IN COURT OF SPECIAL JUDGE UNDER MCOC ACT, 1999 AND NIA ACT, 2008 FOR GREATER MUMBAI, AT MUMBAI

COMMON ORDER BELOW EXHIBIT 1 AND DISCHARGE APPLICATIONS AT EXH.4137 (A-1), EXH. 3541 (A-4), EXH.1593 (A-5), EXH.3756 (A-6), EXH.4683 (A-7), EXH.4247 & EXH.4698 (A-9), EXH.4407 & EXH.4711 (A-10) AFTER HEARING UNDER SECTIONS 227 & 228 OF THE CODE OF CRIMINAL PROCEDURE

IN

MCOC SPECIAL CASE NO.01 OF 2009

ALONGWITH

MCOC SPECIAL CASE NO.08 OF 2011

ALONG WITH

N.I.A SPECIAL CASE NO.01 OF 2016

The State of Maharashtra
(Through, Anti Terrorist Squad)
AND
National Investigation Agency (NIA) ... Prosecution

Versus

Pragyasingh Chandrapalsingh Thakur
@ Swami Purna Chetnanand Giri, and others … Accused

EXH.4137

Sadhwi Pragya Singh Chandrapal
Singh Thakur .. Applicant/accused No.1

Versus

The State of Maharashtra
Through National Investigation Agency ..Respondents

EXH. 3541

Major Ramesh Upadhyay .. Applicant/accused No.04

Versus

State (Through N.I.A) .. Respondent

EXH.1593

Sameer Sharad Kulkarni ..Applicant/accused No.05

Versus

State of Maharashtra (Through
National Investigating Agency, Mumbai) ..Complainant

EXH.3756

Ajay Eknath Rahirkar .. Applicant/accused No.6
Versus
State of Maharashtra .. Respondent

EXH.4683

Rakesh S/o Dattatray Dhawde .. Applicant/accused No.7
Versus
State of Maharashtra .. Opponent

EXH.4247 & EXH.4698

Ltd. Col. Prasad Purohit ... Applicant/accused No.9
Versus
National Investigating Agency ... Respondent

EXH.4407 & EXH.4711

Sudhakar Udaybhan Dhar Dwivedi @
Swamy Amrutanand Dev Tirth .. Applicant/accused No.10
Versus
National Investigation Agency .. Respondent/
Ori. Complainant

CORAM : S.D.Tekale, Special Judge,
(Under MCOC & NIA Act).
(C.R.No.26)

DATE : 27th December, 2017.

SPP Avinash Rasal, for NIA/Respondent.
Adv. J. P. Mishra & Adv. Prashant Maggu, for applicants/accd.Nos.1 to 3
Adv. Pasbola, for applicant/accused No.4
Sameer Kulkarni, applicant/accused No.5 in person
Adv. Nitin Apte, for applicant/accused No.6
Adv. Sanjeev Punalekar for applicants/accused Nos.7,8,11 &12
Adv. Shrikant Shivde, for applicant/accused No.9
Adv. Ranjeet Sangle, for applicant/accused No.10

O R D E R

1. Brief facts concerning to these applications can be summarized as under:

In all 12 accused persons along with 2 absconding accused persons are charge-sheeted by Anti Terrorist Squad (ATS), Mumbai, under Sections 302, 307, 326, 324, 427, 153-A and 120-B of the Indian Penal Code read with Sections 3, 4, 5, 6 of the Explosive Substance Act, 1908 read with Sections 3, 5 and 25 of Arms Act 1959 read with Sections 15, 16, 17, 18, 20 and 23 of Unlawful Activities (Prevention) Act, 1967 read with Sections 3(1)(i), 3(1)(ii),3(2), 3(4), 3(5) of the Maharashtra Control of Organized Crime Act, 1999.

2. On 29.09.2008 at about 9.35 p.m. bomb explosion took place at Malegaon, District Nasik, opposite Shakil Goods Transport Company between Anjuman Chowk and Bhiku Chowk. The said blast was caused by explosive device fitted in LML Freedom Motor Cycle bearing registration No.MH-15-P-4572. As a result of the said explosion six persons were killed and about 101 persons had received injuries of various nature. Damage to the property was also caused.

3. Initially on 30.09.2008 at about 3.00 a.m. offence came to be registered under Crime No.130/2008 in Azad Nagar Police Station, Malegaon under Sections 302, 307, 326, 324, 427, 153-A and 120-B of the Indian Penal Code ("IPC" for short) read with Sections 3, 4, 5 and 6 of Indian Explosive Substance Act read with Sections 3, 5 and 25 of Arms Act 1959.

4. During the course of investigation forensic laboratory Nasik opined that exhibits collected from the place of offence contained cyclonite (RDX) and Ammonium Nitrate which were used as high explosive. It was also transpired that registration number of LML freedom motorcycle used in the crime was bogus and chassis and engine number of the said motorcycle were found to be erased.

5. On 18.10.2008 the provisions of Sections 15, 16, 17,18, 20 and 23 of the Unlawful Activities (Prevention) Act, 1967 (Amended) 2004 (hereinafter referred to as "UAP" Act) were invoked and investigation of this case was entrusted to Dy.SP (Headquarter) Nasik Rural as per the provisions of UAP Act. Thereafter on 26.10.2008 ACP and Chief Investigating Officer, ATS, Mumbai Mohan Kulkarni took the charge of the investigation. On 29.11.2008, provisions of the Maharashtra Control of Organized Crime Act 1999 (hereinafter referred to as "MCOC" Act) were added. Investigating Officer of the ATS investigated the matter and initially submitted the charge-sheet against accused Nos.1 to 11 on 20.01.2009. Thereafter ATS arrested accused No.12 and submitted the supplementary charge sheet against him on 21.04.2011. Ramchandra Kalsangara and Sandeep Dange are shown as absconding in both the charge-sheets.

6. During the course of investigation original Chassis number and engine number of LML freedom motorcycle were found to be erased, but FSL Nasik successfully restored the original engine number of the said motorcycle. It was found that original registration number of the said motor cycle was GJ-05-BR-1920. It was also transpired that accused No.1 Pragyasingh Thakur @ Sadhvi is the registered owner of the said vehicle. Accordingly, she was arrested on 23.10.2008 at

Mumbai alongwith co-accused Nos.2 and 3 i.e. Shivnarayan G. Kalsangara and Sham B. Sahu. According to prosecution case, accused No.9 Prasad Purohit is serving as Army Officer and was associated with Military Intelligence and Interior Terrorism (Insurgency Activities). Accused Prasad Purohit floated Abhinav Bharat Organization in the year 2007 inspite of being serving as a Commissioned Officer in Armed Forces against service rules. According to the prosecution, co-accused Ramesh Upadhyaya, Swami A.D. Tirth, Sameer Kulkarni, Ajay Rahirkar, Sudhakar Chaturvedi and other co-accused as well as some witnesses were members of the said Abhinav Bharat Organization.

7. It is the case of the prosecution that the object of the accused persons was to turn India into Hindu Rashtra called as "Aryavart". They wanted to form Government in exile. They were dissatisfied with the Constitution of India and had wanted to prepare their own constitution. They had planned to train the persons for guerrilla war. They had also decided to kill the persons opposing their object of formation of Hindu Rashtra which is against the secular policy of the Government. According to the prosecution most of the accused persons time to time held meetings to discuss various aspects for achieving their goals.

As per the case of ATS in one of the meetings at Bhopal discussion to take revenge against Muslims in Malegaon by exploding the bomb took place and accused No.1 Pragyasingh Thakur shouldered the responsibility of proving persons to cause bomb-blast in order to take revenge of Jihadi activities by Mohamedian community. According to prosecution, accused No.10 Swami A.D. Tirth recorded the conversation in some of the meetings.

8. It is the case of ATS that said Abhinav Bharat is the Organized Crime Syndicate and its members were active since year 2003. According to ATS, all accused persons along with absconding accused entered into criminal conspiracy between January 2008 to 23rd October, 2008 with the common object and with intention to strike terror in the minds of people by exploding bomb at Malegaon and overawe the Government. According to ATS, accused No.9 Prasad Purohit had brought RDX with him from Kashmir after completing his posting and he had kept the same in his cupboard at his house.

9. Case of the ATS further shows that traces of RDX were also found in the house of accused No.11 Sudhakar Onkarnath Chaturvedi @ Chanakya Sudhakar at Devlali Camp Nasik. Case of the ATS shows that the Bomb was assembled in the house of accused No.11 Sudhakar Onkarnath Chaturvedi. As per the case of ATS, accused No.12 Pravin Takkalki and absconding accused i.e. Ramji @ Ramchandra Gopalsingh Kalsangra, Sandip Dange in pursuance of the conspiracy hatched by all accused persons planted and exploded the explosive device by using LML Freedom Motor Cycle. As per the case of ATS, absconding accused Ramjii @ Ramchandra Gopalsingh Kalsangra and Sandeep Dange are the men of accused No.1 Pragyasingh Thakur and they acted at her instance. As per the case of ATS, accused No.1 Pragyasingh Thakur with full knowledge provided her motorcycle for causing bomb-blast.

10. As per prosecution case bomb explosion was caused in the holy month of Ramzan in crowded place having Muslim dominating area. Holy festival of Navratri was to commence on 30.09.2008. According to the prosecution this bomb blast was caused with intent to strike terror in the people and to create communal rift. After

completion of the investigation ATS, Mumbai filed the chargesheet on 20.01.2009. At this stage it will appropriate to mention that after filing the charge-sheet by A.T.S. Mumbai, investigation was started in this matter by National Investigation Agency (NIA), New Delhgi, as per the order of the Government of India dated 01.04.2011. Accordingly, on 13.04.2011, NIA re-registered the offence in respect of the said incident as Crime No.05/2011.

11. It will appropriate to mention that while deciding the bail application my learned predecessor on 31.07.2009 discharged all accused persons from the offences under MCOC Act and directed to transfer the case to the Regular Court at Nasik as per Section 11 of the MCOC Act. The State being an aggrieved by the said order filed Appeal bearing No.866/2009 before Hon'ble High Court under Section 12 of the MCOC Act. The said appeal was allowed by the Division Bench of Hon'ble High Court by order dated 19.07.2010. The Hon'ble High Court set aside the order of my learned Predecessor dated 31.07.2009. Case was restored to the file of this Court under MCOC Act for the decision on merit. Accused persons challenged the order of Division Bench of the Hon'ble Bombay High Court dated 19.07.2010 in Appeal No.866/2009 before the Hon'ble Apex Court.

12. The Hon'ble Apex Court by common order dated 15.04.2015 in Criminal Appeal No.1969-1970 of 2010 decided all appeals raised by the accused persons regarding applicability of MCOC Act in present case. Copy of the said order of the Hon’ble Apex Court is at Exh.2377. Hon'ble Apex Court confirmed the order of Hon'ble Bombay High Court dated 19.07.2010 but raised the dout regarding applicability of the MCOC against remaining accused persons except

accused No.7 Rakesh Dhawde. But, as investigation of NIA was in progress did not discharge accsued persons from the charges under the MCOC Act.

13. On 13.05.2016, NIA submitted the supplementary report under Section 173(8) of the Code of Criminal Procedure ("the Code" for short). During the course of further investigation, NIA transpired that accused No.1 Pragyasingh Thakur, accused No.2 Shivnarayan Kalsangara, accused No.3 Sham Sahu, accused No.12 Pravin Takklaki have no concern with this offence and Investigating officer of NIA exonerated them as no case is made out against them. Investigating officer of NIA also dropped the charges of MCOC against all accused persons and Investiganting Officer of NIA concluded that no offence under MCOC Act is attracted in this case.

14. During the course of investigation Investigating officer of NIA had arresed one Lokesh Sharma as well as Dhansingh but Investigating officer did not transpire their involvement in this offence and filed report under section 169 of the Code of Criminal Procedure. Accordingly above two accused i.e. Lokesh Sharma and Dhansingh are released.

15. Investigating officer of NIA also found involvement of absconding accused Ramchandra Kalsangara and Sandeep Dange in present crime but NIA also could not arrest them and they are shown as absconding. Investigating officer of NIA also found that accused No.8 Jagdish Mhatre is not involved in commission of terrorist act. NIA has filed the report against him only under sections 3, 5 r/w section 25 of the Arms Act.

16. At this stage it will appropriate to mention that except accused No.7 Rakesh Dhawde all other accused persons are on bail.

Applications filed by the accused persons :

17. Accused No.1 Pragyasingh Thakur @ Sadhvi filed discharge application at Exh.4137 mainly on following grounds;

According to her in further investigation under section 173(8) of the CrPC NIA has exonerated her from all charges. There is no sufficient material on record to show that she is the conspirator. Investigation papers show that already she had parted with the possession of LML Freedom motorcycle long back prior to the incident. She was present in the public meeting at Bhopal only. If anything is uttered by her due to anger it does not amount to conspiracy. PW-79, PW-112 and PW-55 have retracted their previous statement before ATS. ATS has recorded the statements of witnesses by torturing them physically and mentally. She prayed for discharge from all charges.

18. Prosecution filed reply at Exh.4137-A and gave no objection to discharge the accused No.1 Pragyasingh Thakur @ Sadhvi.

19. Accused No.4 Major Ramesh Upadhyay filed discharge application at Exh.3541 and prayed for dropping the charges under the U.A.P. Act for want of valid sanction. According to him without following mandatory provision under sub section 2 of Section 45 of the U.A.P. Act sanction is granted hence charges under the provisions of U.A.P. Act cannot be framed. During the course of argument he has also prayed for discharge from other charges also.

20. This application is resisted by the prosecution by filing say on application itself mainly on the ground already this point is decided by the Hon'ble Bombay High Court and now, it cannot be raised.

21. Accused No.5 Sameer Kulkarni filed discharge application at Exh.1593 from all charges. According to him he has not committed any offence and he is liable to be discharge.

22. This application is resisted by the prosecution by filling say at Exh.1593-A

23. Accused No.6 filed discharge application at Exh.3756 and has prayed for discharge from all offences. According to him he is the businessman and was working as a Treasurer of Abhivan Bharat Trust at the time of alleged offence. Said Trust is duly registered under Bombay Charitable Trust Act. Trustees of the said Trust had no criminal history.

24. Prosecution has intentionally and falsely added the charges under the MCOC Act. After arrest of accused No.7 Rakesh Dhawde in this matter he (A-7) was falsely implicated in previous cases at Parbhani and Jalana so as to invoke the provisions of MCOC Act. Accused No.7 is acquitted in those cases. Provisions of MCOC Act are not applicable in this matter.

25. He is innocent and has no role in the alleged offence. There is absolutely no material against him to show his nexus with crime or to show that the trust money paid by him to the accused persons has any concern with alleged crime. No specific role is attributed to him. Prosecution has falsely implicated him in this matter.

26. By filing say on the application itself prosecution has resisted this application.

27. Accused No.7 Rakesh Dhawde filed discharge application at Exh.4683 and prayed for discharge from the offences under the MCOC Act mainly on following grounds :

That accused is not the member of Abhinav Bharat and was not present in any meeting. No any specific role is attributed to the accused. NIA has exonerated all accused persons from charges of the MCOC Act including this accused. He was falsely implicated after his arrest in this case in previous cases at Jalana and Parbhani. In fact ingredients of offences under the MCOC Act do not attract in present case.

28. Prosecution filed say at Exh.4683-A and alleged that as per investigation of NIA provisions under the MCOC Act are not attracted against any accused in this case.

