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SANJAY DUTT (A-117)

v.

THE STATE OF MAHARASHTRA, THROUGH CBI (STF), BOMBAY

B (CRIMINAL APPEAL NO. 1060 OF 2007 ETC.)

PART- 6

MARCH 21, 2013

[P. SATHASIVAM AND DR. B.S. CHAUHAN, JJ.]

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Terrorist and Destructive Activities (Prevention) Act, 1987 – ss. 3(2)(i)(ii), 3(3), (4), 5 and 6 – Penal Code, 1860 – 120-B, 302, 307, 326, 427, 435, 436, 201 and 212 – Arms Act, 1959 – ss. 3, 7 and 25(1-A), (1-B)(a) – Explosives Act, 1884 D *– s.9B(1)(a)(b)(c) – Explosive Substances Act, 1908 – ss. 3, 4(a)(b), 5 and 6 – Prevention of Damage to Public Property Act, 1984 – s. 4 – Prosecution under – Designated Court convicted A-117 under the provisions of Arms Act and sentenced him to 6 years imprisonment; convicted A-118* E *under the provisions of Arms Act and u/s. 201 IPC and sentenced him to 5 years RI – A-124 was convicted u/s. 25(1-B)(a) of Arms Act and s.201 IPC and sentenced to 2 years RI – Acquittal of A-120 – Conviction of A-53 u/s. 3(3) TADA and sentenced of 9 years RI – Conviction of A-119 u/ss. 3(3)* F *and 5 of TADA and sentenced to 5 years RI – All the appellants-accused preferred appeal – The State filed appeal against acquittal of A-120 and cross-appeals in respect of A-53 and A-119 – Held: Order of the Designated Court upheld as regards conviction/acquittal of the accused persons –* G *However, in the circumstances of the case, sentence of A-117 reduced to 5 years RI from 6 years RI; sentence of A-124 reduced to 1 years RI from 2 years; and sentence of A-53 reduced to the period already undergone.*

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s.15 – Confessional statement under – Evidentiary value of – Held: A confessional statement is a substantive piece of evidence and can be the sole basis for conviction, if recorded in accordance with the provisions of TADA – A voluntary and truthful confessional statement requires no corroboration – But if such statement is to be used against the co-accused, the Court may look for corroboration as a matter of prudence – Minor and curable irregularities in recording such statement do not affect the admissibility of the said evidence.

s. 15 – Confessional statement – Retraction of – Effect – Held: A voluntary and free confession even if retracted later, can be relied upon.

s.15 – Confessional statement under – Reliance on – Permissibility – When accused is acquitted of TADA charges – Held: Confession recorded u/s. 15 can be relied upon in case of a joint trial, even if the accused is subsequently acquitted of TADA charges.

Evidence Act, 1872 – s.27 – Scope of – Held: s.27 is attracted even when identification is of the person, instead of place where the article is to be found.

Probation of Offenders Act, 1958:

s.4 – Scope of – Held: s. 4 is intended to attempt possible reformation of an offender instead of inflicting upon him the normal punishment – Such exercise of discretion needs a sense of responsibility, by taking into consideration the attendant circumstances – In the present case, circumstances of the case and nature of the offence are so serious that they do not warrant A-117 benefit of provisions of the Act.

s. 4 – Effect of – Held: The provision will have overriding effect and shall prevail, if conditions prescribed therein are fulfilled – Code of Criminal Procedure, 1973 – s. 360.

A As a retaliation to demolition of Babri Masjid at Ayodhya 'DI' 'TM' and 'MD' all absconding accused (AA), formulated a conspiracy to commit terrorist acts in the city of Bombay. In pursuance of the said objective 'DI' (AA) sent arms and ammunitions from abroad and 'TM' (AA) B received those arms and ammunitions in India. Pursuant to the serial bomb blast in the city of Bombay, a common charge of conspiracy was framed against all the co-conspirators including the appellants in the present appeals.

C The appellants in appeal Nos. 1060/2007, 1102/2007 and 1687/2007 (A-117, A-118 and A-124), in addition to the common charge, were charged u/s. 3(3) for acquiring and keeping in their possession 3 AK-56 rifles, its ammunitions and one 9 mm pistol and its cartridges and D handgranades unauthorisedly, u/s. 5 and 6 of TADA, and u/ss. 3 and 7 r/w. ss.25(1-A) and (1-8)(a) of Arms Act, 1959. The appellants (A-118 and 124) were also charged u/s. 201 IPC for destroying the unauthorisedly possessed arms.

E Designated court convicted A-117 u/ss. 3 and 7 r/w. ss.25(1-A)(1-B)(a) of Arms Act, 1959 and sentenced him to 6 years RI alongwith fine of Rs.25,000/-, with default clause. He was acquitted of rest of the offences for which he was charged. A-118 was convicted u/ss. 3 and 7 r/w F ss.25(1-A)(1-B)(a) of Arms Act and was sentenced to 5 years RI and fine. He was further convicted u/s. 201 IPC and sentenced to 2 years RI. A-124 was also convicted u/ss. 3 and 7 r/w. ss. 25(1-A), (1-B)(a) of Arms Act and u/s. 201 IPC and was sentenced to 2 years RI on each count G and fine of Rs.25,000/- was imposed. Hence the present appeals were filed by A-117, A-118 and A-124.

The respondent-accused (A-120) in the appeal No. 596/2011, apart from common charge of conspiracy, was charged u/ss. 3(3), 5 and 6 of TADA and u/ss. 3 and 7 r/

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w. ss.25(1-A)(1-B)(a) of Arms Act, 1959. Designated Court acquitted him of all the charges. Hence the appeal was filed by CBI.

Accused No.53 (A-53), in addition to common charge of conspiracy was charged u/ss. 3(3) and 6 of TADA. He was convicted by Designated Court u/s. 3(3) of TADA and sentenced to 9 years RI and fine of Rs. one lakh with default clause. Hence the cross-appeals (appeal No.1104/ 2007 and 1026/ 2012) were filed by the accused as well as CBI.

The accused (A-119), apart from general charge of conspiracy, was also charged u/ss. 3(3), 5 and 6 of TADA. He was convicted u/s. 3(3) and 5 of TADA and was acquitted of the general charge of conspiracy. Hence the cross-appeals (Appeal Nos.1001/2007 and 392/2011) by the accused as well as CBI.

It was *interalia* contended that reliance on confessional statement of A-117 to the police was impermissible for the offences other than TADA offences, as he was acquitted of the charges under TADA; that identification of person, instead of the place where the article is to be found does not attract the provisions of s.27 of Evidence Act; and that A-117 was entitled to benefit of s.4 of Probation of Offenders Act, 1958.

Partly allowing the appeals by A-117, A-124 and A-53 and dismissing the appeals by A-118 and 129 and the appeals by the State, the Court

HELD:

Criminal Appeal Nos.1060 of 2007; 1102 of 2007 and 1687 of 2007:

1.1. A confessional statement duly recorded by a

A Police Officer is a substantive piece of evidence and the same can be relied upon in the trial of such person or of the co-accused, abettor or conspirator if the requirements of Section 15 of TADA, and the rules framed thereunder are complied with. The police officer, before recording the B confession, has to observe the requirement of Section 15(2) of TADA. A voluntary and truthful confessional statement recorded under Section 15 of TADA requires no corroboration. However, as a matter of prudence, the court may look for some corroboration if confession is C to be used against co-accused. Whether such confession requires corroboration or not is a matter for the court to consider such confession on the facts and circumstances of each case. If the confession made by an accused is voluntary and true, it is admissible against co-accused as a substantive piece of evidence and minor D and curable irregularities in recording of confession, such as omission in obtaining the certificate of the competent officer with respect to the confession do not affect the admissibility of the said evidence. [Para 37] [427-E-H; 428-A-B]

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1.2. The corroboration can be found in the present case both in the nature of substantive evidence in the form of the confessions of the co-accused, as well as in the oral testimony of witnesses, including the eye F witnesses to the incident who have identified the appellant-A-117, as well as the co-accused viz., A-41 and A-53.Apart from the evidence contemporaneous to the arrest of the abovesaid three accused and the recovery made from A-124 and subsequent recovery at the G instance of A-124 from A-120, are also relevant in respect of all the three appellants i.e. A-117, A-118 and A-124. [Paras 56 and 57] [438-E-G]

1.3. A voluntary and free confession, even if later retracted, can be relied upon. In the case of the appellant

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A-117, the retraction statement was not made at the first available opportunity. After the recording of his confession, within 10 days, the accused was released on bail by the High Court, and the accused remained free for a considerable period of time. The retractions were made many months after the recording of the confession. [Paras 38 and 39] [428-C-E]

1.4. The appellant A-117 not only implicates himself in his confessional statement but also amongst others the appellant A-118. The confession was duly recorded by PW-193 who has proved the compliance with the provisions of law while recording the confession. The confession is a substantive piece of evidence and the confession can be the sole basis of conviction, if recorded in accordance with the provisions of TADA. Further, the confessional statement establishes the unauthorized possession of weapons in the notified area of Bombay. The confession of the appellant (A-117) is also substantiated and corroborated with the confession of other co-accused, namely, A-53, A-41, A-89, A-40, A-118 and A-124. [Paras 20 and 21] [405-D-G]

1.5. In view of the confessional statement of A-118, it is seen that the appellant (A-118), upon instructions, caused destruction of evidence related to an offence, which were unauthorisedly possessed automatic firearms/weapons in a notified area, attracting the provisions of the Arms Act. The confession of A-118 not only involves and implicates him, but also implicates A-124. The confession of A-118 corroborates with the confession of A-117 as well as A-124. [Para 25] [414-F-G]

1.6.The confession of appellant A-124 establishes the charge framed against A-124 that he knowingly destroyed evidence related to an offence. A-124 was

A **thereafter in unauthorized possession of the fire-arm. The abovesaid confession also corroborates in material particulars, the confession of A-118. [Para 28] [417-G]**

1.7. The sequence of events after the arrest of A-117 till the recovery of pistol from A-120, forms part of an unbroken chain inseparably connected to each other. No foul play can be assumed in view of the fact that the events happened in quick succession one after the other, lending credibility and truthfulness to the whole episode. The role and the part played by A-118 and A-124 is also clear from the evidence relied upon by the prosecution in respect of A-117, which corroborates with each other in material particulars and is thus a substantive piece of evidence. [Para 58] [438-H; 439-A-B]

1.8. The confessions of the appellants, viz., A-117, A-118 and A-124 have been recorded by PW-193, who has proved that the said confessions were recorded after following the requirements of the provisions of Section 15 of TADA. Notwithstanding vigorous cross-examination of the witness (PW-193), he stood firmly without being shaken. [Para 29] [417-H; 418-A]

Jayawant Dattatray Suryarao vs. State of Mharashtra **(2001) 10 SCC 109: 2001 (5) Suppl. SCR 54;** *Ravinder Singh @ Bittu vs. State of Maharashtra* **(2002) 9 SCC 55: 2002 (3) SCR 622;** *Mohmed Amin vs. Central Bureau of Investigation* **(2008) 15 SCC 49: 2008 (16) SCR 155;** *Jameel Ahmed and Anr. vs. State of Rajasthan* **(2003) 9 SCC 673;** *Mohd. Farooq Abdul Gafur vs. State of Maharashtra* **(2010) 14 SCC 641: 2009 (12) SCR 1093;** *State of Maharashtra vs. Bharat Chaganlal Raghani* **(2001) 9 SCC 1: 2001 (3) SCR 840;** *Manjit Singh vs. CBI* **(2011) 11 SCC 578: 2011 (1) SCR 997;** *Wariyam Singh vs. State of U.P.* **(1995) 6 SCC 458: 1995 (3) Suppl. SCR 807;** *S.N. Dube vs. N.B. Bhoir and Ors.* **(2000) 2 SCC 254: 2000 (1) SCR 200;** *Lal Singh vs. State*

of Gujarat **(2001) 3 SCC 221: 2001 (1) SCR 111;** *State of Maharashtra vs. Bharat Chaganlal Raghani*, **(2001) 9 SCC 1: 2001 (3) SCR 840;** *Devender Pal Singh vs. State of NCT of Delhi* **(2002) 5 SCC 234: 2002 (2) SCR 767;** *Ravinder Singh vs. State of Maharashtra* **(2002) 9 SCC 55: 2002 (3) SCR 622;** *Nazir Khan vs. State of Delhi* **(2003) 8 SCC 461: 2003 (2) Suppl. SCR 884;** *Sukhwant Singh vs. State* **(2003) 8 SCC 90;** *Mohd. Ayub Dar vs. State of Jammu and Kashmir* **(2010) 9 SCC 312: 2010 (8) SCR 916;** *Manjit Singh vs. CBI*, **(2011) 11 SCC 578: 2011 (1) SCR 997 – relied on.**

2. It cannot be said that u/s. 27 of the Evidence Act, only recovery of object is permissible and identification of the person instead of the place where the article is to be found cannot attract the provisions of Section 27. The rod and the spring recovered from the possession of A-124 were sent to FSL for examination. The experts opined that the said articles correspond to that of an AK-56 type rifle, but did not correspond to similar components used in AK-47 rifle. The requisition and the report show that the seal on the packet containing the object was perfect and had not been tempered with. In that event, the said anomaly may not be of much consequence. The prosecution has also established through one independent witness PW-265 that A-118 and A-124 further made statement to the police and pursuant whereof the gas cylinder used in destroying AK-56 was recovered at the instance of A-124 and some of the ammunition of AK-56 were recovered at the instance of A-118. [Paras 61 and 63 to 65] [449-F-G; 451-G-H; 452-B-D]

Jaffar Hussain Dastagir vs. State of Maharashtra **(1969) 2 SCC 872: 1970 (2) SCR 332;** *State (NCT of Delhi) vs. Navjot Sandhu* **(2005) 11 SCC 600: 2005 (2) Suppl. SCR 79 – relied on.**

3. Even if the accused was to be acquitted of the

A **TADA charges, still in a joint trial, the confessions recorded under Section 15 of TADA can be relied upon in respect of the said accused. The stage at which the trial can be separated is at the stage of cognizance and not subsequently. In the present case, at the time of**
B **taking cognizance by the Designated Court, there were sufficient evidence against the appellants to proceed against them in the joint trial. In the case of A-117, the Designated Court rightly took a view on the basis of his own confession that the weapons were not acquired for**
C **any terrorist activity but they were acquired for self-defence, therefore, acquittal was rightly recorded in respect of charge under Section 5 of TADA. In *_Sanjay Dutt (II) case_ wherein this Court considered the entire case of the appellant-A-117 at that stage and opined that**
D **although the offence was complete by the unauthorized possession of a weapon in the notified area, a defence would be available to the accused to be taken at the time of the trial and the Trial Court can consider the same by virtue of Section 12 of TADA. [Paras 67 and 70] [452-G-**
E **H; 453-A-C; 460-D-E]**

Sanjay Dutt vs. State (II)* **(1994) 5 SCC 410: 1994 (3) Suppl. SCR 263; *Prakash Kumar @ Prakash Bhutto vs. State of Gujarat* **(2005) 2 SCC 409: 2005 (1) SCR 408 – relied on.**

F **4.1. The Probation of Offenders Act, was enacted with a view to provide for the release of offenders of certain categories on Probation or alter due admonition and for matters connected therewith. The object of the Act is to prevent the conversion of offenders into obdurate**
G **criminals as a result of their association with hardened criminals. The scope of Section 4 of the Probation of Offenders Act is much wider. It applies to any person found guilty of having committed an offence not punishable with death or imprisonment for life. [Paras 79**
H **and 80] [463-C-D, G]**

4.2. Section 360 Cr.P.C. does not provide for any role for probation officers in assisting the courts in relation to supervision and other matters while the Probation of Offenders Act does make such a provision. While Section 12 of the Probation of Offenders Act states that a person found guilty of an offence and dealt with under Section 3 or 4 of the Probation of Offenders Act, shall not suffer disqualification, if any, attached to the conviction of an offence under any law. Cr.P.C. does not contain parallel provision. Two statutes with such significant differences could not be intended to co-exist at the same time in the same area. Such co-existence would lead to anamolous results. The intention to retain the provisions of Section 360 CrP.C. and Probation of Offenders Act as applicable at the same time in a given area cannot be gathered from the provisions of s.360 or any other provisions of Cr.P.C. [Para 81] [463-H; 464-A-C]

4.3. Sub-section 4 of the Probation of Offenders Act contains the words "Notwithstanding anything contained in any other law for the time being in force". The above *non obstante* clause points to the conclusion that the provisions of Section 4 of the Probation of Offenders Act would have an overriding effect and shall prevail if the other conditions prescribed therein are fulfilled. Those conditions being (i) the accused is found guilty of having committed an offence not punishable with death or imprisonment for life; (ii) the Court finding him guilty is of the opinion that having regard to the circumstances of the case, including the nature of the offence and the character of the offender, it is expedient to release him on probation; (iii) the accused in such an event enters into a bond with or without sureties to appear and receive sentence when called upon during such period not exceeding three years as the court may direct and, in the meantime, to keep the peace and be of good behaviour.

A **The underlying object of the above provisions obviously is that an accused person should be given a chance of reformation, which he would lose in case he is incarcerated in prison and associates with hardened criminals. The provisions of the said Act are beneficial**
B **provisions and, therefore, they should receive wide interpretation and should not be read in a restricted sence. [Paras 83 and 84] [464-E-H; 465-A-C]**

4.4. Section 4 of the Probation of Offenders Act applies to all kinds of offenders, whether under or above the age
C **of 21 years. This section is intended to attempt possible reformation of an offender instead of inflicting upon him the normal punishment of his crime. Such exercise of discretion needs a sense of responsibility. The section itself is clear that before applying the same, this Court**
D **should carefully take into consideration the attendant circumstances. The circumstances and the nature of the offence are so serious, that they do not warrant A-117 the benefit of the provisions of the Probation of Offenders Act, however, taking note of various aspects, the sentence is**
E **reduced to minimum period, viz., 6 years to 5 years. [Paras 85 and 86] [465-D-G]**

Ratanlal vs. State of Punjab **(1964) SCR 676;** *Chhani vs. State of U.P.* **(2006) 5 SCC 396: 2006 (3) Suppl. SCR**
F **305;** *Ishar Das vs. State ofPunjab* **1973 (2) SCC 65: 1972 (3) SCR 312 – relied on.**

Ved Prakash vs. State of Haryana **1981 (1) SCC 447: 1981 (1) SCR 1279;** *Jugal Kishore vs. State of Bihar* **(1972) 2 SCC 633: 1973 (1) SCR 875 – referred to.**

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5. In the facts and circumstances of the case, the conviction and sentence awarded to A-118 by the Designated Court is confirmed. [Para 87] [466-A-B]

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Sanjay Dutt vs. State (I) **(1994) 5 SCC 402: 1994 (2) Suppl. SCR 729;***Kartar Singh vs. State of Punjab* **(1994) 3 SCC 569: 1994 (2) SCR 375;** *Sanjay Dutt vs. State* **(1994) 5 SCC 410: 1994 (3) Suppl. SCR 263 – referred to.**

Niranjan Singh Karam Singh Punjabi vs. Jitendra Bhimraj Bijayal **(1990) 4 SCC 76: 1990 (3) SCR 633 – cited.**

6. The Designated Court has convicted A-124 u/ss. 3 and 7 r.w ss. 25(1-A)(1-B)(a) of the Arms Act, 1959, as well as u/s. 201 of IPC and sentenced him to undergo RI for 2 years on both the counts separately. A perusal of all the materials relating to A-124 shows that the Designated Court itself convicted and sentenced A-124 under Section 25(1-B)(a) of the Arms Act along with Section 201 of IPC. While clarifying the same, it is held that there is no substantive evidence for convicting him u/s. 25(1-A) of the Arms Act, though the Designated Court has referred to the same while awarding sentence to him. Also, considering his age, i.e. 82 years as on date and taking note of the fact that the minimum sentence for the offence u/s. 25(1-B)(a) being one year, while confirming his conviction, the sentence awarded to A-124 u/s. 25(1-B)(a) as well as u/s. 201 IPC is reduced to 1 year which shall run concurrently. [Para 88] [466-B-E]

<u>Criminal Appeal No. 596 of 2011:</u>

7.1. The respondent A-120 has not made any confession and the co-accused A-125 relied on by the prosecution has also not made any confession and even the confessional statements of other co-accused failed to disclose any involvement of A-120 in any manner. The only allegation against the present accused was that of seizure of a box containing a pistol from his house. The Designated Court, after considering the evidence of panch witness (PW-211) regarding the statement made

A by A-125 and after finding that there was lot of variation in their statements and bereft of materials about the role of A-120 and further finding that different stories had been projected by the prosecution, refused to accept the same. After analyzing the entire statement of A-125, the B trial court came to a conclusion that the same were insufficient to connect A-120 as being the person who had received the same pistol and rounds. [Para 94] [470-D-G]

C 7.2. The Designated Court, has rightly observed that mere recoveries of a .9mm pistol and the rounds from the bungalow of A-120 would not be sufficient to connect him with the said articles. It is settled law that the recoveries made must be found to have been made as a consequence ofhe statement made by the accused in D custody. If the nexus in between is not established, the said statement made would be inadmissible in evidence. The Designated Court, after considering the well settled principles and the materials placed concluded that "it will be further necessary to say that scrutiny of the evidence E also does not reveal A-120 having purchased .9mm pistol and rounds....." The Designated Court has also concluded that even if the statement made by A-125 is acceptable, in the absence of any supporting oral and documentary evidence and taking note of the F improvement made by panch witness as well as in the statements of witnesses stage by stage "hardly there would be any evidence to connect A-120 with the relevant contraband articles" and rightly discarded the same. In the light of the categorical finding by the trial court and G after analyzing the materials placed by the prosecution, the conclusion reached by trial court is correct and with the above said insufficient evidence, the order of acquittal cannot be lightly interfered in the present appeal. Hence, the appeal, filed by CBI, fails. [Paras 95 and 96] H [470-G-H; 471-A-E]

Criminal Appeal Nos. 1104/2007 and 1026/2012:

8.1. A perusal of the confessional statement of co-accused A-41 shows that the appellant (A-53) helped the co-accused persons to look for a garage where the weapons could be off-loaded and after that they were to be distributed to various persons. [Para 104] [479-A-B]

8.2. Upon perusal of the entire evidence, it is clear that the appellant-A-53 was closely associated with 'TM' (AA) and 'AIK' (AA). Further, inspite of the unwillingness shown by his partner A-40, the appellant helped the co-accused search for garages where the weapons were to be off-loaded and concealed whereafter they were to be distributed to A-117 and other persons. In addition to the same, the appellant was also associated with co-accused even after the blasts, which fact is clearly discernible from the confession of A-96 wherein she stated that after coming back to her house, her father informed her that A-53 had come and gave Rs. 50,000/- for help. [Para 106] [480-E-H]

8.3. It is not correct to say that only on the ground of acquaintance with the main conspirators, the appellant has been erroneously convicted under Section 3(3) TADA. It was on the instructions of 'AIK' (AA) that the arms were delivered to A-117 and because of the relationship of 'AIK' (AA) and 'TM' (AA) and 'DI' (AA), it establishes a strong link between A-53 and 'AIK' (AA). Materials relied on by the prosecution clearly prove relationship between 'AIK' (AA) and A-53. Further, their relationship cannot be simply construed as a business relationship. The materials placed on record by the prosecution, relied on and accepted by the Special Judge show that the appellant was guilty of distributing arms to persons other than A-117. The finding recorded by the trial Judge was that A-53 not only distributed weapons to A-117 but also to third parties. [Para 107] [479-A-B]

A *State vs. Nalini* **(1999) 5 SCC 253: 1999 (3) SCR 1 – referred to.**

8.4. The CBI has successfully placed materials to show that the appellant was responsible for arranging garages for the storage of weapons. In the confessional statement of A-41, in categorical terms it was asserted that A-53, the present appellant, along with A-41 and A-139 searched for garages at different places in Mumbai where the weapons could be off-loaded and after that they were to be distributed to various persons as suggested by Anees Ibrahim. The confessional statement of A-41 also shows that the appellant helped the co-accused persons to look for garages. In such circumstance, it cannot be claimed that at no point of time A-53 was ever aware of what was to be stored in the garages. [Para 108] [481-E-H]

8.5. The Designated Court, on going through the evidence of the officer who recorded the confession of A-53, the procedure followed, opportunity given to the appellant, rejected the similar objection raised before him. In view thereof, there is no flaw in the procedure while recording the confession of the appellant. [Para 109] [482-B]

8.6. The materials available establish involvement of A-53 only to the extent of the smaller conspiracy and the Designated Court was justified in arriving at such conclusion. Hence, the appeal filed by the State is liable to be dismissed. [Para 110] [482-D-E]

8.7. Taking note of all the aspects viz. appellant is a sick person; he has 6 stents in his arteries; he is a diabetic coupled with a serious heart ailment; he has already faced protracted trial for 13 ½ years on day to day basis; his entire business and goodwill has been lost; he has already served about 6 ½ (six and a half) years and

of the fact that the CBI was not able to establish the charge relating to major conspiracy and taking note of the fact that the minimum sentence prescribed is 5 years, while confirming the conviction, the sentence is reduced to the period already undergone. [Para 112] [483-D]

Criminal Appeal Nos.1001/2007 and 392/2011:

9.1. The Designated Court convicted the appellant (A-119) u/s. 3(3) and Section 6 of TADA only on the basis of the confessional statement of A-89 and the evidence of PW-283 (watchman in the building). Admittedly, the appellant, at no point of time, had made any confession admitting her guilt. Equally, it is not in dispute that no recovery has been affected from her house. The only incriminating circumstance against her is the statement of A-89 that while handing over a plastic bag, he mentioned that it contains AK-56 rifle and other arms. It is also his claim that after knowing the contents, she received the same and kept it in her house. In view of these aspects, there is no case insofar as the main conspiracy against her and the Designated Court has rightly acquitted her of the main charge of main conspiracy. However, upon perusal of the entire evidence, the judgment passed by the Designated Court is upheld to the extent of Charge u/ss. 3(3) and 6 of TADA. [Paras 124 and 125] [492-E-H; 493-A]

9.2. In view of the minimum sentence of 5 years prescribed under Sections 3(3) and 6 of TADA, the conviction and sentence as awarded by the Designated Court is confirmed. [Para 126] [493-B-C]

Mohd. Ayub Dar vs. State of Jammu and Kashmir **(2010) 9 SCC 312: 2010 (8) SCR 916 – relied on.**

Case Law Reference:

1994 (2) Suppl. SCR 729	**relied on**	**Para 5(o)**

A	1994 (3) Suppl. SCR 263	relied on	Para 67
	1994 (2) SCR 375	relied on	Para 5(p)
	2005 (1) SCR 408	relied on	Para 67
B	1994 (3) Suppl. SCR 263	relied on	Para 9
	1990 (3) SCR 633	relied on	Para 10
	2008 (16) SCR 155	relied on	Paras 33, 41, 53
C	2001 (5) Suppl. SCR 54	relied on	Para 31
	2002 (3) SCR 622	relied on	Para 32
	(2003) 9 SCC 673	relied on	Para 34
D	2009 (12) SCR 1093	relied on	Para 36
	2001 (3) SCR 840	relied on	Para 40
	2011 (1) SCR 997	relied on	Para 42
	1995 (3) Suppl. SCR 807	relied on	Para 44
E	2000 (1) SCR 200	relied on	Para 45
	2001 (1) SCR 111	relied on	Para 46
	2001 (3) SCR 840	relied on	Para 47
F	2002 (2) SCR 767	relied on	Para 48
	2002 (3) SCR 622	relied on	Para 49
	(2003) 9 SCC 673	relied on	Para 50
G	2003 (2) Suppl. SCR 884	relied on	Para 51
	(2003) 8 SCC 90	relied on	Para 52
	2010 (8) SCR 916	relied on	Para 54
	2011 (1) SCR 997	relied on	Para 55
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2005 (2) Suppl. SCR 79	**relied on**	**Para 61**
1970 (2) SCR 332	**relied on**	**Para 62**
1981 (1) SCR 1279	**relied on**	**Para 77**
1973 (1) SCR 875	**relied on**	**Para 78**
(1964) SCR 676	**relied on**	**Para 79**
2006 (3) Suppl. SCR 305	**relied on**	**Para 80**
1972 (3) SCR 312	**relied on**	**Para 84**
1999 (3) SCR 1	**referred to**	**Para 107**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No (s). 1060 of 2007 etc.

From the Judgment and Order date 31.07.2007 of the presiding Officer of the Designated Court under TADA (P) Act, 1987 for Bomb Blast Cases, Greater Bombay, Maharshtra in Bombay Blast Case No. 1 of 1993

WITH

Crl.A. Nos. 1102, 1687 of 2007, 596 of 2011, 1104 of 2007, 1026 of 2012, 1001 of 2007 & 392 of 2011

Harin P. Raval, ASG, Harish N. Salve, Surender Singh, Ranjit Kumar, Mukul Gupta, Sr. Advs., Hari Sanker K., Vikas Singh Jangra, B.H. Marlapalle, Ms. Shirin Khajuria, Kunal Cheema, Satyakaam, Anubhav Kumar Anando Mukherjee, Harsh N. Parekh, Annirudh, Arvind Kr. Sharma, Ajay Sharma, Sanjay jain, P. Parmeswaran, Ms. Anjali Jha, Advs., with them for the appearing parties.

The Judment of the Court was delivered by

P. SATHASIVAM, J. Criminal Appeal No. 1060, 1102 and 1687 of 2007. 1. Mr. Harish Salve, Mr. Surendra Singh, Mr. B.H. Marlapalle learned senior counsel appeared for A-117, A-118,

A A-124 respectively and Mr. Raval, learned ASG duly assisted by Mr. Satyakam, learned counsel appeared for the respondent-CBI.

2. The abovesaid appeals are directed against the final B judgment and order of conviction and sentence dated 28.11.2006 and 31.07.2007 respectively by the Designated Court under TADA for the Bombay Bomb Blast Case, Greater Bombay in B.B.C. No.1/1993.

Charges:

C

3. A common charge of conspiracy was framed against all the co-conspirators including the appellants. The relevant portion of the said charge is reproduced hereunder:

D "During the period from December, 1992 to April, 1993 at various places in Bombay, District Raigad and District Thane in India and outside India in Dubai (U.A.E.) Pakistan, entered into a criminal conspiracy and/or were members of the said criminal conspiracy whose object was to commit terrorist acts in India and that you all agreed E to commit following illegal acts, namely, to commit terrorist acts with an intent to overawe the Government as by law established, to strike terror in the people, to alienate sections of the people and to adversely affect the harmony amongst different sections of the people, i.e. Hindus and F Muslims by using bombs, dynamites, handgrenades and other explosive substances like RDX or inflammable substances or fire-arms like AK-56 rifles, carbines, pistols and other lethal weapons, in such a manner as to cause or as likely to cause death of or injuries to any person or G persons, loss of or damage to and disruption of supplies of services essential to the life of the community, and to achieve the objectives of the conspiracy, you all agreed to smuggle fire-arms, ammunition, detonators, handgrenades and high explosives like RDX into India H and to distribute the same amongst yourselves and your

men of confidence for the purpose of committing terrorist acts and for the said purpose to conceal and store all these arms, ammunition and explosives at such safe places and amongst yourselves and with your men of confidence till its use for committing terrorist acts and achieving the objects of criminal conspiracy and to dispose off the same as need arises. To organize training camps in Pakistan and in India to import and undergo weapons training in handling of arms, ammunitions and explosives to commit terrorist acts. To harbour and conceal terrorists/ co-conspirators, and also to aid, abet and knowingly facilitate the terrorist acts and/or any act preparatory to the commission of terrorist acts and to render any assistance financial or otherwise for accomplishing the object of the conspiracy to commit terrorist acts, to do and commit any other illegal acts as were necessary for achieving the aforesaid objectives of the criminal conspiracy and that on 12.03.1993 were successful in causing bomb explosions at Stock Exchange Building, Air India Building, Hotel Sea Rock at Bandra, Hotel Centaur at Juhu, Hotel Centaur at Santacruz, Zaveri Bazaar, Katha Bazaar, Century Bazaar at Worli, Petrol Pump adjoining Shiv Sena Bhavan, Plaza Theatre and in lobbing handgrenades at Macchimar Hindu Colony, Mahim and at Bay-52, Sahar International Airport which left more than 257 persons dead, 713 injured and property worth about Rs.27 crores destroyed, and attempted to cause bomb explosions at Naigaum Cross Road and Dhanji Street, all in the city of Bombay and its suburbs i.e. within Greater Bombay. And thereby committed offences punishable under Section 3(3) of TADA (P) Act, 1987 and Section 120-B of IPC read with Sections 3(2)(i)(ii), 3(3), (4), 5 and 6 of TADA (P) Act, 1987 and read with Sections 302, 307, 326, 324, 427, 435, 436, 201 and 212 of Indian Penal Code and offences under Sections 3 and 7 read with Sections 25 (1-A), (1-B)(a) of the Arms Act, 1959, Sections 9B (1)(a)(b)(c) of the Explosives Act, 1884, Sections 3, 4(a)(b), 5 and 6 of

A B C D E F G H

A the Explosive Substances Act, 1908 and Section 4 of the Prevention of Damage to Public Property Act, 1984 and within my cognizance."

