prayer of stay to the implementation of the order. It was submitted that since this matter was closed for orders, two judgments have been delivered

by the Supreme Court which have affirmed the decision in the case of ***Bikramjit Singh*** (Supra).

Suffice to note that we have considered those two judgments in this order.

In view of the nature of the question which fell for our determination, we consider it appropriate to direct that the applicant-Sudha Bharadwaj be produced before the learned Special Judge, NIA Court, Mumbai on ‘8th December 2021’ instead of ‘6th December 2021’ and the learned Special Judge, NIA Court, Mumbai shall pass the order in terms of clause (iv) of the order, on that day.

[N. J. Jamadar, J.] **[S.S. Shinde, J.]**