29. Accused No.9 Lt. Col. Prasad Purohit filed first application for discharge at Exh.4247 from the offences under the MCOC Act and U.A.P. Act mainly on following grounds;

According to him there is no material to show that accused are the members of Organized Crime Syndicate. Only with a view to add the charges of MCOC, accused No.7 Rakesh Dhawde was falsely implicated in previous cases at Jalana and Parbhani at the instances of Top officers of the Police. Now, NIA has also come with the case that provisions under the MCOC Act are not attracted against any of the accused persons.

30. According to him due to non compliance of mandatory provision under sub section 2 of section 45 of the UAP Act sanction granted under this Act is invalid. He was present in the alleged conspiracy meetings as a part of his duty being military intelligence officer to generate the counter intelligence. Material on record shows that he had informed about the meeting at Faridabad in advance to his superior and he had also given inputs of the said meeting to his superior officers.

Contention of ATS regarding findings of traces of RDX in the house of accused No.11 Sudhakar Chaturvedi is false. This evidence is fabricated by the ATS and NIA has also arrived at the same finding in its investigation. There is absolutely no material against him.

31. By filing reply at Exh.4247-A prosecution resisted this application and prayed to reject the same.

32. Accused No.9 then filed one more application at Exh.4698 and prayed for discharge from other offences also almost on the same grounds and ground that there is no sufficient material to attract those offences also.

33. Prosecution by filing say at Exh.4698-A resisted this application also and prayed to reject the same.

34. Accused No.10 Swami A.D. Tirth by filing application at Exh.4407 prayed for discharge mainly on following grounds:

According to him investigation papers show that police had wanted to arrest one Dayanand Pandye but they have falsely implicated him in this matter though his name is not Dayanand Pandye. According

to him theory of involvement of motorcycle of accused No.1 Prgyasingh Thakur @ Sadhvi in this crime is disbelieved by Hon'ble High Court while deciding bail application of accused No.1. Seizure of articles including the laptop is doubtful. Alleged retrieved material from his laptop by FSL, Nashik in the form of CD's and DVD's cannot be relied on for want of certificate under section 65-B of the Evidence Act. Integrity of the said material is doubtful.

35. There is absolutely no material against him about his involvement in crime. Provisions under the MCOC Act and U.A.P. Act do not attracted.

36. Prosecution by filing say at Exh.4407-A resisted this application and prayed to reject the same.

37. This accused No.10 again filed application at Exh.4711 alleging that his previous application at Exh.4407 be also extended for discharge under sections 302 & 307 of the Indian Penal Code.

38. This application is resisted by the prosecution by filing say on the application itself.

39. Accused No.2, No.3, No.8, No.11 Sudhakar Chatruvedi and No.12 Pravin Takkalki have not filed discharge applications separately but during the course of argument they prayed for discharge from all the offences.

40. At this stage it will appropriate to mention that all above applications are heard along with the hearing under sections 227 and

228 of the Code of Criminal Procedure. To avoid repetition of discussion and considering the fact that accused persons are facing the charge of conspiracy I proceed to pass this common order.

41. Heard learned SPP Shri Avinash Rasal for the prosecution also heard Adv. Shri J. P. Mishra and Adv. Shri Prashant Maggu for accused Nos.1 to 3, Adv. Shri Pasbola for accused No.4, Adv. Shri Apte for accused No.6, Adv. Shri Punalkar for accused No.7, 8, 11 & 12, Adv. Shri Shrikant Shivde for accused No.9 and Adv. Shri Ranjeet Sangle for accused No.10. Accused No.5 has not engaged any advocate and he refused to have legal aid as per pursis at Exh.2721. Accused No.5 heard in person. Accused No.9 also filed written argument at Exh.4750 and learned SPP filed written argument at Exh.4697

Section 227 & 228 of the Code of Criminal Procedure :

42. During the course of argument advocates of accused persons as well as accused No.5 in person relied on various authorities in support of their respective argument on the point of scope of section 227 & 228 of the CrPC. Advocates of accused No.1 Pragyasingh Thakur @ Sadhvi on this point relied on the authorities reported in (A) **1982 CRI. L.J. 1025, Dr. Dattatraya Narayan Samant Vs. State of Maharashtra**, (B) **1977 Supreme Court Cases (Cri) 404, State of Karnataka Vs. L. Muniswamy & Others**, (C) **1979 Supreme Court Cases (Cri) 609, Union of India Vs. Prafulla Kumar Samal and Another**, (D) **1990 CRI. L. J. 1869, Niranjan Singh Karam Singh Punjabi Vs. Jitendra Bhimraj Bijja and others**, and (E) **2017 ALL MR (Cri) 1610 (Bombay High Court), Sumeet Ganpatrao Bachewar Vs. The State of Maharashtra & Anr.**

43. Accused No.5 Sameer Kulkarni on this point relied on the authorities reported in (A) **2010 (9) Supreme Court Cases 368, Sajjankumar Vs. Central Bureau of Investigation,** (B) **1989 (1) Supreme Court Cases 715, Stree Atyachar Virodhi Parishad : State of Maharashtra Vs. Dilip Nathumal Chordia**, and (C) **CRL. R. C. No.1299/2010 (Madras High Court), Jayarama Reddiar Jayaram Vs. Station House Officer, Gingee Police Station,Gingee.**

44. Advocate of accused No.9 Lt. Col. Prasad Purohit on this point relied on the authorities reported in (A) **AIR 1990 Supreme Court 1962, Niranjan Singh Karam Singh Punjabi Vs. Jitendra Bhimraj Bijja and others**, (B) **(1994) 4 Supreme Court Cases 602, Hitendra Vishnu Thakur and Others Vs. State of Maharashtra and Others**, (C) **2007 (1) Bom.C.R. (Cri) 853 (Supreme Court), State of Maharashtra & Ors. Vs. Lalit Somadatta Nagpal and Anr.**, and (D) **2015 (7) Supreme Court Cases 440, Prasad Shrikant Purohit Vs. State of Maharashtra and Another**.

45. Learned SPP also on this point relied on the authorities reported in (A) **AIR 2000 Supreme Court 665, State of M.P. Vs. S. B. Johari and others**, (B) **2013 CRI. L.J. 331, Supreme Court Shoraj Singh Ahlawat & Ors. Vs. State of U.P. and Anr.**, (C) **1999 (1) MH. L. J. 679, Manoj Jaswantrai Sheth Vs. Central Bureau of Investigation**, and (D) **Judgments Today 1989 (1) S.C. 247, Stree Atyachar Virodhi Parishad : State of Maharashtra Vs. Dilip Nathumal Chordia & Anr**.

46. I have gone through all above authorities. Hon'ble Apex Court and Hon'ble High Court have laid down various principles and guide-lines after considering the scope of Sections 227 and 228 of the

CrPC. To avoid repetition it will appropriate to mention the summary of law on this point laid down by the Hon'ble Apex Court in the case of ***Sajjan Kumar Vs. CBI (cited supra)*** after considering the various authorities. In this case in para 17 of the judgment Hon'ble Apex Court observed that :

> **17.** Exercise of jurisdiction under Sections 227 & 228 of Cr.P.C. On consideration of the authorities about the scope of Section 227 and 228 of the Code, the following principles emerge:-
>
> i) The Judge while considering the question of framing the charges under Section 227 of the Cr.P.C. has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.
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> ii) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing a charge and proceeding with the trial.
>
> iii) The Court cannot act merely as a Post Office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court and any basic infirmities etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

iv) If on the basis of the material on record, the Court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the Court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

vi) At the stage of Sections 227 and 228, the Court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value discloses the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal.

47. During the course of argument advocate of accused No.9 submitted that above principles are applicable to the general cases under the Indian Penal Code. According to him, accused persons are

charge-sheeted for the offences under the MCOC Act and U.A.P. Act having draconian provisions and enhanced punishment is provided under these Acts. According to him, considering this fact extra care is required tobe taken by the Court. In support of his submission he relied on the observations of Hon'ble Apex Court in the cases of ***Hitendra Thakur Vs. State of Maharashtra (cited supra)***. In this case in para 14 of the judgment after considering the provisions of TADA it is observed by Hon'ble Apex Court that :

> **14 :** "…. The stringent provisions of the Act coupled with the enhanced punishment prescribed for the offences under the Act make the task of the Designated Court even more onerous, because the graver the offence, greater should be the care taken to see that the offence must strictly fall within the four corners of the Act before a charge is framed against an accused person ...."

48. The Hon'ble Apex Court considered the case of ***Niranjan Singh Punjabi (cited supra)*** and accepted the views expressed in the said case while considering the scope of sections 227 & 228 of the Code. In case of ***Niranjan Singh Punjabi*** also accused persons were charge-sheeted for the offences under the TADA and other acts. After considering the various authorities Hon'ble Apex Court in para No.8 of the judgment observed that :

> **8.** ….Therefore, 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 cover by the express language of the statute are not roped in by stretching the language of the law. But that does not mean that the judicial officer called upon to decide whether or not a case for framing a charge under the Act is made out should adopt a negative attitude. He should frame a charge if the prosecution shows that the material placed on record and the

documents relied on give rise to a strong suspicion of the accused having committed the crime alleged against him.....”

49. On the basis of all above principles laid by the Hon'ble Apex Court conclusion can be drawn that when accused are charge-sheeted for the offences providing stringent and enhanced punishment, extra care is to be taken to see that whether accused are roped in by the prosecution by stretching the language of the provision and if prosecution shows that the material on record gives rise to strong suspicion of the accused having committed the crime then charge can be framed against the accused.

50. Keeping in mind all above principles now it has to be seen whether there is sufficient material on record to frame the charge against the accused persons.

Whether material other than produced by the prosecution can be considered :

51. Prior to considering the material on record it has to be seen that which material can be taken into consideration by the Court at this stage. During the course of argument it was submitted that participation of accused No.9 Lt. Col. Prasad Purohit in various meetings alleged to be conspiracy meetings was in discharge of his duty. According to advocate of accused, accused No.9 is serving as a military intelligence officer. During his service tenure he had infiltrated the SIMI. He was having excellence service record. According to him, he had participated in the alleged meetings with a view to generate the counter intelligence. According to him, he had informed to his superiors in advance about the meeting at Faridabad. Not only this after

completing this meeting he had also informed his superiors about the details of the said meeting on phone. According to him, statement of PW-121 shows this fact.

52. Advocate of accused No.9 wants to rely upon the documents called from Ministry of Defence (MoD) and documents relating to the Court of Enquiry called from concern department of the military at the instance of accused No.9. Relying on above documents he submitted that accused No.9 Lt. Col. Prasad Purohit was discharging his duty by participating in the meetings. Advocate of accused No.9 submitted that charge-sheet filed by the NIA shows that investigating officer of NIA had collected the documents of Court of Enquiry against the accused No.9. According to him, as those documents support the case of accused No.9, intentionally, Investigating officer has not filed those documents along with the charge-sheet. But according to him as investigating officer has referred those documents during the course of investigation now documents called from concern department of military can be said as a part of the charge-sheet and can be relied on. In support of his submission that the material other than produced by the prosecution along with the charge-sheet having impeachable character can be considered at this stage, Learned advocate of accused No.9 relied on the authorities reported in (A) **(2013) 9 Supreme Court Cases 293, Prashant Bharti Vs. State (NCT of Delhi)**, (B) **(2011) 3 Supreme Court Cases 351, Harshendra Kumar D. Vs. Rebatilata Koley**, and (C) **(2013) 3 Supreme Court Cases 330, Rajiv Thapar & Others Vs. Madan Lal Kapoor**.

53. All accused persons have also relied on certain documents obtained under the provisions of Right to Information Act from various

authorities. They have also relied upon the documents called from Secretary of Government of Maharashtra, Home Department and Director of Prosecution.

54. As against this learned SPP submitted that at the stage of framing of charge the material produced by the prosecution along with the charge-sheet only is required to be considered and no other material can be taken into consideration. In support of his submission learned SPP relied on the judgment of Division Bench of Hon'ble Bombay High Court dated 25.04.2017 in Criminal Appeal No.664 of 2016 while rejecting the bail application of accused No.9 Lt. Col. Prasad Purohit. According to him, while rejecting the bail Division Bench of Hon'ble Bombay High Court did not consider the documents filed by MoD and documents filed in Court of Enquiry. Learned SPP also relied on the authorities reported in **AIR 2005 Supreme Court 359, State of Orissa Vs. Debendra Nath Padhi**, and **(2008) 5 Supreme Court Cases 113, Hem Chand Vs. State of Jharkhand**.

55. In reply to this submission of learned SPP, advocate of accused No.9 submitted that Hon'ble Apex Court has set aside the judgment of Division Bench of Hon'ble Bombay High Court dated 25.04.2017 and granted bail to the accused No.9. According to him, while granting bail Hon'ble Apex Court has considered the documents of Court of Enquiry and Documents filed by MoD.

56. It is true that while rejecting the bail application of accused No.9 Hon'ble Bombay High Court did not consider these documents but Hon'ble Apex Court while granting bail to the accused No.9 considered the said documents but still question remains as to whether at the stage

of framing of charge can these documents be considered by the Court in view of three Judge bench decision of Hon'ble Apex Court on this direct point in case of ***Debendra Nath Padhi (cited supra)***. In this case question before Hon'ble Apex Court was, "***Can the Trial Court at the time of framing of charge consider material filed by the accused***". After considering the scope of sections 227 & 228 of the Code of Criminal Procedure and various authorities Hon'ble Apex Court in Para No.18 observed that :

> 18. "...The expression 'hearing the submissions of the accused' cannot mean opportunity to file material to be granted to the accused and thereby changing the settled law. At the stage of framing of charge hearing the submissions of the accused has to be confined to the material produced by the police...".

57. In case of ***Hem Chand Vs. State of Jharkhand (cited supra)*** charge-sheet was filed by the Central Bureau of Investigation. Accused had obtained the copies of certain documents filed by the prosecution along with the charge-sheet. Accused filed the discharge application and submitted the copies of those documents with his application. Prosecution objected to take into consideration those documents at that stage. It was argued on behalf of accused that those documents were seized by the police from the house of the accused hence accused can rely upon it. But Hon'ble Apex Court refused to consider these documents and it is observed in para No.10 that :

> 10. ".....It is one thing to say that on the basis of the admitted documents, the appellant was in a position to show that the charges could not have been framed against him, but it is another thing to say that for the said purpose he could rely

upon some documents whereupon the prosecution would not rely upon....".

58. So far as the authorities relied by Advocate of accused No.9 Lt. Col. Prasad Purohit are concerned it is pertinent to note that all these judgments are in respect of Petitions filed under Section 482 of the CrPC. In case of ***Prashant Bharti (cited supra)*** charge was framed against the accused by the Trial Court. Hon'ble High Court had dismissed the revision petition filed against the order of the Trial Court. Then under Section 482 of the CrPC petition was filed before Hon'ble Apex Court by the complainant/informant herself for quashing the FIR. While considering this prayer it is held that the documents filed by the accused persons can be considered by invoking inherent jurisdiction to see that defence is based on sound, reasonable, and indubitable facts and would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution.

59. In case of ***Hareshendra Kumar D. Vs. Rebatilala Koley (cited supra)*** also Hon'ble Apex Court held that in order to prevent injustice or abuse of process or to promote justice, the High Court may look into the materials which have significant bearing on the matter and which are beyond suspicion or doubt or which are in the nature of public documents and are uncontroverted under inherent powers of section 482 of the CrPC.

60. In case of **Rajiv Thapar Vs. Madan Lal Kapoor (cited supra)**, Hon'ble Apex Court laid down the stepwise enquiry for quashing the proceeding under section 482 of CrPC and laid down the guidelines when defence material can be relied on to quash the proceeding.