In addition to the above-said principal charge of conspiracy, the appellants were also charged on other counts which are as under:

Sanjay Dutt (A-117):

At head Secondly; The appellant, in pursuance of the aforesaid criminal conspiracy and during the period from January, 1993 to April, 1993, agreed to keep in his possession and acquired 3 AK-56 rifles and its ammunition, one 9mm pistol and its cartridges and handgrenades, unauthorisedly, which were part of the consignments smuggled into the country by Dawood Ibrahim Kaskar and his associates knowingly and intentionally that these were smuggled into the country for the purpose of committing terrorists acts and that he thereby committed an offence punishable under Section 3(3) of TADA.

At head Thirdly; The appellant, by doing the aforesaid act, unauthorisedly, in Greater Bombay which is specified as a Notified Area under Clause (f) of Sub Section (1) of Section 2 of TADA and thereby committed an offence punishable under Section 5 of TADA.

At head Fourthly; The appellant possessed the above mentioned arms and ammunitions with an intent to aid terrorists and contravened the provisions of the Arms Act, 1959 and the Arms Rules, 1962, the Explosive Substances Act, 1908 and the Explosives Rules, 2008 and thereby committed an offence punishable under Section 6 of TADA.

At head Fifthly; The appellant, by doing the aforesaid act, committed an offence punishable under Sections 3 and 7

read with Sections 25(1-A) (1-B)(a) of the Arms Act, 1959. A

Yusuf Nulwalla (A-118):

At head Secondly; The appellant acquired AK-56 Rifles and its carridges and one 9mm pistol and its cartridges which were smuggled into the country for committing terrorist acts and destroyed the said AK-56 Rifle with the assistance of Kersi Adajania (A-124) and entrusted him the 9mm pistol and its cartridges for safe custody and thereby committed an offence punishable under Section 3(3) of TADA. B C

At head Thirdly; The appellant acquired the abovementioned arms and ammunitions from the house of Sanjay Dutt (A-117) and possessed the same, unauthorisedly, in a notified area of Greater Bombay and thereby committed an offence punishable under Section 5 of TADA. D

At head Fourthly; The appellant acquired and possessed the abovementioned arms and ammunitions and failed to give information to Police/Magistrate with an intent to aid terrorists and thereby committed an offence punishable under Section 6 of TADA. E

At head Fifthly; The appellant, by doing the aforesaid act, committed an offence punishable under Sections 3 and 7 read with Sections 25(1-A), (1-B)(a) of the Arms Act, 1959. F

At head Sixthly; The appellant caused destruction of the abovementioned arms and ammunitions with an intention to screen him and other co-conspirators from legal punishment and thereby committed an offence punishable under Section 201 of the IPC. G

Kersi Adajania (A-124):

At head Secondly; The appellant aided and abetted H

A Yusuf Nulwalla (A-118) in destroying AK-56 rifle and disposing of 9mm pistol and its cartridges which were smuggled into the country for committing terrorist acts and thereby committed an offence punishable under Section 3(3) of TADA.

B **At head Thirdly;** In the first week of April, 1993, the appellant had in his possession one AK-56 rifle, one 9 mm pistol and its rounds in a notified area of Bombay and thereby committed an offence punishable under Section 5 of TADA.

C **At head Fourthly;** The appellant possessed the said arms and ammunitions with an intention to aid terrorists and thereby committed an offence punishable under Section 6 of TADA.

D **At head Fifthly;** The appellant, by possessing the abovementioned arms and ammunitions, unauthorisedly, committed an offence punishable under Sections 3 and 7 read with Sections 25(1-A), (1-B)(a) of the Arms Act, 1959.

E **At head Sixthly;** The appellant caused destruction of the abovementioned AK-56 rifle, 9mm pistol and its ammunitions which were smuggled into the country for commission of terrorist acts with the intention of screening himself and the other co-conspirators from legal F punishment and thereby committed an offence punishable under Section 201 of the IPC.

4. The appellants have been convicted and sentenced for the above said charges as under:

G **Conviction and Sentence:**

Sanjay Dutt (A-117):

A-117 has been convicted for the offence punishable under H Sections 3 and 7 read with Sections 25(1-A), (1-B)(a) of the

Arms Act, 1959 and sentenced to suffer RI for 6 years along with a fine of Rs. 25,000/-, in default, to further undergo RI for a period of 6 months. However, the appellant was not found guilty of all other offences for which he was charged and, accordingly, acquitted for all the said offences.

Yusuf Mohsin Nulwalla (A-118):

(i) A-118 has been convicted for the offence punishable under Sections 3 and 7 read with Sections 25(1-A), (1-B)(a) of the Arms Act, 1959 and sentenced to RI for 5 years along with a fine of Rs. 25,000/-, in default, to further undergo RI for a period of 6 months.

(ii) The appellant has been further convicted for the offence punishable under Section 201 of IPC and sentenced to suffer RI for 2 years. However, the aforesaid accused being found not guilty of all other offences for which he was charged at trial.

Kersi Bapuji Adajania (A-124):

(i) A-124 has been convicted for the offence punishable under Sections 3 and 7 read with Sections 25(1-A), (1-B)(a) of the Arms Act, 1959 and sentenced to suffer RI for 2 years alongwith a fine of Rs. 25,000/-, in default, to suffer further RI for a period of 6 months.

(ii) The appellant has been further convicted for the offence punishable under Section 201 of IPC mentioned at head sixthly and sentenced to suffer RI for 2 years. However, the aforesaid accused also being not found guilty of all other offences for which he was charged at trial.

Brief Facts:-

5. Before adverting to the detailed analysis of the evidence and the contentions urged, the story of the prosecution is as under:

A (a) Babri Masjid at Ayodhya was demolished on 06.12.1992. After its demolition, violence broke out throughout the country. Tiger Memon (AA) and Dawood Ibrahim (AA), a resident of Dubai, in order to take revenge of the said demolition, formulated a conspiracy to commit terrorist act in B the city of Bombay. In pursuance of the said object, Dawood Ibrahim agreed to send arms and ammunitions from abroad. Tiger Memon, in association with his men, particularly, the accused persons, received those arms and ammunitions through sea-coasts of Bombay. The evidence on record C establishes that the said consignment was a result of a conspiracy between Dawood Ibrahim Kaskar, Mohammed Dosa and Tiger Memon (all three absconding accused).

(b) On 15.01.1993, Samir Hingora (A-53), Hanif Kandawala (A-40), Ibrahim Musa Chauhan@Baba (A-41) and D Abu Salem (A-139) - then absconding, came to the residence of the appellant (A-117) at Pali Hill, Bandra, Bombay and told him that they would deliver the weapons tomorrow i.e., on 16.01.1993. On 16.01.1993, A-53, A-41 and A-139 delivered 3 AK-56 Rifles and 250 rounds of ammunitions and some E handgrenades at the residence of A-117. On 18.01.1993, out of the abovesaid 3 AK-56 Rifles and ammunitions, 2 rifles and some ammunition were taken away by co-accused persons including one Mansoor Ahmed (A-89).

F (c) On 12.03.1993, bomb explosions took place at various places in Bombay causing death of 257 persons, injuries to 713 and destruction of property worth about Rs. 27 crores.

(d) On 18.04.1993, A-89 was taken in police custody whereas A-117 was arrested from the Mumbai International G Airport on 19.04.1993 upon his arrival from Mauritius. On the same day, at about 15:30-15:40 hrs., he made a statement to the police that the rifle and the pistol and its rounds thereof have been kept with A-118 and that he would identify him and his house in Dongri, Umarkhari. He also led the police party to the

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house of A-118 at 15:45 hrs. When wherebaouts of A-118 were searched, it was found that he was detained by the Dongri Police Station in connection with the non-renewal of Arms licence.

(e) A-118 was summoned from Dongri Police Station and produced before DCB-CID. He made a statement mentioning the name of A-124 and led the police party to his house.

(f) During investigation, A-124 produced a spring and a rod remanent of the burnt AK-56 and also made a further statement regarding 9mm pistol and led the police party to A-125. A-125 made a statement and after that the police party proceeded to the house of A-120.

(g) A-120 produced a bag containing box wherein the pistol and its cartridges were found. His statement was recorded and the articles were seized and a Panchnama was drawn.

(h) All the above facts form part of the complaint culminated into the registration of a Local Act Case (LAC) bearing No. 21 of 1993 in respect of the abvoesaid 5 persons, namely, A-117, A-118, A-124, A-125 and A-120. The said complaint mentioned that the investigation being carried out in furtherance of C.R. No. 70 of 1993. The sequence of events after the arrest of A-117 till the recovery of pistol from A-120 formed part of an unbroken chain inseparably connected with each other.

(i) On 22.04.1993, Mr. Krishan Lal Bishnoi, the then DCP (PW-193), who was investigating Worli Blast from 13.03.1993 was withdrawn from investigation. On 26.04.1993, A-117 expressed his desire to make a confession and, accordingly, he was produced before PW-193, who after recording the preliminary statement (First part), awarded him a period of 48 hours for cooling off.

(j) On 27.04.1993, the confession of A-118 was recorded by Mr. Bishnoi (PW-193) in first part and a further time for reflection was awarded to him.

A (k) On 28.04.1993, PW-193 recorded the second part of the confession of A-117. Similarly, on 29.04.1993, the confession of A-118 was recorded by PW-193 which remained un-retracted.

B (l) On 03.05.1993, A-117 was sent to the judicial custody. On 05.05.1993, A-117 filed a writ petition before the Bombay High Court and the High Court released him on interim bail with the direction that the bail granted to A-117 would continue till the filing of charge sheet in the Designated Court and after that the said Court would consider his bail application.

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(m) Between 18th and 20th May, 1993, and 24th and 26th May, 1993, confessions of A-53 and A-89 respectively were recorded by PW-193.

D (n) On 04.11.1993, a consolidated charge sheet was filed against all the accused persons including the appellants (A-117, A-118 and A-124). On 19.06.1994, A-117 applied for bail before the Designated Court. By order dated 04.07.1994, the Designated Court dismissed the said application.

E (o) Against the said order, A-117 filed a special leave petition before this Court and prayed for grant of bail. After hearing the bail petition, this Court, by order dated 18.08.1994 in *Sanjay Dutt* vs. *State (I),* (1994) 5 SCC 402, referred the matter to the Constitution Bench on the question of F interpretation and construction of the provisions of TADA, namely, Section 5 as well as Section 20. By order dated 09.09.1994, the said reference was answered by the Constitution Bench in *Sanjay Dutt* vs. *State (II),* (1994) 5 SCC 410. After the reference was answered, the matter was placed G before the regular Bench for consideration of the bail application. By order dated 23.09.1994, this Court rejected the application for bail filed by A-117. On 09.11.1994, A-117 filed a detailed retraction.

H (p) In June, 1995, in view of the directions of this Court in

Kartar Singh vs. *State of Punjab*, (1994) 3 SCC 569, the Central and State Government set up a Review Committee in order to individually review the cases of the accused persons involved in the Bombay bomb blasts case to consider whether or not the provisions of TADA are applicable against individual accused persons and whether or not any of the accused persons ought to be entitled to bail? On 08.08.1995, the report of the Review Committee recommended that the public prosecutor, on certain parameters, may recommend certain cases for bail. The case of A-117 was one such case that was considered for grant of bail by the public prosecutor. The said report was filed by the prosecution before the trial Court on 09.08.1995. The CBI, in M.A. No. 312 of 1995, filed an application before the Designated Court stating that they have no objection for grant of bail to A-117 and 11 others.

(q) On 11.09.1995, in view of the report of the Review Committee, A-117 renewed his prayer for bail before the Designated Court but the Designated Court again dismissed the said application. In September, 1995, challenging the said order, A-117 filed Criminal Appeal No. 1196 of 1995 before this Court and prayed for grant of bail. On 16.10.1995, this Court granted bail to him till the completion of his trial. (1995 (6) SCC 189).

(r) By order dated 28.11.2006 and 31.07.2007, the appellants (A-117, A-118 and A-124) were convicted and sentenced by the Designated Court as mentioned earlier.

Evidence

6. The prosecution relied on the following evidence which is in the form of:-

(i) the evidence of their own confessions;

(ii) confessions made by other co-conspirators; (co-accused)

A (iii) Deposition of Prosecution witnesses, viz., – Shri Krishan Lal Bishnoi (PW-193), the then DCP, Pandharinath H. Shinde (PW-218)- who was on guard duty at the bungalow of Sunil Dutt, Manohar Vasudev Shirdokar (PW-219)-Sr. Inspector of
B Police, Suresh S. Walishetty (PW-680), Rajaram Ramchandra Joshi (PW-475), API, Panch Witness Shashikant Rajaram Sawant (PW-211), Gangaram Bajoji (PW-265)-independent witness and Karmegam Algappan, PW-472 attached with
C computer cell of MTNL, Malabar Hill and;

(iv) documentary evidence.

Submissions made by Mr. Harish Salve, learned senior counsel for the appellant (A-117)

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7. Mr. Harish Salve, learned senior counsel for A-117, at the foremost, submitted that reliance on the confessional statement made by A-117 is impermissible. He pointed out that the contention that the judgments of this Court have held that
E the prosecution can rely on the confession of an accused made before a police officer in every case where the accused is charged of a TADA offence, as long as the trial is joint, has been misconceived. He also pointed out that if the language of the provisions led to a situation that a confession to the police becomes admissible irrespective of the fate of the TADA
F charge, then it would lead to invidious discrimination between the accused, who were charged (but acquitted) under TADA along with other offences and those who were accused only of non-TADA offences.

G 8. Mr. Harish Salve further pointed out that in *Prakash Kumar @ Prakash Bhutto* vs. *State of Gujarat* (2005) 2 SCC 409, it was contended before the Court that *"rigours of Section 12 are discriminatory and attract the wrath of Articles 14 and 21 of the Constitution as it empowers the Designated Court*
H *to try and convict the accused for the offences committed*

under any other law along with the offences committed under TADA thereby depriving the rights available to the accused under the ordinary law." This contention was rejected by holding that *"Section 12 is to take care of the offences connected with or incidental to terrorist activities. The other offences being connected and inextricably intertwined with the terrorist act."*

9. He further pointed out that a Bench of five Judges of this Court in *Sanjay Dutt* vs. *State* (1994) 5 SCC 410, had observed in paragraph 14 that

"the construction made of any provision of this Act must therefore be to promote the object of its enactment to enable the machinery to deal effectively with the persons involved in, and the associated with, terrorist and disruptive activities while ensuring that any person not in that category should not be subject to the rigors of the stringent provisions of the ....Act. It must, therefore, be borne in mind that any person who is being dealt with and prosecuted in accordance with the provisions of the TADA must ordinarily have the opportunity to show that he does not belong to the category of persons governed by TADA. Such a course would permit exclusion from its ambit of persons not intended to be covered by it....." In paragraph 17, this Court cited with approval an earlier decision, viz., *Niranjan Singh Karam Singh Punjabi vs. Jitendra Bhimraj Bijayal,* (1990) 4 SCC 76 in which it was observed that *"when a law visits a person with serious penal consequences, extra care must be taken to ensure that those whom the Legislature did not intend to become by the express language of the Statute are not roped in by stretching the language of the law."* This Court read down the provisions of Section 5 of TADA and held that the presumption under the said section in relation to possession of weapons was a rebuttable presumption and an accused could always establish his innocence in relation to that statute.

10. According to him, only where the transactions in respect of which an accused is convicted are interrelated

A inextricably with the transactions which fall under TADA, then Section 12 would enable the prosecution to rely upon the confession of the accused made to a police officer. He further pointed out that it would be a travesty to apply this principle in the present case.

B

11. By poining out the confession of the appellant (A-117), learned senior counsel contended that even if we believe the statements made, it would simply establish a case of violation of the Arms Act, there is no suggestion of any terrorist act. On the contrary, the act was the resultant of the personal as well C as the security need of the family of the appellant. He further contended that judicial notice must be taken of the state of affairs in Bombay during the post Babri Masjid demolition period, particularly, in January, 1993. It is further pointed out that the Legislature did not intend to cover such persons ever in a D law dealing with terrorism. The victims of terrorism of a kind (vicious communal riots) cannot and should not be treated at par with perpetrators.

12. He further pointed out that the unchallenged finding of E the trial Court in the present case is that the alleged acquisition of 2 illegal weapons by the appellant (A-117) was at a different point of time, much before even the conspiracy in relation to the Bombay blasts was commenced. He further contended that the provocation for the alleged acquisition was not the F conspiracy or any act or omission related to the Bombay blasts, but related to an entirely different event, i.e., the riots in January 1993 and the appellant (A-117) allegedly, out of fear for his own life and for the security of his family, acquired those weapons. Under such circumstances, the question of any connection leave G alone the acquisition of weapons or any act or omission relating to the Bombay blasts is conspicuous by its absence.

13. With regard to the evidence in order to establish that the appellant was in conversation with Anees over phone, learned senior counsel contended that the alleged confession H of Samir Hingora (A-53) as well as of Hanif Kandawala (A-40)

(his partner) to the effect that the appellant (A-117) was in conversation with Anees relates to A-53's visit to the house of the appellant (A-117) on the night of 15th January whereas the call records relied on were of 16th January, 1993. A

14. Learned senior counsel also pointed out that the prosecution has not appealed the findings of the Designated Court and the alleged confession which suggested that the appellant (A-117) was in conversation with Anees is, in fact, unbelievable. One significant reason for the same is that it does not explain as to how Samir could have known that the appellant was in conversation with someone on a landline telephone which was inside his house. This attempt of the prosecution to unnecessarily create prejudice against the appellant (A-117) is baseless and, therefore, merits summary rejection. The judgment of this Court in ***Sanjay Dutt's case*** (supra) dealt with a pure interpretation of Section 5 of TADA. It clearly lays down that the possession of a weapon is not *per se* a TADA offence. Section 5 mearly raises a presumption that a person, who is in possession of unauthorized arms or ammunitions of the specified variety, would be liable to be punished under TADA. According to him, this Court, in fact, read down the plain language of Section 5 to make it applicable only as a presumptive rule of evidence. This issue is no longer open because it has been conclusively found that the alleged acquisition of the weapon had absolutely nothing to do with any of the alleged terrorist activities of the other accused in the conspiracy. Learned senior counsel for the appellant further contended that the State has not filed an appeal in the matter, hence, stands concluded. B C D E F

15. In addition to the above arguments, Mr. Surendra Singh, learned senior counsel for A-118 contended that everything was manufactured at the Crime Branch Police Station. He further contended that even if A-118 was having possession of AK 56 rifle, memorandum for the same was not signed by him and Sections 12 and 15 of TADA have no G H

application in his case. He further submitted that his confession is hit by Section 25 of the Evidence Act, 1872 and his alleged statement is compelled one which is hit by Article 21 of the Constitution.

16. Similar to the contentions of Mr. Salve and Mr. Singh, Mr. B.H. Marlapalle, learned senior counsel for A-124 also contended that there was no constructive possession of any weapon and A-124 was not having any knowledge about it. He also contended that he was charged only under the Arms act and IPC which has nothing to do with TADA and the offence against him, if any, ought to have been referred to the normal criminal court and for that reason, the confession recorded under TADA ought to have been erased. He also very much relied on the decisions of this Court in *Sanjay Dutt (supra)*, *Prakash Kumar (supra)* and *Mohd. Amin* vs. *CBI* (2008) 15 SCC 49.

17. Learned ASG met all the contentions and took us through the relevant materials relied on by the prosecution.

Confesssional Statement of Sanjay Dutt (A-117)

18. The confessional statement of A-117 was duly recorded under Section 15 of TADA on 26.04.1993 at 15.30 hrs. (First Part) and on 28.04.1993 at 1600 hrs. (Second Part) by Shri Krishan Lal Bishnoi (PW-193), the then DCP, Zone III, Bombay. The following extracts from the confession of the appellant are pertinent:

"(i) I am having three valid license for fire arms and possess 3 fire arms as mentioned below:

(a) 270 Rifle of BRUNO make;

(b) 375 Magnum Double barreled Rifle; and

(c) 12 Bore Gun of Double Barrel.

(ii) I purchased these weapons due to my fondness for hunting. I normally go for hunting with one friend of mine, viz., Mr. Yusuf Nullwala as he is an experienced hunter. I also know one friend of Yusuf Nullwala by name Kersi Bapuji Adajenia and met him three times.

(iii) In December, 1991, I had given dates for shooting to actor producer Firoz Khan for his film Yalgar. He had taken the whole unit for shooting in Dubai. During one of the shootings, Firoz Khan introduced me to one Mr. Daud Ibrahim and also to his brother Anees during another shooting session. After that, Anees used to visit us regularly during the shootings and also at the place of our stay.

(iv) Since Anees used to come frequently, I become well acquainted with him.

(v) I also know the proprietors of Magnum Video, namely Hanif Kandawala and Samir Hingora. I also signed for acting in one of their film Sanam. Samir is treasurer of Indian Motion Picture Association (IMPA). Hanif and Samir used to come quite frequently to my house for taking dates for shooting from my Secretary.

(vi) Hanif told me that if I so desire, he would make immediate arrangements to provide an automatic fire arm to me for my protection. Initially, I did not show any interest but when Hanif and Samir started repeatedly telling me to acquire a firearm from them, I gradually fell prey to their persistent suggestion and expressed my desire to Hanif and Samir. They said that they would immediately provide me with an automatic fire arm.

(vii) One day, in mid Jan., in the evening, around 9.00

A to 9.30 p.m., Hanif and Samir came to my house along with one person by name Salem. I had met this Salem once or twice earlier also.

(viii) Then these 3 fellows told me that they were coming tomorrow morning with the weapons to be delivered to you. Then they went away.

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(ix) Next day morning Samir, Hanif and Salem all three came to my house along with one other person who is not known to me.

C

(x) They came in a Maruti Van and parked it in a Tin shed which is used by us for parking our vehicles. One person was sitting inside the Maruti Van. After about 15-20 min., he took out three rifles and they said it is AK-56 rifles.

D

(xi) I got some cloth from my house and gave it to them. Salem and the person who has come with him wrapped those rifles in the cloth and gave it to me.

E (xii) When I opened and saw it, there were three rifles some magazines and rounds, they have told me that there are 250 rounds. The rounds were kept in another hand bag fetched by me.

F (xiii) On seeing three rifles, I got scared and told them that I wanted only one weapon. Then Hanif and Salem told me to keep it for the time being and in case it is not required, we will take away the rest of the two weapons.

G (xiv) They have also shown me some brown coloured hand-grenades and asked me whether I want that also. I do not want these grenades and you may please leave my house immediately, I told them.

H (xv) I kept these rifles and ammunition in the dickey of

my Fiat Car No. MMU 4372 and locked it. A

(xvi) On the same night, I removed the three rifles and ammunition, kept the same in a handbag which I kept in my private hall which was on the 2nd floor of our bungalow. B

(xvii) Two days thereafter, since I had considerable mental tension, I contacted Hanif Kandawala and requested him to take away the weapons. He said that he would arrange to send somebody to collect the same. After two days, Hanif Kandawala and C Samir Hingora along with Salem came to my house in the evening in a car. I returned two AK-56 rifles and a part of the ammunition to them but retained one AK-56 rifle and some ammunitions with me. D

(xviii) Around Sept. 1992, during one of my shooting at R.K. Studio, one Kayyum, who is a member of Dawood Ibrahim gang, who had also met me in Dubai at the time of shooting of the film Yalgar approached me with a stranger. They offered me E a 9 mm pistol with ammunition. When I saw it, I liked it and had a strong desire to purchase the same. They offered it to me for a sum of Rs.40,000/-. I paid the said amount in cash to them at my house and purchased the same. I do not know the name F of that person who was brought by Kayyum. However, he was aged about 35-38 years, apparently, Muslim, dark complexion, height about 5'8", fat built, moustache, medium curly hair, wearing shirt and pant. I will be able to identify him if brought before me. He also handed over 8 rounds G of the said pistol.

(xix) On 2nd April, I left for Mauritious for shooting of the film 'Aatish'. There I was informed by a casual contact that Hanif and Samir have been arrested H

A by the Bombay Police for their complicity in bomb blasts.

(xx) On hearing the news, I got frightened as these fellows had given me the AK-56 rifles and they may tell my name to the police to involve me in the bomb blasts case. I contacted my friend Mr. Yusuf Nullwala on telephone and asked him that something is lying in a black coloured bag which is kept in my hall at the second floor of my house and it should be taken away immediately and destroy the things completely which are there in the bag, otherwise, I shall be in a great trouble. By this time, the news about my possession of AK-56 rifles had appeared in the press and on coming to know about this, my father asked me about the truthfulness of this news, but I denied the same. My anxiety about the whole episode became unbearable and I decided to return to Bombay in between. My father informed my flight details to the Police and I was picked up by police as soon as I landed at Bombay and I confessed the whole things to them."

19. The abovesaid confession highlighted the crime for which the appellant-Sanjay Dutt has been charged. The following facts emerge from the abovesaid confession:

(i) He was already having three licensed firearms.

(ii) He developed acquaintance with Anees Ibrahim - brother of Dawood Ibrahim during a film-shooting in Dubai.

(iii) He expressed his desire to Samir Hingora (A-53) and Hanif Kandawala (A-40) to have an automatic fire-arm.

(iv They came with one Salem with whom Sanjay Dutt was already acquainted with and they assured him of the delivery of weapons the next day in the morning.

(v) They came in the morning of 16.01.1993 with one other person and delivered 3 AK-56 Rifles and 250 rounds.

(vi) After 2 days, he returned 2 AK-56 and ammunitions but retained 1 AK-56 and some ammunition.

(vii) In April, while he was shooting at Mauritius, he heard the news of the arrest of Samir and Hanif, on which, he got frightened and requested his friend Yusuf Nulwalla to destroy the weapons.

20. The appellant (A-117) not only implicates himself in the above said statement but also amongst others the appellant-Yusuf Nulwalla (A-118). The abovesaid confession has been duly recorded by PW-193 who has proved the compliance with the provisions of law while recording the confession. The abovesaid confession is a substantive piece of evidence and it has been held in a series of judgments that the confession can be the sole basis of conviction, if recorded in accordance with the provisions of TADA. Further, the confessional statement establishes the unauthorized possession of weapons in the notified area of Bombay.

Confessional Statements of co-accused:

21. The confession of the appellant (A-117) is substantiated and corroborated with the confession of other co-accused, namely, Samir Hingora (A-53), Baba @ Ibrahim Musa Chauhan (A-41), Mansoor Ahmed (A-89), Hanif Kandawala (A-40), Yusuf Nulwalla (A-118) and Kersi Bapuji Adajania (A-124) which are as under.

Confessional Statement of Samir Ahmed Hingora (A-53)

A Confessional statement of A-53 under Section 15 of TADA was recorded on 18.05.1993 (17:00 hrs.) and 20.05.1993 (17:30 hrs.) by Shri Krishan Lal Bishnoi (PW-193), the then DCP, Zone III, Bombay. The said confession reveals as under:

B

(i) He started a Video Library and Mustafa Dossa @ Mustafa Majnoo (A-138) - brother of Mohd. Dossa (AA) was a member of his Video Library and he had 2-3 shops in the same market.

C

(ii) Tiger Memon used to work with Mustafa Dossa and became a friend of A-53.

(iii) A-53 started film distribution and production business by the name of 'Magnum' in partnership with Hanif Kandawala (A-40 – since died).

D

(iv) Anis Ibrahim (AA) became a member of his Video Library and was referred to by everyone as Anisbhai since he was the brother of Dawood Ibrahim.

E

(v) A-53 received a payment of Rs. 21.90 lacs from Ayub Memon sent through someone on 13.03.1993 (one day after the blasts) as advance for purchasing rights of films.

F

(vi) A-53 had visited Dubai and met Anis Ibrahim many times and sold the rights of many films to M/s Kings Video, managed by Anis. Anis also controls Al-Mansoor Video Company through Chota Rajan.

G

(vii) On 15.01.1993, A-41 and A-139 met A-53 at his office. Anis Ibrahim called him from Dubai and said that A-41 and A-139 are his men and they have some weapons which have to be delivered to A-117 at his residence.

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(viii) A-53 and A-139 went to Sanjay Dutt's (A-117) house where he hugged Abu Salem and asked him about the weapons. A-117 then told A-139 to bring the weapons next day at 7 am.

(ix) On 16.01.1993, A-53 led A-139 and A-41 to the house of Sanjay Dutt. A-139 and A-41 were in a blue maruti van while A-53 was in his own car.

(x) At the residence of A-117, A-53 saw that the blue van was containing 9 AK-56 rifles and hand grenades and they gave 3 AK-56 rifles and some magazines to A-117. A-117 also asked for some hand grenades which were put in a black bag by A-139.

(xi) A-139 kept the rifles in a fiat car belonging to A-117. The hand grenades were kept in the car of A-53 and he left the car at A-117's residence and took an auto rickshaw.

(xii) A-53 collected his car from A-117's residence after 3 days when he called him and said that grenades have been taken out.

Confessional statement of Baba @ Ibhrahim Musa Chauhan (A-41)

Confessional statement of A-41 was recorded under Section 15 of TADA on 23.04.1993 (12:45 hrs.) and 25.04.1993 (13:05 hrs.) by Shri Prem Krishna Jain (PW-189), the then DCP, Zone X, Bombay. The said confession shows that:

(i) A-41 was introduced to Anees Ibrahim Kaskar (AA)-brother of Dawood Ibrahim and Abu Salem when he had been to Dubai and, thereafter, he developed good acquaintance with both of them.

(ii) On 15.01.993, A-139 telephoned A-41 and asked

A him to arrange for a garage having facility of closing it by shutter.

(iii) Abu Salem is an extortionist and worked for Anees Ibrahim.

B (iv) Thereafter, A-139 went to the office of A-41 and inquired if he had received a phone call from Anees Ibrahim. On replying in the negative, A-139 went to a nearby STD booth and called Anees and then made A-41 talk to him, at that time, A-41 told him C that the garages, as required, cannot be arranged by him.

(v) Thereafter, at the behest of Anees Ibrahim (AA), A-41 along with A-139 went in search for garages in D Bandra and Pali Hills area and Samir Hingora (A-53) and Hanif Kandawala (A-40) also joined them.

(vi) Since they did not find any garage, A-139, A-53 and A-41 informed the same to Anees over phone who was in Dubai and it was decided that the work E of finding out the garage would be carried out the next day. In the meanwhile, A-139 told A-41 that he will keep 2 to 3 AK-56 rifles with him for 2/3 days.

(vii) On the next day i.e. 16.01.1993, A-139 went to the F house of A-41 and told him to take a white coloured Maruti van bearing registration number of Gujarat, which was parked near the Arsha Shopping Centre, and to reach the office of Magnum Video. Accordingly, he went to the said place and from G there he along with A-139 and A-53, went to the house of A-117.

(viii) At that time, A-139 introduced A-41 to A-117.