61. When this matter was fixed for order, on 19.12.2017 accused No.9 took this matter on board and filed the copy of the judgment of Hon'ble Apex Court delivered on 07.12.2017 in ***Criminal Appeal No.2114 of 2017 (arising out of Special Leave Petition (crl.) No. 8279 of 2016), Nitya Dharmanandra @ K. Lenin & Anr. Vs. Sri Gopal Sheelum Reddy also known as Nithya Bhaktananda and Anr***. It is submitted to consider the law laid down in the said authority. I called the say of learned SPP and as per his request matter was fixed for the argument on this authority on 21.12.2017.

62. On 21.12.2017, I heard the arguments of learned SPP as well as advocate of accused persons. It is submitted by the learned SPP that the said judgment is of Two Judge Bench but the law laid down in ***Debendra Padhi's case*** is of Three Judge Bench. According to him, already documents in Court of Enquiry are called under Section 91 of CrPC but these documents can be used by the accused for his defence at the time of trial and not at this stage. He submitted that though Investigating officer of NIA collected the documents of Court of Enquiry during the course of investigation, he also received the letter dated 29.03.2011 issued to Additional Director General of Police by Brigadier Gautam Deb, SM, VSM, DDGMI (B) (NIA Charge-sheet, Annexure B, Page 23). According to him, this letter shows that accused No.9 did not communicate officially to his superior officers pertaining to any terrorist related inputs or information about the meetings of Abhinav Bharat. Learned SPP submitted that in view of the said letter Investigating officer of NIA found that acts done by the accused No.9 were not in discharge of his official duty, hence documents in Court of Enquiry are not filed along with the charge-sheet.

63. The authorities relied by the advocate of accused No.9 except in case of ***Nitya Dharmananda (cited supra)*** are relating to the inherent powers of Hon'ble Apex Court and Hon'ble High Court under section 482 of the CrPC hence certainly are not useful to the accused No.9. For the controversy between the parties judgment in case of ***Debendra Nath Padhi and Hem Chand (cited supra)*** relied by learned SPP and now, judgment in case of ***Nitya Dharmananda*** are required to be considered. In case of ***Debendra Nath Padhi*** it is held that at the stage of framing of charge hearing of accused is required to be confined to the material produced by the police. In case of ***Hem Chand*** it is also held that at this stage material relied by the prosecution only is to be considered. But now in recent judgment of ***Nitya Dharmananda's case*** it is held by Hon'ble Apex Court that if the court is satisfied that there is material of sterling quality which has been withheld by the investigator or prosecutor, the Court is not debarred from summoning or relying upon the same even if such document is not part of the charge-sheet at the stage of framing of charge. Keeping in mind these principles now it is necessary to see as to whether there is a ground to presume that accused are involved in this crime.

Effects of Two Investigation Reports :

64. In present case initially investigation was carried out by the ATS. After completion of the investigation ATS submitted the charge-sheet against the accused Nos.1 to 11 on 20.01.2009. Then on 21.04.2011, ATS also submitted the supplementary charge-sheet against accused No.12. As per the order of Government of India dated 01.04.2011, NIA started the investigation in this matter. Accordingly, on 13.05.2016, NIA filed the report under section 173(8) of the CrPC.

By filing said report Investigating officer of NIA exonerated the accused Nos.1 to 3 and 12 concluding that they have no concerned with this offence. Investigating officer of NIA also came to the conclusion that provisions under MCOC Act are not attracted in this matter.

65. I have already pointed out that now NIA has given no objection to discharge the accused No.1 by filing reply at Exh.4137-A. During the course of investigation, investigating officer of NIA has rerecorded the statements of certain witnesses i.e. PW-55, PW-79, PW-112 and some other witnesses. Not only this, Investigating officer of NIA got recorded the statements of PW-79 and PW-112 under section 164 of the CrPC and Metropolitan Magistrate, Delhi recorded the said statements. Aforesaid witnesses have retracted from their previous statements on material points. Relying on this part of the investigation done by NIA it is submitted that investigation done by ATS is false and cannot be accepted. Due to this reason it is necessary to consider the effects of investigation reports if there are more than one investigation reports on record.

66. In case of **Vinay Tyagi Vs. Irshad Ali @ Deepak & Ors, 2013 (5) Supreme Court Cases 762** Hon'ble Apex Court considered this aspect. In that case respondents were arrested for the offence under sections 4, 5 of the Explosive Substance Act, Sections 120-B, 121 and 122 of the Indian Penal Code and Section 25 of the Indian Arms Act. Respondents had approached the Hon'ble High Court for direction to transfer the investigation to some other agency i.e. CBI. It was argued that they were informer of Delhi police and Intelligence Bureau. It was also argued that when they were asked to join the Militant Organization in Kashmir and asked to provide information they denied

to do this work hence they are falsely implicated in this matter.

Hon'ble High Court initially did not grant stay hence investigation was completed and charge-sheet was filed by Delhi police. Later on Hon'ble High Court observed that it was the fit case to transfer the investigation and accordingly, CBI was directed to do the investigation and submit the report. CBI investigated the matter and filed the report that respondents were falsely implicated in the case.

67. On the basis of the report filed by CBI respondents prayed for discharge. Hon'ble Apex Court considered the scope of "investigation", "further investigation" and "reinvestigation" or "fresh investigation". Hon'ble Apex Court also considered the effects of two charge-sheets filed by the same Investigation agency or different investigation agencies regarding the same offence. Hon'ble Apex Court held that no investigation agency has the authority to do fresh or reinvestigation (denovo) in the matter when there is already previous investigation in the case except the order of Hon'ble High Court or Hon'ble Apex Court. It is held by Hon'ble Apex Court that if there are more than one investigation reports on record by same investigation agency or different investigation agencies; all these reports are required to be read conjointly and the Court has to apply its mind to the cumulative effects of all reports and the documents annexed thereto to see that there exits ground to presume that accused has committed an offence.

68. In view of above law laid down by the Hon'ble Apex Court it has to be said that the investigation report filed by the NIA has not wiped out directly or impliedly the initial investigation conducted by the ATS and investigation reports filed by the ATS is also required to be

considered along with the report of NIA to see whether there is prima facie case against the accused persons including the accused Nos.1 to 3 and 12 to whom NIA has exonerated from this case.

MCOC Act :

69. Now, first of all it will appropriate to consider as to whether there is ground to presume that accused persons have committed the offence under the MCOC Act or there is no sufficient ground to proceed against the accused persons under the MCOC Act. It will appropriate to mention that while considering the bail application filed by accused No.9 Lt. Col. Prasad Purohit, my learned Predecessor by order dated 31.07.2009, had discharged all the accused persons from the offences under the MCOC Act and directed to transfer the case to the Regular Court at Nashik as per section 11 of the MCOC Act. The State being an aggrieved by the said order filed Appeal bearing No.866 of 2009 before the Hon'ble High Court under section 12 of the MCOC Act. Said appeal was allowed by Division Bench of Hon'ble High Court by an order dated 19.07.2010. Hon'ble High Court set aside the order of my learned Predecessor dated 31.07.2009 and case was restored to the file of this Court under the MCOC Act for the decision on merit.

70. Against above order accused persons had approached the Hon'ble Apex Court. On 15.04.2015, Hon'ble Apex Court by common order in Criminal Appeal Nos.1969-1970/2010 decided all appeals raised by the accused persons regarding applicability of the MCOC Act in present case. Copy of the order of Hon'ble Apex Court is at Exh.2377. Hon'ble Apex Court confirmed the judgment of Hon'ble Bombay High Court in Appeal No.866 of 2009 but observed that except the accused

No.7 Rakesh Dhawde there is no material to show that remaining accused persons had the nexus with accused or with the crime pertaining to Parbhani and Jalna cases. Observations of the Hon'ble Apex Court in para No.91 of the judgment show that Hon'ble Apex Court straightway did not discharge the accused persons from the charges under the MCOC Act because investigation was pending with NIA and there was a possibility that NIA may come with some material after completing the investigation to show the nexus of above accused persons with previous two cases. Now, admittedly, NIA has completed the investigation and came to the conclusion that there is no material against all accused persons under provisions of MCOC Act.

71. Considering all these facts it is submitted on behalf of accused Nos.1 to 4, 6 and 8 to 12 and accused No.5 in person that now there is absolutely no material on record to connect these accused persons with the offence punishable under the MCOC Act. According to them charge-sheet filed by ATS also does not show the connection of these accused persons with the offence or accused in Parbhani and Jalna Cases.

72. Adv. Shri Punalkar for accused No.7 Rakesh Dhawde submitted that there cannot be a charge under the MCOC Act only against accused No.7. According to him, previous discharge order passed by this Court was only on the ground that there was no cognizance against accused No.7 in previous two cases pertaining to Parbhani and Jalna bomb blast prior to the offence in this case. According to him, in fact accused No.7 was arrested in this matter on 02.11.2008 and thereafter only with a view to add the stringent provisions of MCOC Act against all accused persons accused No.7 was

arrested in connection with Parbhani case on 11.11.2008 and charge-sheet was filed against accused No.7 in that case on 13.11.2008. In connection with Jalna case accused No.7 was arrested i.e. on 15.11.2008 and on the same date i.e. on 15.11.2008 charge-sheet was filed. According to him while discharging the accused persons from the offences under the MCOC Act this Court had held that as cognizance against accused No.7 in above two previous cases at Parbhani and Jalna was taken after the arrest of accused in this case there is no compliance of requirement as per section 2(d) of the MCOC Act to attract the provisions under the said Act.

73. He further submitted that in Parbhani case first charge-sheet was submitted by the police on 07.09.2006 and in Jalana case first charge-sheet was submitted on 30.09.2006. The concerned Courts had taken the cognizance of the offence on the basis of these charge-sheets on 07.09.2006 and 30.09.2006 itself hence Hon'ble High Court took the view in Appeal that cognizance of offence is taken and not the offender and set aside the order of discharging the accused persons from the offences under the MCOC Act.

74. According to him, only this limited question was decided by the Hon'ble High Court and was challenged before the Hon'ble Apex Court by accused persons. He submitted that Hon'ble Apex Court also considered this aspect only and confirmed the judgment and order of the Hon'ble High Court. According to him, Hon'ble High Court while deciding the Criminal Appeal No.866 of 2009 dated 19.07.2010 kept open all remaining questions regarding the applicability of the MCOC Act to raise and decide at appropriate stage i.e. at the stage of framing of charge. He relied on para No.18 of the said judgment. In short,

according to him, now this Court is required to examine independently whether there is prima facie case against accused persons under the provisions of MCOC Act. According to him, as per case of ATS Abhinav Bharat is the crime syndicate but there is absolutely no material to show that any member of the Abhinav Bharat was involved in Parbhani and Jalna case hence provisions of MCOC Act are not attracted.

75. I have gone through the judgment of Division Bench of Hon'ble High Court in Criminal Appeal No.866 of 2009 dated 19.07.2010. In para No.18 of the judgment it is observed that :

> **18.** "..... We make it clear that the scope of these appeals is only related to examine the issue of taking cognizance of the offence by the Chief Judicial Magistrate at Parbhani and his counter part at Jalna. As far as the merits of charge under the MCOC Act or other issues covered in the argument of Mr. Jethmalani and Mr. Lalit there would not be expediment to deal with them in these appeals and prosecution must be given due opportunity to deal with same before the Special Court as and when the said occasion arise....".

76. In above appeal Hon'ble Bombay High Court set aside the order of my Ld. Predecessor discharging the accused persons observing that the cognizance of the offence is to be taken and not the offender hence there is compliance of requirement under section 2(d) of the MCOC Act. This order of Hon'ble Bombay High Court is confirmed by Hon'ble Apex Court. In view of above observations of Hon'ble Bombay High Court I found substance in the submissions of advocate of accused that now at the stage of framing the charge they are entitled to raise other points in respect of applicability of provisions of the MCOC Act.

77. So far as the accusations under the MCOC Act are concerned it is necessary to see that by accepting the material filed by the ATS as it is can it be said that ingredients of section 2(d) to 2(f) of the MCOC At are prima facie attracted. Section 2(f) of the MCOC Act defines “organised crime syndicate”. As per this section, it means a group of two or more persons who, acting either singly or collectively, as a syndicate or gang indulge in activities of organised crime;

Section 2(e) of the Act defines “orgnised crime” and section 2 (d) of the Act defines "continuing unlawful activity". One of the most important ingredients of this definition is that there must be continuing unlawful activity by an individual, singly or jointly, either as a member of an organised crime syndicate or on behalf of such syndicate. It means organised crime and continuing unlawful activity can be done by a person either singly or jointly but it must be done as a member of organised crime syndicate or on behalf of such syndicate.

78. In present case ATS has not specifically named the organised crime syndicate but from the case of the ATS set out in the charge-sheet in Volume-IA it appears that according to the ATS, Abhinav Bharat is the organised crime syndicate within meaning of section 2(f) of the MCOC Act. In view of this, now, it has to be seen that whether there is a prima facie material on record to say that the alleged involvement of accused No.7 Rakesh Dhawde in Parbhani and Jalna case was as a member of or on behalf of organised crime syndicate i.e. Abhinav Bharat.

79. It is pertinent to note that the documents relating to Parbhani and Jalna case i.e. copies of the charge-sheet filed in Volume-I at page Nos.477 to 527 show that incident of bomb blast at Parbhani in

Mohamadiya Masjid took place on 21.11.2003 and incident of Bomb Blast at Kadariya Masjid, Bhokardan Naka, Jalna took place on 27.08.2004. It is further notable that initially accused No.7 Rakesh Dhawde was not arrested in these matters. Not only this he was also not shown as an absconding accused in above two cases when charge-sheets against the other accused persons who were arrested in connection with those offences were filed in the Court. There is no reference in those previous charge-sheets about the involvement of accused No.7 Rakesh Dhawde. Suddenly, after arrest of accused No.7 in this case on 02.11.2008, he was implicated in above two cases as submitted by advocate of accused No.7.

80. It appears from the recitals in the charge-sheet in both cases that according to prosecution the accused who were arrested and charge-sheeted in those offences were connected with either 'Bajrang Dal' or 'R.S.S.'. Nowhere it is alleged in those charge-sheets that the accused persons who were arrested had any connection with Abhinav Bharat. On the contrary, statement of PW-40, PW-38 and other witnesses show that Abhinav Bharat came in existence in 2006-2007. There is also no material on record to show that prior to 2006-2007, accused No.7 Rakesh Dhawde had any connection with present accused persons or he was working on behalf of them. Even it is not the case of prosecution that other accused persons involved in Parbhani and Jalna case have any concern with Abhinav Bharat or the present accused persons. I have already pointed out that Hon'ble Apex Court in the order at Exh.2377 in Criminal Appeal Nos.1969-1970/2010 has already held that there is no material against other accused persons except accused No.7 Rakesh Dhawde to show their connection with the accused persons involved in Parbhani and Jalna case or the incident in

that matters and raised doubt about applicability of the provisions of MCOC Act against them.

81. In view of all above discussions now position became that there is no material to show that in the year 2003-2004 i.e. when incidents at Parbhani and Jalna took place Abhinav Bharat was in existence. There is also no material to show that during that period accused No.7 Rakesh Dhawde or any other accused involved in those cases had any connection with present accused persons at that time. In such circumstances it cannot be said that accused persons including the accused No.7 Rakesh Dhawde committed the act in Parbhani and Jalna case as a member or on behalf of crime syndicate i.e. Abhinav Bharat. Moreover, immediate filing of supplementary charge-sheets against accused No.7 Rakesh Dhawde in Parbhani and Jalna case after his arrest in this case speaks volume. In view of all above discussion I hold that all accused persons are entitled to be discharged from the offences under the MCOC Act as there is no sufficient ground to proceed against them under the provisions of the MCOC Act.