(ix) A-41 parked the above white coloured Maruti Van H which he had driven to reach the house of Sanjay

Dutt in his garage.

(x) There were 9 AK-56 rifles, 80 hand grenades, 1500/2000 cartridges and 56 magazines in the cavities beneath the rear seat of the aforesaid Maruti Van as well as inside the lining near the front and rear side doors, out of which, 3 rifles, 9 magazines, 450 bullets and 20 hand grenades were asked to be kept by A-139 in Sanjay Dutt's Fiat car.

(xi) Accordingly, A-41 shifted the cartridges and magazines to a sports bag and kept it in Sanjay Dutt's car.

(xii) A-53 packed the above mentioned 20 grenades in another sports bag and kept it in Sanjay Dutt's car and gave another long sports bag to A-41 in which he filled 3 rifles, 16 magazines, 25 hand grenades and 750 cartridges. A-41 took the said bag to his house and hid it beneath his bed and on the next day, A-41 loaded all the bullets in the magazines of the rifles.

Confessional Statement of Manzoor Ahmed Sayyed Ahmed (A-89)

Confessional statement of A-89 under Section 15 of TADA was duly recorded on 24.05.1993 (11:15 hrs.) and 26.05.1993 (17:30 hrs.) by Shri Krishan Lal Bishnoi (PW-193) the then DCP, Zone III, Bombay. The said confession reveals as under:

(i) A-89 was a good friend of Abu Salem.

(ii) He owns a Maruti 1000 bearing No. MP 23 B-9264.

(iii) On 22/23rd January, 1993, A-89 met A-139. A-139

A gave the keys of his car to A-41 who kept a black bag of weapons in it.

(iv) A-139 and A-89 then went to the first floor of 22 Mount Mary, Vidhyanchal Apts. They gave the bag to an old lady, viz., Zaibunisa Anwar Kazi (A-119) and told her that the arms were for the purpose of causing riots, and were sent by Anees Ibrahim - brother of Dawood Ibrahim.

(v) A-119 looked at the contents of the bag and then kept it at her residence.

(vi) After 8 days, A-139 called A-89 again and together with A-40, they went to the residence of A-117 where he gave them a blue rexin bag and a carton.

(vii) Abu Salem and A-89 then went to the house of A-119 and gave the carton and the bag to her. Abu Salem told A-119 to keep those weapons safely as they were to be used for orchestrating bomb blasts.

22. The abovesaid confessional statements of the co-accused clearly establish the case against the appellant-Sanjay Dutt and also corroborate with each other in material particulars. The following facts emerge from the abovesaid confessional statements:-

(i) The appellant had acquired 3 AK-56 rifles and its ammunitions unauthorisedly.

(ii) Samir Hingora (A-53), Hanif Kandawala (A-40) and Salem (A-139) provided the above said arms and ammunitions to the appellant at his residence.

(iii) On being frightened after seeing the weapons, the appellant contacted Hanif Kandawala (A-41) and requested him to take away the weapons.

(iv) Abu Salem came after few days and the appellant returned 2 AK-56 rifles and also ammunitions, but retained one AK-56 rifle and some of its ammunitions.

Confessional Statement of the appellant - Yusuf Mohsin Nulwalla (A-118)

23. Confessional statement of A-118 under 15 of TADA was recorded on 27.04.1993 at (14:20 hrs.) and 29.04.1993 at (16:00 hrs.) by Shri K.L. Bishnoi, the then DCP, Zone-III, Bombay. The following extracts from the confession of the appellant are pertinent:-

"Somewhere around the year, 1970, I came in contact with one person by name Azhar Hussain and later on I became very friendly with him. He was cousin of Sanjay Dutt through him I met Sanjay Dutt and developed friendship with him as he was also fond of hunting, fishing and staying in camp life. After this myself and Sanjay Dutt used to go out for hunting with other friends occasionally. I came in contact with Sanjay Dutt's father and other family members due to my friendship with Sanjay Dutt and his cousin Azhar Hussain. Later on Sanjay Dutt had started taking on drugs and because of this he used to remain out off from us and started avoiding me. However, my contact with Sanjay's father and other family members was as it is and they normally used to ask me to convince Sanjay to give up the drugs but my convincing and persuasion did not help him."

"Somewhere in the year 1984, Sanjay has taken me out to one of his friend by name Tariq Ibrahim's place in Kanpur. From there his friend had taken us out of his farm in Tarai and we stayed there for one week. During the stay, I casually mentioned to Tariq Ibrahim that I am quite fond of guns but I am not getting arms license. Then he told me that don't worry my brother is Supdt. of Police at Ratlam and he will get you arms license as and when you wanted.

A Later on, I contacted his brother Asif Ibrahim, who was Supdt. of Police, Ratlam to give me arms license, he did it and subsequently he gave me two more arms licenses. After getting these licenses, I was gifted two guns by Sunil Dutt out of which one was 12 Bore DBBL gun and another B was 22 Rifle. I purchased the 3rd weapon, which is single barrel 375 Magnum Rifle."

"In the meanwhile, I had come in contact with one Kesi Bapuji Adajenia, who was also in steel fabrication business and was also an old hunter so we became C friends. He also used to give me sub contracts for steel fabrication. I had introduced him to Sanjay Dutt also and later on he went with us for hunting to a place near Surat once."

D "Later on Sanjay Dutt became quite popular in Hindi movies and most of the times he used to remain busy in his shootings. Many times, I also used to get to the place for shooting to meet Sanjay Dutt. He had taken me to Bangalore, Mysore, Ooty, Kodai Kanal and various other E places during this outdoor shooting to these places. Normally, I used to meet Sanjay two to three times in a week either at his house or at the place of shootings."

"In the first week of April, he left for Mauritius and I got busy with my normal business. Then one day, I read in F newspaper the news item that "Sanjay dutt is in possession of AK-56 Rifles."

In the same day evening, I received a telephone call at my residential telephone from Sanjay dutty, who was speaking G from Mauritius. He told me that there is something which is kept in a black coloured bag kept in his room at his residence (i.e. 58, Pali Hill Bandra, Bombay-50) and I shall take that bag from his room and destroy the things inside it immediately otherwise he will be in a great trouble.

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Next day morning, I went to Sanjay's residence and took the black bag from his second floor room and opened it there only.

When I opened it I found it containing one AK-56 rifle, two empty magazines and approximately two hundred fifty rounds of AK-56, one pistol and one loaded magazines of pistol.

I took out the AK-56 rifle there only and cutted it in pieces with a hexa, which I had taken along with me then I put all the cut pieces in the bag and came to my friend Kersi Bapuji Adajenia's house as he used to keep all the tools of his steel fabrication in the godown in his house.

I told him the whole story and also that Sanju is in great trouble, so I required your help in melting and destroying the cutted pieces of AK-56 rifles. Both of us came to his godown and I tried to melt the cutted pieces of AK-56 with the help of cutter, but could not succeed, then my friend Adajenia melted all the pieces of AK-56 rifle with the help of gas cutter.

After that I gave the pistol to Kersi Bapuji Adajenia asked him to burn it also after sometime. I collected the melted remains of AK-56 Rifle and threw it in the sea at Marine Drive.

Next day morning, I kept the rounds of AK-56 in two separate bundles wrapped in papers and threw it in the sea in front of Oberoi Towers and returned to my home.

Next day in the early morning, I got telephone call from Sanjay Dutt at my residence No. 3755092 and I informed him that your work is done and had normal talk with Sanjay Dutt.

After this, I spoke to Kersi Bapuji Adajenia once and told him that you burn the pistol also but he told me that you

A do no worry about this. I will take care of this. Then I stayed at my house and did my normal business till I was picked up by the Police."

24. From the abovesaid confession, the following facts B emerge:

(i) Yusuf Mohsin Nulwalla is an old and well known friend of Sanjay Dutt.

(ii) In the month of April, when Sanjay Dutt was in C Mauritius, A-118 was asked to destroy certain objects kept at his residence.

(iii) On reaching there, he discovered AK-56 and a pistol and ammunition.

D (iv) He tried to destroy them.

(v) He took all these objects to a friend of his, namely, Kersi Bapuji Adajania (A-124)

(vi) A-124 helped him to destroy the same but he E retained the pistol with him.

(vii) Upon being reminded about destroying the pistol, A-124 assured A-118 that he would take care of it.

F 25. In view of the above, it is seen that the appellant (A-118), upon instructions, caused destruction of evidence related to an offence, which were unauthorisedly possessed automatic firearms/weapons in a notified area, attracting the provisions of the Arms Act. The confession of A-118 not only involves and G implicates him, but also implicates Kersi Adajania (A-124). The confession of A-118 corroborates with the confession of A-117 as well as A-124.

Confessional Statement of the appellant - Kersi Bapuji Adajania (A-124)

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26. The confessional statement of A-124 under Section 15 of TADA was recorded on 27.04.1993 (15:10 hrs.) and on 30.04.1993 at (16:00 hr.) by Shri K.L. Bishnoi, the then DCP, Zone-III, Bombay. The following extracts from the confession of the appellant-Kersi Bapuji Adajenia are relevant:-

"I am Kersi Bapuji Adajenia, age 63 years. I stay at 605, Karim Manzil, JSS Road, Bombay-2 with my family. I normally take contracts for steel fabrications and the work is done at the sites of the parties only. I normally keep the equipments and the tools for steel fabrications at the temporary godown in my house and I take these equipments to the sites as and when it is required. Due to the work load, I have purchased two or three sets of all the equipments and tools. Whenever there is a heavy work load, I give the excess work on sub-contracts to other persons. Sometimes, I provide my own tools and equipments to sub-contractors. Yusuf Mohsin Nullwala was my one such sub-contractor. I had come in contact with him about ten years back. Since then, I used to give him sub-contracts regularly.

During the days of my youth, I used to be very fond of hunting and used to go out for hunting occasionally with my friends. But I had given up this hobby (hunting) since 1969 onwards. This, Yusuf Nullwalla was also very fond of hunting and he used to talk a lot about hunting and about his friend cineactor Sanjay Dutt. He introduced me with him about seven years back and they had taken me out once for hunting to a place near Surat, I stayed with Sanjay, Yusuf and three – four their other friends there for two days and we all came back. After that I met Sanjay Dutt for two or three times more.

Somewhere around the end of first week of April, 1993, one day Yusuf Mohsin Nullwalla came to my house around 10.00 a.m. in the morning, he was having a black coloured Rexin bag hung to his shoulder with him and he said to

A me that Sanjay Dutt had telephoned him saying that on AK-56 rifle and other things are lying at this house and police had come to know about his and he is in great trouble and he has asked me to collect it and destroy it, so I had gone to his house and collected it and I have also cut it into B pieces and now I want gas cutting set to completely destroy it, then he showed me the cut pieces of AK-56 rifle by opening the bag.

Since I have read about Sanjay Dutt's possession of AK-56 rifle and police being after him in the newspaper about C a day or two earlier. So initially, I told him that I do not went to get involved in this thing. Then Yusuf said to me that in case he goes out to some other place for destroying it he is likely to be caught and requested me to again to give my gas cutter, so I agreed. Then he went to my godown D and started destroying the cut pieces of AK-56 rifle with the help of gas cutter.

I also went to the place to see that no mishap takes place. When I went there I saw that he was fumbling with the gas E cutter and was in no position to destroy the pieces properly. Then I adjusted the gas and started melting the pieces of AK-56 rifle myself with the gas cutter. These parts were having lot of grease on them so lot of smoke was coming out. Somehow, I managed to destroy all the F parts of AK-56 which he had brought in the bag.

Then he took out one pistol from the bag and wanted me to destroy that alo but I was quite tired and had some breathing problem due to the smoke which was coming out while the pieces of AK-56 reifle were being destroyed. G So I told him to leave te weapon with me and I will destroy it some other time. Then he collected the meted remains of AK-56 rifle in a plastic bag, gave the pistol to me for destruction and he went away. After two days, he telephoned me and enquired whether I have destroyed

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pistol or not. I told him not to worry about that.

As I was to go to Calcutta on 9th April morning so I telephoned and called a friend of mine, by name Rusi Framrose Mulla to my house. He came to my house next day morning and I gave the pistol to him and asked to keep it in sae custody as I was going out to Calcutta. I did not tell him anything about the history of the pistol and told him that I will collect it as soon as I come back from Calcutta.

27. From the above confession, the following facts emerge:-

(i) A-118 was a sub-contractor of A-124. A-124 was also acquainted with A-117. All three of them were fond of hunting and, in fact, went together for hunting once.

(ii) A-124 had his workshop in his house where he was keeping all his tools including the gas cutter.

(iii) In or around April, A-118 contacted A-124 in order to destroy an AK-56 and a pistol belonging to Sanjay Dutt (A-117).

(iv) A-124 permitted him to do so.

(v) A-124 personally destroyed AK-56.

(vi) A-124 kept with himself the pistol.

28. The abovesaid confession establishes the charge framed against A-124 that he knowingly destroyed evidence related to an offence. A-124 was thereafter in unauthorized possession of the fire-arm. The abovesaid confession also corroborates in material particulars, the confession of A-118.

29. The abovesaid confessions of the appellants, viz., A-117, A-118 and A-124 have been recorded by PW-193, who has proved that the said confessions were recorded after

A following the requirements of the provisions of Section 15 of TADA. It is relevant to point out that notwithstanding vigorous cross-examination of the witness (PW-193), he stood firmly without being shaken. A long line of arguments was placed before the Designated Court attacking the voluntariness of the B confession on various occasions, which had been considered in detail by the trial Court and we fully agree with the same.

Law relating to Confessions under TADA

30. It is contended on behalf of the appellants that their C confessional statements, and the confessional statements of the co-accused relied upon by the prosecution against them, are confessions recorded by a police officer, and it is hence not proper to base the conviction on the basis of the said confessions under Section 15 of TADA. Section 15 of TADA D reads as under:

> **15. Certain confessions made to police officers to be taken into consideration.-** (1) Nothwithstanding anything in the Code or in the Indian Evidence Act, 1872, but E subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer in writing or on any mechanical device like cassettes, tapes or sound tracks from out of which sounds or images can be reproduced, shall be admissible in the F trial of such person or [co-accused, abettor or conspirator] for an offence under this Act or rules made thereunder:
>
> Provided that co-accused, abettor or conspirator is charged and tried in the same case together with the G accused.

31. In *Jayawant Dattatray Suryarao* vs. *State of Mharashtra*, (2001) 10 SCC 109, this Court considered in detail the evidentiary value and admissibility of a confessional H statement recorded under Section 15 of TADA and held that it

is settled legal position that a confessional statement recorded by a police officer is in fact, substantive evidence, and that the same can be relied upon in the trial of such person or of a co-accused, an abettor or a conspirator, so long as the requirements of Section 15 and of the TADA rules are complied with. It was observed:

> "60. .... Confessional statement before the police officer under Section 15 of the TADA is substantive evidence and it can be relied upon in the trial of such person or co-accused, abettor or conspirator for an offence punishable under the Act or the Rules. The police officer before recording the confession has to observe the requirement of sub-section (2) of Section 15. Irregularities here and there would not make such confessional statement inadmissible in evidence. If the legislature in its wisdom has provided after considering the situation prevailing in the society that such confessional statement can be used as evidence, it would not be just, reasonable and prudent to water down the scheme of the Act on the assumption that the said statement was recorded under duress or was not recorded truly by the officer concerned in whom faith is reposed."

It was further held by this Court, that minor irregularities do not make the confessional statement inadmissible as substantive evidence and observed as under:

> "**50.** In this view of settled legal position, confessional statement is admissible in evidence and is substantive evidence. It also could be relied upon for connecting the co-accused with the crime. Minor irregularity would not vitiate its evidentiary value....."

32. In *Ravinder Singh @ Bittu* vs. *State of Maharashtra*, (2002) 9 SCC 55, this Court, while considering the reliability of a confession recorded under Section 15 of TADA against the maker, as well as the co-accused, held that after ***State*** vs.

A ***Nalini, Kalpnath Rai*** vs. ***CBI,*** it does not reflect the correct position of law. It was observed:

> **"13.** In *Kalpnath Rai* v. *State (through CBI)* it was observed that the confession made by one accused is not
B substantive evidence against a co-accused. It has only a corroborative value. In the present case, we are, however, primarily concerned with the confession made by the maker i.e. the appellant himself. Besides this confession, there is also a confession made by co-accused Nishan Singh which too implicates the appellant in commission of
C the offence of the bomb blast in the train. The observations made in *Kalpnath Rai case* were considered in *State through Supdt. of Police, CBI/SIT* v. *Nalini*, a decision by a three-Judge Bench. It was held that the confession recorded under Section 15 of the TADA Act is to be
D considered as a substantive piece of evidence not only against the maker of it but also against its co-accused. In this view, the observations in *Kalpnath Rai case* do not represent the correct position of law.
>
E **17.** It is thus well established that a voluntary and truthful confessional statement recorded under Section 15 of the TADA Act requires no corroboration. Here, we are concerned primarily with the confessional statement of the maker. The weight to be attached to the truthful and
F voluntary confession made by an accused under Section 15 of the TADA Act came to be considered again in a recent three-Judge Bench decision in *Devender Pal Singh* v. *State of NCT of Delhi.* It was held in the majority opinion that the confessional statement of the accused can be
G relied upon for the purpose of conviction and no further corroboration is necessary if it relates to the accused himself.
>
> **18.** There can be no doubt that a free and voluntary confession deserves the highest credit. It is presumed to
H

flow from the highest sense of guilt. Having examined the record, we are satisfied that the confession made by the appellant is voluntary and truthful and was recorded, as already noticed, by due observance of all the safeguards provided under Section 15 and the appellant could be convicted solely on the basis of his confession." A B

33. In *Mohmed Amin* vs. *Central Bureau of Investigation*, (2008) 15 SCC 49, it was observed:

"28. In *Devender Pal Singh case* majority of three-Judge Bench made a reference to *Gurdeep Singh case* and *Nalini case* and held (at SCC pp. 261-62, para 33) that whenever an accused challenges the voluntary character of his confession recorded under Section 15(1) of the Act, the initial burden is on the prosecution to prove that all the conditions specified in that section read with Rule 15 of the Rules have been complied with and once that is done, it is for the accused to show and satisfy the court that the confession was not made voluntarily. The Court further held that the confession of an accused can be relied upon for the purpose of conviction and no further corroboration is necessary if it relates to the accused himself. However, as a matter of prudence the court may look for some corroboration if confession is to be used against a co-accused though that will be again within the sphere of appraisal of evidence. C D E F

29. In *Jameel Ahmed case* a two-Judge Bench after discussing, considering and analysing several precedents on the subject, including *Devender Pal Singh case*, culled out the following propositions: (*Jameel Ahmed case*, SCC pp. 689-90, para 35) G

"(*i*) If the confessional statement is properly recorded, satisfying the mandatory provision of Section 15 of the TADA Act and the Rules made thereunder, and if the same is found by the court as having been made voluntarily and H

A truthfully then the said confession is sufficient to base a conviction on the maker of the confession.

(*ii*) Whether such confession requires corroboration or not, is a matter for the court considering such confession on facts of each case.
B

(*iii*) In regard to the use of such confession as against a co-accused, it has to be held that as a matter of caution, a general corroboration should be sought for *but in cases where the court is satisfied that the probative value of*
C *such confession is such that it does not require corroboration then it may base a conviction on the basis of such confession of the co-accused* without corroboration. But this is an exception to the general rule of requiring corroboration when such confession is to be
D used against a co-accused.

(*iv*) The nature of corroboration required both in regard to the use of confession against the maker as also in regard to the use of the same against a co-accused is of a
E general nature, unless the court comes to the conclusion that such corroboration should be on material facts also because of the facts of a particular case. The degree of corroboration so required is that which is necessary for a prudent man to believe in the existence of facts mentioned
F in the confessional statement.

(*v*) The requirement of sub-rule (5) of Rule 15 of the TADA Rules which contemplates a confessional statement being sent to the Chief Metropolitan Magistrate or the Chief Judicial Magistrate who, in turn, will have to send the same
G to the Designated Court is not mandatory and is only directory. However, the court considering the case of direct transmission of the confessional statement to the Designated Court should satisfy itself on facts of each case whether such direct transmission of the confessional
H statement in the facts of the case creates any doubt as to

the genuineness of the said confessional statement." A

30. In *Abdulvahab Abdul Majid Shaikh case* this Court rejected the argument raised on behalf of the appellant that the confession made by him cannot be treated as voluntary because the same had been retracted and observed: B

"9. ... The police officer was empowered to record the confession and in law such a confession is made admissible under the provisions of the TADA Act. The mere fact that A-9 Musakhan @ Babakhan retracted subsequently is not a valid ground to reject the confession. C The crucial question is whether at the time when the accused was giving the statement he was subjected to coercion, threat or any undue influence or was offered any inducement to give any confession. There is nothing in the evidence to show that there was any coercion, threat or D any undue influence to the accused to make the confession."

31. The ratio of the abovenoted judgments is that if a person accused of an offence under the Act makes a E confession before a police officer not below the rank of Superintendent of Police and the same is recorded by the officer concerned in writing or on any mechanical device like cassettes, tapes or sound tracks from out of which sounds or images can be reproduced, then such F confession is admissible in the trial of the maker as also the co-accused, abettor or conspirator not only for an offence under the Act but also for offence(s) under other enactments, provided that the co-accused, abettor or conspirator is charged and tried in the same case along with the accused and the court is satisfied that G requirements of the Act and the Rules have been complied with. Whether such confession requires corroboration depends on the facts of the given case. If the court is convinced that the probative value of the confession is such that it does not require corroboration then the same can H

A be used for convicting the maker and/or the co-accused under the Act and/or the other enactments without independent corroboration."

After considering the confessions of the accused in the aforesaid case, it was held as follows:

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"**81.** Therefore, keeping in view the provisions of Section 15 of the Act as interpreted by this Court in *Gurprit Singh case*, *Nalini case*, *S.N. Dube case*, *Lal Singh case*, *Devender Pal Singh case* and *Jameel Ahmed case*, we C hold that the appellants are guilty of offence under Section 302 read with Section 120-B IPC and no independent corroboration is required for sustaining their conviction."

34. In *Jameel Ahmed & Anr.* vs. *State of Rajasthan*, D (2003) 9 SCC 673, this Court held that Section 30 of the Evidence Act has no role to play in deciding the admissibility of confession recorded under Section 15 of TADA. This Court held that:

"**23.** .... it is relevant to note that Section 15 of the TADA E Act by the use of non obstante clause has made confession recorded under Section 15 admissible notwithstanding anything contained in the Indian Evidence Act or the Code of Criminal Procedure. It also specifically provides that the confession so recorded shall be F admissible in the trial of a co-accused for offence committed and tried in the same case together with the accused who makes the confession. Apart from the plain language of Section 15 which excludes the application of Section 30 of the Evidence Act, this Court has in many G judgments in specific terms held that Section 30 of the Evidence Act has no role to play when the court considers the confession of an accused made under Section 15 of the TADA Act either in regard to himself or in regard to his co-accused."

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35. In *Ahmed Hussein Vali (supra)*, this Court, while relying upon *Nalini (supra)*, held that if the confession made by an accused is voluntary and true, then it is admissible against the co-accused as a substantive piece of evidence, and that minor and curable irregularities in the recording of the confession like omission in obtaining the certificate of competent office with respect to confession do not affect the admissibility of the said evidence. It was further observed:

> **"74.** ... As far as the admissibility of the confessional statement of A-27 is concerned with regard to his co-accused in this case, it is not vitiated because of the amendment and it is rightly used as a major evidence for the trial of his co-accused by the Designated Court. As this confessional statement was made complying with all the procedural essentials as provided for by the TADA Act and the Rules it can be a valid ground for the conviction when corroborated with the confessional statement of the other four accused, namely, A-1, A-2, A-3 and A-20 respectively which have been made prior to the amendment of the Act...."

36. In *Mohd. Farooq Abdul Gafur* vs. *State of Maharashtra* (2010) 14 SCC 641, this Court has upheld the conviction, *inter alia*, relying upon the confession of the accused, as well as the confession of the co-accused in determining the guilt of the accused. The relevant observations in the judgment are as under:-

> **"76.** The confessional statements of Accused 5 and 6 are also relevant to prove and establish the involvement of Accused 1 with the incident. In the said confessional statement, Accused 5 had stated that on 2-3-1999, Faheem informed Accused 5 on the phone that he would be sending two pistols with Accused 1. In fact, Accused 1 came to the house of Accused 5 to deliver the said pistols.
>
> **77.** It has also come out in the said confessional statement

A (of Accused 5) that out of the two pistols one was not in order and so the same was returned to Accused 1 and that on 5-3-1999 Accused 5 called Accused 1 who informed him that he (Accused 1) has spoken to Chhota Shakeel over the phone and informed him about the B incident on the previous day.

78. Accused 5 has also stated in his confessional statement that Accused 1 informed him that Chhota Shakeel had asked Accused 1 to pay Accused 5 some money. Thereupon, Accused 1 paid Rs 20,000 to C Accused 5 at Vakola and Accused 5 and 6 together informed Accused 1 that they were going to Kolkata.

81. The High Court disbelieved the aforesaid confessional statements of Accused 5 and 6 on the ground that the said D confessional statements were inadmissible in evidence thereby it reversed the findings of the trial court. The High Court came to the aforesaid conclusion on the basis that there is no evidence to show that any preliminary warning was given prior to the recording of the confessional E statements and that in the absence of proof of the fact that a warning was given prior to the recording of the confessional statements, the same were inadmissible in evidence. In our considered opinion the High Court ignored the fact that there is evidence of PW 64, the typist F who had deposed that the preliminary warning was in fact given which was so recorded on 23-7-1999.

82. Considering the facts and circumstances of the case we find no reason not to accept the said statement of PW 64, the typist. We also hold that the aforesaid confessional G statement of the co-accused could be the basis of conviction under the provisions of MCOCA.

83. We, therefore, hold Accused 1 guilty of all the charges which were already found to be proved and established H by the trial court and affirmed by the High Court. So far as

the sentence is concerned we, however, uphold and confirm the sentence passed by the High Court and also restore the punishment awarded by the trial court under Section 212 read with Section 52-A read with Section 120-B IPC. A

84. So far as the conviction (of Accused 1) under MCOCA is concerned, it is quite clear that conviction could be based solely on the basis of the confessional statement itself and such conviction is also permissible on the basis of the confessional statement of the co-accused which could be used and relied upon for the purpose of conviction. B C

85. In *State* v. *Nalini*[1] it was held by this Court in the context of Section 15 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (now repealed), which is pari materia with Section 18 of MCOCA that the evidence of a co-accused is admissible as a piece of substantive evidence and in view of the non obstante clause, CrPC will not apply." D

37. It is clear that a confessional statement duly recorded by a Police Officer is a substantive piece of evidence and the same can be relied upon in the trial of such person or of the co-accused, abettor or conspirator if the requirements of Section 15 of TADA, and the rules framed thereunder are complied with. The police officer, before recording the confession, has to observe the requirement of Section 15(2) of TADA. A voluntary and truthful confessional statement recorded under Section 15 of TADA requires no corroboration. However, as a matter of prudence, the court may look for some corroboration if confession is to be used against co-accused. It is made clear that whether such confession requires corroboration or not is a matter for the court to consider such confession on the facts and circumstances of each case. If the confession made by an accused is voluntary and true, it is admissible against co-accused as a substantive piece of E F G H

A evidence and minor and curable irregularities in recording of confession, such as omission in obtaining the certificate of the competent officer with respect to the confession do not affect the admissibility of the said evidence.

B **Retracted Confessions:**

38. It has been contended that since the confession of the appellant - Sanjay Dutt (A-117) has been retracted, hence, it is not trustworthy and it would not be safe to place reliance upon it. It is settled law that a voluntary and free confession, even if C later retracted, can be relied upon.

39. In the case of the appellant - Sanjay Dutt (A-117), the retraction statement was not made at the first available opportunity. After the recording of his confession, within 10 D days, the accused was released on bail by the High Court, and the accused remained free for a considerable period of time. In fact, the judgment delivered by the Constitution Bench on 09.09.1994 also noted down that the said confession of the accused remained un-retracted. The retractions were made E many months after the recording of the confession.

40. In *State of Maharashtra* vs. *Bharat Chaganlal Raghani*, (2001) 9 SCC 1, this Court while setting aside the judgment of acquittal recorded by the Designated TADA Court, observed as under:

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> "58. .... There is no denial of the fact that the judicial confessions made are usually retracted. Retracted confessions are good confessions if held to have been made voluntarily and in accordance with the provisions of G law.... Corroboration of the confessional statement is not a rule of law but a rule of prudence. Whether in a given case corroboration is sufficient would depend upon the facts and circumstances of that case."

41. In *Mohd. Amin (supra)*, this Court considered two

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issues, viz., (i) whether the confession of an accused can be relied upon or used against the co-accused without corroboration, and (ii) whether confessional statements can be relied upon to convict the accused in spite of their subsequent retraction. It was held that in so far as the retraction of confessional statements is concerned, it is clear that the allegations of torture, coercions and threats etc. by accused were not raised at the first available opportunity, and that the retractions were made after almost a year and were therefore only an afterthought and a result of the ingenuinty of their advocates. Accordingly, the retracted confessions were relied upon. It was observed:-

> "If the confessions of the appellants are scrutinized in the light of the above enumerated factors, it becomes clear that the allegations regarding coercion, threat, torture, etc. after more than one year of recording of confessions are an afterthought and products of ingenuity of their advocates. The statements made by them under Section 313 of CrPC were also the result of an afterthought because no tangible reason has been put forward by the defence as to why Appellants A-4 to A-8 did not retract their confessions when they were produced before the Magistrate at Ahmedabad and thereafter despite the fact that they had access to legal assistance in more than one way. Therefore, we hold that the trial court did not commit any error by relying upon the confessions of the Appellants A-4 to A-8 and A-10 and we do not find any valid ground to discard the confessions of Appellants A-4 toA-8 and A-10."

42. In *Manjit Singh* vs. *CBI*, (2011) 11 SCC 578, this Court, while considering the question whether retracted confessions of the co-accused could be relied upon to convict the accused, held that the retracted statements can be used against the accused as well as the co-accused provided such statements were truthful and voluntary when made. In the said

A case, two accused persons made confessional statements and, subsequently, they retracted from their statements. This Court observed:

> "87. A confessional statement given under Section 15 of
B TADA shall not be discarded merely for the reason that the same has been retracted...."
>
> It is pointed out that the confession in the present case was truthful and voluntary and has been recorded after strictly following the law and the prescribed procedure, the
C subsequent retraction and denial of such confessional statements in the statement of the accused under Section 313 was only as a result of an afterthought.

Corroboration of Confession:

D 43. A contention was raised by learned senior counsel for the appellant that there was no sufficient corroboration of the confessional statements made by the accused. In reply to the above, the prosecution relied upon the following decisions:-

E 44. In *Wariyam Singh* vs. *State of U.P.*, (1995) 6 SCC 458, this Court relied upon the confession made by an accused for convicting him. The confession was alleged to have been fabricated. In para 16 of the judgment, it was held that a part of the confession stood corroborated by the testimony of a
F witness, and hence there was no reason to believe that the confession was fabricated. This Court held that the allegation of the confession being fabricated was without any basis and the confession could be taken into account while recording the conviction.

G 45. In *S.N. Dube* vs. *N.B. Bhoir & Ors.*, (2000) 2 SCC 254, this Court in para 34 observed that the confessions of two accused being substantive evidence are sufficient for considering them and it also received corroboration from the confessions of other accused and also general corroboration
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as regards the other illegal activities committed by them from the evidence of other witnesses. On the basis of these confessional statements, this Court reversed the orders of acquittal passed by the High Court.

46. In *Lal Singh* vs. *State of Gujarat*, (2001) 3 SCC 221, this Court upheld the conviction of the accused on the basis of the confessions. It was held that the Nation has been 'facing great stress and strain because of misguided militants and cooperation of the militancy' which was affecting the social security, peace and stability. Since the knowledge of the details of such terrorist conspiracies remains with the people directly involved in it and it is not easy to prove the involvement of all the conspirators, hence, the confessional statements are reliable pieces of evidence. This Court, in para 84, observed as under:

> "84. ..... Hence, in case of conspiracy and particularly such activities, better evidence than acts and statements including that of co-conspirators in pursuance of the conspiracy is hardly available. In such cases, when there is confessional statement it is not necessary for the prosecution to establish each and every link as confessional statement gets corroboration from the link which is proved by the prosecution. In any case, the law requires establishment of such a degree of probability that a prudent man may on its basis, believe in the existence of the facts in issue. For assessing evidence in such cases, this Court in *Collector of Customs* v. *D. Bhoormall* dealing with smuggling activities and the penalty proceedings under Section 167 of the Sea Customs Act, 1878 observed that many facts relating to illicit business remain in the special or peculiar knowledge of the person concerned in it and held thus: (SCC pp. 553-55, paras 30-32 and 37)
>
> "*30.* ... that the prosecution or the Department is not

A required to prove its case with mathematical precision to a demonstrable degree; for, in all human affairs absolute certainty is a myth, and—as Prof. Brett felicitously puts it — 'all exactness is a fake'. El Dorado of absolute proof being unattainable, the law accepts for it probability as a
B working substitute in this work-a-day world. The law does not require the prosecution to prove the impossible. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus, legal proof is
C not necessarily perfect proof; often it is nothing more than a prudent man's estimate as to the probabilities of the case.

31. The other cardinal principle having an important bearing on the incidence of burden of proof is that
D sufficiency and weight of the evidence is to be considered — to use the words of Lord Mansfied in *Blatch* v. *Archar* (1774) 1 Cowp 63: 98 ER 969 (Cowp at p. 65) 'according to the proof which it was in the power of one side to prove, and in the power of the other to have contradicted'."

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47. In *State of Maharashtra* vs. *Bharat Chaganlal Raghani*, (2001) 9 SCC 1, this Court mainly relied on the confessional statements of the accused which were also retracted. It was held that there was sufficient general
F corroboration of the confessional statements made by the accused. The Court found sufficient corroboration in the testimony of the witnesses and the recoveries pursuant to the statements given by the accused. It was also held that once the confessional statements were found to have been made
G voluntarily, the test identification parade was not significant. It was further held that corroboration is not a rule of law but a rule of prudence.

48. In *Devender Pal Singh* vs. *State of NCT of Delhi*, (2002) 5 SCC 234, this Court was considering, among other
H things, whether the accused making the confessional statement

can be convicted on the basis of the confession alone without any corroboration. It was held that once it is found that the confessional statement is voluntary, it is not proper to hold that the police had incorporated certain aspects in the confessional statement which were gathered during the investigation conducted earlier. It was held that the so-called retraction by the appellant, was made long after he was taken into judicial custody.

49. In *Ravinder Singh* vs. *State of Maharashtra*, (2002) 9 SCC 55, this Court held that a confession does not require any corroboration if it relates to the accused himself. It was further held that there was enough evidence to provide general corroboration to the confessional statement. It was also held that minor contradictions in the statements of the accused were of no consequence once the confessions were held to be reliable.

50. In *Jameel Ahmed* vs. *State of Rajasthan*, (2003) 9 SCC 673, the position of law was summed up by this Court as follows:

> **"35.** .....(*i*) If the confessional statement is properly recorded, satisfying the mandatory provision of Section 15 of the TADA Act and the Rules made thereunder, and if the same is found by the court as having been made voluntarily and truthfully then the said confession is sufficient to base a conviction on the maker of the confession.
>
> (*ii*) Whether such confession requires corroboration or not, is a matter for the court considering such confession on facts of each case.
>
> (*iii*) In regard to the use of such confession as against a co-accused, it has to be held that as a matter of caution, a general corroboration should be sought for but in cases where the court is satisfied that the probative value of such confession is such that it does not require corroboration

A then it may base a conviction on the basis of such confession of the co-accused without corroboration. But this is an exception to the general rule of requiring corroboration when such confession is to be used against a co-accused.

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(*iv*) The nature of corroboration required both in regard to the use of confession against the maker as also in regard to the use of the same against a co-accused is of a general nature, unless the court comes to the conclusion that such corroboration should be on material facts also
C because of the facts of a particular case. The degree of corroboration so required is that which is necessary for a prudent man to believe in the existence of facts mentioned in the confessional statement.

D (*v*) The requirement of sub-rule (5) of Rule 15 of the TADA Rules which contemplates a confessional statement being sent to the Chief Metropolitan Magistrate or the Chief Judicial Magistrate who, in turn, will have to send the same to the Designated Court is not mandatory and is only
E directory. However, the court considering the case of direct transmission of the confessional statement to the Designated Court should satisfy itself on facts of each case whether such direct transmission of the confessional statement in the facts of the case creates any doubt as to
F the genuineness of the said confessional statement."

51. In *Nazir Khan* vs. *State of Delhi*, (2003) 8 SCC 461, this court held that the confessional statements made by the co-accused can be used to convict a person, and that it is only as a rule of prudence that the Court should look for
G corroboration elsewhere. It was held that:

"**27.** Applying the principles which can be culled out from the principles set out above to the factual scenario, the inevitable conclusion is that the trial court was justified in
H its conclusions by holding the accused-appellants guilty.

When an accused is a participant in a big game planned, he cannot take the advantage of being ignorant about the finer details applied to give effect to the conspiracy hatched, for example, A-7 is stated to be ignorant of the conspiracy and the kidnapping. But the factual scenario described by the co-accused in the statements recorded under Section 15 of the TADA Act shows his deep involvement in the meticulous planning done by Umar Sheikh. He organized all the activities for making arrangements for the accused and other terrorists.

52. In *Sukhwant Singh* vs. *State*, (2003) 8 SCC 90, this Court upheld the conviction solely on the basis of the confession of the co-accused, without any corroboration, that too in a situation where the accused himself had not confessed. The judgment in the case of *Jameel Ahmed (supra)* was relied upon. It was held:

> **"3.** In the present case we are aware of the fact that the appellant has not made any confessional statement nor is there any corroboration of the confessional statement of the co-accused implicating this appellant from any other independent source but then we have held in the above-reported case that if the confessional statement of a co-accused is acceptable to the court even without corroboration then a confession of a co-accused can be the basis of conviction of another accused so implicated in that confession. Therefore the fact that the appellant herein has not confessed or the confessional statements made implicating him by A-1 and A-2 are not independently corroborated, will not be a ground to reject the evidence produced by the prosecution in the form of confessional statement of co-accused provided the confession relied against the appellant is acceptable to the court."

53. In *Mohammed Amin (supra)*, this Court convicted the

A accused on the basis of their confessions and confessional statements of co-accused. It was held that there is no requirement of corroboration if the confessions are proved to be made voluntarily, and the Rules applicable have been complied with. The following observations are pertinent:

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"**31.** The ratio of the abovenoted judgments is that if a person accused of an offence under the Act makes a confession before a police officer not below the rank of Superintendent of Police and the same is recorded by the officer concerned in writing or on any mechanical device C like cassettes, tapes or sound tracks from out of which sounds or images can be reproduced, then such confession is admissible in the trial of the maker as also the co-accused, abettor or conspirator not only for an offence under the Act but also for offence(s) under other D enactments, provided that the co-accused, abettor or conspirator is charged and tried in the same case along with the accused and the court is satisfied that requirements of the Act and the Rules have been complied with. Whether such confession requires corroboration E depends on the facts of the given case. If the court is convinced that the probative value of the confession is such that it does not require corroboration then the same can be used for convicting the maker and/or the co-accused under the Act and/or the other enactments without F independent corroboration."

54. In *Mohd. Ayub Dar* vs. *State of Jammu and Kashmir*, (2010) 9 SCC 312, it was held that even though the guidelines in *Kartar Singh (supra)*, have not been strictly followed, the G confession of the accused recorded is admissible against him and can be relied upon solely to convict him. The following observations of this Court are pertinent:

"**59.** It would, therefore, be clear, as rightly contended by Shri Rawal that merely because the guidelines in *Kartar*

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Singh v. *State of Punjab* were not fully followed, that by itself does not wipe out the confession recorded. We have already given our reasons for holding that the confession was recorded by A.K. Suri (PW 2) taking full care and cautions which were required to be observed while recording the confession.

60. In *Ravinder Singh* v. *State of Maharashtra* it has been observed in para 19 that if the confession made by the accused is voluntary and truthful and relates to the accused himself, then no further corroboration is necessary and a conviction of the accused can be solely based on it. It has also been observed that such confessional statement is admissible as a substantive piece of evidence. It was further observed that the said confession need not be tested for the contradictions to be found in the confession of the co-accused. It is for that reason that even if the other oral evidence goes counter to the statements made in the confession, one's confession can be found to be voluntary and reliable and it can become the basis of the conviction.

61. In this case, there is ample corroboration to the confession in the oral evidence as well as the documentary evidence in shape of a chit, which is referred to in the said confession. There is a clear reference that the Personal Assistant, who was a non-Kashmiri and kept a beard, had sent a slip inside. Ultimately, that slip was found by the police, which corroborates the contents in the confession. In our opinion, that is a sufficient corroboration to the confession.

64. All these cases suggest that the only test which the court has to apply is whether the confession was voluntary and free of coercion, threat or inducement and whether sufficient caution is taken by the police officer who recorded the confession. Once the confession passes that test, it can become the basis of the conviction. We are completely convinced that the confession in this case was

A free from all the aforementioned defects and was voluntary."

55. In *Manjit Singh* vs. *CBI*, (2011) 11 SCC 578, the following observations of this Court regarding the admissibility of confessional statements are pertinent:-

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91. In *Ravinder Singh case*, the Court relying on *State* v. *Nalini*, *S.N. Dube* v. *N.B. Bhoir* and *Devender Pal Singh* v. *State (NCT of Delhi)*, held that: (*Ravinder Singh case*, SCC p. 59, para 17)

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"*17.* It is thus well established that a voluntary and truthful confessional statement recorded under Section 15 of the TADA Act requires no corroboration."

D This apposite observation by the Bench of two learned Judges in *Ravinder Singh case (supra)* should be considered with measured caution and we believe, taking into account the ground realities that it would be prudent to examine the authenticity of a confession on a case-by-case basis.

E 56. The corroboration as required in the abovesaid judgment can also be found in the case at hand, both in the nature of substantive evidence in the form of the confessions of the co-accused, as well as in the oral testimony of witnesses, including the eye witnesses to the incident who have identified F the appellant-Sanjay Dutt (A-117), as well as the co-accused persons, viz., A-41 and A-53.

57. Apart from the evidence contemporaneous to the arrest of the abovesaid three accused and the recovery made from A-124 and subsequent recovery at the instance of A-124 from G A-120, are also relevant in respect of all the three abovenamed appellants.

58. It is clear that the sequence of events after the arrest of Sanjay Dutt till the recovery of pistol from A-120, forms part

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of an unbroken chain inseparably connected to each other. No foul play can be assumed in view of the fact that the events happened in quick succession one after the other, lending credibility and truthfulness to the whole episode. The role and the part played by A-118 and A-124 is also clear from the evidence relied upon by the prosecution in respect of A-117, which corroborates with each other in material particulars and is thus a substantive piece of evidence.

Deposition of Prosecution Witnesses:

59. Apart from the aforesaid evidence, the involvement and the role of the appellant in the conspiracy as stated above is disclosed by the deposition of various prosecution witnesses which are as follows:

Deposition of Shri K.L. Bishnoi (PW-193)

PW-193, the then DCP, deposed as under with regard to the confession made by A-117:-

(i) On 26.04.1993, at about 3:15 p.m., A-117 was produced by A.P.I. Shri Sanjay Kadam before him in the room given by Senior P.I. Shri Kumbhar, in the office of DCB, CID, Crime Branch, for recording of his confession and he took the proceedings by asking A-117 certain questions in English and during the same, amongst other replies given by him, he told him that he wanted to make a statement.

(ii) During the said proceedings, amongst other, he had explained to A-117, that he was not bound to make a confession and the same can be used against him in evidence and when A-117 still intended to give the confession, PW-193 gave him 48 hours time to reconsider his decision.

(iii) Exhibit 868 being the true and correct record of the

A said proceedings made by him with the help of a typist in his presence which was read over to A-117 and confirmed by him as of being correctly recorded, and bearing the signatures of A-117 as well as of PW-193.

B (iv) On 28.04.1993, at about 16:00 hours, A-117 was again produced before P.W. 193 in the chamber of Senior P.I. DCB,CID, in the office of Crime Branch, C.P. office by A.P.I. Shri S.A. Khere for further proceedings, and he followed all the C procedures mentioned above and recorded the same which is Exh. 868-A.

(v) PW-193 deposed that A-117 confessed that he already had three licensed firearms.

D (vi) He developed acquaintance with Anees Ibrahim-brother of Dawood Ibrahim during a film-shooting

(vii) He expressed his desire to have an automatic fire-arm to Samir Hingora (A-53) and Hanif Kandawala E (A-40).

(viii) Sanjay Dutt was already acquainted with Salem and he had assured him of delivery of the weapons.

F (ix) With the help of above named persons, 3 AK-56 Rifles and 250 rounds were delivered to A-117.

(x) After 2 days, he returned 2 AK-56 rifles and ammunitions, and retained 1 AK-56 and some ammunition.

G (xi) A-117 kept the same in a handbag and placed it in the private hall on the 2nd floor of his bungalow.

(xii) On hearing the news of the arrest of co-accused persons, viz., Samir Hingora (A-53) and Hanif H

Kandawala (A-40), A-117 contacted Yusuf Nulwalla over telephone and asked him that something is lying in a black coloured bag kept in the hall on the second floor of his house, and it should be taken away immediately and to destroy the objects completely.

(xiii) He was picked up by the police as soon as he landed at Bombay.

Deposition of PW-193 with regard to the confession made by A-118:-

(i) A-118 is an old and well known friend of Sanjay Dutt (A-117).

(ii) In the month of April, when Sanjay Dutt was in Mauritius, A-118 was asked to destroy certain objects kept at his residence.

(iii) On reaching there, he discovered one AK-56 rifle, two empty magazines, approximately 250 rounds of AK-56, one pistol and one loaded magazine.

(iv) A-118 cutted the rifle into pieces with the help of a hexa-cutting machine.

(v) A-118 took all those things to Kersi Adajania (A-124), who was having a gas-cutter, in order to melt the same.

(vi) A-118 caused disappearance of evidence of an offence which were also unauthorisedly possessed automatic firearms/weapons.

(vii) Next day, he informed A-117 about the completion of the work assigned to him.

Deposition of PW-193 with regard to the confession made by A-124:-

A (i) A-124 was very well acquainted with A-117 and A-118.

(ii) A-124 had his workshop in his house where he kept all his tools including the gas cutter.

B (iii) A-118 contacted A-124 and said that he wanted to destroy AK-56 and a pistol belonging to Sanjay Dutt (A-117).

(iv) A-124 permitted him to do so.

C (v) A-124 personally destroyed AK-56.

(vi) A-124 kept with himself the pistol.

Deposition of Pandharinath H. Shinde (PW-218)

D The deposition reveals as under:

(i) On 11.01.1993, he was posted on guard duty at the bunglow of Sunil Dutt at Pali Hill, Khar, Bombay.

E (ii) He had worked as a Protection Guard at the said bunglow from 11.01.1993 to 19.01.1993. He was on duty during that period for 24 hours.

(iii) On the said day, at about 7:30 a.m., one white maruti van came to gate No. 2 of the said bunglow F and three persons were sitting in the said van.

(iv) He identified Ibrahim Musa Chauhan (A-41) and Samir Hingora (A-53) as the persons who were sitting at the back of the said van.

G **Deposition of Manohar Vasudev Shirodkar (PW-219)**

At the relevant time, PW-219 was Senior Inspector of Police at Khar Police Station, Bombay. His deposition establishes that PW-218 was posted on Protection Duty at the H bunglow of Sunil Dutt.

Deposition of Suresh S. Walishetty (PW-680)

PW-680, the Investigating officer revealed as under:-

(i) He deposed that Sanjay Dutt (A-117) expressed his desire to make a voluntary statement. Thereafter, he instructed his staff to make arrangement of two persons to act as panch witnesses. The said persons were Shri Tavade and Shri Sawant (PW 211).

(ii) PW-680 instructed Shri Rajaram Ramchandra Joshi (PW-475), Assistant Inspector of Police to record the panchnama.

(iii) Sanjay Dutt made a voluntary statement in Hindi Language, which was recorded in the memorandum Panchnama Exhibit 1068 by PW-475.

(iv) As per the said disclosure, Sanjay Dutt led the Police party to the House of Yusuf Nulwala (A-118).

(v) Yusuf Nulwala was produced by the officers of Dongri police station after about half an hour after their return to the office of DCB-CID.

(vi) Yusuf Nulwala made a disclosure statement and led the police party to the house of Kersi Adajania (A-124).

(vii) Kersi Adajania made a disclosure statement and produced a spring and a rod which was seized by the police and also led the Police party to A-125.

(viii) A-125 made a disclosure statement and led the police party to the House of A-120 wherefrom a pistol and its rounds were recovered.

A **Deposition of Rajaram Ramchandra Joshi (PW-475)**

At the relevant time, PW-475 was working as the Assistant Inspector of Police. In his deposition, he corroborates with the deposition of PW-680 that he assisted him in the investigation relating to Sanjay Dutt and others.

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Deposition of Shashikant Rajaram Sawant (PW-211)

PW-211 acted as an independent witness and proved the disclosure statements made by the appellants pointing out the recoveries therefrom. The deposition reveals as under:

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(i) At about 3:00 p.m., he alongwith Tawade was asked by 3-4 havaldars to act as panch witnesses to which they agreed.

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(ii) They were taken to the office of the Crime Branch at Crawford Market.

(iii) He saw Sanjay Dutt present in the said police station.

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(iv) He was asked to hear what Sanjay Dutt had to say.

(v) He refers to the disclosure made by Sanjay Dutt to the police.

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(vi) Panchnama was drawn by Joshi Saheb (PW-475).

(vii) Sanjay Dutt led the police party to the house of Yusuf Nulwalla (A-118).

(viii) He proved the Panchnama Exhibit 1068-A.

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(ix) Yusuf Nulwala was produced by the two constables who was then arrested by Wallishetty (PW-680).

(x) The witness proved the statement made by Yusuf Nulwala to the Police.

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(xi) Yusuf Nulwala lead the police party to the house of A-124 who was then arrested by the Police.

(xii) Kersi made a disclosure statement.

(xiii) The witness proved the Panchnama Exhibit 1068-C.

(xiv) He also identified the articles, viz., the Rod and the spring produced by A-124.

(xv) Kersi led the police party to Rusi Mulla (A-125).

(xvi) Rusi Mulla led the Police party to Ajay Marwah (A-120).

(xvii) Ajay Marwah produced the bag containing a pistol loaded with Magazine.

(xix) The witness also proved the panchnama Exh. 1068-E.

Deposition of Gangaram Bajoji (PW-265)

PW-265 acted as an independent witness and proved Exhibit Nos. 1100, 1100A, 1101 and 1101 A. In his deposition, he reveals as under:-

(i) The witness was approached on 1.5.1993 by Police Havaldars to act as Panch witnesses to which he agreed. He went to the Crime Branc-CID, Crawford market.

(ii) He met PW 680 and PW 475 there.

(iii) Kersi Adajenia made a statement.

(iv) Pursuant to the said statement, Kersi Adajenia produced Gas Cylinder, Gas Cutter, from his workplace-Factory.

A (v) Police seized those articles vide seizure memo Exhibit 1100A.

(vi) Upon his return to the Police station, Yusuf Nulwala made a statement before him, PW 680 and PW 475.
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(vii) A panchnama was drawn as Exhibit 1101.

(viii) The said accused led the Police party to marine drive and asked the jeep to be halted in front of
C Shanti Niketan building.

(ix) The accused then took the police party to the stoney area and took out a plastic bag concealed in the gap of one of the stones. He handed over the same to PW 680. The said bag was found to be
D containing 53 bullets and he also proved Exhibit 1101A.

Deposition of Karmegam Alagappan (PW-472)

E The deposition of PW 472 reveals as under:

(i) The call records of Telephone No. 6462786 were provided by him.

(ii) Out of 7-8 numbers provided by the Investigating
F officer, only 6462786 has STD and ISD calls.

(iii X 572 contains the printout of call records provided by him.

(iv) After the objections were decided, the said call
G records were marked as Exhibit 2532 collectively.

60. The entire sequence of abovesaid events have been proved Shri Suresh S. Walishetty (PW-680)-the Investigating Officer and Sh. Rajaram Ramchandra Joshi (PW-475)-the

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Assistant Inspector of Police. The above said incident has also been witnessed and proved by an independent witness, viz. PW-211. Further, the credibility of the witness has not been shaken despite vigorous cross examination.

Section 27 of the Indian Evidence Act:

61. This Court, while dealing with the law relating to Section 27 of the Indian Evidence Act observed about the possibility and plausibility of such recoveries as followed in *State (NCT of Delhi)* vs. *Navjot Sandhu*, (2005) 11 SCC 600 which are as under:-

> "142. There is one more point which we would like to discuss i.e. whether pointing out a material object by the accused furnishing the information is a necessary concomitant of Section 27. We think that the answer should be in the negative. Though in most of the cases the person who makes the disclosure himself leads the police officer to the place where an object is concealed and points out the same to him, however, it is not essential that there should be such pointing out in order to make the information admissible under Section 27. It could very well be that on the basis of information furnished by the accused, the investigating officer may go to the spot in the company of other witnesses and recover the material object. By doing so, the investigating officer will be discovering a fact viz. the concealment of an incriminating article and the knowledge of the accused furnishing the information about it. In other words, where the information furnished by the person in custody is verified by the police officer by going to the spot mentioned by the informant and finds it to be correct, that amounts to discovery of fact within the meaning of Section 27. Of course, it is subject to the rider that the information so furnished was the immediate and proximate cause of discovery. If the police officer chooses not to take the informant accused to the spot, it

A will have no bearing on the point of admissibility under Section 27, though it may be one of the aspects that goes into evaluation of that particular piece of evidence.

145. Before parting with the discussion on the subject of confessions under Section 27, we may briefly refer to the B legal position as regards joint disclosures. This point assumes relevance in the context of such disclosures made by the first two accused viz. Afzal and Shaukat. The admissibility of information said to have been furnished by both of them leading to the discovery of the hideouts of the C deceased terrorists and the recovery of a laptop computer, a mobile phone and cash of Rs 10 lakhs from the truck in which they were found at Srinagar is in issue. Learned Senior Counsel Mr Shanti Bhushan and Mr Sushil Kumar appearing for the accused contend, as was contended D before the High Court, that the disclosure and pointing out attributed to both cannot fall within the ken of Section 27, whereas it is the contention of Mr Gopal Subramanium that there is no taboo against the admission of such information as incriminating evidence against both the E accused informants. Some of the High Courts have taken the view that the wording "a person" excludes the applicability of the section to more than one person. But, that is too narrow a view to be taken. Joint disclosures, to be more accurate, simultaneous disclosures, per se, are F not inadmissible under Section 27. "A person accused" need not necessarily be a single person, but it could be plurality of the accused. It seems to us that the real reason for not acting upon the joint disclosures by taking resort to Section 27 is the inherent difficulty in placing reliance on G such information supposed to have emerged from the mouths of two or more accused at a time. In fact, joint or simultaneous disclosure is a myth, because two or more accused persons would not have uttered informatory words in a chorus. At best, one person would have made the

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statement orally and the other person would have stated so substantially in similar terms a few seconds or minutes later, or the second person would have given unequivocal nod to what has been said by the first person. Or, two persons in custody may be interrogated separately and simultaneously and both of them may furnish similar information leading to the discovery of fact. Or, in rare cases, both the accused may reduce the information into writing and hand over the written notes to the police officer at the same time. We do not think that such disclosures by two or more persons in police custody go out of the purview of Section 27 altogether. If information is given one after the other without any break, almost simultaneously, and if such information is followed up by pointing out the material thing by both of them, we find no good reason to eschew such evidence from the regime of Section 27. However, there may be practical difficulties in placing reliance on such evidence. It may be difficult for the witness (generally the police officer), to depose which accused spoke what words and in what sequence. In other words, the deposition in regard to the information given by the two accused may be exposed to criticism from the standpoint of credibility and its nexus with discovery. Admissibility and credibility are two distinct aspects, as pointed out by Mr Gopal Subramanium. Whether and to what extent such a simultaneous disclosure could be relied upon by the Court is really a matter of evaluation of evidence....."

A B C D E F

It was contended that under Section 27 of the Evidence Act, only recovery of object is permissible and identification of the person instead of the place where the article is to be found cannot attract the provisions of Section 27.

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62. The very same situation has been considered by this Court in *Jaffar Hussain Dastagir* vs. *State of Maharashtra*, (1969) 2 SCC 872, 875 wherein the following observations are pertinent:-

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A "4.....In order that the section may apply the prosecution must establish that the information given by the appellant led to the discovery of some fact deposed to by him. It is evident that the discovery must be of some fact which the police had not previously learnt from other sources and that
B the knowledge of the fact was first derived from information given by the accused. If the police had no information before of the complicity of Accused 3 with the crime and had no idea as to whether the diamonds would be found with him and the appellant had made a statement to the
C police that he knew where the diamonds were and would lead them to the person who had them, it can be said that the discovery of the diamonds with the third accused was a fact deposed to by the appellant and admissible in evidence under Section 27. However, if it be shown that
D the police already knew that Accused 3 had got the diamonds but did not know where the said accused was to be found, it cannot be said that the information given by the appellant that Accused 3 had the diamonds and could be pointed out in a large crowd at the waiting hall
E led to the discovery of a fact proving his complicity with any crime within the meaning of Section 27. The fact deposed to by him would at best lead to the discovery of the whereabouts of Accused 3.

5. Under Section 25 of the Evidence Act no confession
F made by an accused to a police officer can be admitted in evidence against him. An exception to this is however provided by Section 26 which makes a confessional statement made before a Magistrate admissible in evidence against an accused notwithstanding the fact that
G he was in the custody of the police when he made the incriminating statement. Section 27 is a proviso to Section 26 and makes admissible so much of the statement of the accused which leads to the discovery of a fact deposed to by him and connected with the crime, irrespective of the

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question whether it is confessional or otherwise. The essential ingredient of the section is that the information given by the accused must lead to the discovery of the fact which is the direct outcome of such information. Secondly, only such portion of the information given as is distinctly connected with the said recovery is admissible against the accused. Thirdly, the discovery of the fact must relate to the commission of some offence. The embargo on statements of the accused before the police will not apply if all the above conditions are fulfilled. If an accused charged with a theft of articles or receiving stolen articles, within the meaning of Section 411 IPC states to the police, "I will show you the articles at the place where I have kept them" and the articles are actually found there, there can be no doubt that the information given by him led to the discovery of a fact i.e. keeping of the articles by the accused at the place mentioned. The discovery of the fact deposed to in such a case is not the discovery of the articles but the discovery of the fact that the articles were kept by the accused at a particular place. In principle there is no difference between the above statement and that made by the appellant in this case which in effect is that "I will show you the person to whom I have given the diamonds exceeding 200 in number". *The only difference between the two statements is that a "named person" is substituted for "the place" where the article is kept. In neither case are the articles or the diamonds the fact discovered."*

A B C D E F

Recoveries:

63. The rod and the spring recovered from the possession of A-124 were sent to FSL for examination. The experts opined that the said articles correspond to that of an AK-56 type rifle, but did not correspond to similar components used in AK-47 rifle.

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A 64. The independent witness was given a tape to measure the rod, and the measurement came to be 15 inches which is not one and a half feet, as was recorded and deposed to by the prosecution witness. A contention was also raised with regard to the removal of the seal from the packet. The B requisition and the report show that the seal on the packet containing the object was perfect and had not been tempered with. In that event, the said anomaly may not be of much consequence.

65. The prosecution has also established through one C independent witness PW-265 that A-118 and A-124 further made statement to the police and pursuant whereof the gas cylinder used in destroying AK-56 was recovered at the instance of A-124 and some of the ammunition of AK-56 were recovered at the instance of A-118.

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66. The relevant confession of A-53, wherein he stated that when they reached the house of Sanjay Dutt, he was speaking to Anees over phone, the said call details along with a certified copy of the relevant directory which contains the telephone E number of Anees Ibrahim in Dubai has been filed. The call record was pertaining to Tel. No. 6462786. Exh. No. X-572 shows that the said number belongs to Sanjay Dutt. The United Arab Emirates' Telephone Directory which is also exhibited indicates the number as 448585 in the name of Anees Shaikh Ibrahim.

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67. It was contended on behalf of Sanjay Dutt that since he has been acquitted of all the charges, the confession ought not to have been relied upon for convicting him for offences other than TADA offences. The answer to the said contention G lies in reading together the two judgments of the Constitution Bench of this Court. One is in the case of ***Sanjay Dutt (II) (supra)*** wherein this Court considered the entire case of the appellant-Sanjay Dutt at that stage and opined that although the offence is complete by the unauthorized possession of a

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weapon in the notified area, a defence would be available to the accused to be taken at the time of the trial and the Trial Court can consider the same by virtue of Section 12 of TADA. The other case is of ***Prakash Kumar (supra)***, wherein this Court held that even if the accused was to be acquitted of the TADA charges, still in a joint trial, the confessions recorded under Section 15 of TADA can be relied upon in respect of the said accused. It was further held that the stage at which the trial can be separated is at the stage of cognizance and not subsequently.

68. The following observation of this Court in the abovesaid judgment is as under:-

In ***Sanjay Dutt (Supra)***, this Court held:-

"27. There is no controversy about the facts necessary to constitute the first two ingredients. For proving the non-existence of facts constituting the third ingredient of the offence, the accused would be entitled to rebut the above statutory presumption and prove that his unauthorised possession of any such arms and ammunition etc. was wholly unrelated to any terrorist or disruptive activity and the same was neither used nor available in that area for any such use and its availability in a "notified area" was innocuous. Whatever be the extent of burden on the accused to prove the non-existence of the third ingredient, as a matter of law he has such a right which flows from the basic right of the accused in every prosecution to prove the non-existence of a fact essential to constitute an ingredient of the offence for which he is being tried. If the accused succeeds in proving non-existence of the facts necessary to constitute the third ingredient alone after his unauthorised possession of any such arms and ammunition etc. in a notified area is proved by the prosecution, then he cannot be convicted under Section 5 of the TADA Act and would be dealt with and punished

A under the general law. It is obviously to meet situations of this kind that Section 12 was incorporated in the TADA Act.

28. The non-obstante clause in Section 5 of the TADA Act shows that within a notified area, the general law relating to unauthorised possession of any of the specified arms and ammunition etc. is superseded by the special enactment for that area, namely, the TADA Act. If however the third ingredient to constitute the offence under Section 5 of the TADA Act is negatived by the accused while the first two ingredients are proved to make out an offence punishable under the general law, namely, the Arms Act, then the Designated Court is empowered to deal with the situation in accordance with Section 12 of the TADA Act. Section 12 itself shows that Parliament envisaged a situation in which a person tried under the TADA Act of any offence may ultimately be found to have committed any other offence punishable under any other law and in that situation, the Designated Court is empowered to punish the accused for the offence under such other law. The offence under Section 5 of the TADA Act is graver and visited with more severe punishment as compared to the corresponding offence under the general law. This is because of the greater propensity of misuse of such arms and ammunition etc. for a terrorist or disruptive act within a notified area. If the assumed propensity of such use is negatived by the accused, the offence gets reduced to one under the general law and is punishable only thereunder. In such a situation, the accused is punished in the same manner as any other person found to be in unauthorised possession of any such arms and ammunition etc. outside a notified area. The presumption in law is of the greater and natural danger arising from its unauthorised possession within a notified area more prone to terrorist or disruptive activities.