Accused No.2 & 3 :

82. So far as accused No.2 Shivnarayan Kalsangra and Accused No.3 Shyam Shau is concerned as per the case of the prosecution they were arrested in connection with this offence on 23.10.2008. Admittedly, they are on bail. As per the case of ATS, accused Shivnarayan is the brother of absconding accused Ramchandra Kalsangra and accused Shaym Shau is friend of said absconding accused Ramchandra. According to the ATS, at the instance of accused No.2 Shivnarayan, two electric timer circuits given to him by absconding

accused Ramchandra are recovered from his house at Indore on 01.11.2008 and according to ATS, accused No.3 Shyam Sahu had provided sim cards to wanted accused Ramchandra Kalsangra which later on said Ramchandra used for commission of conspiracy.

83. NIA has come with the specific case that there is no involvement of these accused persons in commission of crime and NIA has exonerated the accused No.2 and 3.

84. Learned SPP during the course of argument simply pointed out the materials collected by ATS against these accused persons. As against this, advocates of these accused persons submitted that though material produced by ATS is accepted as it is, it cannot be said that these accused persons have any connection with alleged crime. According to them, mere on the ground that accused No.2 Shivnarayan is, the brother of wanted accused Ramchandra he is falsely implicated in this matter. The alleged recovery of electric timer is doubtful because PW-185 & PW-186 who are the policemen from Madhya Pradesh have not supported the contents of alleged seizure panchanama. According to advocates of accused No.2 & 3, there is nothing on record to show that seized electric timers have any connection with the bomb blast. According to them, accused No.2 is the electrician.

85. They submitted that statement of PW-30 shows that as accused No.3 Shyam Shahu and wanted accused Ramchandra were working for some period in R.S.S. they were friends. Ramchandra had purchased the sim cards from the shop of accused No.3 by submitting the documents and he had instructed PW-30 for making recharge of sim cards without insisting for net payment. According to them, except this

material there is no other material to show the involvement of these accused in the crime.

86. They further submitted that CDR of the mobile hand sets seized from the possession of these accused persons show that mostly they were in contact with each others and wanted accused Ramchandra Kalsangra. According to advocates of accused there is nothing doubtful in it because these both accused persons are belonging to same place and one is the brother of Ramchandra and other is friend of Ramchandra. In short, according to advocates of accused No.2 and 3 there is no sufficient ground to proceed against these accused persons.

87. It is true that NIA has exonerated accused No.2 and 3 and according to them these accused persons have no concerned with the alleged crime. There is no case of ATS that these accused persons had participated in any meetings. Admittedly, accused No.2 Shivnarayan is the brother of wanted accused Ramchandra Kalsangra. It appears from the statement of PW-30 that Shyam Shahu i.e. accused No.3 is the friend of Ramchandra Kalsangra. Both of them are residents of Indore.

88. So far as accused No.2 Shivnarayan Kalsangra is concerned as per the case of ATS on 01.11.2008 at his instance two electric timers were recovered from his house at Indore in presence of two panch witnesses and during the said seizure PW-185 & PW-186 being local police helped the ATS officers. During the further investigation, Investigating officer of NIA has recorded the statement of PW-185 and PW-186. It is pertinent to note that these two local policemen did not support the case of ATS on the point of seizure of alleged electric timers. Apart from this, though seizure panchanama is accepted as it is there is

nothing on record to show that there is any connection between seized electric timers and bomb blast a Malegoan. So far as call record of mobile of accused No.2 Shivnarayan is concerned it appears that mostly there is conversation between accused No.2 and his brother i.e. wanted accused Ramchandra as well as accused No.3 Shyam Sahu. There is substance in the submission of advocates of accused that having conversation with brother and accused No.3 Shyam Sahu cannot itself be an incriminating circumstance when there is no other material on record to show the involvement of these accused in the crime.

89. So far as accused No.3 Shaym Shahu is concerned as per the case of ATS he is owner of mobile shop and he was also selling sim cards and recharging the same. Statement of PW-30 who was working in the shop of accused No.3 shows that both i.e. accused No.3 and wanted accused Ramchandra Kalsangra were working for R.S.S. for certain period but later on they stopped to work for R.S.S. According to PW-30 they were friends. His statement further shows that in all five sim cards were purchased by the wanted accused Ramchandra from his (A/3) shop in the name of different persons. According to this witness those persons had come with waned accused Ramji and signed on necessary papers by providing their documents and then sim cards were sold. If this statement is accepted as it is, it shows that being seller of sim cards all required procedure was followed. Purchasers of the sim cards came in the shop and by signing necessary papers purchased the same. Moreover it appears that being seller of the sim card he has maintained the record of sale transactions. It also appears that he has also maintained the record of recharging the sim cards. Considering this statement of PW-30 certainly one cannot conclude that accused No.3 Shyam Shau has any connection with alleged crime.

90. So far as call record of mobile hand set of accused No.3 is concerned it appears that mostly he was in contact with accused No.2 Shivnarayan and absconding accused Ramchandra. Being a friend and belonging to the same village, if he remained in contact with accused No.2 and wanted accused Ramchandra in absence of any other material on record about his involvement in the crime certainly this call record is also not sufficient to connect the accused with the crime. Having contact with Ramchandra at the most create suspicion but certainly cannot a grave suspicion. As per the law laid down by Hon'ble Apex Court discussed above mere suspicion is not sufficient to frame the charge against the accused. In view of these reasons certainly accused No.2 Shivnarayan Kalsangra and accused No.3 Shyam Sahu are entitled for the discharge from all the offences alleged against them.

Accused No.8:

91. So far as accused No.8 Jagdish Mhatre is concerned learned SPP submitted that there is only recovery of two fire arms and fifteen live cartridges from him. As per the prosecution case accused No.7 Rakesh Dhawde is the friend of accused No.8 Jagdish Mhatre. Prosecution case further shows that accused No.8 purchased these fire arms from accused No.7. All these facts revealed from the confessional statement of accused No.7 Rakesh Dhawde recorded under section 18 of the MCOC Act. But, now, as I have already come to the conclusion that there is no prima facie case against the accused persons under the provision of MCOC Act certainly contents in this confessional statement cannot be considered hence excluding the confessional statement of accused No.7 Rakesh Dhawde only it remains that this accused No.8 was found in possession of two fire arms and fifteen live cartridges as per panchanama under section 27 of Evidence Act dated 03.11.2008.

92. Advocate of accused No.8 submitted that there is no material on record to show that this accused had knowledge about the conspiracy to commit the bomb blast or he has any concern with the said crime. He submitted that NIA has submitted the charge-sheet against accused No.8 only under the provision of Arms Act hence according to him accused No.8 is entitled to be discharge from other offences.

93. I have already pointed out that there is only recovery of fire arms and live cartridges under the panchanama against the accused No.8. There is no material in the charge-sheet filed by ATS to show that this accused was involved in the conspiracy to commit the alleged offence. Only on the basis of above referred confessional statement of accused No.7 Rakesh Dhawde and findings of weapons in possession of this accused No.8, ATS has charge-sheeted him under the provision of MCOC Act as well as UAP Act and other IPC offences along with other accused persons. In absence of any material to show the connection of this accused with the alleged conspiracy it cannot be said that there is prima facie case against this accused for the offences under the UAP Act as well as other offences hence I hold that this accused No.8 Jagdish Mhatre is entitled for the discharge for offences under the UAP Act as well as for the offences of IPC and Explosive Substance Act. Already I have come to the conclusion that this accused is also entitled for the discharge from the offences under the MCOC Act. In view of above discussion it becomes clear that this accused No.8 is required to face an accusation under the provision of Arms Act 1959, only.

94. Nowhere it is the case of the prosecution that the fire arms and live cartridges found in possession of this accused has any

connection with the bomb blast. It means this offence cannot be tried along with other offences under the provision of UAP Act by using power under section 14 of the National Investigation Agency Act, 2008 and by using power under section 7 of the MCOC Act, 1999. On the contrary, it is necessary to transfer the case of accused No.8 to Regular Court as per section 11 of MCOC Act and section 20 of NIA Act, 2008.

95. For this purpose support can be taken of the law laid down by Hon'ble Apex Court in case of ***Niranjan Singh Punjabi Vs. Jitendra Bhimraj Bijja (cited supra)***. In that case also when accused persons were discharged from the offences under the TADA, Special Court had directed to transfer the case to the Regular Sessions Court. On behalf of the State Government it was argued that as per section 12(1) of the TADA Special Court has power to try the other offences though accused were discharged from the offences under the TADA. Hon'ble Apex Court in para No.12 of the judgment did not accept this argument and held that Designated Court was right in transferring the case to the regular Sessions Court as per section 18 of the TADA. Section 7(1) of the MCOC Act is similar to that of section 12(1) of the TADA. Section 14(1) of NIA Act is similar to that of section 12(1) of TADA. In the same manner section 11 of the MCOC Act and section 20 of the NIA Act are similar to that of section 18 of the TADA. Hence law laid down by Hon'ble Apex Court is applicable in present case also. In result I hold that case of accused No.8 Jagdish Mhatre is required to be transferred to the Competent Sessions Court having jurisdiction to try the offences under the Arms Act. As per the prosecution case the alleged weapons were found in the house of accused No.8 situated at Dombivali (West) hence case of accused No.8 is required to be transferred to the Competent Court having jurisdiction over the area of Dombivali (West).

Conspiracy and offences under the UAP Act :

96. In view of all above discussion now it is necessary to consider whether there is ground for presuming that remaining accused i.e. accused Nos.1, 4 to 7, and 9 to 12 have committed an offence or whether there is sufficient ground for proceeding against them. Admittedly, it is the case of prosecution that all accused persons are conspirators. According to prosecution case in pursuance of the conspiracy absconding accused Ramchandra Kalsangra and Sandeep Dange caused the bomb blast by using LML Freedom motorcycle. During the course of argument prosecution as well as accused persons have relied upon several authorities on the point of law regarding conspiracy.

97. On this point learned SPP relied upon the authorities reported in **1981 CRI. L.J. 588 (Supreme Court), Mohamad Usman Mohammad Hussain Maniyar and another Vs. The State of Maharashtra** and **AIR 1999 Supreme Court 1086, Vijayan alias Rajan Vs. State of Kerala**.

On this point advocate of accused No.1 relied upon the authorities reported in (A) **1988 Supreme Court Cases (Cri) 711, Kehar Singh and others Vs. State (Delhi Administration)**. (B) **1982 CRI. L.J. 1025 (Bombay High Court), Dr. Dattatraya Narayan Samant & others Vs. State of Maharashtra**. (C) **2001 Supreme Court Cases (Cri) 160, Saju Vs. State of Kerala**. (D) **1995 Supreme Court Cases (Cri) 215, P. K. Narayanan Vs. State of Kerala**. (E) **2002 Supreme Court Cases (Cri) 1734, Mohd. Khalid Vs. State of West Bengal**. (F) **AIR 1999 Supreme Court 2640, State of Tamil Nadu Through Superintendent of Police, CBI/SIT Vs. Nalini and others**.

Accused No.5 in person on this point relied on the authority

reported in **2008 (10) Supreme Court Cases 394, Yogesh @ Sachin Jagdish Joshi Vs. State of Maharashtra**.

On this point advocate of accused No.9 relied upon the authority reported in **(1999) 5 Supreme Court Cases 253, State through Superintendent of Police, CBI/SIT Vs. Nalini and others.**

98. I have gone through all above authorities relied by both the parties. Hon'ble Apex Court in case of ***State Vs. Nalini (cited supra)*** after considering the various authorities laid down the principles governing the law of conspiracy as under in para No.574 of the judgment.

> 1. Under Section 120A IPC offence of criminal conspiracy is committed when two or more persons agree to do or cause to be done an illegal act or legal act by illegal means. When it is legal act by illegal means overt act is necessary. Offence of criminal conspiracy is exception to the general law where intent alone does not constitute crime. It is intention to commit crime and joining hands with persons having the same intention. Not only the intention but there has to be agreement to carry out the object of the intention, which is an offence. The question for consideration in a case is did all the accused had the intention and did they agree that the crime be committed. It would not be enough for the offence of conspiracy when some of the accused merely entertained a wish, howsoever, horrendous it may be, that offence be committed.
>
> 2. Acts subsequent to the achieving of the object of conspiracy may tend to prove that a particular accused was party to the conspiracy. Once the object of conspiracy has been achieved, any subsequent act, which maybe unlawful, would not make the accused a part of the conspiracy like giving shelter to an absconder.
>
> 3. Conspiracy is hatched in private or in secrecy. It is rarely possible to establish a conspiracy by direct evidence. Usually, both the existence of the conspiracy and its objects

have to be inferred from the circumstances and the conduct of the accused.

4. Conspirators may, for example, be enrolled in chain A enrolling B, B enrolling C, and so on and all will be members of the single conspiracy if they so intend and agree, even though each member knows only the person who enrolled him and the person whom he enrolls. There may be a kind of umbrella-spoke enrolment, where a single person at the center doing the enrolling and all the other members being unknown to each other, though they know that there are to be other members. These are theories and in practice it may be difficult to tell whether the conspiracy in a particular case falls into which category. It may, however, even overlap. But then there has to be present mutual interest. Persons may be members of single conspiracy even though each is ignorant of the identity of many others who may have diverse roles to play. It is not a part of the crime of conspiracy that all the conspirators need to agree to play the same or an active role.

5. When two or more persons agree to commit a crime of conspiracy, then regardless of making or considering any plans for its commission, and despite the fact that no step is taken by any such person to carry out their common purpose, a crime is committed by each and every one who joins in the agreement. There has thus to be two conspirators and there may be more than that. To prove the charge of conspiracy it is not necessary that intended crime was committed or not. If committed it may further help prosecution to prove the charge of conspiracy.

6. It is not necessary that all conspirators should agree to the common purpose at the same time. They may join with other conspirators at any time before the consummation of the intended objective, and all are equally responsible. What part each conspirator is to play may not be known to everyone or the fact as to when a conspirator joined the conspiracy and when he left.

7. A charge of conspiracy may prejudice the accused because it is forced them into a joint trial and the Court may consider the entire mass of evidence against every accused. Prosecution has to produce evidence not only to show that

each of the accused has knowledge of object of conspiracy but also of the agreement. In the charge of conspiracy Court has to guard itself against the danger of unfairness to the accused. Introduction of evidence against some may result in the conviction of all, which is to be avoided. By means of evidence in conspiracy, which is otherwise inadmissible in the trial of any other substantive offence prosecution tries to implicate the accused not only in the conspiracy itself but also in the substantive crime of the alleged conspirators. There is always difficulty in tracing the precise contribution of each member of the conspiracy but then there has to be cogent and convincing evidence against each one of the accused charged with the offence of conspiracy. As observed to Judge Learned Hand that "this distinction is important today when many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders".

8. As stated above it is the unlawful agreement and not its accomplishment, which is the gist or essence of the crime of conspiracy. Offence of criminal conspiracy is complete even though there is no agreement as to the means by which the purpose is to be accomplished. It is the unlawful agreement, which is the gravamen of the crime of conspiracy. The unlawful agreement which amounts to a conspiracy need not be formal or express, but may be inherent in and inferred from the circumstances, especially declarations, acts and conduct of the conspirators. The agreement need not be entered into by all the parties to it at the same time, but may be reached by successive actions evidencing their joining of the conspiracy.