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37. It is a settled rule of criminal jurisprudence that the burden on an accused of proving a fact for rebutting a statutory presumption in his defence is not as heavy as on the prosecution to prove its case beyond reasonable doubt but the lighter burden of proving the greater probability. Thus, the burden on the accused of rebutting the statutory presumption which arises against him under Section 5 of the TADA Act on proof by the prosecution that the accused was in unauthorised possession of any of the specified arms and ammunition etc. within a notified area, is of greater probability. When the prosecution has proved these facts, it has to do nothing more and conviction under Section 5 of the TADA Act must follow unless the accused rebuts the statutory presumption by proving that any such arms and ammunition etc. was neither used nor was meant to be used for a terrorist or disruptive activity. No further nexus of his unauthorised possession of the same with any specific terrorist or disruptive activity is required to be proved by the prosecution for proving the offence under Section 5 of the TADA Act. The nexus is implicit, unless rebutted, from the fact of unauthorised conscious possession of any such weapon etc. within a notified area and the inherent lethal and hazardous nature and potential of the same. The observations of Sahai, J. alone in *Kartar Singh*[1] cannot be read to enlarge the burden on the prosecution to prove the implicit nexus by evidence *aliunde*, or to require the prosecution to prove anything more than what we have indicated."

69. Similary, in ***Prakash Kumar (supra),*** this Court held as under:-

"18. The questions posed before us for the termination are no more *res integra*. In our view, the same have been set at rest by the three-Judge Bench decision rendered in *Nalini*. The rigours of Sections 12 and 15 were considered in *Nalini case*[1] and a finding rendered in paras 80, 81 and 82 (SCC p. 304) as under:

A "*80.* Section 12 of TADA enables the Designated Court to jointly try, at the same trial, any offence under TADA together with any other offence 'with which the accused may be charged' as per the Code of Criminal Procedure. Sub-section (2) thereof empowers the Designated Court
B to convict the accused, in such a trial, of any offence 'under any other law' if it is found by such Designated Court in such trial that the accused is found guilty of such offence. *If the accused is acquitted of the offences under TADA in such a trial, but convicted of the offence under any*
C *other law, it does not mean that there was only a trial for such other offence under any other law.*

81. Section 15 of TADA enables the confessional statement of an accused made to a police officer specified therein to become admissible 'in the trial of such a
D person'. It means, if there was a trial of any offence under TADA together with any other offence under any other law, *the admissibility of the confessional statement would continue to hold good even if the accused is acquitted under TADA offences.*

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82. The aforesaid implications of Section 12 vis-à-vis Section 15 of TADA have not been adverted to in *Bilal Ahmed case*[2]. Hence the observations therein (at SCC p. 434, para 5) that

F 'while dealing with the offences of which the appellant was convicted there is no question of looking into the confessional statement attributed to him, much less relying on it since he was acquitted of all offences under TADA'

G cannot be followed by us. *The correct position is that the confessional statement duly recorded under Section 15 of TADA would continue to remain admissible as for the other offences under any other law which too were tried along with TADA offences, no matter that the accused*
H *was acquitted of offences under TADA in that trial.*"

(emphasis supplied)

We are in respectful agreement with the findings recorded by a three-Judge Bench in *Nalini case*.

33. Section 12 empowers the Designated Court to try any other offence with which the accused may be charged under the Code at the same trial provided the offence is connected with such other offence. This section has been brought to the statute-book in consonance with the preamble of the Act, which says "for the prevention of, and for coping with, terrorist and disruptive activities and *for matters connected therewith or incidental thereto*". (emphasis supplied) Therefore, Section 12 is introduced to take care of the matters connected with or incidental to terrorist activities.

34. A conjoint reading of the two sections as a whole leaves no manner of doubt that one provision is to be construed with reference to the other provision and vice versa so as to make the provision consistent with the object sought to be achieved. The scheme and object of the Act being the admissibility of the confession recorded under Section 15 of the Act in the trial of a person or co-accused, abettor or conspirator charged and tried in the same case together with the accused, as provided under Section 12 of the Act.

35. Counsel contends that Section 12 is only an enabling provision empowering the Designated Court to try and convict for the offences committed under any other law along with the offences under TADA so as to avoid multiplicity of the trial and does not empower the Designated Court to try and convict for other offences, even if the offences under TADA are not made out. Does it mean: "Thou shalt have teeth, but not bite?" We think not. When the courts have the power to try, it is implicit in it that

A they have the power to convict also. In the present case, sub-section (2) of Section 12 expressly empowered the Designated Court to convict the accused person of such other offence and pass any sentence authorised by the Act — if the offence is connected with such other offence and B — if it is found that the accused person has committed any other offence.

36. Section 12(1) as quoted above authorises the Designated Court to try offences under TADA along with another offence with which the accused may be charged C under CrPC at the same trial. The only embargo imposed on the exercise of the power is that the offence under TADA is connected with any other offence being tried together. Further, Section 12(2) provides that the Designated Court may convict the accused person of D offence under that Act or any rule made thereunder *or under any other law and pass any sentence authorised under that Act or the Rules or under any other law, as the case may be for the punishment thereof, if in the course of any trial under TADA the accused persons are found* E *to have committed any offence either under that Act or any rule or under any other law.*

37. The legislative intendment underlying Sections 12(1) and (2) is clearly discernible, to empower the Designated F Court to try and convict the accused for offences committed under any other law along with offences committed under the Act, if the offence is connected with such other offence. The language "if the offence is connected with such other offence" employed in Section 12(1) of the Act has great G significance. The necessary corollary is that once the other offence is connected with the offence under TADA and if the accused is charged under the Code and tried together in the same trial, the Designated Court is empowered to convict the accused for the offence under any other law, notwithstanding the fact that no offence under TADA is H

made out. This could be the only intendment of the legislature. To hold otherwise, would amount to rewrite or recast legislation and read something into it which is not there.

41. The other leg of the submission is rigours of Section 18 of the Act. Section 18 deals with the power to transfer cases to regular courts. It reads:

"18. Where, *after taking cognizance* of any offence, a Designated Court is of opinion that the offence is not triable by it, it shall, notwithstanding that it has no jurisdiction to try such offence, transfer the case for the trial of such offence to any court having jurisdiction under the Code and the court to which the case is transferred may proceed with the trial of the offence as if it had taken cognizance of the offence."

(emphasis supplied)

42. It is contended that the words "*after taking cognizance*" employed in Section 18 of the Act would include any stage of trial including the stage when the judgment is to be delivered. This submission is also misconceived. If it ought to have been the intention of the legislature they could have said so. The legislature deliberately uses the words "after taking cognizance of any offence" to mean that Section 18 would be attracted only at the stage where the Designated Court takes cognizance of offence i.e. after the investigation is complete and charge-sheet is filed. The provisions of Section 209 CrPC on which the counsel for the appellants sought to rely are not in *pari materia* with Section 18. In Section 209 CrPC the words "after taking cognizance" are absent conspicuously. Section 18 is a filtered provision. The section is attracted only at a stage the Designated Court takes cognizance of the offence. It is at the stage of taking cognizance, the Designated Court

A is expected to scan the documents and evidence collected therewith. If the Designated Court is of the opinion that the offence is not triable by it, it shall then, notwithstanding that it has no jurisdiction to try such offence, transfer the case for the trial of such offence to any court having jurisdiction
B under the Code and the court to which the case is transferred may proceed with the trial of the offence as if it had taken cognizance of the offence. In our view, there is no ambiguity in the language used in Section 18. If the submissions of the counsel for the appellant are accepted,
C it would amount to reading something into the statute which is not there."

70. In the case on hand, at the time of taking cognizance by the Designated Court, there were sufficient evidence against the appellants to proceed against them in the joint trial. In the
D case of Sanjay Dutt, the Designated Court took a view on the basis of his own confession that the weapons were not acquired for any terrorist activity but they were acquired for self-defence, therefore, acquittal was recorded in respect of charge under Section 5 of TADA. We fully agree with the same.

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71. For the same reasons discussed above, we are in agreement with the conclusion arrived at by the Designated Court and reject the arguments of the counsel for the other appellants, viz., A-118 and A-124. In the light of the above
F discussion, we are of the view that the course adopted by the trial Court was correct in view of both the abovesaid judgments of this Court.

Sentence:

G 72. Coming to sentence, A-117 has filed an additional affidavit dated 24.07.2012 highlighting the circumstances under which he was implicated, relationship of his family members with the victims etc. It is not in dispute that though the appellant was also charged under TADA Act, the fact remains that he

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was acquitted of those charges and admittedly the CBI has not filed an appeal against the same. As said earlier, the Designated Court convicted him for the offences under Sections 3 and 7 read with Sections 25(1-A) and (1-B)(a) of the Arms Act, 1959. Consequently, in his additional affidavit, the appellant has asserted that he is entitled to seek the benefit of Section 4 of Probation of Offenders Act.

73. The appellant (A-117) asserted that though the prosecution involved him in Bombay Bomb Blast Case that he had knowledge as to the conspiracy and had kept in his possession fire arms and ammunitions as well as hand grenades knowing that the same were from the consignment that had landed for use in the said Blasts, the fact remains that the Designated Court did not accept the prosecution story against him and rejected his involvement in the conspiracy as well as any knowledge of the events as charged. The TADA Court has also held that the prosecution has failed to prove that the alleged arms in possession of the appellant were from the same alleged consignment that was used in the said blasts.

74. It was also contended from the side of the appellant that in the year 1992-93, the appellant and his family members were involved in helping people residing in riots affected areas, more particularly, Behrampada, predominantly having a Muslim population which was objectionable to certain group of persons who were of the opinion that the Dutt family was sympathizers of only the Muslim community. In fact, this leads to an attack on Sunil Dutt in January, 1993 as well as threatening phone calls were being received at their residence, including threats to the family members being killed as well as the sisters of the appellant being kidnapped and raped. This lead to a great and serious apprehension that an attack could be perpetrated upon the Dutt family in view of the fact that Shri Sunil Dutt had already been attacked. This apprehension was clearly set out in the letter of Shri Sunil Dutt to the then DCP of Zone VII dated 06.01.1993, wherein he asked for enhancing security

A arrangements further and for more police protection at his house as deposed by PW-219 in this case.

75. It is stated that A-117 had no previous involvement or conviction prior to one in 1992 which ended in acquittal. Thus, according to him, he is not a previous offender or a convict. In the event, this Court releases the appellant on Probation under the provisions of the Probation of Offenders Act, neither any injustice would occasion to anyone as the offence in which he was convicted, is not even a social offence nor any prejudice be caused to the prosecution. He asserted that he is not a habitual offender, and is not likely to commit any offence in future. The TADA Court did not get any opportunity to complain about the conduct of the appellant in 19 years. He further submitted that he has also suffered the agony of long trial of 13 ½ (thirteen and a half) years. The stress and trauma of the same, besides the fact that he has carried the tag of an alleged terrorist for 13 ½ (thirteen and a half) years though unwarranted, and has been deprived of the company of his daughter, is a punishment in itself. He has also stated that he had suffered mentally, physically and emotionally in the last several years.

76. He also informed this Court that he got married again in the year 2008 and is blessed with two children aged 1 and ½ years and they need their father's presence in their life. He further submitted that he has been actively involved in an AIDS charity and raises funds for the free treatment of aids patients who cannot afford the same, besides visiting the hospitals/ centres. It is further submitted that he is on the Board of Directors of "Save the Children Foundation" and helping in raising funds for children who are needy, orphaned and destitute as their Brand Ambassador for a long time, even prior to his being charged in this case.

77. In view of the above, learned senior counsel for A-117 draws attention of this Court towards the following decisions, viz., *Ved Prakash* vs. *State of Haryana*, 1981 (1) SCC 447,

this Court observed that the social background and the personal factors of the crime-doer are very relevant although in practice Criminal Courts have hardly paid attention to the social milieu or the personal circumstances of the offender.

78. In *Jugal Kishore* vs. *State of Bihar*, (1972) 2 SCC 633 this Court observed that the modern criminal jurisprudence recognizes that no one is a born criminal and that a good many crimes are the product of socio-economic milieu.

79. This Court in *Ratanlal* vs. *State of Punjab*, (1964) SCR 676 has observed to the effect that the Probation of Offenders Act, was enacted with a view to provide for the release of offenders of certain categories on Probation or alter due admonition and for matters connected therewith. The object of the Act is to prevent the conversion of offenders into obdurate criminals as a result of their association with hardened criminals. The above object is in consonance with the present trend in the field of penology, according to which, efforts should be made to bring about correction and reformation of the individual offenders and not to resort to retributive justice. Although, not much can be done for hardened criminals, considerable stress has been laid on bringing about reform of offenders not guilty of serious offences and of preventing their association with hardened criminals. The Act gives statutory recognition to the above objective. It is, therefore, provided that offenders should not be sent to jail, except in certain circumstances.

80. The scope of Section 4 of the Probation of Offenders Act is much wider. It applies to any person found guilty of having committed an offence not punishable with death or imprisonment for life. The same has also been held by this Court in *Chhani* vs. *State of U.P.*, (2006) 5 SCC 396.

81. Section 360 of the Code of Criminal Procedure does not provide for any role for probation officers in assisting the

courts in relation to supervision and other matters while the Probation of Offenders Act does make such a provision. While Section 12 of the Probation of Offenders Act states that a person found guilty of an offence and dealt with under Section 3 or 4 of the Probation of Offenders Act, shall not suffer disqualification, if any, attached to the conviction of an offence under any law. The Code of Criminal Procedure does not contain parallel provision. Two statutes with such significant differences could not be intended to co-exist at the same time in the same area. Such co-existence would lead to anamolous results. The intention to retain the provisions of Section 360 of the Code and the Probation of Offenders Act as applicable at the same time in a given area cannot be gathered from the provisions of Section 360 or any other provisons of the Code.

82. Keeping those information in the form of an additional affidavit, let us consider his claim and eligibility of applying Section 4 of the Probation of Offenders Act.

83. Sub-section 4 of the Probation of Offenders Act contains the words "Notwithstanding anything contained in any other law for the time being in force". The above *non obstante* clause points to the conclusion that the provisions of Section 4 of the Probation of Offenders Act would have an overriding effect and shall prevail if the other conditions prescribed therein are fulfilled. Those conditions are:

(i) The accused is found guilty of having committed an offence not punishable with death or imprisonment for life;

(ii) The Court finding him guilty is of the opinion that having regard to the circumstances of the case, including the nature of the offence and the character of the offender, it is expedient to release him on probation;

(iii) The accused in such an event enters into a bond

with or without sureties to appear and receive sentence when called upon during such period not exceeding three years as the court may direct and, in the meantime, to keep the peace and be of good behaviour.

84. The underlying object of the above provisions obviously is that an accused person should be given a chance of reformation, which he would lose in case he is incarcerated in prison and associates with hardened criminals. It is submitted that the provisions of the said Act are beneficial provisions and, therefore, they should receive wide interpretation and should not be read in a restricted sence vide *Ishar Das* vs. *State of Punjab*, 1973 (2) SCC 65.

85. Section 4 of the Probation of Offenders Act applies to all kinds of offenders, whether under or above the age of 21 years. This section is intended to attempt possible reformation of an offender instead of inflicting upon him the normal punishment of his crime. It is submitted that it is settled law that while extending benefit of the said provision, this Court has to exercise its discretion having regard to the circumstances in which the crime was committed, viz., the age, character and antecedents of the offender. It is also settled law that such exercise of discretion needs a sense of responsibility. The section itself is clear that before applying the same, this Court should carefully take into consideration the attendant circumstances.

86. The circumstances and the nature of the offence as analysed and discussed above are so serious and we are of the view that they do not warrant A-117 the benefit of the provisions of the Probation of Offenders Act, however, taking note of various aspects, we reduce the sentence to minimum period, viz., 6 years to 5 years. The appeal is disposed of on the above terms.

87. In respect of A-118, in view of the discussion and the above conclusion, we confirm the conviction and sentence awarded to him by the Designated Court. Consquently, the appeal is dismissed.

88. Insofar as A-124 is concerned, the Designated Court has convicted him under Sections 3 and 7 read with Sections 25(1-A)(1-B)(a) of the Arms Act, 1959, as well as under Section 201 of IPC and sentenced him to undergo RI for 2 years on both the counts separately. A perusal of all the materials relating to A-124 shows that the Designated Court itself convicted and sentenced him under Section 25(1-B)(a) of the Arms Act along with Section 201 of IPC. While clarifying the same, we hold that there is no substantive evidence for convicting him under Section 25(1-A) of the Arms Act, though the Designated Court has referred to the same while awarding sentence to him. Also, considering his age, i.e. 82 years as on date and taking note of the fact that the minimum sentence for the offence under Section 25(1-B)(a) being one year, while confirming his conviction, we reduce the sentence awarded to A-124 under Section 25(1-B)(a) as well as under Section 201 IPC to 1 year which shall run concurrently. The appeal is disposed of on the above terms.

Criminal Appeal No. 596 of 2011

The State of Maharashtra, through CBI .... Appellant(s)

vs.

Ajai Yash Prakash Marwah (A-120) ... Respondent(s)

89. Heard Mr. H.P. Rawal, learned ASG duly assisted by Mr. Satyakam, learned counsel for the appellant (CBI). None appeared for the respondent.

90. The instant appeal is directed against the impugned judgment and order dated 02.08.2007 passed by the

Designated Court under TADA for the Bombay Bomb Blast Case, Greater Bombay in B.B.C. No.1/1993 whereby the Respondent (A-120) has been acquitted of all the charges framed against him.

Charges:

91. A common charge of conspiracy was framed against all the co-conspirators including the respondent The relevant portion of the said charge is reproduced hereunder:

> "During the period from December, 1992 to April, 1993 at various places in Bombay, District Raigad and District Thane in India and outside India in Dubai (U.A.E.) Pakistan, entered into a criminal conspiracy and/or were members of the said criminal conspiracy whose object was to commit terrorist acts in India and that you all agreed to commit following illegal acts, namely, to commit terrorist acts with an intent to overawe the Government as by law established, to strike terror in the people, to alienate sections of the people and to adversely affect the harmony amongst different sections of the people, i.e. Hindus and Muslims by using bombs, dynamites, handgrenades and other explosive substances like RDX or inflammable substances or fire-arms like AK-56 rifles, carbines, pistols and other lethal weapons, in such a manner as to cause or as likely to cause death of or injuries to any person or persons, loss of or damage to and disruption of supplies of services essential to the life of the community, and to achieve the objectives of the conspiracy, you all agreed to smuggle fire-arms, ammunition, detonators, handgrenades and high explosives like RDX into India and to distribute the same amongst yourselves and your men of confidence for the purpose of committing terrorist acts and for the said purpose to conceal and store all these arms, ammunition and explosives at such safe places and amongst yourselves and with your men of confidence till its use for

committing terrorist acts and achieving the objects of criminal conspiracy and to dispose off the same as need arises. To organize training camps in Pakistan and in India to import and undergo weapon training in handling of arms, ammunitions and explosives to commit terrorist acts. To harbour and conceal terrorists/co-conspirators, and also to aid, abet and knowingly facilitate the terrorist acts and/or any act preparatory to the commission of terrorist acts and to render any assistance financial or otherwise for accomplishing the object of the conspiracy to commit terrorist acts, to do and commit any other illegal acts as were necessary for achieving the aforesaid objectives of the criminal conspiracy and that on 12.03.1993 were successful in causing bomb explosions at Stock Exchange Building, Air India Building, Hotel Sea Rock at Bandra, Hotel Centaur at Juhu, Hotel Centaur at Santacruz, Zaveri Bazar, Katha Bazar, Century Bazar at Worli, Petrol Pump adjoining Shiv Sena Bhavan, Plaza Theatre and in lobbing handgrenades at Macchimar Hindu Colony, Mahim and at Bay-52, Sahar International Airport which left more than 257 persons dead, 713 injured and property worth about Rs.27 crores destroyed, and attempted to cause bomb explosions at Naigaum Cross Road and Dhanji Street, all in the city of Bombay and its suburbs i.e. within Greater Bombay. And thereby committed offences punishable under Section 3(3) of TADA (P) Act, 1987 and Section 120-B of IPC read with Sections 3(2)(i)(ii), 3(3),(4), 5 and 6 of TADA (P) Act, 1987 and read with Sections 302, 307, 326, 324, 427, 435, 436, 201 and 212 of Indian Penal Code and offences under Sections 3 and 7 read with Sections 25 (1A), (1B)(a) of the Arms Act, 1959, Sections 9B (1)(a)(b)(c) of the Explosives Act, 1884, Sections 3, 4(a)(b), 5 and 6 of the Explosive Substances Act, 1908 and Section 4 of the Prevention of Damage to Public Property Act, 1984 and within my cognizance."

In addition to the first charge, the respondent (A-120) was also charged for having committed the following offence in pursuance of the criminal conspiracy described at charge firstly:

At head Secondly: The respondent, in pursuance of the aforesaid criminal conspiracy, was found to be connected with the episode of possession of unauthorized arms and hand grenades by A-117, A-118, A-124 and A-125 and committed the following overt acts:

(a) The respondent, by receiving and keeping in his possession one 9mm pistol and its cartridges, which were smuggled into the country for committing terrorist acts, thereby aided the co-conspirator and committed an offence punishable under Section 3(3) of TADA.

At head Thirdly: The respondent possessed the above mentioned pistol and its ammunition in Greater Bombay which is specified as a notified area under clause (f) of sub-section (1) of Section 2 of TADA and thereby committed an offence punishable under Section 5 of TADA.

At head Fourthly: The respondent, by possessing the above mentioned arms and its ammunitions with intent to aid terrorists committed an offence punishable under Section 6 of TADA.

At head Fifthly: The respondent, by possessing the above mentioned arms and its ammunitions, committed an offence punishable under Sections 3 and 7 read with Section 25(1-A)(1-B)(a) of the Arms Act, 1959.

Conviction and Sentence:

92. The Designated Court, by impugned judgment dated 02.08.2007, after considering the materials placed on record and after adverting to all the contentions raised and

A submissions made, acquitted him of all the charges framed against him.

Discussion:

93. Against the order of acquittal in respect of all the B charges against the respondent (A-120), the CBI has filed the present appeal. The only point for consideration in this appeal is whether the order of acquittal rendered by the Designated Court is justifiable or requires interference by this Court. Keeping the basic principles in mind, in a matter when acquittal C is recorded by the trial Court and the grounds on which the Appellate Court can interfere, let us consider and dispose of the above appeal.

94. It is not in dispute that A-120 has not made any D confession and his co-accused A-125 relied on by the prosecution has also not made any confession and even the confessional statements of other co-accused failed to disclose any involvement of A-120 in any manner. The only allegation against the present accused is that of seizure of a box E containing a pistol from his house. The Designated Court, after considering the evidence of panch witness (PW-211) regarding the statement made by A-125 and after finding that there was lot of variation in their statements and bereft of materials about the role of A-120 and further finding that different stories have been projected by the prosecution, refused to accept the same. F After analyzing the entire statement of A-125, the trial Court came to a conclusion that the same are insufficient to connect A-120 as being the person who had received the same pistol and rounds.

G 95. As has been rightly observed by the Designated Court, mere recoveries of a .9mm pistol and the rounds from the bungalow of A-120 would not be sufficient to connect him with the said articles. It is settled law that the recoveries made must be found to have been made as a consequence to the

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statement made by the accused in custody. In other words, if the nexus in between is not established, the said statement made would be inadmissible in evidence. The Designated Court, after considering the well settled principles and the materials placed concluded that "it will be further necessary to say that scrutiny of the evidence also does not reveals A-120 having purchased .9mm pistol and rounds....." The Designated Court has also concluded that even if the statement made by A-125 is acceptable, in the absence of any supporting oral and documentary evidence and taking note of the improvement made by panch witness as well as in the statements of witnesses stage by stage "hardly there would be any evidence to connect A-120 with the relevant contraband articles" and rightly discarded the same.

96. In the light of the categorical finding by the trial Court and after analyzing the materials placed by the prosecution, we fully concur with the said conclusion and according to us, with the above said insufficient evidence, the order of acquittal cannot be lightly interfered in the present appeal, consequently, the appeal filed by the CBI fails and the same is dismissed.

Criminal Appeal No. 1104 of 2007

Samir Ahmed Hingora (A-53) .... Appellant(s)

vs.

The State of Maharashtra,
thro. Superintendent of Police,
CBI (STF), Bombay .... Respondent(s)

WITH

Criminal Appeal No. 1026 of 2012

The State of Maharashtra,
through CBI (STF), Bombay .... Appellant(s)

vs.

A Samir Ahmed Hingora (A-53) .... Respondent(s)

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97. Heard Mr. Mukul Rohtagi and Mr. V.K. Bali, learned senior counsel for A-53 and Mr. H.P. Rawal, learned ASG for B the CBI.

Criminal Appeal No. 1104 of 2007

98. The present appeal is directed against the final C judgment and order of conviction and sentence dated 29.11.2006 and 01.06.2007 respectively whereby the appellant (A-53) has been convicted and sentenced by the Designated Court under TADA for the Bombay Bomb Blast Case, Greater Bombay in B.B.C. No.1/1993.

D **Charges:**

99. A common charge of conspiracy was framed against all the co-conspirators including the appellant. The relevant portion of the said charge is reproduced hereunder:

E "During the period from December, 1992 to April, 1993 at various places in Bombay, District Raigad and District Thane in India and outside India in Dubai (U.A.E.) Pakistan, entered into a criminal conspiracy and/or were members of the said criminal conspiracy whose object F was to commit terrorist acts in India and that you all agreed to commit following illegal acts, namely, to commit terrorist acts with an intent to overawe the Government as by law established, to strike terror in the people, to alienate sections of the people and to adversely affect the harmony G amongst different sections of the people, i.e. Hindus and Muslims by using bombs, dynamites, handgrenades and other explosive substances like RDX or inflammable substances or fire-arms like AK-56 rifles, carbines, pistols and other lethal weapons, in such a manner as to cause

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or as likely to cause death of or injuries to any person or persons, loss of or damage to and disruption of supplies of services essential to the life of the community, and to achieve the objectives of the conspiracy, you all agreed to smuggle fire-arms, ammunition, detonators, handgrenades and high explosives like RDX into India and to distribute the same amongst yourselves and your men of confidence for the purpose of committing terrorist acts and for the said purpose to conceal and store all these arms, ammunition and explosives at such safe places and amongst yourselves and with your men of confidence till its use for committing terrorist acts and achieving the objects of criminal conspiracy and to dispose off the same as need arises. To organize training camps in Pakistan and in India to import and undergo weapon training in handling of arms, ammunitions and explosives to commit terrorist acts. To harbour and conceal terrorists/ co-conspirators, and also to aid, abet and knowingly facilitate the terrorist acts and/or any act preparatory to the commission of terrorist acts and to render any assistance financial or otherwise for accomplishing the object of the conspiracy to commit terrorist acts, to do and commit any other illegal acts as were necessary for achieving the aforesaid objectives of the criminal conspiracy and that on 12.03.1993 were successful in causing bomb explosions at Stock Exchange Building, Air India Building, Hotel Sea Rock at Bandra, Hotel Centaur at Juhu, Hotel Centaur at Santacruz, Zaveri Bazaar, Katha Bazaar, Century Bazaar at Worli, Petrol Pump adjoining Shiv Sena Bhavan, Plaza Theatre and in lobbing handgrenades at Macchimar Hindu Colony, Mahim and at Bay-52, Sahar International Airport which left more than 257 persons dead, 713 injured and property worth about Rs.27 crores destroyed, and attempted to cause bomb explosions at Naigaum Cross Road and Dhanji Street, all in the city of Bombay and its suburbs i.e. within Greater Bombay. And thereby

committed offences punishable under Section 3(3) of TADA (P) Act, 1987 and Section 120-B of IPC read with Sections 3(2)(i)(ii), 3(3)(4), 5 and 6 of TADA (P) Act, 1987 and read with Sections 302, 307, 326, 324, 427, 435, 436, 201 and 212 of Indian Penal Code and offences under Sections 3 and 7 read with Sections 25 (1A), (1B)(a) of the Arms Act, 1959, Sections 9B (1)(a)(b)(c) of the Explosives Act, 1884, Sections 3, 4(a)(b), 5 and 6 of the Explosive Substances Act, 1908 and Section 4 of the Prevention of Damage to Public Property Act, 1984 and within my cognizance."

In addition to the above-said principal charge of conspiracy, the appellant was also charged on other counts which are as under:

At head Secondly; The appellant committed an offence punishable under Section 3(3) of TADA by doing the following overt acts:-

(a) The appellant supplied 3 AK-56 rifles, its magazines, ammunitions and hand grenades to Sanjay Dutt (A-117) at his residence at the instance of Anees Ibrahim Kaskar (AA).

(b) The appellant arranged 7 air tickets from East West Travels by making cash payment at the instance of A-1 to facilitate the escape of members of Memon family to Pakistan via Dubai.

At head Thirdly; The appellant acquired and facilitated transport of the above mentioned arms and ammunitions to A-117 with intent to aid terrorist and thereby committed an offence punishable under Section 6 of TADA.

100. The Designated Court found the appellant guilty on the charges mentioned at head firstly (smaller conspiracy) and clause (a) at head secondly. The appellant has been convicted and sentenced for the above said charges as under:

Conviction and Sentence:

(i) The appellant has been convicted for the offence of conspiracy read with the offences described at head firstly and sentenced to RI for 9 years alongwith a fine of Rs. 1,00,000/-, in default, to further undergo RI for 3 years for the commission of offence under Section 3(3) of TADA. **(charge firstly)**

(ii) The appellant has been convicted for the offence under section 3(3) of TADA for commission of acts mentioned at clause (a) of head secondly, and sentenced to RI for 9 years alongwith a fine of Rs. 1, 00,000/-, in default, to further undergo RI for 3 years. **(charge secondly)**

Evidence

101. The evidence against the appellant (A-53) is in the form of:-

(i) his own confession;

(ii) confessions made by other co-conspirators; (co-accused); and

(iii) testimony of prosecution witness.

Confesssional Statement of Samir Ahmed Hingora (A-53)

102. Confessional statement of A-53 under Section 15 of TADA has been recorded on 18.05.1993 (17:00 hrs.) and 20.05.1993 (17:30 hrs.) by Shri Krishan Lal Bishnoi (PW-193), the then DCP, Zone III, Bombay. A perusal of his confessional statement states as under:-

(i) The appellant started a Video Library and Mustafa Dossa @ Mustafa Majnoo (A-138)-brother of Mohd. Dossa (AA), was a member of his Library.

(ii) Tiger Memon used to work with A-138 in his shops at Manish Market and became a friend of A-53.

A (iii) The appellant started the business of film distribution and production by the name of Magnum in partnership with Hanif Kandawala (A-40)-since deceased.

(iv) Anees Ibrahim Kaskar (AA) became a member of his Video Library and was referred to by everyone as Anisbhai B since he was the brother of Dawood Ibrahim.

(v) A-53 and Tiger Memon used to meet frequently and discuss matters relating to the business.

C (vi) A-53 received a payment of Rs. 21.90 lakhs from Ayub Memon sent through someone on 13.03.1993 (one day after the blasts) as advance for purchasing rights of films.

(vii) A-53 had visited Dubai and met Anis Ibrahim many times and sold the rights of many films to M/s Kings Video, D managed by Anis. Anis also controls Al-Mansoor Video Company through Chota Rajan.

(viii) On 15.01.1993, Ibrahim Musa Chauhan (A-41) and Abu Salem (A-139) met A-53 at his office, and gave him a E message that they have been directed by Anisbhai to see the appellant regarding the handing over of weapons to A-117 at his residence.

(ix) Anis Ibrahim called the appellant from Dubai and told him that A-41 and A-139 are his men and that they will bring F one vehicle loaded with weapons and the appellant has to make arrangements for off-loading and handing over the weapons to A-117, and the rest will be taken by them for distribution to other persons.

G (x) Inspite of the unwillingness of Hanif Kandawala, his partner, in order to carry out the instructions, A-53 took A-139 to the residence of A-117, where A-117 hugged Abu Salem and asked him about the weapons. A-117 then told A-139 to bring the weapons the next day at 7 am.

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(xi) On 16.01.1993, A-53 led A-139 and A-41 to the house of Sanjay Dutt. A-139 and A-41 were in a blue maruti van while A-53 was in his own car.