9. It has been said that a criminal conspiracy is a partnership in crime, and that there is in each conspiracy a joint or mutual agency for the prosecution of a common plan. Thus, if two or more persons enter into a conspiracy, any act done by any of them pursuant to the agreement is, in contemplation of law, the act of each of them and they are jointly responsible therefor. This means that everything said, written or done by any of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done, or written by each of them. And this joint responsibility extends not only to what is done by any of the

> conspirators pursuant to the original agreement but also to collateral acts incident to and growing out of the original purpose. A conspirator is not responsible, however, for acts done by a co-conspirator after termination of the conspiracy. The joinder of a conspiracy by a new member does not create a new conspiracy nor does it change the status of the other conspirators, and the mere fact that conspirators individually or in groups perform different tasks to a common end does not split up a conspiracy into several different conspiracies.
>
> 10. A man may join a conspiracy by word or by deed. However, criminal responsibility for a conspiracy requires more than a merely passive attitude towards an existing conspiracy. One who commits an overt act with knowledge of the conspiracy is guilty. And one who tacitly consents to the object of a conspiracy and goes along with other conspirators, actually standing by while the other but the conspiracy into effect, is guilty though he intends to take no active part in the crime.

99. In case of ***Mohd. Khalid Vs. State of West Bengal*** (cited supra), Three Judges Bench of Hon'ble Apex Court held that it is a matter of common experience that direct evidence to prove conspiracy is rarely available. Therefore, circumstances proved before, during and after the occurrence have to be considered to decide about complicity of the accused.

100. Keeping in the mind all above principles laid down by Hon'ble Apex Court it has to be seen whether, prima facie can it be said that above accused persons are involved in conspiracy to commit the crime in present case. Prosecution has mainly relied on following circumstances to show the involvement of the accused persons :

1) Participation in alleged conspiracy meetings and discussion therein.

2) Certain statements made by the accused No.9 Lt. Col. Prasad Purohit to PW-55 prior to the bomb blast and after the bomb blast.

3) Involvement of LML Freedom Motorcycle belonging to accused No.1 Pragyasingh Thakur @ Sadhvi in commission of crime.

4) Conversation between accused No.1 Pragyasingh Thakur @ Sadhvi and absconding accused Ramchandra Kalsangra in presence of PW-22.

5) Intercepted telephonic conversation between accused No.9 Lt. Col. Prasad Purohit and accused No.4 Major Ramesh Upadhyay after the incident of the blast.

6) Finding of RDX traces during the house search of accused No.11 Sudhakar Chaturvedi.

7) Formation of Abhinav Bharat Trust, collection of money on behalf of said Trust and use of said money by the accused persons to meet their expenses of activities relating to crime.

Participation in alleged conspiracy meetings and discussion therein.

101. So far as this circumstance is concerned according to the prosecution there were meetings at Faridabad (Anangpur), Calcutta, Bhopal, Jabalpur, Indore, Ujjain and Nashik. But prosecution has mainly relied on the the meetings at Faridabad (Anangpur) and Bhopal.

According to the prosecution accused No.10 Swami A. D. Tirth has recored conversation in some meetings in his laptop. After seizure of laptop from the possession of accused No.10 the recorded data was retrieved by FSL Mumbai. So far as these meetings are concerned prosecution has mainly relied on the retrieved data as well as statements of witnesses who were present in the meetings.

102. Prosecution filed transcripts of the meetings in files named as sanatanbharat.wma dated 26.01.2008, purohit.wma dated 27.01.2008 and upadhyay.wma dated 25.01.2008. According to the prosecution meeting at faridabad, Anangapura village took place on 25.01.2008 & 26.01.2008 and Bhopal meeting took place on 11.04.2008 & 12.04.2008.

103. Advocate of accused No.10 submitted that the seizure of alleged laptop from which FSL Mumbai has retrieved the data from the possession of accused No.10 itself is doubtful. He submitted that according to the prosecution accused No.10 was arrested on 12.11.2008 at Kanpur. Police prepared the document of 'Fard Giraftari' (Vol-I, page No.109) instead of arrest panchanama. Instead of seizure panchanama police prepared the document 'fard Baramadgi' (Vol-I, page-111) on the same date. After brining the accused No.10 at Mumbai from Kanpur on 13.11.2008 police prepared the panchanama regarding the articles alleged to be found in possession of accused No.10. He submitted that everything is doubtful. The alleged laptop is not seized in presence of panch witnesses on 12.11.2008. The panchanama dated 13.11.2008 is not useful because since 12.11.2008 to 13.11.2008 the alleged laptop was in possession of police and there was every possibility of tampering the same. According to him, the said laptop was sent to FSL Mumbai on

19.11.2008 by Investigating officer of ATS (Vol-I, page – 355). This delay in sending the laptop also creates doubt regarding genuineness of retrieved material relied by the prosecution.

104. As against this, learned SPP submitted that document of 'Fard Giraftari' clearly shows that no one was ready to act as a panch. Accused No.10 was arrested with the help of local police. Document of 'Fard Baramadgi' was prepared immediately and signature of accused No.10 was obtained on the said document. According to him, after coming to Mumbai on 13.11.2008 in presence of panch witnesses all articles including laptop were sealed and panchanama to that effect is prepared. He submitted that in fact contents in the laptop were deleted which are required to be retrieved hence there is no chance of tampering.

105. It is true that document of 'Fard Giraftari' shows that with the help of local police ATS officers arrested the accused No.10. Recitals in this document show that no one was ready to act as a panch. Document of 'Fard Baramadgi' reveals that including laptop other several articles were found in possession of accused No.10 and custody of those articles was taken by the police. Thereafter on 13.11.2008 after coming to Mumbai police sealed all articles including laptop in presence of panch witnesses. There is substance in the submission of learned SPP that when deleted contents in laptop were retrieved by FSL Mumbai there is no question of tampering the contents in the laptop by the police. Moreover, at this prima facie stage there is no reason to disbelieve the case of prosecution hence first of all it has to be accepted that as alleged by the prosecution the data is retrieved from the laptop seized from the possession of accused No.10 Swami A.D. Tirth.

106. FSL Mumbai has provided the retrieved data in CD's/DVD's. It is submitted by accused persons that there is no compliance of section 65-B of the Evidence Act hence said CD's/DVD's provided by FSL, Mumbai cannot be considered. In support of this submission accused No.5 relied on the judgment of Hon'ble Apex Court in case of **Anvar P.V. Vs. P. K. Basheer and others, in Civil Appeal No.4226/2012 dated 18.09.2014**. It is true that prosecution has not filed the certificate under section 65-B of the Evidence Act with CD's/ DVD's but certainly now it is well settled that if certificate under section 65-B of the Evidence Act is required it can be filed prior to giving evidence in view of section 65-B (4) of the Evidence Act. At this prima facie stage for want of certificate this material cannot excluded from the consideration.

107. It is also submitted by the accused persons that transcript in file named sanatanbharat.wma is not useful to the prosecution because voice samples of the accused persons of text in the said file were not sent to FSL Mumbai hence FSL report regarding matching of voice of accused persons with the voice in the said file cannot be accepted. According to accused, FSL report dated 13.03.2009 filed in Volume-IX, page No.1 shows that as text in specimen voice sample was not same as per the text in questioned voice exhibits it was held to be not suitable for conducting the spectrographic test. According to them same analogy can be made applicable to the FSL report in respect of file sanatanbharat.wma.

108. As against this it is submitted by learned SPP that this is the matter of appreciation of evidence hence at this stage this submission cannot be accepted.

109. It appears from the proceeding that by letter dated 25.06.2009, (Vol- VIII, page - 17) Investigating officer of ATS had requested for opinion about the voice samples of accused persons and questioned voice in retrieved files including sanatanbharat.wma after comparison. FSL report in response to the said letter is filed by NIA with its report at page No.25. It shows that specimen voice samples were provided by ATS only from Audio files named apte.wma and drrpsingh.wma. But said report shows that questioned voice in audio files is matching with the specimen voice samples. It shows that according to this report questioned voice in audio file named as sanatanbharat.wma is also matching with the specimen voice samples. Unless concerned analyzer (expert) is examined during the course of trial at this stage FSL report filed on record cannot be doubted as submitted on behalf of accused persons. Apart from this, report of FSL is useful for the prosecution to establish the identity of the speakers in the meetings. This fact can be established by the prosecution by adducing other evidence also during the course of trial hence at this stage above submission made on behalf of accused persons cannot be accepted.

110. Transcripts of the meetings in files sanatanbharat.wma dated 26.01.2008, upadhyay.wma dated 25.01.2008 and purohit.wma dated 27.01.2008 and statements of the witnesses PW-79, PW-112 and PW-121 recorded by ATS show that accused No.4, 5, 9, 10 & 11 along with above witnesses as well as some other persons had participated in the meeting at Anangpur, Faridabad. I have gone through the conversation/discussion of the said meeting retrieved by FSL Mumbai as well as transcript on record. Said conversation shows following facts :

i] Participants in the meeting want to establish Hindu Rashtra i.e.

Aryavart in which there is no place for Muslim and Christian. (At various places from page Nos.815 to 883, Volume- III B and page Nos.819, 827, 828).

ii] Discussion also shows that to achieve the said object they had decided to make double attack i.e. by doing the work remaining within the system and by establishing the Government in exile. (Volume – III B, Page No.820, 827).

iii] Discussion further shows that participants were not ready to accept the present constitution and want to prepare new constitution suited to their ideology. (Volume-III B, Page Nos.815, 819, 826)

iv] Discussion further shows that participants were of the view that persons resisting their ideology should be ex-communicated i.e. should be killed. (Volume-III B, Page No.844).

v] Tone of the discussion further shows that by remaining within the present system they want to create an option for Hindu Community by way of 'Abhinav Bharat Organization' as a political party to create at-least nuisance value for achieving the object of Hindu Rashtra. (Volume-III B, Page Nos.818, 819, 823 and 826).

vi] Participants were of the view that threat should be created against Muslims and Christians by striking them and their unity would show the certificate of their work. (Volume-III B, Page Nos.851 & 852).

111. It appears from the discussion that accused No.9 Lt. Col. Prasad Purohit had stated that he has made contact with his sources in

Israel for implementation of above ideology. They were planning about formation of Ministry. This discussion also shows that accused No.9 spoke about list of 70 persons who were to be ex-communicated. He also spoke about previous two operations done by him successfully and his capacity to execute the operations and raise the equipments. From the discussion it appears that word 'equipments' is used for the 'weapons'. (Volume-III B, Page Nos.820, 837, 840, 841, 847, 849, 850).

112. Discussion further shows that there was a talk about formation of action groups without keeping any record of the same. When PW-112 stated regarding underground operation, accused No.9 stated about having this concept already and according to him it should be called as 'Fantam organization' without having any identity. There was also discussion on the point of giving training to the youth to impress on them their ideology of Hindu Rashtra. (Volume-III B, Page Nos.816, 840, 841, 852 & 864).

113. On the background of this meeting and mind-set of the participants it will appropriate to consider the Bhopal meeting.

114. Admittedly, there is no recording of the said meeting. This meeting took place on 11.04.2008 and 12.04.2008 at Bhopal in Shriram Mandir. On this point statement of PW-112 (PW-184 new) and PW-79 (PW-182 new) are on record. As per the statement of PW-112 before ATS Officer, in Faridabad meeting accused No.9 had talk about Jihadi Activities in Maharashtra at Aurangabad and Malegaon and he also talked about preparation of guerrilla war to take revenge of such activities. It is notable that when Investigating Officer of NIA Re-examined this witness as PW- 184, according to him, he had not stated

before ATS Officer regarding talk of accused No.9 about preparation of guerrilla war to take revenge of Jihadi activities.

115. According to PW-112, after public meeting at Bhopal there was a meeting in one room and in the said meeting accused No.1 Pragyasingh Thakur, accused No.4 Ramesh Upadhyay, accused No.5 Sameer Kulkarni, accused No.11 Sudhakar Chaturvedi, accused No.9 Lt. Col. Prasad Purohit and some other persons were present including him and PW-118 (died). The statement of PW-112 before ATS Officer shows that according to him in the said meeting, accused No.9 talked about necessity to take immediate planed action for taking revenge of Muslim community and he also expressed his opinion that at Malegaon there is a Muslim dominating area and if bomb-blast is caused there it may amount of taking revenge. This witness has stated that accused No.1 Pragya Singh Thakur reacted by saying that she was ready for arranging persons for doing such act.

116. It is pertinent to note that in re-examination of this witness by Investigating Officer of NIA as PW-184, he retracted from some part of his statement before ATS Officer. According to him, accused No.9 Lt. Col. Prasad Purohit and accused No.1 Pragya singh Thakur had not stated the above facts mentioned in his statement by ATS Officer. But it is pertinent to note that this witness has stated before the Investigating Officer of NIA that in the said meeting issue of growing Jihadi activities in Aurangabad and Malegaon of Maharashtra was discussed. According to him, in the said meeting accused No.9 explained about Jihadi activities in detail and expressed need to do something for its prevention by expanding the Abhinav Bharat Sanghatana in the said area.

What it shows that during re-examination by the

Investigating Officer of NIA this witness has not stated actual utterances of accused No.9 Lt. Col. Prasad Purohit and accused No.1 Pragyasingh Thakur regarding causing of bomb-blast at Malegaon and readiness of shouldering responsibility to provide manpower respectively.

117. Relying on this contradiction in the statement of PW-112 it is submitted by accused persons that statement of PW-112 cannot be accepted at all and cannot be relied on. But it is pertinent to note that this witness is well educated person being a Doctor. Not only this, his statement shows that he has shouldered various responsibilities in so many organizations. It appears from his statement before NIA that he had remain present in Faridabad meeting at the instance of I.B. officer. According to accused No.9 this witness was source of I.B. It is notable that this witness has not stated before IO of NIA that due to threat by ATS Officer he had given aforesaid statement before Investigating Officer of ATS.

118. It is pertinent to note that at the request of Investigating Officer of ATS, statement of this witness under Section 164 of the Code of Criminal Procedure (hereinafter referred to as the 'Code') is recorded by the learned Metropolitan Magistrate, Girgaon, Mumbai and in his statement before the learned Metropolitan Magistrate he has stated that in the above meeting at Bhopal, accused No.9 Lt. Col. Prasad Purohit explained about Jihadi activities and discussion was made about Jihadi activities in Maharashtra at Aurangabad and Malegaon. Accused No.9 expressed his view that something is required to be done to prevent the same and also told that preparation of guerrilla war is going on. According to this witness, accused No.1 Pragyasingh Thakur reacted by saying that some persons are ready to do such work.

119. At the request of Investigating Officer of NIA statement of this witness under Section 164 of the Code is also recorded by the learned Chief Metropolitan Magistrate, Delhi, before whom this witness has not stated above facts.

120. This witness in his re-examination by the Investigating Officer of NIA has stated that his signatures were obtained on his statement by ATS Officer and learned Metropolitan Magistrate, Mumbai, without showing his statement and without reading the contents to him. According to him, at that time, he was under pressure as his name was emerging in the media and his wife was suffering from cancer.

121. During the course of arguments it is submitted by accused No.5 Sameer Kulkarni as well as on behalf of accused No.4 Major Ramesh Upadhyay and accused No.9 Lt. Col. Prasad Purohit that statement of this witness before the learned Metropolitan Magistrate, Mumbai cannot be accepted because every page of this statement is not signed by the witness as well as it was directly sent to the Investigating Officer instead of Court as per Section 164(6) of the Code.

122. It is true that every page of the statement of this witness is not signed by the learned Metropolitan Magistrate, Mumbai and the witness, but, on the last page, there is signature of the learned Metropolitan Magistrate and witness. It is pertinent to note that in case of ***State of Tamil Nadu Vs. Nalini*** on confessional statement of accused No.1 Nalini her signature was not obtained on last two pages but there were her signatures on 16 pages out of 18 pages. Relying on the judgment of Hon'ble Bombay High Court in ***Abdul Rajjak Shaikh's case, 1988 CRI. L. J. 382,*** it was submitted that this defect is not

curable under section 463 of the CrPC even though the Magistrate recording the statement under section 164 of the Code entered into witness box and stated that accused had made statement before him voluntarily. But Hon'ble Apex Court in para No.402 to 404 held that this defect is curable under section 463 of the CrPC and it can be cured by examining officer by his oral evidence who recorded the confession. Same principle can also be made applicable in this matter and defects can be cured by the prosecution by examining the concerned Magistrate. He can explain that in which circumstances he sent the confessional statement to the Investigating officer. Moreover, unless there is material on record to show any tampering in the said statement genuineness of the statement recorded by learned Metropolitan Magistrate, Mumbai cannot be doubted.

123. Apart from this, common part in the statement of this witness before the Investigating Officer of NIA and before the learned Metropolitan Magistrate shows that in the aforesaid meeting at Bhopal, accused No.9 Lt. Col. Prasad Purohit explained about Jihadi activities and expressed necessity to prevent the same. In his statement before the Officer of NIA this witness has stated that accused No.9 expressed his view that this prevention can be done by expanding Abhinav Bharat in the said area.

124. So far as PW-79 is concerned, before the ATS Officer he has stated about his presence in Bhopal meeting and he has specifically stated that whenever he was going in the room for serving Tea and other eatables, he heard that accused No.9 expressed his opinion about necessity to take immediate planned action to take revenge against Muslim community and also expressed his opinion that at Malegaon

there is Muslim dominating area and if bomb-blast is caused there, it would amount to take revenge.

125. This witness has also stated that accused No.1 Pragyasingh Thakur showed readiness to provide persons for committing bomb-blast. He has also stated these facts before Metropolitan Magistrate, Mumbai in his statement under Section 164 of the Code. It is true that in his re-examination by Investigating Officer of NIA as well as in his statement before the learned Metropolitan Magistrate, Delhi under Section 164 of the Code this witness has denied his presence in Bhopal meeting.

126. At this prima-facie stage without going to the question that which version of this witness is correct, safe conclusion can be drawn on the basis of statement of PW-112 (PW 184 new) that in Bhopal meeting also accused No.9 Lt. Col. Prasad Purohit, No.1 Pragyasingh Thakur, No.5 Sameer Kulkarni, No.4 Major Ramesh Upadhyay, No.10 Swami A.D. Thirth and accused No.11 Sudhakar Chaturvedi were present and in the said meeting there was discussion about growing Jihadi activities in Aurangabad and Malegaon and accused No.9 expressed his opinion to do something for its prevention by expanding Abhinav Bharat Sanghatana in the said area.

127. During the course of argument accused No.5 Sameer Kulkarni by examining the statements of above witnesses minutely pointed out discrepancies in their statements before ATS officer as well as in their statements before Investigating officer of NIA. According to him, these witnesses are not reliable. He also pointed out that there is difference in the statement of PW-121 in respect of the date and time in the original statement and the copy provided to accused. But I think

that at this stage such detail and minute appreciations of the statements of witnesses before Investigating officer is not permitted. He also submitted that in the statements before Investigating officer of NIA, PW-79 and PW-112 have not stated his presence in Faridbad and Bhopal meetings. I think that above witnesses have specifically stated the presence of accused No.5 Sameer Kulkarni in their statements before ATS officers. Re-examination of these witnesses by Investigating officer of NIA is in the year 2015 i.e. after laps of considerable period from the date of incident and recording of their statements by ATS officers hence much importance need not be given to this submission of accused No.5 at this prima facie stage. He also submitted that statement of PW-57 shows that PW-121 i.e. Col. Dhar was in-charge of the M.P. Unit of Abhinav Bharat. According to him, he was not member of any organization.

128. It is pertinent to note that the statement of PW-83 & PW-84 show that for the meeting at Bhopal accused No.5 Sameer Kulkarni himself had booked the hall in Shriram Mandir in the name of Sameer Chanakya, Abhinav Bharat. True copy of the concerned page in booking Register is at page No.457 & 459 in Volume- III B. Moreover, statement of accused No.9 in the meeting at Anangpur, Faridabad (volume III B, Page No.859) shows that the name 'Chanakya' is given to the accused No.5 Sameer Kulkarni as per previous decision. It also shows that accused no.5 was working as a In-charge of Abhinav Bharat of Madhya Pradesh Unit. It shows the active participation of accused No.5 for arranging the meeting at Bhopal as well as in the work of Abhinav Bharat Sanghatan. There is no material to show that Col. Dhar acted as a in-charge of M.P. Unit. Moreover statement of PW-57 shows that Col. Dhar was appointed as a in-charge of the training section.

129. It is true that in Faridabad meeting as well as in Bhopal meeting there is no material to show the actual utterances of accused No.5 Sameer Kulkarni and No.11 Sudhakar Chaturvedi. On the contrary, from the record it appears that in Faridabad meeting, accused No.9 Lt. Col. Prasad Purothi, No.10 Swami A.D. Thirth, accused No.4 Major Ramesh Upadhyay were vocal. Certainly it does not affect the case of the prosecution when there is material on record to show the active participation of the accused No.5 Sameer Kulkarni and No.11 Sudhakar Chaturvedi in other works relating to the Abhinav Bharat with the accused Nos.4, 9 and 10.

130. During the course of argument it is submitted on behalf of accused No.10 that being Shankaracharya he was called in the meetings. In fact, he has no concerned with the discussion in the meetings. As like other devotees accused No.9 and other accused are his devotees. But certainly this submission is difficult to accept. It appears from the record that in Faridabad meeting he was treated as a chairperson by all accused persons present in the said meeting and the witnesses. He actively took part in the discussion on the point mentioned above. Not only this but in fact conversation in the said meeting at Faridabad is retrieved from the laptop seized from the possession of this accused. It appears from the transcript of sanatanbharat.wma that care was taken to have discussion in secret by closing the doors of room hence this submission on behalf of accused No.10 cannot be accepted.

Certain statements made by the accused No.9 Lt. Col. Prasad Purohit to PW-55 prior to the bomb blast and after the bomb blast.

131. Now so far as next circumstance i.e. certain statements made by the accused No.9 Lt. Col. Prasad Purohit to PW-55 prior to the

bomb blast and after the bomb blast is concerned; there is statement of PW-55 on record. According to his statement before Investigating officer of ATS and learned Metropolitan Magistrate, Girgaum, Mumbai, he is knowing accused No.9 since 2005. According to him, accused No.9 has malice against Muslim community and he is of the firm opinion that Muslims cannot be Indians by their heart and they would divide (partition) India for second time. This witness also stated about showing of bag containing RDX to him kept in the house by the accused No.9 in March 2007. He has also stated about the fact that on 05/06.07.2008, once accused No.9 had come to Nashik from Pachmadi and on his way with this witness at Pune had stated him that there would be a big action in August or September in Nashik District. This witness has also stated about the fact of meeting dated 16.09.2008 in Bhosla Military School, Nashik. According to this witness, he had attended the camp arranged by the accused No.9 for training to the youth at Pachmadi between 16.10.2008 to 20.10.2008. Then this witness has stated about the fact that during the said period of camp, once in a night when he was travelling with accused No.9 by his Scorpio, accused No.9 received a phone call on his mobile and he came to know the fact that police picked up the accused No.1 Pragyasingh Thakur. According to this witness, accused No.9 was disturbed and said that *it became problematic*. This witness has further stated that during his stay at Pachmadi, he was residing in the house of accused No.9. According to this witness during the night hours accused No.9 came in his room and stated about his involvement in Malegaon bomb-blast. Accused No.9 also stated that he along with accused No.11 Sudhakar Chaturvedi and one Ramji prepared the bomb in the house of accused No.11 Sudhakar Chaturvedi at Devlali and blast was caused by fitting it in the motorcycle received from accused No.1 Pragyasingh Thakur.

It is true that this witness is re-examined by Investigating Officer of NIA as PW-181 and this witness has retracted from his aforesaid statement before Investigating Officer of ATS.

132. It is submitted on behalf of accused No.9 that this witness (PW-55) has made complaint on oath to the State Human Rights Commission alleging that the Officers of ATS tortured him and under the threat of gun-point and threat of arrest and encounter got recorded his statement. Advocate of accused No.9 further submitted that statement of this witness is fabricated. Yet complaint before Human Rights Commission is pending. In Court of Enquiry also this witness has stated the same thing. According to him, now Investigating Officer of N.I.A. has recorded the statement of this witness and again this witness has reiterated all above facts. He further submitted that Metropolitan Magistrate, Girgaon, Mumbai did not follow mandatory provision under Section 164(6) of the Code and handed over statement to the Investigating Officer instead of sending it to the Court. According to him, every page of statement of this witness is also not signed by the witness and Metropolitan Magistrate, Mumbai.

133. According to him, on merit also the facts stated by this witness cannot be accepted. He submitted that statement of witness shows that accused No.9 while travelling from Nashik to Pune on 5/6.07.2008 told this witness that there would be some action in August or September in Nashik District. This part of the statement of PW-55 is not acceptable, because in July 2008, accused No.9 was posted at Pachmadhi and leave record show that there was no leave of accused No.9 in the month of July. He submitted that it was highly improbable by any route to travel in 36 hours duration from Pachmadhi to Pune.

134. According to advocate of accused No.9, PW-55 has stated about the fact that accused No.9 showed him a green bag and told him that it contained RDX brought from Kashmir when he was posted in Jammu and Kashmir. According to advocate of accused No.9, documents submitted by Ministry of Defence show that it is highly impossible for any one to bring RDX from Jammu and Kashmir. According to him, these documents further show that accused No.9 was working in intelligence unit and was not having authoirty of carrying operation on its own and intelligence unit was not having access to any explosive. He submitted that in view of documents filed by Ministry of Defence, this part of the statement of PW-55 is difficult to accept.

135. Advocate of accused No.9 further submitted that the incident dated 19.10.2008 about extra-judicial confession of accused No.9 after getting information of arrest of accused No.1 Pragyasingh Thakur, stated by PW-55 is also difficunt to accept as being improbable. According to him, accused No.9 is an intelligence officer. It would absurd to accept that accused No.9 would make extra judicial confession before this witness and say that he should not tell this fact to any one. In short, according to him, even on merit also statement of PW-55 is not acceptable.

136. He further submitted that while releasing the accused No.9 on bail Hon'ble Apex Court also did not accept the statement of PW-55 before ATS officer in view of the fact of his contrary statement before Investigating officer of NIA. On this ground also this statement cannot be accepted.

137. It is true while releasing the accused No.9 on bail Hon'ble Apex Court did not accept the statement of PW55 in viewof contrary statement made by this witness before Investigating officer of NIA. But it is pertinent to note that Hon'ble Apex Court in para No.25 of the Judgment has specifically mentioned that any observations made by Hon'ble Apex Court in this order shall not come in the way of deciding the trial on merit. It shows that the observations made by the Hon'ble Apex Court were restricted to that bail application only.

138. So far as this witness is concerned, position became that there are two statements of this witness under Section 161 of the Code and one statement recorded by the learned Metropolitan Magistrate, Mumbai under Section 164 of the Code.

139. So far as the defects pointed out by the advocate of accused No.9 in the statement under section 164 of the CrPC recorded by learned Metropolitan Magistrate, Mumbai I have already pointed out that as per the law laid down by the Hon'ble Apex Court in case of ***State Vs. Nalini (cited supra)***, this defect can be cured by examining the concerned Magistrate in view of section 463 of the Code. Hence mere on the ground that there are some defects regarding signatures and sending the statement in the Court at this prima facie stage the statement recorded by Metropolitan Magistrate, Mumbai cannot be thrown out. On the contrary, as this statement is made on oath before Metropolitan Magistrate certainly it has more weightage than the statement recorded under section 161 of the Code by Investigating officer of NIA.

140. It is true that this witness has made complaint to the State Human Rights Commission against the ATS officers. That complaint is not yet decided and is pending but it is notable that statement of this witness is recorded by ATS officer on 14.11.2008. Learned Metropolitan Magistrate, Mumbai has recored his statement of 18.11.2008 and this witness has made complaint to the Human Rights Commission on 05.10.2009 i.e. after gap of long period. It is pertinent to note that this witness was also serving in Army and well educated person. Statement of this witness under section 164 of the CrPC shows that learned Metropolitan Magistrate had made inquiry with this witness as to whether there was threatening to him by the police or he was put under the pressure for giving the statement and this witnesses had replied in negative before learned Metropolitan Magistrate. Considering all these facts mere on the ground that this witness has made complaint against ATS officer his statement cannot be disbelieved at this stage.

141. So far as the submission regarding improbability to accept the fact of making extra-judicial confession by accused No.9 is concerned I think that the probabilities or improbabilities as well as falsity or truthness are the factors which cannot be decided at this prima facie stage. For this purpose witness has to be tested in the witness box by way of cross-examination hence it is difficult to accept the submission of advocate of accused No.9 about falsehood of the statement of this witness.

Involvement of LML Freedom motorcycle belonging to accused No.1 in Bomb blast and conversation between accused No.1 Pragya singh Thakur and wanted accused Ramchandra Kalsangra in presence of PW-22.

142. Next incriminating circumstance in this matter is the

involvement of LML Freedom motorcycle belonging to accused No.1 in bomb blast. First of all it is pertinent to note that though Investigating officer of NIA has exonerated the accused No.1 from this crime he has come to the conclusion that vehicle belonging to accused No.1 was used for causing blast and was found on the spot of incident. Hence so far as this fact is concerned it has to be said that both the Investigating Agencies are in agreement with each other.

143. During the course of argument accused No.5 Sameer Kulkarni submitted that though the vehicle is in the name of accused No.1 Pragyasingh Thakur the vehicle which was found on the spot is not the same which was standing in the name of accused no.1. It is also submitted by accused No.5 and on behalf of accused No.1 that vehicle which was standing in the name of accused no.1 alleged to be found on the spot of incident was already in possession of wanted accused Ramchandra Kalsangra and accused No.1 had no control over that vehicle at the relevant time.

144. It appears from the recitals in the FIR as well as material on record that the engine number and chassis number of the motorcycle in which explosive devices was fitted were found to be erased. FSL Nashik has able to restore the engine number only and in its report dated 07.10.2008 (Volume-I, Page No.309) gave three probable engine numbers of the vehicle found on the spot. Those are : 1) 5 – OK – 261886, 2) 5 – OK – 267886 and 3) 5 – OK – 261686. During the course of investigation on the basis of statement of PW-70 who is the Divisional Manager of the company it is found that LML Freedom motorcycle having engine No. E - 55- OK – 261886 was sold to dealer M/S Siddhi Agency, Rustampura, Surat and engine bearing No. E – 55 –

OK – 261686 was sold to dealer M/S. Pranjaal Motors, Badhayu and remaining was not manufactured by the company.

145. Statement of PW-42 to PW-45 show that LML freedom motorcycle bearing Engine No. 55 – OK – 261886 was sold to the accused No.1 Prgyasingh Thakur and Registration number of this motorcycle was GJ-05-BR-1920. Report of the Senior Police Inspector of Badhayu dated 09.11.2008 (Volume – I, page 241) shows that LML Freedom motorcycle bearing Engine No. E – 55 – OK – 261686 is with one Sanjiv Sharma, resident of Badhayu and he is using the same. What it shows that out of three probable engine numbers of LML Freedom motorcycle one was not manufactured by the company, another was with Santosh Sharma and he is using the same and third one was sold to the accused No.1.