(xii) At the residence of A-117, A-53 saw that the blue van was containing 9 AK-56 rifles and some hand grenades and gave 3 AK-56 rifles and some magazines to A-117. A-117 also asked for some hand grenades which were put in a black bag by A-139.

(xiii) A-139 kept the rifles in a fiat car belonging to A-117. The hand grenades were kept in the car of A-53, and he left the car at A-117's residence and took an auto rickshaw.

(xiv) A-53 collected his car from A-117's residence after 3 days when he called him and informed him that grenades have been taken out.

103. A perusal of the aforesaid confession shows that the appellant was aware about the goods which were to be off-loaded and also about the purpose for which the same were to be used which fact is clear from his confession, viz., "*Anees, Bhai telephone to me from Dubai saying that Baba and Saleem are his men. They will bring one vehicle loaded with weapons. You make arrangements for off-loading and hand over weapons to A-117 and the rest will be taken by them for distribution to other persons*". Further, inspite of the unwillingness of Hanif Kandawala, he proceeded to help the co-accused. So the contention of the appellant that he was a mere navigator is misplaced and incorrect.

Confessional Statements of co-accused:

104. Apart from his own confession, the involvement of the appellant has also been disclosed in the confessional statements of the following co-accused. The legality and acceptability of the confessions of the co-accused has already been considered by us in the earlier part of our discussion. The

A said confessions insofar as they refer to the appellant (A-53) are summarized hereinbelow:

Confessional Statement of Ibrahim Musa Chauhan @ Baba (A-41)

B Confessional statement of A-41 under Section 15 of TADA was recorded on 23.04.1993 (12:45 hrs.) and 25.04.1993 (13:05 hrs.) by Shri Prem Krishna Jain (PW-189), the then DCP, Zone X, Bombay. The said confession shows that:

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(i) On 15.01.1993, A-41 and A-139 went to the office of Magnum in order to meet A-53 upon the instructions of Anees who was in Dubai.

(ii) A-53 along with A-41, A-139 and later with A-41 D searched for garages in Pali Hill areas, Bandra as suggested by Anees Ibrahim.

(iii) A-53 and A-139 left together on 15.01.1993.

E (iv) On 16.01.1993, A-139 came to his house in the morning and they reached the office of A-53 at around 06:30-06:45 a.m. A-139 and A-41 sat in one car followed by the car of A-53 to the house of Sanjay Dutt (A-117).

(v) A-139 opened the van at the residence of A-117 and F took out 9 AK-56 rifles, about 80 hand grenades and around 1500/2000 bullets in the presence of A-53 and A-117.

(vi) A-139 kept 3 rifles, 9 magazines, 450 bullets and 20 hand grenades in the car of A-117.

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(vii) A-53 kept 20 hand grenades in his car. A-53 also gave a long sports bag to A-41 in which 3 rifles, 16 magazines, 25 hand grenades and 750 bullets were kept.

(ix) A-53 dropped A-41 to his car and after that they left

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the residence of A-117.

A perusal of the confessional statement of A-41 shows that the appellant helped the co-accused persons to look for a garage where the weapons could be off-loaded and after that they were to be distributed to various persons.

Confessional Statement of Mobina @ Baya Moosa Bhiwandiwala (A-96)

(i) On the directions of Tiger Memon, owner of Magnum Videos (A-53) had sent Rs. 50,000/- to her residence on one or two occasions.

(iii) After the blast, the owner of Magnum Videos (A-53) had sent Rs. 50,000/- for help.

The above confession of A-96 shows that the appellant was in touch with Tiger Memon even after the blasts and on his instructions, he sent Rs. 50,000/- to A-96 for help.

Confessional Statement of Sanjay Dutt (A-117)

Confessional statement of A-117 under Section 15 of TADA was recorded on 26.04.1993 (15:30 hrs.) and 28.04.1993 (16:00 hrs.) by Shri Krishan Lal Bishnoi (PW-193), the then DCP, Zone III, Bombay. The said confession reveals as under:

(i) A-117 knew A-53 and he was acting in one of his films. A-53 used to frequently come to his house for taking dates.

(ii) A-53 and A-40 repeatedly told A-117 to acquire a firearm from them.

(iii) In mid-January, A-53, A-40 and A-139 came to the house of A-117 at around 09:30 p.m. and told him that the weapons will be delievered the next day. Next day, they again came in the morning with one more person to the residence of A-117.

A (iv) At the residence of A-117, in the presence of A-53, A-139 took out weapons and handed it over to him.

(v) A-53 came to his house along with A-40 after 2-3 days when A-117 returned 2 AK-56 rifles to them.

B The confession of A-117 corroborates in material particulars with the confession of other co-accused persons.

Deposition of Prosecution Witness:

C 105. Apart from the aforesaid evidence, the following prosecution witness deposed as under:

Deposition of Pandharinath Hanumanth Shinde (PW-218)

The relevant material in his evidence is as follows:-

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(i) PW-218 identified A-53 in the TIP held on 27.05.1993 at the office of Crime Branch.

(ii) PW-218 identified A-53 in the Court.

E 106. Upon perusal of the entire evidence, it is clear that the appellant was closely associated with Tiger Memon and Anees Ibrahim Kaskar (AA). Further, inspite of the unwillingness shown by his partner - Hanif Kandawala (A-40), the appellant helped the co-accused searched for garages where the F weapons were to be off-loaded and concealed whereafter they were to be distributed to A-117 and.other persons. In addition to the same, the appellant was also associated with co-accused even after the blasts which fact is clearly discernible from the confession of A-96 wherein she stated that after G coming back to her house, her father informed her that owner of Magnum Videos (A-53) had come and gave Rs. 50,000/- for help.

107. Mr. Rohtagi, learned senior counsel for the appellant

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pointed out that without establishing the pre-requisites as held in the case of *State vs. Nalini,* (1999) 5 SCC 253, it is only on the ground of acquaintance with the main conspirators and alleged knowledge acquired on phone that after handing over weapons to A-117, the balance would be taken for distribution, for which the appellant has been erroneously convicted under Section 3(3). We are unable to accept the said claim. We have already pointed out the appellant's proximity with Anees Ibrahim. It was on the instructions of Anees that the arms were delivered to Sanjay Dutt and because of the relationship of Anees and Tiger/Dawood Ibrahim, it establishes a strong link between A-53 and Anees. Though it was argued that there was no proximity between the appellant and Anees, materials relied on by the prosecution clearly prove their relationship. Further, their relationship cannot be simply construed as a business relationship. The materials placed on record by the prosecution, relied on and accepted by the Special Judge show that the appellant was guilty of distributing arms to persons other than Sanjay Dutt. The finding recorded by the trial Judge is that A-53 not only distributed weapons to A-117 but also to third parties.

108. The CBI has successfully placed materials to show that the appellant was responsible for arranging garages for the storage of weapons. We have already adverted to the confessional statement of A-41 wherein in categorical terms it was asserted that A-53, the present appellant, along with A-41 and A-139 searched for garages in Pali Hill areas, Bandra where the weapons could be off loaded and after that they were to be distributed to various persons as suggested by Anees Ibrahim. In view of the same, the argument of the learned senior counsel for the appellant is liable to be rejected. The confessional statement of A-41 also shows that the appellant helped the co-accused persons to look for garages. In such circumstance, it cannot be claimed that at no point of time A-53 was ever aware of what was to be stored in the garages.

A 109. Mr. Rohtagi, learned senior counsel disputed the admissibility of confession made by the appellant and voluntariness of his statement. The Designated Court, on going through the evidence of the officer who recorded his confession, the procedure followed, opportunity given to the appellant, B rejected the similar objection raised before him. Upon going through all the materials, we agree with the reasoning of the Special Judge and we are of the view that there is no flaw in the procedure while recording the confession of the appellant.

C **Appeal by the State of Maharashtra through CBI:**

Criminal Appeal No. 1026 of 2012

110. Though Mr. Rawal, learned ASG, prayed for conviction of A-53 for the charge framed at head firstly, i.e., D larger conspiracy, in view of the above discussion, we are satisfied that the materials available establish his involvement only to the extent of the smaller conspiracy and the Designated Court was justified in arriving at such conclusion and we fully agree with the same, hence, the appeal filed by the State is E liable to be dismissed.

Sentence:

111. According to learned senior counsel for A-53, out of 9 years of sentence awarded, he has completed 6 ½ (six and F a half) years and there are several extenuating circumstances for reduction of the sentence. They are:

(i) The appellant is a sick person suffering from cardiac problems since 2001;

G (ii) He has 6 stents in his arteries;

(iii) The appellant, in addition to heart disease, is a diabetic patient (on insulin). While diabetes on its own may not be a major ailment, it assumes far

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greater seriousness when coupled with a serious heart ailment.

(iv) The appellant has already faced protracted trial for 13 ½ (thirteen and a half) years on day to day basis. In fact, he has continued attendance after conviction as per bail conditions for further 5 years;

(v) The entire business and goodwill of the appellant has been lost.

(vi) The appellant has already served about 6 ½ (six and a half) years (without remission).

112. Taking note of all these aspects and of the fact that the CBI was not able to establish the charge relating to major conspiracy and also that out of the period of 9 years, A-53 has served nearly six and a half years of sentence and in the light of the ailments and taking note of the fact that the minimum sentence prescribed is 5 years, while confirming the conviction, we reduce the sentence to the period already undergone.

113. The appeal filed by the accused is disposed of on the above terms. The appeal filed by the CBI is dismissed.

Criminal Appeal No. 1001 of 2007

Zaibunisa Anwar Kazi (A-119) ... Appellant(s)

vs.

The State of Maharashtra,
through Superintendent of Police,
CBI-STF, Bombay ... Respondent(s)

WITH

Criminal Appeal No. 392 of 2011

The State of Maharashtra, through CBI .... Appellant(s)

A vs.

Zaibunisa Anwar Kazi (A-119) .....Respondent(s)

114. Mr. Sushil Kumar, learned senior counsel appeared for the appellant (A-119) and Mr. Rawal, learned ASG duly B assisted by Mr. Satyakam, learned counsel appeared for the respondent (CBI).

Criminal Appeal No. 1001 of 2007

C 115. The instant appeal is directed against the final judgment and order of conviction and sentence dated 28.11.2006 and 14.06.2007 respectively whereby the appellant (A-119) has been convicted and sentenced to rigorous imprisonment for 5 years by the Designated Court under TADA for the Bombay Bomb Blast Case, Greater Bombay in B.B.C. D No.1/1993.

Charges:

116. A common charge of conspiracy was framed against E all the co-conspirators including the appellant. The relevant portion of the said charge is reproduced hereunder:

"During the period from December, 1992 to April, 1993 at various places in Bombay, District Raigad and District Thane in India and outside India in Dubai (U.A.E.) F Pakistan, entered into a criminal conspiracy and/or were members of the said criminal conspiracy whose object was to commit terrorist acts in India and that you all agreed to commit following illegal acts, namely, to commit terrorist acts with an intent to overawe the Government as by law G established, to strike terror in the people, to alienate sections of the people and to adversely affect the harmony amongst different sections of the people, i.e. Hindus and Muslims by using bombs, dynamites, handgrenades and other explosive substances like RDX or inflammable

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substances or fire-arms like AK-56 rifles, carbines, pistols and other lethal weapons, in such a manner as to cause or as likely to cause death of or injuries to any person or persons, loss of or damage to and disruption of supplies of services essential to the life of the community, and to achieve the objectives of the conspiracy, you all agreed to smuggle fire-arms, ammunition, detonators, handgrenades and high explosives like RDX into India and to distribute the same amongst yourselves and your men of confidence for the purpose of committing terrorist acts and for the said purpose to conceal and store all these arms, ammunition and explosives at such safe places and amongst yourselves and with your men of confidence till its use for committing terrorist acts and achieving the objects of criminal conspiracy and to dispose off the same as need arises. To organize training camps in Pakistan and in India to import and undergo weapon training in handling of arms, ammunitions and explosives to commit terrorist acts. To harbour and conceal terrorists/ co-conspirators, and also to aid, abet and knowingly facilitate the terrorist acts and/or any act preparatory to the commission of terrorist acts and to render any assistance financial or otherwise for accomplishing the object of the conspiracy to commit terrorist acts, to do and commit any other illegal acts as were necessary for achieving the aforesaid objectives of the criminal conspiracy and that on 12.03.1993 were successful in causing bomb explosions at Stock Exchange Building, Air India Building, Hotel Sea Rock at Bandra, Hotel Centaur at Juhu, Hotel Centaur at Santacruz, Zaveri Bazaar, Katha Bazaar, Century Bazaar at Worli, Petrol Pump adjoining Shiv Sena Bhavan, Plaza Theatre and in lobbing handgrenades at Macchimar Hindu Colony, Mahim and at Bay-52, Sahar International Airport which left more than 257 persons dead, 713 injured and property worth about Rs.27 crores destroyed, and attempted to cause bomb explosions at Naigaum Cross

A Road and Dhanji Street, all in the city of Bombay and its suburbs i.e. within Greater Bombay. And thereby committed offences punishable under Section 3(3) of TADA (P) Act, 1987 and Section 120-B of IPC read with Sections 3(2)(i)(ii), 3(3)(4), 5 and 6 of TADA (P) Act, 1987 B and read with Sections 302, 307, 326, 324, 427, 435, 436, 201 and 212 of Indian Penal Code and offences under Sections 3 and 7 read with Sections 25 (1A), (1B)(a) of the Arms Act, 1959, Sections 9B (1)(a)(b)(c) of the Explosives Act, 1884, Sections 3, 4(a)(b), 5 and 6 of C the Explosive Substances Act, 1908 and Section 4 of the Prevention of Damage to Public Property Act, 1984 and within my cognizance."

In addition to the first charge, the appellant (A-119) was also charged for having committed the following offences in D pursuance of the criminal conspiracy described as under:

At head Secondly: The appellant, in pursuance of the aforesaid criminal conspiracy, has committed the following overt acts:

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(a) The appellant, in connivance with other co-conspirators kept in her possession AK-56 rifles, its ammunitions and hand grenades which she stored at her residence at the instance of Anees Ibrahim Kaskar (AA) which was brought to her F residence by wanted accused Abu Salem Qayum Ansari (then absconding now A-139) and Manzoor Ahmed Sayed Ahmed (A-89) and thereby aided and facilitated the distribution of firearms, ammunition and explosives smuggled into India by G other co-conspirators for committing terrorist acts and thereby committed an offence punishable under Section 3 (3) of TADA.

At head Thirdly: The appellant, in pursuance of

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the aforesaid criminal conspiracy, had in her possession, unauthorisedly, AK-56 rifles, its ammunitions and hand grenades in Greater Bombay which is specified as a notified area under clause (f) of sub-section (1) of Section 2 of TADA and thereby committed an offence punishable under Section 5 of TADA.

At head Fourthly: The appellant, in pursuance of the aforesaid criminal conspiracy, with an intent to aid terrorists and failed to give information to police/ magistrate contravened the provisions of the Arms Act, 1959, the Arms Rules, 1962, the Explosive Substances Act, 1908 and the Explosives Rules, 1983 and thereby committed an offence punishable under Section 6 of TADA.

Conviction and Sentence:

117. The appellant (A-119) has been convicted and sentenced as under:

(i) RI for 5 years with a fine of Rs. 25,000/-, in default, to further undergo RI for 6 months under Section 3(3) of TADA **(charge secondly)**

(ii) RI for 5 years along with a fine of Rs. 75,000/-, in default, to further undergo RI for a period of 1 ½ (one and a half) years. **(charge fourthly)**

118. The Designated Court acquitted the appellant (A-119) on the first and third charge. Challenging the conviction A-119 filed Criminal Appeal No. 1001/2007 and Criminal Appeal No. 392/2011 has been preferred by the prosecution challenging the acquittal of the appellant on the charge of conspiracy alone.

Evidence

119. The evidence against the appellant (A-119) is in the

A form of:-

(i) confessions made by other co-conspirator; (co-accused); and

(ii) testimony of prosecution witnesses.

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120. **Confessional Statements of co-accused:**

A brief account of the evidence brought on record in respect of A-119 is summarized as under:

C **Confesssional Statement of Manzoor Ahmed Sayed Ahmed (A-89)**

Confessional statement of A-89 under Section 15 of TADA has been recorded on 24.05.1993 (11:15 hrs.) (Part I) D and 26.05.1993 (Part II) (17:30 hrs.). The confession of A-89 with respect to the appellant is summarized hereunder:

"A-89 and A-139 went to the first floor of 22 Mount Mary, Vidhyanchal Apartment and handed over the bag to a lady and told that the bag contains arms for causing riots and E they were sent by Anis Bhai and that they would take the bag after some days. After saying so, he gave the bag to that middle aged lady. The lady opened the bag and after seeing its contents, closed the same and took it inside the room".

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121. Upon perusal of the aforesaid confession, it is clear that the appellant was in conscious possession of arms and ammunitions and explosives in a notified area of Bombay, and was also aware about the purpose for which they were to be G used, that is, to cause riots in Bombay. On the other hand, according to counsel for the appellant (A-119), the confession of A-89 cannot be relied upon since it has no evidentiary value. On the other hand, Mr. Rawal, learned ASG while relying on the decision of this Court in *Mohd. Ayub Dar* vs. *State of Jammu*

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and Kashmir, (2010) 9 SCC 312 contended that the conviction and sentence under charge secondly and fourthly is fully justified. He relied heavily on the following conclusion arrived at by this Court which reads thus:

> **"59.** It would, therefore, be clear, as rightly contended by Shri Rawal that merely because the guidelines in *Kartar Singh* v. *State of Punjab* were not fully followed, that by itself does not wipe out the confession recorded. We have already given our reasons for holding that the confession was recorded by A.K. Suri (PW 2) taking full care and cautions which were required to be observed while recording the confession.
>
> **60.** In *Ravinder Singh* v. *State of Maharashtra* it has been observed in para 19 that if the confession made by the accused is voluntary and truthful and relates to the accused himself, then no further corroboration is necessary and a conviction of the accused can be solely based on it. It has also been observed that such confessional statement is admissible as a substantive piece of evidence. It was further observed that the said confession need not be tested for the contradictions to be found in the confession of the co-accused. It is for that reason that even if the other oral evidence goes counter to the statements made in the confession, one's confession can be found to be voluntary and reliable and it can become the basis of the conviction."

In addition to the proposition of law mentioned above, the acceptability of confession of co-accused has already been discussed and considered in the earlier part of our judgment, there is no need to repeat the same once again.

Other evidence:

Deposition of Dilip Bhandur Gosh (PW-283)

122. PW-283 deposed as under:

A (i) At the relevant time, he was working as the watchman in the Vidhyanchal Society.

(ii) He further deposed that he will be able to identify the occupants of the said society in the year 1993

B (iii) He stated that the appellant was residing on the first floor of B Wing of the said society

(iv) He identified the appellant before the court.

C The aforesaid evidence corroborates the fact that the appellant was staying on the first floor of the Vidyanchal Building.

123. Upon appreciation of the entire evidence, the Designated Court held as under:

D "32) With regard to the case of A-119 there appears similarity in many of the aspects with A-89. With regard to the defence criticism of the material evidence against her being in shape of material in confession of A-89 all the dilation made about the submissions canvassed that E conviction cannot be made on the basis of material in confession of co-accused would be applicable. In the said context, it will be necessary to add that material in the confession of co-accused being now held to be substantive piece of evidence and considering the F circumstances relevant to the role played by A-119 i.e. only 3 persons being present when the relevant act of taking and storing the weapons was effected and thus there being no other corroborative material, which could have been available the said matters in the confession will not be liable to be discarded on the count of there being no G corroborations as stated earlier. Now considering the period in which the relevant had occurred and the period after which the police had received the information, merely because evidence does not reveal of any material being found at the house of A-119 will not be a ground for H

discarding the said material in the confession of A-89. As a matter of fact, event the said material itself reveals that the said weapons were to be kept with her and were to be collected back by Abu Salem; non-finding of weapon with her clearly appears to be insignificant circumstance.

33) Thus the evidence having clearly denoted that weapons were kept with her for storage purpose and they were to be collected back, A-119 cannot be said to be in possession of contraband material as all the time the possession of the said weapons would have been that of main conspirator who had kept the same with her. In view of the same, alike A-89 she cannot be said to be guilty for commission of offence under Section 5 of TADA and the relevant sections under the Arms Act, for which she is charged at the trial. Similarly, for the same reasons because of which A-89 cannot be said to be guilty for offence of conspiracy. She also cannot be said tobe guilty for commission of such offence. It is indeed true that considering the role played by her in storing the weapons in her house or even for A-89 being also instrumental for taking the said weapons does create a strong suspicion of both of them being man of confidence of prime conspirator. However, since shrouding of suspicion cannot take the place of proof and there being paucity of material that both of them had knowledge of object of any particular conspiracy both of them cannot be held guilty for commission of offence of conspiracy. Thus, alike A-89 she will be also required to be held not guilty for commission of offence for which she was charged at head firstly.

34) However, considering the repeated participation of A-119 in allowing absconding accused Anees Ibrahim to store the weapons at her house or with her, herself taking up the weapons in spite of knowing the purpose for which the same were sent by Anees, the evidence pertaining to second occasion clearly revealing that the weapons were

A 2 AK-56 Rifles and the ammunition and thereby all the evidence establishing that the same being brought to India for commission of terrorists Act i.e. by and for the terrorists, act committed by her will clearly fall within the four corners of Section 3(3) of TADA. Similarly, her act of keeping such
B a material in the house, even after knowing the purpose for which the same were brought to India clearly reveals that by the same she was aiding and abetting the terrorists by contravening the provisions of the Arms Act. As such she will be required to be held guilty for commission of
C offence under Section 6 of TADA.

35) As a result of the aforesaid discussion, Point No. 163 to 166 and so also relevant points framed for offence of conspiracy will be required to be answered in consonance with conclusions arrived during the aforesaid discussion
D i.e. affirmative for holding A-89 and A-119 guilty for offence under Section 3(3) of TADA and A-119 also guilty for offence under Section 6 of TADA and negative with regard to the other charges framed against them at a trial. Thus Point No. 163 to 166 stands answered accordingly."

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124. The above discussion shows that the Designated Court convicted the appellant under Section 3(3) and Section 6 of TADA only on the basis of the confessional statement of A-89 and the evidence of PW-283 Chowkidar (watchman in the
F building). Admittedly, the appellant, at no point of time, had made any confession admitting her guilt. Equally, it is not in dispute that no recovery has been affected from her house. The only incriminating circumstance against her is the statement of A-89 that while handing over a plastic bag, he mentioned that
G it contains AK-56 rifle and other arms. It is also his claim that after knowing the contents, she received the same and kept it in her house.

125. Taking note of all these aspects, absolutely, there is no case insofar as the main conspiracy against her and we are

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satisfied that the Designated Court has rightly acquitted her of the main charge i.e. charge firstly. However, upon perusal of the entire evidence, the judgment passed by the Designated Court is upheld to the extent of Charge secondly and fourthly.

126. In view of the minimum sentence of 5 years prescribed under Sections 3(3) and 6 of TADA, we have no other option, but to confirm the conviction and sentence as awarded by the Designated Court. Consequently, the appeal fails and is accordingly dismissed.

Appeal by the State of Maharashtra through CBI:

Criminal Appeal No. 392 of 2011

127. Though Mr. Rawal, learned ASG, prayed for conviction of A-119 for the charge framed at head firstly, i.e., conspiracy, in view of the above discussion, we are satisfied that the Designated Court was justified in arriving at such a conclusion and we fully agree with the same. Hence, the appeal filed by the State is liable to be dismissed.

128. The appellants-accused concerned are directed to surrender within a period of 4 (four) weeks from today in order to serve the remaining period of sentence. The Designated Court is directed to take appropriate steps for their custody in case of failure to comply with the above said direction.

129. For convenience, we have reproduced the conclusion arrived at in respect of all the appeals dealt with under this part in Annexure 'A' appended hereto.

130. We must in the end express our deep gratitude to learned senior counsel/counsel for both sides who rendered relentless assistance and support to the Bench in arriving at its decision. Their efforts are salutary and we record our appreciation for the same.

Kalpana K. Tripathy Appeals disposed of.

S No	Criminal Appeal	Accused Name and Number.	Sent Designated Court	Award by Supreme Court
1.	1060/2007 (A-117) years	Sanjay Dutt	RI for 6 years to RI for 5	Reduced
2.	1102/2007	Yusuf Mohsin Nulwalla (A-118)	RI for 5 years	Confirmed
3.	1687/2007	Kersi Bapuji Adajania (A-124)	RI for 2 years	Reduced to RI for 1 year
4.	596/2011 (By State)	Ajai Yash Parkash Marwah (A-120)	Acquitted	State appeal dismissed
5.	1104/2007 with 1026/2012 (By State)	Samir Hingora (A-53)	RI for 9 years	Reduced to the period already under-gone. Dismissed
6.	1001/2007 with 392/2011 (By State)	Zaibunisa Anwar Kazi (A-119)	RI for 5 years	Confirmed Dismissed

UNION OF INDIA AND OTHERS
v.
SANJAY JETHI AND ANOTHER
(CIVIL APPEAL NO. 891-4 OF 2012)

OCTOBER 18, 2013

[DR. B.S. CHAUHAN AND DIPAK MISRA, JJ.]

Armed Forces Rules, 1954 – rr.177, 179 and 180 – Armed Forces Tribunal – Tribunal setting aside the decision rendered by the Additional Court of Inquiry and consequential action taken or orders passed pursuant to the said order against first respondent and directing to convene a fresh Court of Inquiry (COI) with a different Presiding Officer and other independent members – Propriety – Held: On facts, proper – What really weighed with the Tribunal while passing the impugned order was that such members constituted the COI who were biased or reasoned to be biased and such bias was discernible – In quasi-judicial proceedings, the authority empowered to decide a dispute between the contesting parties has to be free from bias – When free from bias is mentioned, it means there should be absence of conscious or unconscious prejudice to either of the parties – In the case at hand, the Technical Members of the Tribunal had compiled the documents, adopted the methodology, made observations, drawn inferences and expressed the view and, above all, they had prepared the report which was brought on record as a document – To say, they had not played any role would tantamount to blinking at reality – Their inclusion as the Technical Members was not legally permissible – Even applying the rigorous substantive test, a case of prejudice came into full play in the case at hand – Once a COI has been constituted to inquire into the allegations relating to a person's character and military reputation subject to the Act it should not be done by the persons who have expressed their views

A *in writing behind the back of the person and assumed the role of the recommending authority which is statutory in nature to take disciplinary action – Law does not countenance the same – Also, in the fitness of things, the Presiding Officer should have recused himself to preside over the COI since his* B *inclusion in the COI had been objected to, on an earlier occasion, yet he was allowed to continue and was not changed – Natural justice – Bias.*

Armed Forces Rules, 1954 – r.180 – Court of Inquiry (COI) – What r.180 postulates – Held: r.180 has a binding C *effect on the COI – The Rule provides for procedural safeguards regard being had to the fact that a person whose character and military reputation is likely to be affected is in a position to offer his explanation and in the ultimate eventuate may not be required to face disciplinary action – Thus* D *understood, the language employed in r.180 postulates of a fair, just and reasonable delineation –Duty of the authorities to ensure that there is proper notice to the person concerned and he is given opportunity to cross-examine the witnesses and, most importantly, nothing should take place behind his* E *back.*

Armed Forces Tribunal Act, 2007 – s.14 – Jurisdiction, powers and authority of the tribunal in service matters – Held: Tribunal required to decide both questions of law and facts F *that may be raised before it and conferred powers to deal with the cases in promptitude – Promptitude does not ostracize or drive away the apposite exposition of facts and necessary ratiocination – A seemly depiction of factual score, succinct analysis of facts and law, pertinent and cogent reasoning in* G *support of the view expressed having due regard to the rational methodology, are imperative.*

Administrative Law – Natural Justice – Bias – Effect of – Held: Bias is an insegregable facet of the concept of natural justice as a genus – Question of bias would arise depending

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on the facts and circumstances of the case – Challenge of bias, when sustained, makes the whole proceeding or order a nullity, the same being coram non-judice. A

The legal propriety of the judgment passed by the Armed Forces Tribunal setting aside the decision rendered by the Additional Court of Inquiry (COI) and consequential action taken or orders passed pursuant to the said order against the first respondent and directing to convene a fresh Court of Inquiry (COI) with a different Presiding Officer and other independent members, was called in question in the present appeal. B C

Four reasons weighed with the Tribunal while passing the impugned judgment, namely, (i) that though the tribunal vide its earlier judgment had directed the witnesses concerned with the annexures which were brought on record before the COI were to be made available for cross-examination, the said witnesses were not made subject to cross-examination by the delinquent officer; (ii) that though the inclusion of the Presiding Officer in the COI had been objected to on earlier occasion, he was allowed to continue and was not changed; (iii) that in spite of the Technical Members had prepared and arranged the documents which would mean that they had expressed an opinion at an earlier stage, yet they were retained as Members of the COI as a consequence of which the principles of natural justice were violated, for one cannot be the judge in his own cause; and (iv) that the doctrine of bias comes into play as the Presiding Officer as well as the Technical Members would have a tendency to support their own reports/ documents and it is against the spirit of Rule 180. D E F G

The issues that therefore emerged for consideration before this Court were whether the tribunal was justified in holding that the constitution of the COI which consisted of two Technical Members and the Presiding H

A Officer was vitiated as there was possibility of their having an interest in the proceedings as a consequence of which being biased or there could be a perception or likelihood of bias in the decision making process which would raise a doubt pertaining to the decision by a B prudent or rational person; and whether the Presiding Officer and the Technical Members should have been made available for cross-examination in a COI to meet the necessary command of Rule 180 of the Armed Forces Rules, 1954 and further whether there was a real violation C of the principles of natural justice which ultimately vitiated the proceedings of the Additional COI.