146. Accused no.1 is the registered owner of the said motorcycle till today. If this is the position then it is for the accused No.01 to show that her motorcycle is still in existence and in use by somebody.

147. It is true that as submitted by accused No.5 Sameer Kulkarni though in fact complete engine number is consists of three alphabet and 8 digits but FSL Nashik is able to restore only 7 digits and two alphabets. It is pertinent to note that RTO report at page No.231 in Volume-I shows that in registration papers of the vehicle pertaining to accused No.1, engine number is simply mentioned as 261886. What it shows that much importance is not given to initial part i.e. E – 55- OK by Registering Authority also. Hence at this prima facie stage submission of accused No.5 that vehicle which was found on the spot is not belonging to accused No.1 Pragyasingh Thakur cannot be accepted.

148. During the course of argument it is submitted by accused No.5 Sameer Kulkarni that according to PW-70, ATS had send letter to him on 03.10.2008 for information. He submitted that FSL report itself is dated 07.10.2008 then how ATS sent letter on 03.10.2008 for calling information. I think that this submission cannot be accepted because statement of PW-70 shows that he had received another letter mentioning three probable numbers dated 31.10.2008 i.e. after FSL report. Any how, at this prima facie stage safe conclusion can be drawn that vehicle involved in the blast is belonging to accused No.1 and is standing in her name in RTO record.

149. It is submitted on behalf of accused No.1 Prgyasingh Thakur that investigation papers show that absconding accused Ramchandra was in possession of the said motorcycle since 2007. According to advocates of accused no.1 even while deciding the bail application of accused No.1 Hon'ble High Court has also accepted this fact. According to advocates of accused No.1, if this is the position then fact of using the said vehicle in bomb-blast cannot be attributed to accused No.1 or cannot be used as incriminating circumstance against her.

150. It is true that Hon'ble High Court while deciding bail application of accused No.1 bearing Criminal Appeal No.545 of 2016 at Exh.4104 held that motorcycle was in possession of absconding accused Ramchandra Kalsangra. But it is pertinent to note that in para No.118 it is specifically clarified by the Hon'ble High Court that observations made in the order are for the purpose to decide the appeal only and this Court should not be influenced by the said observations in any way.

151. For this purpose statements of PW-22 and PW-23 are material to consider.

152. Statement of PW-23 shows that accused No.1 was closely acquainted with wanted accused Ramji and she was in visiting term to the house of Ramji. According to this witness, Ramji was using LML freedom motorcycle and Ramji had informed to this witness that motorcycle was given to him by the accused No.1. On this background it will appropriate to consider the statement of PW-22.

153. Statement of PW-22 shows that he is well acquainted with absconding accused Ramchandra as well as accused No.1 Pragyasingh Thakur. According to him on 07.10.2008, Ramji had contacted him and asked him to phone accused No.1. Accordingly, he phoned accused No.1 and she had called this witness on the next day i.e. on 8.10.2008 at Ujjain.

154. Statement of this witness further shows that he went to receive accused No.1 at Ujjain railway station. There was talk between accused No.1 and Ramji on mobile phone at railway station for 5 to 7 minutes. According to this witness then he took accused No.1 in Mahakal Dharmshala where accused No.1 halted in one room. This witness has given the account regarding meeting of accused No.1 with one Arvind Jain and then he stated about the fact of arrival of Ramji in the said Dharmashala to meet accused No.1.

According to this witness in his presence there was conversation between accused No.1 and wanted accused Ramji. His statement shows that they were talking about incident of bomb blast. According to this witness absconding accused Ramji Kalsangara

admitted his complicity in causing bomb blast. It appears from the statement of this witness that accused no.1 was having knowledge about this fact. According to this witness accused No.1 made inquiry with Ramji as to how there were less casualties though her vehicle was used for causing blast and then Ramji gave explanation or reason for it. It is pertinent to note that statement of PW-22 and PW-23 are also recorded under section 164 of the CrPC and they have stated the above facts before the Metropolitan Magistrate, Mumbai also.

155. For excluding the statement of PW-22 from consideration, advocates of accused relied upon the complaint made by PW-22 against ATS officer before the Magistrate at Indore. It is true that in the said complaint PW-22 has alleged that his statement was got recorded by ATS officer by harassing, and ill-treating him. It appears from the copy of the complaint that it is filed in the Month of November, 2008 but it is pertinent to note that this witness has not stated about any ill-treatment at the hands of police before Metropolitan Magistrate, Mumbai while recording his statement under section 164 of the CrPC. In such circumstances truth can be elucidated from the mouth of this witness only after his examination in witness box. At this prima facie stage mere on the ground that he has lodged the complaint against ATS officer his statement under section 164 of the CrPC recorded by Metropolitan Magistrate, Mumbai and his statement before Investigating officer of ATS cannot be disbelieved.

156. During the course of argument it is submitted by advocates of accused that whatever statement is made by Ramji about his complicity in the crime is made after the termination of conspiracy i.e. after the bomb-blast. Hence in view of section 10 of the Evidence Act

statement of PW-22 stating above facts cannot be considered at this stage also. In support of this submission advocates of accused No.1 relied upon the authorities reported in (A) **Saju Vs. State of Kerala (supra)**. (B) **2005 Supreme Court Cases (Cri) 1715, State (NCT Delhi) Vs. Navjot Sandhu alias Afsan Guru** and (C) **State of Tamil Nadu Vs. Nalini (supra)**. While considering the scope of section 10 of the Evidence Act it is held by Hon'ble Apex Court that, this section is founded on the principle of law of agency but statement or act of conspirator become relevant only when it is done or made during the subsistence of conspiracy. Once conspiracy comes to an end or common intention ceased to be exist, statement or act of the co-conspirator thereafter does not become admissible.

157. The same argument is advanced in respect of intercepted phone conversation between accused No.4 Major Ramesh Upadhyay and accused No.9 Lt. Col. Prasad Purohit. While giving reply to that submission it was submitted by learned SPP that in present case object of conspiracy of the accused persons is to form Hindu Rahstra hence causing bomb-blast is not the termination of conspiracy. According to him, conspiracy to cause bomb-blast is the step towards achieving object of Hindu Rashtra.

158. According to prosecution case conspiracy period is January, 2008 to 23.10.2008 i.e. till the date of arrest of accused No.1 Pragyasing Thakur. I have already pointed out the discussion in Faridabad meeting as well as in Bhopal meeting. There was discussion regarding formation of Hindu Rashtra excluding Muslims and Christian people. There was also discussion to create threat against these peoples by striking them. In sequence to that in Bhopal meeting, there was

discussion about Jihadi activities in Aurangbad and Malegaon. Accused No.9 expressed his opinion about expanding the work of Abhinav Bharat in that area to control the same. Considering all these facts I found substance in the submission of learned SPP. Any how, at this stage at-least the evidence of PW-22 can be used to say that accused No.1 had knowledge about involvement of her motorcycle in the blast and her dissatisfaction about causing less casualties. Hence it is difficult to accept the submission on behalf of accused No.1 that she has no concerned with present crime as she has been exonerated by Investigating officer of NIA.

Finding of RDX traces during the house search of accused No.11 Sudhakar Chaturvedi.

159. As per the prosecution case on 25.11.2008, house of accused No.11 Sudhakar Chaturvedi was searched in presence of panch witnesses. As there was lock to the house of accused No.11 it was broke opened. According to the prosecution case and recitals in the panchanama traces of RDX as well as two gunny bags were found along with other so many articles in the house of accused No.11. FSL Report on record shows that these traces of RDX are similar with the RDX found on the spot of incident.

160. During the course of argument accused no.5 submitted that panchanama dated 25.11.2008 is not under section 27 of the Evidence Act then how the ATS officer came to know the address of accused No.11. Panchanama shows that FSL team was taken by the ATS officer with them. This fact itself shows that ATS officer had knowledge about RDX traces in the house of accused No.11 as it was planted by ATS officer. He further submitted that when it was informed to the ATS

officer that key of the lock was with Subhedar Pawar by accused No.11 then whey Subhedar Pawar was not called by ATS officer. It is not mentioned in the panchanama that after completion of panchanama again house of accused No.11 was locked by ATS officer. According to him, ATS officer has not followed the procedure under sub-sections (4) & (6) of section 100 of the Code. ATS officer did not call panch witnesses residing at Devlali near the house of accused No.11 and took panch witnesses from Nahik. In short, according to him, this panchanama is fabricated and false one. He also submitted that FSL report says that RDX traces found in the house are similar with RDX found on the spot. According to him it does not mean that both are same. He submitted that any two samples of RDX can be similar to each other.

161. According to accused persons in-fact this RDX was planted in the house of accused No.11 by ATS officer by name API Bagde to create false evidence. The statement of PW-180 & PW-183 are recorded by Investigating officer of NIA. In the said statement both witnesses have stated that on 03.11.2008, they found that API Bagde had entered illegally in the house of accused No.11, but he requested not to disclose this fact to anybody, hence, they kept quiet.

162. Relying on this further investigation made by NIA it is submitted that ATS officer created this false evidence to implicate the accused persons. It is submitted on behalf of accused persons that even Investigating officer of NIA has also made serious allegations against API Bagde about planting of RDX. In short according to accused persons search panchanama dated 25.11.2008 of the house of accused No.11 cannot be useful to the prosecution.

163. It appears from the record that statement of PW-180 was already recorded by Investigating officer of ATS for three times i.e. on 03.12.2008 as PW-80, on 19.12.2008 as PW-104 and on 16.03.2011 as PW-174. Nowhere this witness who is serving on responsible post in Army has stated about aforesaid fact of illegal entrance of API Bagde in the house of accused No.11 Sudhakar Chaturvedi, to Investigating officer of ATS. Nowhere this witness has stated before Investigating officer of NIA that he had stated this fact to the Investigating Officer of ATS, but, intentionally he did not record the same.

164. Statement of PW-183 shows that he had received the information about entrance of API Bagde in the house of accused No.11 from PW-180. In-fact, this witness had not gone in the house of accused No.11 at that time and he was on his scooter by which he had gone there along with PW-180.

165. It has to bear in the mind that according to accused persons, accused No.11 Sudhakar Chaturvedi was intelligence source of military and was on pay roll of Military. Statements of PW-180 & PW-183 show that on 03.11.2008, both of them had knowledge about the fact that investigation in respect of Malegaon Bomb-blast was going on and ATS was doing the investigation. Despite this fact, these two witnesses who are responsible officers of Army did not bring this fact to the notice of any superior officer of police. According to PW-183 he informed this fact telephonically to his superior i.e. Commanding officer, V. S. Pachpure. But no record in writing was prepared in respect of alleged illegal entrance of API Bagde in the house of accused No.11 Sudhakar Chaturvedi.

166. It is further notable that as per the statement of PW-180 dated 03.12.2008 as PW-80, accused No.11 had handed over key of his house to him and then he gave the said key to accused No.12 on 22.09.2008 as per direction of accused No.9. In his statement dated 03.12.2008, PW-180 has not stated specifically that while leaving the room accused No.12 had returned the key to him. But naturally accused No.12 would have locked the house while leaving. Unless lock is broken it was not possible for any other person including API Bagde to have entrance in the house of accused No.11. It is pertinent to note that nowhere PW-180 & PW-183 have stated in their statements before Investigating officer of NIA that API Bagade had broke opened the lock of the house of accused No.11. On the contrary, I have already pointed out that in the panchanama dated 25.11.2008 there is reference of breaking the lock of the house of accused No.11. At this stage, it is notable that nowhere PW-180 & PW-183 have stated in their statement before Investigating officer of NIA that, on 03.11.2008 while leaving the house of accused No.11 they had locked the house of accused No.11. What it shows that house which was locked by accused No.12 while leaving the same was broke opened directly on 25.11.2008 at the time of panchanama. If this is the position then at this prima facie stage contention of plantation of RDX is difficult to accept.

167. Apart from all above discussion it is very important that Investigating officer of NIA has not recorded the statement of API Bagde though he himself has made very serious allegations against API Bagde. Not only this, Investigating officer of NIA has not initiated any legal action against API Bagde when he came to the conclusion that false evidence is created by API Bagde in this matter. I think that everything would be clear only during the course of trial when API Bagde would

enter in the witness box being witness. Unless opportunity is given to API Bagde to explain the serious allegation made against him, said allegation cannot be accepted as truth. So far as submission regarding meaning of word 'similar' in FSL report I think that the expert who has given this report is the only person who can give explanation about this. At this prima facie stage the panchanama of house of accused No.11 dated 25.11.2008 and FSL report required to be accepted.

Intercepted Telephonic conversation between accused No.4 and accused No.9.

168. Transcripts of the said conversation between accused No.4 and accused No.9 is on page Nos.681 to 699 in Volume III-B. It appears that this conversation is dated 23.10.2008 at 11.23 a.m., 4.10 p.m., 4.12 p.m. and 5.54 p.m. It appears that in the first conversation they referred news in Times of India and Indian Express about Malegaon blast. Accused No.9 told accused No.4 that "**cat is out of the bag**". According to prosecution this refers to the arrest of accused No.1. It appears from this conversation that they had discussed about scooter and probable defences for disowning the scooter. They also discussed that by that time police had not found any evidence regarding direct involvement of any person except the scooter. This conversation shows that accused No.9 suggested accused No.4 for procuring another Sim card which should not be in the name of accused No.4. He also expressed the need to be more meticulous by all of them.

169. In phone talk at about 04.12 p.m. both of them talked about Shankaracharya, Dr. R.P. Singh as well as accused No.1 Pragyasingh Thakur. Then there is another telephonic call of the same date at about 05.54 p.m. between them. In the said call accused No.9

told accused No.4 that "**Singh has sung a song quite a bit**". According to prosecution this is referred to accused No.1 Pragyasingh Thakur. This conversation discloses that accused No.9 came to know about figuring his name in this matter and both of them confirmed that name of accused No.9 was taken by accused No.1 Pragyasingh Thakur. Accused No.9 said that he was under pressure and tension. They also discussed about engaging Advocate. This conversation shows that accused No.9 talked about changing of his phone number and he also asked accused No.4 to give instructions to all members of the organization not to have contact with him.

170. Accused No.4 has also informed the accused No.9 about commencement of his enquiry also. Their conversation shows that according to them till Bhopal meeting PW-118 Tai Himani Savarkar was shown as public figure in "Pragat Karyakram". Accused No.9 told that there is no problem regarding "Pragat Karyakram" because those were arranged by proper police permission and they have not stated anything wrong in those "Pragat Karyakram". Conversation further shows that accused No.9 Lt. Col. Prasad Purohit has given certain instructions to accused No.6 Ajay Rahirkar. There is also one more telephonic talk on page No.631 in Volume III-B between accused No.9 and accused No.4. In this telephonic talk they were speaking about to be more conscious and they were under apprehension of having on radar. They instructed each other to be more careful. It appears from this conversation that accused No.4 and accused No.9 were preparing for their defence and were talking that which circumstances can be used for their defence.

171. It is submitted by accused No.4 that FSL report regarding matching of specimen voice samples with the question voice in

intercepted telephonic talk cannot be accepted because prior permission of the Court for taking specimen voice samples of the accused was not taken by the investigating officer. In support of argument he relied on the authorities reported in (A) **1982 AIR 949 Supreme Court, State of West Bengal & Ors. Vs. Swapan Kumar Guha and Ors.** (B) **2004 STPL (LE-Crim) 24407 Bom, Central Bureau of Investigation, New Delhi Vs. Abdul Karim Ladsab Telgi.** (C) **2011 (4) Supreme Court Cases 143, Nilesh Dinkar Paradkar Vs. State of Maharashtra**.