Dismissing the appeal, the Court

HELD:1. The authorities, as far as Rule 180 of the D Armed Forces Rules, 1954 is concerned, are to the effect that when a COI is set up under Rule 177 and during the course of enquiry, character or military reputation of a person is likely to be affected, he should be granted full opportunity to participate in the proceedings; that the COI E in its very nature is likely to examine certain issues generally concerning a situation or persons; that his participation could not be avoided on a mercurial plea that no specific enquiry was directed against the person whose character or military reputation is involved; that F the concerned person shall be afforded full opportunity so that nothing is done at his back and without opportunity of participation; that it is the command of the said provision to ensure such participation; that it is not a condition precedent to always hold that a COI for G proceeding a trial by court martial where character or military reputation of the officer concerned is likely to be affected; that the COI is in the nature of a fact finding enquiry committee; that the participation in a COI is at a stage prior to the trial by court martial; that the said rule H gives adequate protection to the person affected at the

stage of COI and there is no provision for supplying the accused with a copy of the report of the COI; and that the proceedings before a COI are not adversarial proceedings. [Para 23] [519-D-H] A

Lt. Col. Prithi Pal Singh Bedi v. Union of India and others **AIR 1982 SC 1413: 1983 (1) SCR 393;** *Uma Nath Pandey and others v. State of U.P. and another* **AIR 2009 SC 2375: 2009 (4) SCR 374;** *Major General Inder Jit Kumar v. Union of India and others* **(1997) 9 SCC 1;** *Union of India and Others v. Major A. Hussain (IC-14827):* **(1998) 1 SCC 537: 1997 (6) Suppl. SCR 218 and** *Major G.S. Sodhi v. Union of India* **(1991) 2 SCC 382 – referred to.** B C

2.1. In the instant case, what really weighed with the tribunal while passing the impugned order is that such members constituted the COI who were biased or reasoned to be biased and such bias is discernible. Bias is an insegregable facet of the concept of natural justice as a genus. The fundamental principles of natural justice are ingrained in the decision making process to prevent miscarriage of justice. It is applicable to administrative enquiries and administrative proceedings. It is also fundamental facet of principle of natural justice that in the case of quasi-judicial proceeding the authority empowered to decide a dispute between the contesting parties has to be free from bias. When free from bias is mentioned, it means there should be absence of conscious or unconscious prejudice to either of the parties. [Para 29] [523-A-D] D E F

2.2. The question of bias would arise depending on the facts and circumstances of the case. It cannot be an imaginary one or come into existence by an individual's perception based on figment of imagination. While dealing with the plea of bias advanced by the delinquent officer or an accused a court or tribunal is required to adopt a rational approach keeping in view the basic G H

concept of legitimacy of interdiction in such matters, for the challenge of bias, when sustained, makes the whole proceeding or order a nullity, the same being *coram non-judice*. One has to keep oneself alive to the relevant aspects while accepting the plea of bias. What is relevant is actually the reasonableness of the apprehension in this regard in the mind of such a party or an impression would go that the decision is dented and affected by bias. To adjudge the attractability of plea of bias a tribunal or a court is required to adopt a deliberative and logical thinking based on the acceptable touchstone and parameters for testing such a plea and not to be guided or moved by emotions or for that matter by one's individual perception or misguided intuition. [Para 45] [532-B-E]

A.K. Kraipak v. Union of India **(1969) 2 SCC 262: 1970 (1) SCR 457;** *Gullapalli Nageswara Rao v. Andhra Pradesh State Road Transport Corporation and others* **AIR 1959 SC 308: 1959 Suppl. SCR 319** *Gullappalli Nageswarrao v. State of A.P. and others* **AIR 1959 SC 1376: 1960 SCR 580** *Dr. G. Sarana v. University of Lucknow and others* **(1976) 3 SCC 585: 1977 (1) SCR 64;** *Manak Lal v. Dr. Prem Chand Singhvi and others* **AIR 1957 SC 425: 1957 SCR 575;** *Secretary to Government, Transport Deptt., Madras v. Munuswamy Mudaliar and another* **1988 (Supp) SCC 651: 1988 Suppl. SCR 673;** *Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant and others* **(2001) 1 SCC 182: 2000 (4) Suppl. SCR 248;** *S. Parthasarathi v. State of Andhra Pradesh* **(1974) 3 SCC 459: 1974 (1) SCR 697;** *G.N. Nayak v. Goa University and others* **(2002) 2 SCC 712: 2002 (1) SCR 636;** *Delhi Financial Corpn. and another v. Rajiv Anand and others* **(2004) 11 SCC 625;** *Chandra Kumar Chopra v. Union of India and others* **(2012) 6 SCC 369: 2012 (5) SCR 1029;** *State of Gujarat and another v. Justice R.A. Mehta (Retired) and others* **(2013) 3 SCC 1: 2013 (1) SCR 1;** *Ranjit Thakur v. Union of India and others* **(1987) 4 SCC 611: 1988 (1) SCR**

512 and *Major G.S. Sodhi v. Union of India* **(1991) 2 SCC 382 – referred to.**

Frome United Breweries v. Bath Justices (1926) AC 586; *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* **(1968) 3 WLR 694;** *Franklin v. Minister of Town and Country Planning* **1948 AC 87;** *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No. 2)* **(2000) 1 AC 119;** *Locabail Locabail (U.K.) Ltd. v. Bayfield Properties Ltd.* **2000 QB 451; Ebner, Re. (1999) 161 ALR 55;** *President of the Republic of South Africa v. South African Rugby Football Union* **(1999) 4 SA 147;** *Vassiliadas v. Vassiliades* **AIR 1945 PC 38;** *Allinson v. General Council of Medical Education and Registration* **(1894) 1 QB 759;** *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* **(1969) 1 QB 577;** *Public Utilities Commission of the District of Columbia v. Pollak* **343 US 451 and** *Regina v. Liverpool City Justices, ex parte Topping* **(1983) 1 All ER 490 – referred to.**

Principles of Administrative Law by **J.A.C. Griffith and H Street (Fourth Edition) – referred to.**

Halsbury's Laws of England, **Fourth Edition, Volume 2, paragraph 551**

3. The case at hand is to be appreciated in its factual backdrop whether there has been "really likelihood of bias". In a COI participation of a delinquent officer whose character or military reputation is likely to be affected is a categorical imperative. The participation has to be meaningful, effective and he has to be afforded adequate opportunity. Rule 180 is framed under the Army Act and it has the statutory colour and flavour. It has the binding effect on the COI. The Rule provides for procedural safeguards regard being had to the fact that a person whose character and military reputation is likely to be affected is in a position to offer his explanation and in the ultimate eventuate may not be required to face

A disciplinary action. Thus understood, the language employed in the Rule 180 lays postulates of a fair, just and reasonable delineation. It is the duty of the authorities to ensure that there is proper notice to the person concerned and he is given opportunity to cross-examine
B the witnesses and, most importantly, nothing should take place behind his back. It is one thing to say that the COI may not always be essential or *sine qua non* for initiation of a court martial but the another spectrum is once the authority has exercised the power to hold such an inquiry
C and the COI has recommended for disciplinary action, then the recommendation of the COI is subject to judicial review. While exercising the power of judicial review it becomes obligatory to see whether there has been due compliance of the stipulates prescribed under the Rule,
D for the language employed in the said Rule is absolutely clear and unambiguous. One cannot stretch the said concept at infinitum on the bedrock of grant of opportunity and fair play. It has to be tested on the touchstone of factual matrix of each case. [Para 46] [532-
E F-H; 533-A-E]

4. In the case at hand, initially the COI was constituted by three members by order dated 22.7.2009 and it was asked to investigate certain issues. Thereafter, an amendment was brought regarding composition of
F the COI vide order dated 28.7.2009. The core of controversy, is the inclusion of the Technical Members and the Presiding Officer in the COI. The respondent raised the plea of bias against the Technical Members and had objected to the inclusion of Brig. N.S. Ahamed as
G Presiding Officer. The Technical Members have expressed their opinion after analysis of the documents. They have, in detail, scrutinized the documents, drawn their inferences and made their observations. By no stretch of imagination it can be said that it is an
H arrangement of documents or pagination of documents.

True it is, they are not the authors of the original documents but their analysis and inference have been used against the respondent in the earlier COI and in the Additional COI. It cannot be brushed aside by saying that Technical Members did not sign the final report. Once they have given an opinion, the possibility to support the same cannot be totally discarded. That is where the real likelihood of bias comes into play. If one has something substantial, relevant or material to do with the case he is disqualified. In the case at hand, the Technical Members had compiled the documents, adopted the methodology, made observations, drawn inferences and expressed the view and, above all, they had prepared the report which has been brought on record as a document. To say, they had not played any role would tantamount to blinking at reality. Their inclusion as the Technical Members is not legally permissible. It is so as the said respondent is bound to be prejudiced. Even applying the rigorous substantive test, a case of prejudice comes into full play in the case at hand. [Paras 47, 48, 51 and 52] [533-F; 534-C; 536-D-E; 537-D-H; 538-A-B]

5. Once a COI has been constituted to inquire into the allegations relating to a person's character and military reputation subject to the Act it should not be done by the persons who have expressed their views in writing behind the back of the person and assume the role of the recommending authority which is statutory in nature to take disciplinary action. Law does not countenance the same. In the present case it is irrefragably clear that the recommendation of the COI was the sole basis on which the disciplinary action has been initiated. Nothing else had come on record as observed by the tribunal on earlier occasion as well as by the impugned order and the said finding is unassailable. That being the position, in the fitness of things, the Presiding Officer should have recused himself to preside over the COI. However, on

earlier occasion the tribunal had not quashed the entire proceedings and the same was not challenged by either of the parties. Therefore, the Additional COI which has been directed by the tribunal by the impugned judgment, shall only function as an Additional COI and deal with the documents which were produced earlier before the tribunal. [Para 54] [539-G-H; 540-A-C]

6. Respondent No. 1 at one point of time had filed a long list of witnesses. On the earlier occasion the tribunal permitted for examination or cross-examination of witnesses who had something to do with the documents. The Additional COI shall keep that in view so that there is no procrastination of the proceedings at the behest of the delinquent officer, for natural justice has also its own limitations. [Para 55] [540-D-E]

7. Though, in the case at hand, the verdict of the tribunal is being sustained, it is found that the tribunal did not advert to the necessitous facts. Section 14 of the Armed Forces Tribunal Act, 2007 occurs in Chapter III of the said Act and deals with jurisdiction, powers and authority of the tribunal in service matters. Under sub-section (5) of Section 14 the tribunal is required to decide both questions of law and facts that may be raised before it. The tribunal has been conferred powers to deal with the cases in promptitude. Promptitude does not ostracize or drives away the apposite exposition of facts and necessary ratiocination. A seemly depiction of factual score, succinct analysis of facts and law, pertinent and cogent reasoning in support of the view expressed having due regard to the rational methodology, are imperative. [Para 56] [540-F-H; 541-A-C]

Case Law Reference:

1983 (1) SCR 393	referred to	Para 4
2009 (4) SCR 374	referred to	Para 5

(1997) 9 SCC 1	referred to	Para 20	A
(1991) 2 SCC 382	referred to	Para 20	
1997 (6) Suppl. SCR 218	referred to	Para 22	
1970 (1) SCR 457	referred to	Para 29	B
1959 Suppl. SCR	referred to	Para 29	
1960 SCR 580	referred to	Para 29	
1977 (1) SCR 64	referred to	Para 29	
1957 SCR 575	referred to	Para 29	C
(1926) AC 586	referred to	Para 31	
1988 Suppl. SCR 673	referred to	Para 34	
2000 (4) Suppl. SCR 248	referred to	Para 35	D
1974 (1) SCR 697	referred to	Para 36	
(1968) 3 WLR 694	referred to	Para 36	
1948 AC 87	referred to	Para 36	E
(2000) 1 AC 119	referred to	Para 36	
2000 QB 451	referred to	Para 36	
(1999) 161 ALR 55	referred to	Para 36	F
(1999) 4 SA 147	referred to	Para 36	
2002 (1) SCR 636	referred to	Para 37	
(2004) 11 SCC 625	referred to	Para 38	
2012 (5) SCR 1029	referred to	Para 39	G
2013 (1) SCR 1	referred to	Para 40	
1988 (1) SCR 512	referred to	Para 42	
			H

A	**(1991) 2 SCC 382**	**referred to**	**Para 42**
	AIR 1945 PC 38	**referred to**	**Para 42**
	(1894) 1 QB 759	**referred to**	**Para 43**
B	**(1969) 1 QB 577**	**referred to**	**Para 43**
	343 US 451	**referred to**	**Para 43**
	(1983) 1 All ER 490	**referred to**	**Para 43**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. C 8914 of 2012.

From the Judgment & Order dated 12.10.2012 of the Armed Forces Tribunal, Regional Bench, Mumbai in Transfer Application No. 38 of 2011.

D Paras Kuhad, ASG, Jitin Chaturvedi, R. Balasubramaniam, Abhinav Mukherjee, Shalaj Mridul, B.V. Balaram Das for the Appellants.

Shekhar Naphade, Ashok K. Mahajan for the E Respondents.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. The legal propriety of the judgment and order dated 12.12.2012 in TA No. 38 of 2011 passed by F the Armed Forces Tribunal, Regional Bench at Mumbai (for short "the tribunal") setting aside the decision rendered by the Additional Court of Inquiry and consequential action taken or orders passed pursuant to the said order and directing to convene a fresh Court of Inquiry (COI) with a different Presiding G Officer and other independent members, if decision is taken to proceed against the 1st respondent, is called in question in the present appeal.

2. The factual score as depicted is that on 5.8.2009, a complaint was made by one of the officers alleging irregularity H in the hiring of Civil Hired Transport (CHT), which were used

for the purpose of supply of ordnance stores to units spread over the country, including remotest field and high altitude area by the respondent No. 1 who holds the rank of Colonel in the Army. On the basis of a complaint, the General Officer Commanding-in-Chief, Pune initiated an action against the respondent No. 1 by making his attachment with HQ Sub Area on 6.8. 2009 and also convened a Board of Officers on 21.7.2009 for ascertaining the truthfulness of the allegations. On 22.7.2009 the said Board seized the entire records and submitted a report. On the premises of that report, a COI was convened against the respondent No. 1 to investigate into the alleged irregularities.

3. The COI conducted an inquiry and on 8.3.2010 recommended for taking appropriate disciplinary action against the 1st respondent and some other officers. On the basis of the said recommendation on 23.2.2010 the first respondent was attached to the Head Quarters, Mumbai Sub Area till finalization of the disciplinary proceedings. At that juncture, respondent No. 1 filed Original Application No. 283 of 2010 before the Principal Bench of the tribunal at New Delhi challenging the COI proceedings contending, inter alia, that he had been deprived of the right of cross-examination as stipulated under Rule 180 of the Armed Forces Rules, 1954 (for short "the Rules"); and that there had been non-supply of documents which were annexed after conclusion of the proceedings before the COI. As the factual matrix would unveil, on 17.6.2010 the hearing of charges commenced and the Commanding Officer, Mumbai Sub Area, under Rule 22 directed for recording of Summary of Evidence under Rule 23.

4. The Original Application filed before the tribunal was disposed of on 8.10.2010. While dealing with the grievance pertaining to violation of Rule 180, especially the deprivation of the right to cross-examine, the tribunal referred to the decision in *Lt. Col. Prithi Pal Singh Bedi v. Union of India and*

1. AIR 1982 SC 1413.

A *others*[1], certain passages from Administrative Law by De Smith and applicability of the principles of natural justice and came to hold that as the 1st respondent had remained present throughout the course of COI and had been given opportunity to cross-examine the witnesses and, therefore, the grievance
B that he was not afforded full opportunity to cross-examine did not merit consideration. In fact, the tribunal opined that in-depth cross-examination was allowed to the respondent No. 1 and the Presiding officer asking for written questions to be submitted, could be treated as fair and reasonable exercise of discretion
C and hence, there was no illegality or irregularity in the conduct of the COI.

5. A contention was advanced that after conclusion of the proceedings by the COI when the report was submitted, certain documents which were not made available to the said
D respondent were annexed to justify his culpability. The tribunal found force in the said submission and opined that it was the duty of the COI to find out the truth by holding suitable investigation about the documents that were annexed afterwards. This opinion was formed on scrutiny of the language
E employed in Rule 180 and placing reliance on the dictum in *Uma Nath Pandey and others v. State of U.P. and another*[2]. This led to the ultimate conclusion that such enclosing of the documents along with the report by the COI amounted to violation of Rule 180 inasmuch as the said report was treated
F as the sole basis for initiating the disciplinary proceedings against the respondent No. 1. It was also held that it would be difficult for the authority concerned to proceed for hearing on the point of charge to take into account those documents which were subsequently annexed, and in all fairness, an Additional
G COI should be convened affording full opportunity to the parties, by examining or cross-examining any of the witnesses pertaining to those annexures.

H 2. AIR 2009 SC 2375.

6. Being of this view the tribunal directed the authority to convene an Additional COI limiting to the documents which were subsequently annexed to the report of the COI and granting liberty to the delinquent officer to cross-examine any of the witnesses, if produced, pertaining to those documents.

7. In pursuance to the aforesaid order, the Additional COI reassembled and the respondent No. 1 was shown all the documents and he perused the same, as the proceedings would reveal, availing considerable length of time. At that stage, he made a request for grant of permission to cross-examine the Technical Members but the same was denied on the ground that as per Rule 180 he could only cross-examine the witnesses and not the Members. However, certain other witnesses were examined and cross-examined in the COI and, eventually, a report was sent by the Presiding Officer.

8. Being grieved by the said order the respondent No. 1 preferred an Original Application under Section 14 of the Armed Forces Tribunal Act, 2007 for quashing of the Additional COI as there had been infraction of Rule 180 and for issue of appropriate direction for holding a fresh Additional COI with new Members who are independent and unbiased and the said Original Application was transferred to the Regional Bench at Mumbai where it was registered as TA No. 38/2011. For claiming such relief heavy reliance was placed on the order passed on earlier occasion in OA No. 283/2010. It was contended before the tribunal that Brig. N.S. Ahmed, who was the earlier Presiding Officer of the COI, had continued as the Presiding Officer of the Additional COI despite objections raised by the applicant therein and in spite of the request to constitute a fresh COI without him. It was highlighted that the concerned Brigadier should have been made available for cross-examination as he was the author of the document, i.e., Ext. XLI which was referred to in the order dated 8.10.2010 in OA No. 283/2010. It was brought to the notice of the tribunal that in the Additional COI Lt. Col. Sandeep Sinha and Maj.

A Sanjeev Narula were also retained as Technical Members despite the factum that those two officers were responsible for preparing the appendices 'N' to 'AB' to Ext. XLIX and on that ground he had been deprived of the opportunity of cross-examining them. It was further put forth that the document, vide B Ext. XXXV, was not shown or allowed for his perusal although the said document was a complete report making serious allegations of misappropriation and fraud against the applicant therein. In essence, the grievance that was agitated before the tribunal was that certain documents were not supplied and the C authors of document had become the Members of the Additional COI. It was also submitted that as the Additional COI had already submitted the report and the next phase of the proceedings, i.e., Summary of Evidence was about to be over the same also deserved to be quashed.

D 9. The said submissions were resisted by the respondents therein contending that Ext. XLI contains the observations of the Court on the two letters referred to it, i.e., COD, Mumbai letter No. 2754/Gen/Cont dated 4.8.2008 and DGOS IHQ of MoD (Army) letter No. PC-2/13357/RI00159/Fin/OS-4(e) dated E 6.8.2009 and these two letters were earlier perused by respondent No. 1. Emphasis was laid on the fact that there is no provision for cross-examination of the Presiding Officer of the COI on the basis of his observations made in the COI. As regards the cross-examination of the Technical Members, it F was opposed on the ground that the Technical Members had only collated the data which was taken into consideration for formation of an opinion by the COI and the same was done to comply with the order passed on the earlier occasion. It was put forth that Technical Members had only signed the day's G proceedings and had no role to play in the final opinion expressed by the COI. That apart, it was stressed that the Technical Members had been produced as witnesses in Summary of Evidence and every opportunity had been granted to the applicant therein to cross-examine them and, therefore, H no prejudice has been caused to him due to their non-

production in the COI for cross-examination. A

10. It was also contended that request of the applicant therein to cross-examine the authors of the document XLI and XLIX was beyond the scope of the Rule and was also not in accord with the earlier judgment passed on 8.10.2010. It was B put forth that Technical Members were allowed only to assist the Presiding Officer in the proceedings and not allowed to form any opinion and finding. Their inclusion in the Additional COI would not vitiate the enquiry as it does not violate the spirit of Rule 180.

C

11. The tribunal first dealt with the contention relating to inclusion of Technical Members in the Additional COI. In that context, it observed that the Technical Members were undoubtedly involved and connected with the matter being investigated and since they had submitted their report, it was D obvious that those members would certainly support their own report/ documents and it would not be possible for them to arrive at a different finding than what they had already found as their personal credibility would be at stake. Taking note of this fact situation and also the factum that the respondent herein E had raised his objection at the initial stage pertaining to inclusion of these officers in the Additional COI, the tribunal opined that the apprehension expressed by him was well-founded.

F

12. After so holding the tribunal proceeded to deal with the mandate of Rule 180 and relying on the decision rendered in *Lt. Col Prithi Pal Singh Bedi* (supra) and certain other decisions of the High Courts came to hold as follows: -

> "..... that the respondents did not produce the maker of G those documents XLIX and XLI for cross examination by the applicant, although he specifically prayed for it which was also directed in judgment passed in OA 283/2010. The applicant objected from the very beginning not to include Brig NS Ahmed and two Technical Members in the H

A Addl. COI so that a fair trial can be held and they could be cross examined by him. But the respondents turned a deaf ear to such request of the applicant and in fact that has been done at their own risks. The categorical direction in the earlier OA 283/2010 dt. 8.10.2010 passed by the B Principal Bench of AFT is that in the additional COI the petitioner is to be afforded with full opportunities to examine and cross examine the witnesses pertaining to those documents. The respondents, could have convened the additional COI with different members when there are C various other officers available for holding the additional inquiry, but they preferred not to do so and in turn creators of some vital documents were inducted as members allowing themselves to decide upon the documents created by them and they being the Members of the inquiry were D not produced for cross examination by the applicant. Such action on the part of the respondents is contrary to fair play in action."

13. The tribunal observed that as the applicant therein was not allowed to cross-examine the makers of documents XLIX E and XLI, the respondents therein not only violated the provisions of Rule 180 but also did not comply with the directions contained in the earlier judgment passed in OA No. 283/2010. The tribunal proceeded to state that the contention advanced by the respondents therein that on reading of Rule 180 it cannot F be discerned that the Presiding Officer and Technical Member of the COI were required to be produced as witnesses was devoid of merit. After so stating the tribunal held that the respondents therein should not have included Brig. N.S. Ahmad as Presiding Officer and Lt. Col. Sandeep Sinha and Maj. G Sanjeev Narula as Technical Members in the said Additional COI, for whatever might be the role of the Technical Members, nonetheless they were Members of the Additional COI and must have applied their mind while preparing the inquiry report.

14. Being of this opinion, the tribunal concluded that the H

decision rendered by Additional COI was in violation of the provisions contained in Rule 180 and, accordingly, set aside the same and also all consequential actions taken on the basis of the said Additional COI. It granted liberty to the respondents therein to convene a fresh Additional COI with a different Presiding Officer and other independent Members.

15. The centripodal issues that emerge for consideration are whether the tribunal was justified in holding that the constitution of the COI which consisted of two Technical Members and the Presiding Officer was vitiated as there was possibility of their having an interest in the proceedings as a consequence of which being biased or there could be a perception or likelihood of bias in the decision making prooess which would raise a doubt pertaining to the decision by a prudent or rational person; whether the Presiding Officer and the Technical Members should have been made available for cross-examination in a COI to meet the necessary command of Rule 180 and further regard being had to the earlier order passed in OA No. 283 of 2010; and whether there has been real violation of the principles of natural justice which ultimately vitiates the proceedings of the Additional COI.

16. To appreciate the said aspects we shall first proceed to examine the schematic contents of the Rules in issue and how they have been understood and interpreted by this Court. Chapter VI of the Rules provides for COI. Rule 177 deals with the Constitution of COI and its role, namely, to collect evidence and if so required to report with regard to any matter which may be referred to them. Rule 179 provides the procedure by which a COI shall be guided.

17. Rule 180 on which the present controversy revolves deals with the procedure when character of person subject to the Act is involved. It is as follows:-

"180. **Procedure when character of a person subject to the Act is involved.** - Save in the case of a prisoner

A of war who is still absent whenever any inquiry affects the character of military reputation of a person subject to the Act, full opportunity must be afforded to such person of being present throughout the inquiry and of making any statement, and of giving any evidence he may wish to
B make or give, and of cross- examining any witness whose evidence in his opinion, affects his character or military reputation and producing any witnesses in defence of his character or military reputation. The presiding officer of the court shall take such steps as may be necessary to ensure
C that any such person so affected and not previously notified receives notice of any fully understands his rights, under this rule."

17. Rule 182 stipulates that the proceeding of Courts of Inquiry or any confession statement or answer to a question
D made or given at a COI shall not be admissible in evidence against a person subject to the Act, nor shall any evidence respecting the proceedings of the court be given against any such person except upon the trial or such person for willfully giving false evidence before that court. The proviso to the rule
E states nothing in the said rules shall prevent the proceedings from being used by the prosecution or the defence for the purpose of cross-examining any witnesses. Rule 184 which has been substituted by S.R.O. 44, dated 24th January, 1985 deals with right of certain persons to copies of statements and
F documents.

18. Rule 180 had come up for consideration in *Lt. Col Prithi Pal Singh Bedi* (supra). In the said case a contention was advanced that it was obligatory upon the authorities concerned
G to appoint a COI whenever it affects the character or military reputation of a persons subject to the Act and in such an enquiry full opportunity must be afforded to such person of being present throughout the enquiry and of making any statement or giving any evidence he may wish to make or give and of cross-examining any witness whose evidence in his opinion affects
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the character or military reputation and producing any witness in defence of his character or military reputation. It was further urged before the court that on a correct interpretation of Rule 180, it would appear whenever the character of a person subject to the Act is involved in any inquiry, a COI must be set up. Repelling the said submission the learned judges opined thus:-

> "Rule 180 does not bear out the submission. It sets up a stage in the procedure prescribed for the Courts of inquiry. Rule 180 cannot be construed to mean that whenever or wherever in any inquiry in respect of any person subject to the Act his character or military reputation is likely to be affected setting up of a Court of inquiry is a sine qua non. Rule 180 merely makes it obligatory that whenever a Court of inquiry is set up and in the course of inquiry by the Court of inquiry character or military reputation of a person is likely to be affected then such a person must be given a full opportunity to participate in the proceedings of Court of inquiry. Court of inquiry by its very nature is likely to examine certain issues generally concerning a situation or persons."
>
> [Emphasis supplied]

19. Thereafter, the Court dealt with the proceedings where the participation of a person is obligatory and where it is not required. The said delineation is as follows:-

> "Where collective fine is desired to be imposed, a Court of inquiry may generally examine the shortfall to ascertain how many persons are responsible. In the course of such an inquiry there may be a distinct possibility of character or military reputation of a person subject to the Act likely to be affected. His participation cannot be avoided on the specious plea that no specific inquiry was directed against the person whose character or military reputation is involved. To ensure that such a person whose character or military reputation is likely to be affected by the

A proceedings of the Court of inquiry should be afforded full opportunity so that nothing is done at his back and without opportunity of participation. Rule 180 merely makes an enabling provision to ensure such participation. But it cannot be used to say that whenever in any other inquiry B or an inquiry before a Commanding officer under R. 22 or a convening officer under Rule 37 of the trial by a court martial, character or military reputation of the officer concerned is likely to be affected a prior inquiry by the Court of inquiry is a sine qua non."

C [Underlining is ours]

20. In *Major General Inder Jit Kumar v. Union of India and others,*[3] a two-Judge Bench observed that COI is set up under Rule 177 to collect evidence and to report, if so required, with D regard to any matter which may be referred to it. The COI is in the nature of a fact-finding inquiry committee. The learned Judges proceeded to state that Army Rule 180 provides, inter alia, that whenever any inquiry affects the character or military reputation of a person subject to the Army Act, full opportunity E must be afforded to such a person of being present throughout the inquiry and of making any statement, and of giving any evidence he may wish to make or give, and of cross-examining any witness whose evidence, in his opinion, affects his character or military reputation and producing any witnesses F in defence of his character or military reputation and the presiding officer of the COI is required to take such steps as may be necessary to ensure that any such person so affected receives notice of and fully understands his rights under this rule.

21. In that case the appellant therein was present before G the COI and witnesses were examined by the COI in his presence and were offered to him for cross-examination, but he declined to cross-examine them. In fact, he had moved an application for adjournment for preparing his defence. He had

H 3. (1997) 9 SCC 1.

also applied for the evidence adduced before the COI should be reduced to writing. The COI noticed that sufficient time had been granted to him for preparation of his defence after receipt of the COI proceedings by him and, accordingly, refused the application for adjournment. Be it noted, a contention was advanced that a copy of the report of the COI should be provided to him. Dealing with the said aspect, this Court ruled thus: -

> "There is no provision for supplying the accused with a copy of the report of the Court of Inquiry. The procedure relating to a Court of Inquiry and the framing of charges was examined by this Court in the case of *Major G.S. Sodhi* v. *Union of India*[4]. This Court said that the Court of Inquiry and participation in the Court of Inquiry is at a stage prior to the trial by court-martial. It is the order of the court-martial which results in deprivation of liberty and not any order directing that a charge be heard or that a summary of evidence be recorded or that a court-martial be convened. Principles of natural justice are not attracted to such a preliminary inquiry. Army Rule 180, however, which is set out earlier gives adequate protection to the person affected even at the stage of the Court of Inquiry. In the present case, the appellant was given that protection. He was present at the Court of Inquiry and evidence was recorded in his presence. He was given an opportunity to cross-examine witnesses, make a statement or examine defence witnesses."
>
> [Emphasis supplied]

22. In *Union of India and Others v. Major A. Hussain (IC-14827)*[5], Union of India and its functionaries had challenged the decision of the High Court which had quashed the court-martial proceedings including the confirmation of the sentence on the

4. (1991) 2 SCC 382.

5. (1998) 1 SCC 537.

A ground that the delinquent officers had denied reasonable opportunity to defend himself as he was not communicated the conclusion reached. In the said case the High Court opined that during the proceeding under Section 22 of the Act, the copies submitted in earlier COI were not supplied; that he was not given
B assistance of a defending officer of his choice; that he was not provided a loan which was already sanctioned to engage a new counsel; and that the documents for which he had made a request to the convening authority long before assembly of the court-martial were not provided. This court referred to Rule 180
C and 184 of the Army Rules and various other provisions and in that context came to hold that the respondent had been unable to show if there was any non-compliance with the provisions of Rules 22, 23 and 24 and Army Order No. 70/84. The Court referred to the decisions in *Lt. Col. Prithi Pal Singh Bedi* (supra)
D *Major G.S. Sodhi* (supra) and observed that in *G.S. Sodhi case* this Court with reference to Rules 22 to 25 said that procedural defects, unless those were vital and substantial, would not affect the trial. The Court, in the case before it, said that the accused had duly participated in the proceedings regarding recording
E of summary of evidence and that there was no flagrant violation of any procedure or provision causing prejudice to the accused. Thereafter, the learned Judges adverted to the role of COI and opined thus: -

> "Proceedings before a Court of Inquiry are not adversarial
F proceedings and is also not a part of pre-trial investigation. In *Major General Inder Jit Kumar* v. *Union of India* this Court has held that the Court of Inquiry is in the nature of a fact-finding enquiry committee. The appellant in that case had contended that a copy of the report of the Court of
G Inquiry was not given to him and that had vitiated the entire court-martial. He had relied upon Rule 184 in this connection. With reference to Rule 184, the Court said that there was no provision for supplying the accused with a copy of the report of the Court of Inquiry. This Court considered the judgment in *Major G.S. Sodhi case* and
H

observed that supply of a copy of the report of enquiry to the accused was not necessary because proceedings of the court of inquiry were in the nature of preliminary enquiry and further that rules of natural justice were not applicable during the proceedings of the court of inquiry though adequate protection was given by Rule 180. This Court also said that under Rule 177, a court of inquiry can be set up to collect evidence and to report, if so required, with regard to any matter which may be referred to it. Rule 177, therefore, does not mandate that a court of inquiry must invariably be set up in each and every case prior to recording of summary of evidence or convening of a court-martial."

[Emphasis supplied]

23. The aforesaid authorities, as far as Rule 180 is concerned, are to the effect that when a COI is set up under Rule 177 and during the course of enquiry character or military reputation of a person is likely to be affected, he should be granted full opportunity to participate in the proceedings; that the COI in its very nature is likely to examine certain issues generally concerning a situation or persons; that his participation could not be avoided on a mercurial plea that no specific enquiry was directed against the person whose character or military reputation is involved; that the concerned person shall be afforded full opportunity so that nothing is done at his back and without opportunity of participation; that it is the command of the said provision to ensure such participation; that it not a condition precedent to always hold that a COI for proceeding a trial by court martial where character or military reputation of the officer concerned is likely to be affected; that the COI is in the nature of a fact finding enquiry committee; that the participation in a COI is at a stage prior to the trial by court martial; that the said rule gives adequate protection to the person affected at the stage of COI and there is no provision for supplying the accused with a copy of the report of the COI; and that the proceedings before a COI are not adversarial proceedings.

24. Keeping in view the aforesaid principles which have been laid down by this Court, we are required to scrutinise whether the tribunal has appositely applied the principles in quashing the Additional COI including its composition. To appreciate the said position we think it necessary to refer to the earlier order passed by the tribunal. In the earlier decision, the tribunal took note of the fact that COI while submitting the Report had annexed certain documents and the said documents were produced in a tabular chart which is as follows:-

"

	EXHIBIT NO.	LETTER NO. AND DATE	REMARKS
1	XLIX including all appendices		Still not shown/ given to applicant
2.	LXIX	CMM Jabalpur Letter No. 126/CL/HQ dt 05 Nov 2009	-
3	L		Still not shown/ given to applicant
4	LXVIII		-Do-
5.	XXXV		-Do-
6.	XLI		-Do-
7.	LV		-Do-
8.	ZXVI	(a) FOD Lr No.50060/ Tfc/X/ dt. 30 Nov 2009 (b) 22 ABOD Lr.No. C/1224/499/Tfc dt. 01 Dec 2009 (c) FOD Lr. No. G3334/ PC/Tfc dt 30 Nov 2009	

"

25. Thereafter, the tribunal appreciating the submissions A
ıeld thus;-

"As has clearly been stated in AR 180, a fair opportunity is to be afforded to an individual whose character and military reputation is involved. In this case, the documents B were not given to the applicant warranting judicial review by this Tribunal. We find that the mandatory procedure under AR 180 was not followed by the respondents with regard to those documents which were subsequently annexed to the report. Therefore, that portion of the report, C which deals with the conduct and reputation of the applicant without giving him an opportunity of being heard in the inquiry, should be taken to be vitiated for violation of AR 180. It is true that the report of the COI has no legal force proprio vigore. But, however, it is seen in this case that D the findings rendered by the COI have been taken as the sole basis for initiating disciplinary proceedings against the applicant. In these circumstances, the applicant is entitled to put forward his grievance that the COI has given findings regarding his conduct without giving him an E opportunity to put forward his defence as regards those annexures; the applicant was obviously not afforded opportunity to see the documents which were annexed to the report of COI. It would be difficult for the authority concerned to proceed for hearing on the point of charge F to take into account those documents which were subsequently annexed. In all fairness, an additional COI is to be convened affording full opportunity to the parties, by examining or cross examining any of the witnesses pertaining to those annexures. The additional COI would remain confined to the annexures referred to above." G

[Underlining is ours]

26. After so holding, the tribunal directed the concerned authority to pass orders convening an Additional COI limiting H

A to the documents which were subsequently annexed to the report of the COI and the applicant was granted liberty to cross examine any of the witnesses, if produced, pertaining to those documents.

B 27. We may note here with profit that the aforesaid order was not assailed by the Union of India and its functionaries.

28. We have referred to the earlier order in extensor despite the same having gone unchallenged, for it is submitted by Mr. Kuhad, learned Additional Solicitor General, that the said C order has to be understood in the backdrop of the fact situation. There can be no trace of doubt that the tribunal had passed directions to the limited extent, but it had specified the documents and directed for full grant of opportunity to the delinquent officer.

D

29. At this juncture, we may refer to the analysis made by the tribunal in the impugned judgment while setting aside the Additional COI. On a scrutiny of the impugned judgment of the tribunal, four reasons, namely, (i) that though the tribunal vide its earlier judgment dated 8.10.2010 had directed the witnesses E concerned with the annexures which were brought on record before the COI were to be made available for cross-examination, the said witnesses like the makers of the documents XLI and XLIX were not made subject to cross-examination by the delinquent officer; (ii) that though the F inclusion of the Presiding Officer in the COI had been objected to on earlier occasion, he was allowed to continue and was not changed; (iii) that in spite of the Technical Members had prepared and arranged the documents which would mean that they had expressed an opinion at an earlier stage, yet they were G retained as Members of the COI as a consequence of which the principles of natural justice were violated, for one cannot be the judge in his own cause; and (iv) that the doctrine of bias comes into play as the Presiding Officer as well as the Technical Members would have a tendency to support their own reports/ H documents and it is against the spirit of Rule 180. In essence,

what has really weighed with the tribunal while passing the impugned order is that such members constituted the COI who were biased or reasoned to be biased and such bias is discernible. To appreciate the said facet of reasoning it is necessary to understand when the doctrine of bias really comes into play, for bias is an insegregable facet of the concept of natural justice as a genus. The fundamental principles of natural justice are ingrained in the decision making process to prevent miscarriage of justice. It is applicable to administrative enquiries and administrative proceedings as has been held in *A.K. Kraipak v. Union of India*[6]. It is also fundamental facet of principle of natural justice that in the case of quasi-judicial proceeding the authority empowered to decide a dispute between the contesting parties has to be free from bias. When free from bias is mentioned, it means there should be absence of conscious or unconscious prejudice to either of the parties and the said principle has been laid down in *Gullapalli Nageswara Rao v. Andhra Pradesh State Road Transport Corporation and others*[7], *Gullappalli Nageswarrao v. State of A.P. and others*[8] *and Dr. G. Sarana v. University of Lucknow and others*[9].

30. In *Manak Lal v. Dr. Prem Chand Singhvi and others*[10] the Court has stated thus: -

> "It is well settled that every member of a tribunal that is called upon to try issues in judicial or quasi-judicial proceedings must be able to act judicially; and it is of the essence of judicial decisions and judicial administration that judges should be able to act impartially, objectively and without any bias. In such cases the test is not whether in

6. (1969) 2 SCC 262.
7. AIR 1959 SC 308.
8. AIR 1959 SC 1376.
9. (1976) 3 SCC 585.
10. AIR 1957 SC 425.

A fact a bias has affected the judgment; the test always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of the tribunal might have operated against him in the final decision of the tribunal. It is in this sense that it is often said that justice B must not only be done but must also appear to be done."

31. In *Dr. G. Sarana* (supra), the learned Judges referred to the *Principles of Administrative Law* by J.A.C. Griffith and H. Street (Fourth Edition), and observed that the position with regard to bias has been aptly and succinctly stated thus: C

"The prohibition or bias strikes against factors which may improperly influence a judge in deciding in favour of one party. The first of the three disabling types of bias is bias on the subject-matter. Only rarely will this bias invalidate D proceedings. "A mere general interest in the general object to be pursued would not disqualify," said Field J., holding that a Magistrate who subscribed to the Royal Society for the Prevention of Cruelty to Animals was not thereby disabled from trying a charge brought by that body E of cruelty to a horse. There must be some direct connection with the litigation. If there is such prejudice on the subject-matter that the court has reached fixed and unalterable conclusions not founded on reason or understanding, so that there is not a fair hearing, that is bias of which the F courts will take account, as where a justice announced his intention of convicting anyone coming before him on a charge of supplying liquor after the permitted hours. . .

Secondly, a pecuniary interest, however, slight will disqualify, even though it is not proved that the decision is G in any way affected.

The third type of bias is personal bias. A judge may be a relative, friend or business associate of a party, or he may be personally hostile as a result of events happening either H before or during the course of a trial. The courts have not

been consistent in laying down when bias of this type will invalidate a hearing. The House of Lords in *Frome United Breweries* v. *Bath Justices*[11] approved an earlier test of whether "there is a real likelihood of bias." The House of Lords has since approved a dictum of Lord Hewart that "justice should not only be done, but should manifestly and undoubtedly be seen to be done" although it did not mention another test suggested by him in the same judgment: Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice."

32. Eventually in the said decision it has been ruled that what has to be seen in a case where there is an allegation of bias in respect of a member of an administrative board or body is whether there is a reasonable ground for believing that he was likely to have been biased. In other words, whether there is substantial possibility of bias animating the mind of the member against the aggrieved party.

33. At this juncture, we may refer with profit to Halsbury's Laws of England, Fourth Edition, Volume 2, paragraph 551, where it has been observed: -

"The test for bias is whether a reasonable intelligent man, fully appraised of all the circumstances, would feel a serious apprehension of bias".[12]

34. In *Secretary to Government, Transport Deptt., Madras v. Munuswamy Mudaliar and another*[13], while dealing with the concept of bias as a part of natural Justice, the Court observed that a predisposition to decide for or against one party, without proper regard to the true merits of the dispute is bias. There must be reasonable apprehension of that predisposition. The

11. 1926 AC 586.

12. R v. Moore, ex parte Brooks [1969] 2 OR 677, 6 DLR (3d) 465.

13. 1988 (Supp) SCC 651.

A reasonable apprehension must be based on cogent materials. Needless to say, personal bias is one of the limbs of bias, namely, pecuniary bias, personal bias and official bias.

35. In *Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant and others*[14], the Court referred to a passage from the B view expressed by Mathew, J. in *S. Parthasarathi* v. *State of Andhra Pradesh*[15]: -

"16. The tests of 'real likelihood' and 'reasonable suspicion' are really inconsistent with each other. We think C that the reviewing authority must make a determination on the basis of the whole evidence before it, whether a reasonable man would in the circumstances infer that there is real likelihood of bias. The court must look at the impression which other people have. This follows from the D principle that justice must not only be done but seen to be done. If right-minded persons would think that there is real likelihood of bias on the part of an inquiring officer, he must not conduct the inquiry; nevertheless, there must be a real likelihood of bias. Surmise or conjecture would not be E enough. There must exist circumstances from which reasonable men would think it probable or likely that the inquiring officer will be prejudiced against the delinquent. The court will not inquire whether he was really prejudiced. If a reasonable man would think on the basis of the existing F circumstances that he is likely to be prejudiced, that is sufficient to quash the decision [see per Lord Denning, M.R. in *Metropolitan Properties Co. (F.G.C.) Ltd.* v. *Lannon*[16] (WLR at p. 707]."

36. Thereafter, the two-Judge Bench referred to the G decision in *Franklin v. Minister of Town and Country Planning*[17] and the sounding of a different note and the dilution of the

14. (2001) 1 SCC 182.
15. (1974) 3 SCC 459.
16. (1968) 3 WLR 694.
H 17 1948 AC 87.

principle by English Courts in *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No. 2)*[18] and the view expressed by Lord Hutton in the said case and thereafter proceeded to analyse the doctrine propounded in *Locabail [Locabail (U.K.) Ltd. v. Bayfield Properties Ltd.*[19] where the Court of Appeal had upon detailed analysis of the decision in *R. v. Gough*[20] together with *Dimes case*[21], *Pinochet case* (supra) as also *Ebner, Re*[22]. and the decision of the Constitutional Court of South Africa in *President of the Republic of South Africa v. South African Rugby Football Union*[23] opined that it would be rather dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. The learned Judges took note of the fact that the Court of Appeal continued to give effect that everything will depend upon facts which may include the nature of the issue to be decided. Eventually, this Court ruled thus: -

> "The test, therefore, is as to whether a mere apprehension of bias or there being a real danger of bias and it is on this score that the surrounding circumstances must and ought to be collated and necessary conclusion drawn therefrom — in the event however the conclusion is otherwise inescapable that there is existing a real danger of bias, the administrative action cannot be sustained: If on the other hand, the allegations pertaining to bias is rather fanciful and otherwise to avoid a particular court, Tribunal or authority, question of declaring them to be unsustainable would not arise. The requirement is availability of positive and cogent evidence and it is in this context that we do record our concurrence with the view expressed by the Court of Appeal in *Locabail case*."

18. (2000) 1 AC 119.
19. 2000 QB 451.
20. 1993 AC 646.
21. 3 House of Lords Cases 759.
22. (1999) 161 ALR 55.
23. (1999) 4 SA 147.

A [Emphasis supplied]

37. In *G.N. Nayak v. Goa University and others*[24] it has been laid down that it is not every kind of bias which in law is taken to vitiate an act. It must be a prejudice which is not
B founded on reason, and actuated by self-interest — whether pecuniary or personal. Because of this element of personal interest, bias is also seen as an extension of the principles of natural justice that no man should be a judge in his own cause. Being a state of mind, a bias is sometimes impossible to
C determine. Therefore, the courts have evolved the principle that it is sufficient for a litigant to successfully impugn an action by establishing a reasonable possibility of bias or proving circumstances from which the operation of influences affecting a fair assessment of the merits of the case can be inferred.

D 38. In *Delhi Financial Corpn. and another v. Rajiv Anand and others,*[25] while dealing with the concept of doctrine that "no man can be a judge in his own cause", the Court opined that the said principle can be applied only in two cases where the person concerned has a personal interest or has himself
E already done some act or taken a decision in the matter concerned. The Court further observed that an officer of a statutory corporation has been appointed as an authority, does not by itself bring the said doctrine into operation. The learned Judges further proceeded to state that in individual cases bias
F may be shown against a particular person but in the absence of any proof of personal bias or connection merely because officers of a particular corporation are named as the authority does not mean that those officers would be biased. Unless the officer concerned is personally interested question of bias or
G conflict between his interest and his duty would not arise.

39. In *Chandra Kumar Chopra v. Union of India and*

24. (2002) 2 SCC 712.

H 25. (2004) 11 SCC 625.

others[26] it has been held that mere suspicion or apprehension is not good enough to entertain a plea of bias. It cannot be a facet of one's imagination. It must be in accord with the prudence of a reasonable man. The circumstances brought on record should show that it can create an impression in the mind of a reasonable man that there is real likelihood of bias. It is not to be forgotten that in a democratic polity, justice in its conceptual eventuality and inherent quintessentiality forms the bedrock of good governance. In a democratic system that is governed by the rule of law, fairness of action, propriety, reasonability, institutional impeccability and non-biased justice delivery system constitute the pillars on which its survival remains in continuum. The plea of bias it is to be scrutinised on the basis of material brought on record whether someone makes wild, irrelevant and imaginary allegations to frustrate a trial or it is in consonance with the thinking of a reasonable man which can meet the test of real likelihood of bias. The principle cannot be attracted in vacuum.

40. In *State of Gujarat and another v. Justice R.A. Mehta (Retired) and others*,[27] a two-Judge Bench dealing with "bias" has observed thus: -

> "Bias is one of the limbs of natural justice. The doctrine of bias emerges from the legal maxim *nemo debet esse judex in propria causa*. It applies only when the interest attributed to an individual is such so as to tempt him to make a decision in favour of, or to further his own cause. There may not be a case of actual bias, or an apprehension to the effect that the matter most certainly will not be decided or dealt with impartially but where the circumstances are such so as to create a reasonable apprehension in the minds of others that there is a likelihood of bias affecting the decision, the same is sufficient to invoke the doctrine of bias."

26. (2012) 6 SCC 369.
27. (2013) 3 SCC 1.

A

41. In the said case, it has been further observed that in the event that actual proof of prejudice is available, the same will naturally make the case of a party much stronger, but the availability of such proof is not a necessary precondition, for
B what is relevant, is actually the reasonableness of the apprehension in this regard in the mind of such party. In case such apprehension exists the trial/judgment/order, etc. would stand vitiated for want of impartiality and such judgment/order becomes a nullity. The trial becomes *coram non judice.*

C 42. At this juncture, we think it apt to refer to the pronouncements in *Ranjit Thakur v. Union of India and others*[28] and *Major G.S. Sodhi v. Union of India*[29]. *In Ranjit Thakur's case* the Court was dealing with justifiability of an order of dismissal passed by the summary court martial of which one
D of the members was the respondent No. 4 therein. The said respondent had sentenced the appellant to suffer sentence of 28 days rigorous imprisonment for violating the norms for representation to higher authorities and the representation that was sent to the higher authorities pertained to the ill-treatment
E at the hands of the respondent No. 4. Keeping the said factual backdrop in view the Court referred to the procedural safeguards provided under Section 130 of the Act and opined that the proceedings of summary court martial was infirm in law. Thereafter, the learned Judges proceeded to deal with the
F second limb of arguments also. It related to bias on the part of the respondent No. 4 therein. In that context, the Court observed as follows: -

> **"16.** It is the essence of a judgment that it is made after due observance of the judicial process; that the court or
G tribunal passing it observes, at least the minimum requirements of natural justice; is composed of impartial

28. (1987) 4 SCC 611.

H 29. (1991) 2 SCC 382.

persons acting fairly and without bias and in good faith. A judgment which is the result of bias or want of impartiality is a nullity and the trial *"coram non-judice"*. (See *Vassiliades* v. *Vassiliades*[30])"

43. The Court referred to the decisions in *Allinson v. General Council of Medical Education and Registration*[31], *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon*[32], *Public Utilities Commission of the District of Columbia v. Pollak*[33] and *Regina v. Liverpool City Justices, ex parte Topping*[34] and, eventually, concluded that the inescapable conclusion was that the participation of respondent No. 4 had rendered the court-martial proceedings *coram non-judice*.

44. In *Major G.S. Sodhi* (supra), the Court did not accept the alleged plea of bias or mala fide as Lt. Col. S.K. Maini, who had ordered summary of evidence against the petitioner therein, was inimical towards him because of certain prior incidents. It was also alleged that he had not acceded to certain requests made by the petitioner during the inquiry. The Court did not accept the same on the ground that the respondent Lt. Col. S.K. Maini was only concerned with the preliminary inquiry and it was for the court martial to try the case and give its verdict and mere allegation of bias and mala fide against him did not affect the court martial proceedings. That apart, the Court observed that the allegations against the said Maini had not been really substantiated and even they are perceived from the point of view of the petitioner therein, it could not be held that it was not reasonable on his part to apprehend that the said officer would act in a biased and partisan manner. Emphasis was laid

30. AIR 1945 PC 38.
31. (1894) 1 QB 750, 758-59.
32. (1969) 1 QB 577, 599.
33. 343 US 451, 466-67 : 96 L ed 1068, 1079.
34. (1983) 1 WLR 119 : (1983) 1 ALL ER 490, 494.

A on the fact that he was only responsible for holding a preliminary enquiry.

45. The principle that can be culled out from the number of authorities fundamentally is that the question of bias would arise depending on the facts and circumstances of the case. It B cannot be an imaginary one or come into existence by an individual's perception based on figment of imagination. While dealing with the plea of bias advanced by the delinquent officer or an accused a court or tribunal is required to adopt a rational approach keeping in view the basic concept of legitimacy of C interdiction in such matters, for the challenge of bias, when sustained, makes the whole proceeding or order a nullity, the same being *coram non-judice*. One has to keep oneself alive to the relevant aspects while accepting the plea of bias. It is to be kept in mind that what is relevant is actually the D reasonableness of the apprehension in this regard in the mind of such a party or an impression would go that the decision is dented and affected by bias. To adjudge the attractability of plea of bias a tribunal or a court is required to adopt a deliberative and logical thinking based on the acceptable touchstone and E parameters for testing such a plea and not to be guided or moved by emotions or for that matter by one's individual perception or misguided intuition.

46. Keeping in view the principles laid down in the F aforesaid precedents and how this Court has understood and dealt with the plea of bias, the case at hand is to be appreciated in its factual backdrop whether there has been "really likelihood of bias". In a COI participation of a delinquent officer whose character or military reputation is likely to be affected is a categorical imperative. The participation has to G be meaningful, effective and he has to be afforded adequate opportunity. It needs no special emphasis to state that Rule 180 is framed under the Army Act and it has the statutory colour and flavour. It has the binding effect on the COI. The Rule provides for procedural safeguards regard being had to the fact that a H

person whose character and military reputation is likely to be affected is in a position to offer his explanation and in the ultimate eventuate may not be required to face disciplinary action. Thus understood, the language employed in the Rule 180 lays postulates of a fair, just and reasonable delineation. It is the duty of the authorities to ensure that there is proper notice to the person concerned and he is given opportunity to cross-examine the witnesses and, most importantly, nothing should take place behind his back. It is one thing to say that the COI may not always be essential or *sine qua non* for initiation of a court martial but the another spectrum is once the authority has exercised the power to hold such an inquiry and the COI has recommended for disciplinary action, then the recommendation of the COI is subject to judicial review. While exercising the power of judicial review it becomes obligatory to see whether there has been due compliance of the stipulates prescribed under the Rule, for the language employed in the said Rule is absolutely clear and unambiguous. We may not dwell upon the concept of "full opportunity" in detail. Suffice it to say that one cannot stretch the said concept at infinitum on the bedrock of grant of opportunity and fair play. It has to be tested on the touchstone of factual matrix of each case.

47. Coming to the case at hand, we are obliged to state that initially the COI was constituted by three members by order dated 22.7.2009 and it was asked to investigate certain issues. The relevant part of the said order reads thus: -

"(a) Pers involved incorrupt practice of submitting inflated claims to PCDA in connivance with Tpt Firms with Spl ref to Kaushik Tpt Pvt Ltd.

(b) Hiring vehs of lower tonnage and submitting bills for hiring of higher tonnages.

(c) The misappropriation in dispatch of stores to Ord Depot."

A The composition of the Board of Officers were as under: -

(a) Presiding Offr - Brig NS Ahamed, CSO, HQ MG & G Area.

(b) Members - 1. Col RV Desai, Jt. Dir DSC Mumbai Sub Area.

B

2. Lt. Col Sandeep Sinha, OC 53 Coy ASC (Sup).

C 48. Thereafter, an amendment was brought regarding composition of the COI vide order dated 28.7.2009. It reads as follows: -

"The following amdts will be made in our above convening order at Para 2: -

D

For Presiding Offr - Brig NS Ahamed, CSO, HQ MG & G Area

Members 1. Col. RV Desai, Jt Dir DSC Mumbai Sub Area

E

2. Lt Col Sandeep Sinha, OC 53 Coy ACS (Supply)

Read Presiding Offr - Brig NS Ahamed, CSO, HQ MG & G Area

F

Members 1. Col. RV Desai, Jt Dir DSC Mumbai Sub Area

2. Col RG Laxman, SO(ECHS) HQ Mumbai Sub Area

G Technical Members 1. Lt Col Sandeep Sinha OC 53 Coy ASC (Supply)

2. Maj Sanjeev Narula, Stn Wksp EME, Mumbai"

H

49. It is submitted by Mr. Kuhad, learned ASG, appearing for the appellants, that the Technical Members had only compiled and collated the documents and for such an act they cannot be disqualified to function as Members. It is also urged by him that the said Members only signed the day-to-day proceedings but were not signatories to the final report that was submitted through the officer who convened the COI. In this context we may refer to what has been recorded on 11.2.2011 by the Additional COI: -

> "In deference to the directions given by Hon'ble Armed Forces Tribunal Principal bench, New Delhi dated 08 Oct 2010, the following exhibits namely exhibit XLIX, exhibit LXIX, exhibit L, exhibit LXVIII, exhibit XXXV, exhibit XLI, exhibit LV, exhibit LXVI are available for perusal. It is clarified that exhibit XLIX named as technical report containing Appces A to M, the documents produced at the initial Court of Inquiry and which have already been perused by all the witnesses under AR 180 and for easy reference these documents have been compiled in one place marked as Appces A to M of exhibit XLIX. The balance of exhibit XLIX, the technical report forming part of Appces N to AB and extract to Appx N is the collation of information in various formats as per headings given in these Appces from the information available in the Appces A to M of exhibits XLIX.
>
> The court has requested the convening authority HQ MG & G Area to intimate details of documents, copies of Court of Inquiry and exhibits handed over to the witnesses if any during the interim period i.e. 06 Dec 2009 to 07 Feb 2011, vide Presiding Officer HQ MG & G Area (Sigs) letter No. PC-0604/CHT/COD/Addl C of I dated 09 Feb 2011 and the letter is read over. The copy of the letter is attached as exhibit 1."

50. It is not in dispute that the respondent No. 1 perused all the documents and objected to the presence of the Technical

A Members, namely, Lt. Col. Sandeep Sinha and Maj. Sanjeev Narula in the Additional COI proceedings. On 17.2.2011 the Additional COI clarified that Ext. XLIX comprised of appendices as brought about by the court at paragraph 5 of the Additional COI proceedings dated 11.2.2011. At that juncture, the said B respondent gave a list of his witnesses. On 24.2.2011 the respondent No. 1 made a prayer to cross-examine the Members of the COI but the said prayer was declined. It is contended by Mr. Kuhad that neither the examination nor the cross-examination of the Presiding Officer and the Members C of the COI can be spelt out from the language of Rule 180 as they are not witnesses. We find force in the said submission of the learned senior counsel and hold that neither the Presiding Officer nor the Technical Members of the COI could be made available for cross-examination before the COI.

D 51. The core of controversy, as we notice, is the inclusion of the Technical Members and the Presiding Officer in the COI. As has been stated earlier, the respondent raised the plea of bias against the Technical Members and had objected to the inclusion of Brig. N.S. Ahamed as Presiding Officer. To E appreciate the fulcrum of the controversy, we are required to see the role played by the Technical Members at an earlier stage, for it was repeatedly stated before us that they had only compiled the documents. A mere compilation or pagination or for that matter an arrangement of documents may not be an act F to compel someone from recusing from a case. He may not be disqualified to be a part of a COI. But on a perusal of the Ext. XLIX we find that it is a "Technical Report" prepared by the two Technical Members. At the beginning it has been stated "Technical Report : Staff C of I". Thereafter it has been G mentioned therein that documents in custody of the court were perused for arriving at the technical inputs. The Members have listed the important documents, stated about the methodology they were going to adopt and have given the input which have been brought on record as appendices 'N' to 'Z'. After giving H the inputs the members have given their observations stating

that during the course of scrutiny of documents they have observed many financial irregularities. The observations are from paragraph 5(a) to (m). Para 6 deals with inferences and describes the part, namely, "Anomaly along with Inference". The same includes (a) variation between Tonnage mentioned in gate register and bills, (b) variation of CHT Tonnage between Traffic Branch Office copy of consignment note (Bilti) and Bills with financial loss, (c) transshipment details as per office copy of Convoy Note in Traffic Branch and receipted copies of Convoy Note and input, from Consignee Units, (d) Same CHT billed for different tonnages with financial loss, (e) same CHT being hired within close period, (f) variation in billed tonnage of CHTs vis-à-vis actual tonnage as per list given by Kaushik Transport with tender documents with financial loss, (g) CHT billed but date record at variance in Gate Register with respect to reporting and utilization of vehicle note, (h) dispatch to same places in consecutive days amounting to splitting of transaction, (i) variation between actual utilization and the CFA sanction, and(k) preliminary inquiry at COD Malad. On a bare perusal of the same one can easily say that the Technical Members have expressed their opinion after analysis of the documents. They have, in detail, scrutinized the documents, drawn their inferences and made their observations. This document has been marked as Ext. XLIX. By no stretch of imagination it can be said that it is an arrangement of documents or pagination of documents. True it is, they are not the authors of the original documents but their analysis and inference have been used against the respondent in the earlier COI and in the Additional COI. It cannot be brushed aside by saying that Technical Members did not sign the final report. Once they have given an opinion, the possibility to support the same cannot be totally discarded. That is where the real likelihood of bias comes into play. As has been stated in number of authorities which we have reproduced hereinbefore if one has something substantial, relevant or material to do with the case he is disqualified. In the case at hand, we find that the Technical Members had compiled the documents, adopted the methodology, made

A B C D E F G H

A observations, drawn inferences and expressed the view and, above all, they had prepared the report which has been brought on record as a document. To say, they had not played any role would tantamount to blinking at reality. In our considered view, their inclusion as the Technical Members is not legally
B permissible. It is so as the said respondent is bound to be prejudiced. In this context, we may reproduce a passage from *State v. N.S. Gnaneswaran*[35]*:*

> "**12.** The issue also requires to be examined on the touchstone of doctrine of prejudice. Thus, unless in a given
C situation, the aggrieved makes out a case of prejudice or injustice, some infraction of law would not vitiate the order/ enquiry/result. **In judging a question of prejudice, the court must act with a broad vision and look to the substance and not to technicalities.** (Vide: *Jankinath*
D *Sarangi* v. *State of Orissa*[36], *State of U.P.* v. *Shatrughan Lal*[37], *State of A.P.* v. *Thakkidiram Reddy*[38] and *Debotosh Pal Choudhury* v. *Punjab National Bank*[39].)"

52. Even applying the rigorous substantive test, we find that
E a case of prejudice comes into full play in the case at hand.

53. Presently we shall advert to the inclusion of Brig. N.S. Ahamed. In the earlier order dated 8.10.2010 the tribunal had referred to Ext. XLI to be made available to the respondent. The learned senior counsel for the appellants has filed the Ext. XLI
F before us. The same has been prepared by the Presiding Officer. It reads as follows: -

> "On sample perusal of file No. 2751/Gen/18/ Cont of Central Ordnance Depot, Mumbai, it is observed by the

G

35. (2013) 3 SCC 594.

36. (1969) 3 SCC 392.

37. (1998) 6 SCC 651.

38. (1998) 6 SCC 554.

H 39. (2002) 8 SCC 68.

Court that recommended distribution of stores has been fwd to DGOS by Central Ordnance Depot, Mumbai. The approval is accorded by DGOS which may or may not be the same as recommended by Central Ordnance Depot, Mumbai. A photocopy of Central Ordnance Depot letter No. 2754/Gen/Cont. Dt. 04 Aug 2008 found from DGOS and approval letter of the same IHQ. MOD, MGO letter No. PC 2 to 13357/R1 001519/ Fin/OS-46 dt. 06 Aug 09, this approval is only for issue of items and not dispatch is enclosed as Exhibit XLI."

54. To the said observation/report two letters have been annexed – one written by Rishab Paliwal, Capt., Control Officer, for Commandant, and another by P. Krishna Kumar, SCSO, Jt Dir OS-4E, for Dir Gen Ord Services. On a scrutiny of the same it cannot be said that it pertained to the proceedings before the COI. In fact, on earlier occasion the tribunal had taken exception to the fact that the said documents were not given to the 1st respondent. No doubt, thereafter he had been allowed to peruse the same but he is entitled to explain the same, more so, when a view has been expressed in the document. Mr. Kuhad would contend that the Summary of Evidence had commenced and a number of witnesses, including the Technical Members, have been examined and they have also been cross-examined by the 1st respondent. Be it noted, this Court, while issuing notice and directing stay of the proceedings of the order passed by the tribunal had permitted the appellants to proceed and further proceedings were made subject to the result of the final decision of the appeal. We are compelled to repeat here that once a COI has been constituted to inquire into the allegations relating to a person's character and military reputation subject to the Act it should not be done by the persons who have expressed their views in writing behind the back of the person and assume the role of the recommending authority which is statutory in nature to take disciplinary action. Law does not countenance the same. In the present case it is irrefragably clear that the

A recommendation of the COI was the sole basis on which the disciplinary action has been initiated. Nothing else had come on record as observed by the tribunal on earlier occasion as well as by the impugned order and the said finding is unassailable. That being the position, we find in fitness of things, B the Presiding Officer should have recused himself to preside over the COI. However, we must make it clear that on earlier occasion the tribunal had not quashed the entire proceedings and the same was not challenged by either of the parties. Therefore, the Additional COI which has been directed by the C tribunal by the impugned judgment, shall only function as an Additional COI and deal with the documents which were produced earlier before the tribunal in a tabular chart to which we have referred to hereinbefore.

55. At this juncture, we think it is necessary to observe that D the respondent No. 1 at one point of time had filed a long list of witnesses. It is to be borne in mind that on the earlier occasion the tribunal permitted for examination or cross-examination of witnesses who had something to do with the documents. The Additional COI shall keep that in view so that E there is no procrastination of the proceedings at the behest of the delinquent officer, for natural justice has also its own limitations. It can be allowed to become an unruly horse.

56. Before parting with the case, we think and we are F constrained to think that we should say something about the order of the tribunal. Section 14 of the Armed Forces Tribunal Act, 2007 occurs in Chapter III of the said Act and deals with jurisdiction, powers and authority of the tribunal in service matters. Under sub-section (5) of Section 14 the tribunal is G required to decide both questions of law and facts that may be raised before it. The respondent had approached the tribunal under Section 14 of the said Act. In the Statement of Objects and Reasons it has been spelt out for constituting an Armed Forces Tribunal for adjudication of complaints and disputes regarding service matters and appeals arising out of the H

verdicts of the court martial to provide for quicker and less expensive justice to the members of the said armed forces of the Union. The Preamble of the Act provides for adjudication or trial by the tribunal of justice anu compliance in respect of many a matter. As we find the tribunal has been conferred powers to deal with the cases in promptitude. Promptitude does not ostracize or drives away the apposite exposition of facts and necessary ratiocination. A seemly depiction of factual score, succinct analysis of facts and law, pertinent and cogent reasoning in support of the view expressed having due regard to the rational methodology, in our considered opinion, are imperative. We have said so as we find that the tribunal by the impugned order has not adverted to the necessitous facts. We say so despite sustaining the verdict.

57. Ex consequenti, the appeal, being sans merit, stands dismissed leaving the parties to bear their own costs.

Bibhuti Bhushan Bose

Appeal dismissed.