172. As against this learned SPP submitted that when voice specimen samples were taken accused persons were in the police custody hence there was no need to take the permission of the Court for taking voice specimen samples of the accused persons.

173. In case of ***Swapan Kumar Guha (cited supra)*** it is specifically observed that Investigating officer has not unfetter discretion to carry out investigation in the matter and he has to investigate the matter in accordance with the provisions of law.

In case of ***Abdul Karim Telgi (cited supra)*** Special Court under the MCOC Act had rejected the permission for taking the voice samples of accused sought by the Investigating officer on the ground that there is no specific provision to that effect. When the matter came before Hon'ble Bombay High Court relying on the judgment of Hon'ble Apex Court in case of ***State of Bombay Vs. Kathikalu Oghad, AIR 1961 Supreme Court 1808*** it is held that Magistrate can grant permission to take the voice samples in view of section 5 of the Identification of the Prisoners Act, 1920.

In case of ***Nilesh Paradakar (cited supra)*** Hon'ble Apex Court has ruled that voice identification evidence is corroborative

evidence and not substantive.

174. In present case according to the prosecution permission is not obtained for taking voice samples from the Court which is necessary in view of the observations of the Hon'ble Bombay High Court in Telgi's case. Non obtaining permission of the Court to take the voice samples of the accused persons at the most affect the FSL report which say that questioned voice in intercepted telephonic conversation tallied with the voice samples of accused persons. But I think that this is not the only way to establish the identity of the speaker. Prosecution may during the course of evidence can adduce other admissible evidence to establish the identity of speakers in questioned intercepted telephonic conversation. Without giving opportunity to the prosecution at this stage this material cannot be excluded from the consideration as submitted by the accused persons.

175. During the course of argument, accused No.5 Sameer Kulkarni also relied on the authority reported in **AIR 1997 Supreme Court 568, People's Union for Civil Liberties (PUCL) Vs. Union of India and another**. In this case, Hon'ble Apex Court has laid down certain guide-lines for interception of the telephonic conversation under section 5 of the Telegraph Act. I think that it is a matter of appreciation of evidence as to whether these guide-lines were followed or not hence at this stage this authority cannot be useful to the accused persons in support of contention that material regarding intercepted telephonic talk should be excluded from the consideration.

In the same manner, observations in case of ***Nilesh Paradakar Vs. State of Maharashtra (cited supra)*** also cannot be useful to the accused persons as stage of appreciation of evidence

regarding voice identification is not yet arrived.

176. During the course of argument it is submitted on behalf of accused persons that this telephonic conversation is after the termination of alleged conspiracy of causing bomb-blast at Malegaon. According to accused persons, conspiracy comes to an end on 29.09.2008 i.e. after the bomb-blast. Hence conversation between accused No.4 and accused No.9 cannot be considered.

177. As against this, it is submitted by learned SPP that accused persons had made conspiracy to establish Hindu Rashtra. According to him, conspiracy to cause bomb-blast is one step towards the aforesaid object of the accused persons.

178. I have already pointed out that there is some substance in the submission of learned SPP. Apart from this, though for the sake of argument it is accepted that this conversation is after the termination of conspiracy, it can be considered as a subsequent conduct of the accused persons particularly accused No.4 Major Ramesh Upadhyay and accused No.9 Lt. Col. Prasad Purohit, as submitted by learned SPP. This submission of learned SPP can be accepted in view of principle No.2 laid down by Hon'ble Apex Court regarding the law governing the conspiracy in ***Nalini's case (cited supra).***

Formation of Abhinav Bharat Trust, collection of money on behalf of said trust and use of said money by accused persons to meet their expenses of activities relating to crime.

179. It appears from the record that by taking initiative accused No.9 Lt. Col. Prasad Purohit has formed the Trust by name Abhinav

Bharat. Copy of the Trust Deed is at page No.315, Volume-VI A. Accused No.6 Ajay Rahirkar has not disputed the fact that he was working as a treasurer of the said Trust. Statement of PW-40 shows that in June, 2006 Accused No.9 Lt. Col. Prasad Purohit, accused No.6 Ajay Rahirkar, accused No.7 Rakesh Dhawde, PW-40 himself and some other witnesses had gathered at Raigad Fort and took oath of not to stop till formation of Hindutwawadi Rashtra. Statement of PW-40 further shows that thereafter all of them decided to form the Trust and accordingly, this Abhinav Bharat trust was formed. It is registered on 09.02.2007.

180. During the course of argument advocate of accused No.6 submitted that formation of Abhinav Bharat Trust is a legal act and there is no wrong to be a treasurer of the said Trust. According to him, Abhinav Bharat Sanghatan in respect of which there is discussion in Anangpur, Faridabad meeting is altogether different organization. He submitted that prosecution has intentionally created confusion to implicate the accused persons falsely in this crime.

181. According to him, there is no case of the prosecution that accused No.6 was present in any meeting at Faridabad or in Bhopal. There is also no material on record to show that accused No.6 has made any objectionable statement in any other meeting. According to him, as per prosecution case, accused no.6 was present in the meeting in Bhosla Military school on 16.09.2008 but this meeting was held in respect of organization of camp at Pachmadi between 16.10.2008 to 20.10.2008. There is no material to show that accused No.6 had any knowledge about the alleged conspiracy. According to him, statement of the witnesses i.e. PW-40 & PW-67 show that though accused No.6 was the

treasurer of the Trust in fact over all control on financial aspect was of accused No.9 Lt. Col. Prasad Purohit only. According to him, accused No.9 was friend of accused No.6 hence he became treasurer of the Abhinav Bharat Trust. He submitted that accused No.6 is the businessman having no criminal background. He is implicated in this matter only because of financial transactions of Abhinav Bharat Trust. He further submitted that there is no material to show that amount provided by this accused No.6 to the co-accused i.e. accused no.9 Lt. Col. Prasad Purohit, accused No.11 Sudhakar Chaturvedi and accused No.5 Sameer Kulkarni is used for commission of any crime. In short, according to advocate of accused No.6, this accused has no concerned with alleged conspiracy.

182. To appreciate the above argument certain statements made by accused No.9 in the meeting at Anangpur, Faridabad are material to consider. I have already pointed out some main points of the discussion in the said meeting. I have already pointed out that tone of the discussion in the said meeting shows that by remaining within the present system participants want to create an option for Hindu Community by way of 'Abhinav Bharat Organization' as a political party to create at-least nuisance value for achieving the object of Hindu Rashtra. I have already pointed out that accused No.9 expressed his view that threat should be created against Muslim and Christian by striking them and he spoke about 'Fantam Organization' for carrying underground operations.

183. In the said meeting there was also discussion regarding social organization. Discussion shows that accused No.9 stated that they have already formed the Trust by name Abhinav Bharat by saying

that they are the persons of Disaster management. According to him TATA motors, Mahindra Motors are providing 5 to 7 vehicles to them on every year. Then he stated about the availability of infrastructure for providing training and purchase of the land in Maharashtra for giving training. According to accused No.9, as a persons of disaster management they are collecting the money. The tone of this discussion shows real purpose of formation of Abhinav Bharat Trust.

184. It is true that there is nothing wrong in the object mentioned in the Trust Deed of Abhinav Bharat Trust. But certainly use of the funds of the said Trust is relevant. It is pertinent to note that during the course of house search of accused No.6 Ajay Rahirkar, various documents including diary was seized by ATS officer under panchanama dated 04.11.2008 (Volume-I, Page No.67). Copy of the diary is at page Nos.425 to 431 and copies of other documents are at page Nos.407 to 423 and 433 to 436. It appears from the entries in the diary that several amounts are shown to be given to accused No.5 Sameer Kulkarni, accused No.9 Lt. Col. Prasad Purohit and accused No.11 Sudhakar Chaturvedi. Admittedly, accused No.5 and accused No.11 are not the trustees of Abhinav Bharat Trust. Certainly, being treasurer of Abhinav Bharat Trust it is within knowledge of accused No.6 that for which purpose he provided the amount to the above accused persons. In the said diary there is entry dated 03.04.2008 & 09.04.2008 regarding payment to accused No.11 and accused No.5 and word is mentioned as “Bhopal Additional”. It has to bear in he mind that Bhopal meeting took place on 11.04.2008 & 12.04.2008. Keeping in mind the discussion in Faridabad meeting and dates of Bhopal meeting reasonable conclusion can be drawn that this amount was provided to meet the expenses of Bhopal meeting. Moreover,

documents on record further show that to meet the expenses of travelling of accused No.9 also various amounts are paid. It shows that by forming Abhinav Bharat Trust amount was raised and was used to meet the expenses of their activities relating to this crime by the accused persons. Certainly, in view of all above discussion at this prima facie stage it is difficult to accept the contention of accused No.6 that he had no knowledge about the object for which this amount is incurred hence I do not accept the submission that accused No.6 has no concerned with this crime.

Accused No.12 :

185. From all above discussion it is clear that accused No.7 Rakesh Dhawde and accused No.12 Praveen Takkalki had not participated in any meeting. Moreover, Investigating officer of NIA has exonerated the accused No.12 from all charges. It is submitted by Adv. Shri Punalekar for accused No.12 that there is no prima facie case against all accused persons under the provisions of MCOC Act. NIA has exonerated all of them from the charges under the MCOC Act. Hence, confessional statement of accused No.12 and accused No.7 cannot be considered. According to him, if confessional statement of accused No.12 and accused No.7 are excluded from the consideration there is absolutely no material on record to say that this accused has any connection with alleged crime. According to him, even though allegations made by ATS are accepted as it is they fall short to show the involvement of this accused in the conspiracy.

186. As against this learned SPP pointed out material in the investigation by ATS against this accused. But he has not disputed the fact that NIA has exonerated this accused from all charges. In view of

the law laid down by Hon'ble Apex Court in case of ***Vinay Tyagi (cited supra)*** now, it has to be seen that on the basis of investigation done by ATS can it be said that there is ground to presume the involvement of this accused in commission of crime.

187. According to allegation of ATS, this accused took the training of preparing the fuse of the bomb from accused No.7. There is statement of PW-38 and PW-39 on this point. Relevant portion of their statements show that according to them in August, 2008 they had gone to the house of accused No.7 Rakesh Dhawde. In the course of formal talk with accused No.7 Rakesh Dhawde he informed them that in the last month at the time of Gurupornima, he had gone to the house of accused No.9 Lt. Co. Prasad Purohit to meet him at Pachmadhi, Madhya Pradesh. Their statements further show that accused No.7 informed them that, at that time he gave training to the assistant of accused No.9, by name Praveen and two local persons having Hindi mother-tongue about making of fuse of bomb.

188. It is pertinent to note that there is no further investigation on this point by the Investigating Officer of ATS that really the person Praveen named in the statement of these witnesses is the present accused. There is also no investigation by ATS that really this alleged training has any connection with bomb-blast at Malegaon. Admittedly, these two witnesses i.e. PW-38 and PW-39 had no occasion to meet the said Praveen. Moreover, statement of these two witnesses i.e. PW-38 & PW-39 is recorded under section 164 of CrPc on 13.11.2008 before learned Metropolitan Magistrate, Mumbai. It is pertinent to note that these two witnesses have not uttered a single word about the alleged statement made by accused No.7 to them hence at this prima facie stage

also it is difficult to accept this allegation of ATS against accused No.12 Praveen Takkalki.

189. Another allegation against accused No.12 by ATS is, he planted the bomb along with absconding accused Ramchandra Kalsangra and Sandeep Dange. For this purpose, there must be a material on record to establish prima facie that this accused was present on the spot at the time of incident or immediate prior to that. Admittedly, alleged incident of bomb-blast took place at Malegaon on 29.09.2008. There is no statement of a single witness on record to show that this accused was seen at Malegaon on the date of incident or immediate prior to that. On the contrary, statement of PW-164 shows that in second week of August 2008, accused No.12 along with two military persons had gone towards him and on their request he gave one room on rent basis to the accused on monthly rent of Rs.1300/-. His statement further shows that he handed over key of that room to the accused. According to this witness, after 15 days accused went somewhere and then returned back in the last week of September, 2008. His statement shows that at that time at the request of accused, he had provided him duplicate key of the room. According to him, in second week of October 2008, accused left the room.

190. PW-164 is the resident of Pachmadhi, Madhya Pradesh. Above statement of this witness shows that in the last week of September, 2008 accused was residing at Pachmadhi in his room. In such circumstance, when there is absolutely no material on record to show that at the time of incident i.e. on 29.09.2008, accused was found near the spot of incident, the above allegation of ATS is difficult to accept at this stage also.

191. Now, it has to be seen whether accused No.12 was involved in the conspiracy to commit offence. Statements of PW-165 to PW-169 show that accused was member of Bajrang Dal as well as Shri Ram Sena in Karnataka. Statement of PW-166 further shows that he was working as a Secretary of Karnataka State of the said Shri Ram Sena and in 2001, he came in contact with accused No.12 and found that he is Hindutvawadi. According to PW-166, accused No.12 was in need of job. His statement further shows that in November, 2007 when he had gone to Pune for the function of giving "Nathuram Godse Puraskar" to Pramod Mutalik, he met Prasad Purohit i.e. accused No.9. According to him, in July 2008, accused No.9 asked this witness to suggest the names of educated youths who are in need of job. Hence, he suggested the name of accused No.12 and then he sent accused No.12 towards accused No.9 at Pachmadhi. Statement of this witness further shows that he came to know from accused No.12 that he has received the job for doing the full time work of Abhinav Bharat at the salary of Rs.15,000/- per month. What it shows that for the first time accused No.12 Praveen Takkalki came in contact with accused No.9 Prasad Purohit in July 2008 and in-fact, he was paid worker of Abhinav Bharat.

192. If statement of PW-80, PW-149 and PW-160 is considered together it shows that accused No.12 stayed at Devlali in the house of accused No.11 Sudhakar Chaturvedi from 14/15.09.2008 to 16/17.09.2008 and on 22.09.2008 i.e. in the third week of September, 2008. It will appropriate to recollect the statement of PW-164 which shows that in the last week of September, 2008 accused No.12 was at Pachmadhi. It appears from the statement of PW-80 and PW-149 that they allowed accused No.12 to reside in the house of accused No.11 at the instances of accused No.9 and accused No.11 himself.

193. As per prosecution case, the house of accused No.11 at Devlali was used for preparation of bomb. But, there is no material to show that accused No.12 has played any role in preparation of bomb or has knowledge that the said house is used or likely to be used for preparation of bomb. On the contrary, I have already pointed out that statement of PW-55 shows that accused No.9 had stated before him that he along with accused No.11 Sudhakar Chaturvedi and one Ramji prepared the bomb in the house of accused No.11 at Devlali and caused the blast by fitting it in the motorcycle received from accused No.1 Pragyasingh Thakur.

194. Relevant portion of statement of PW-55 shows that this accused came along with accused No.11 on 16.09.2008 for meeting which was arranged for the discussion on camp planned to be held at Pachmadhi between 16.10.2008 to 20.10.2008. His statement shows that this meeting was attended by accused No.4 Major Ramesh Upadhyay, accused No.9 Lt. Co. Prasad Purohit, he himself, accused No.6 Ajay Rahirkar, this accused Praveen Takkalki, accused No.11 Sudhkar Chaturvedi and some other witnesses. Nowhere according to the ATS that in the said meeting any discussion about causing bomb-blast at Malegaon took place. At this stage it will appropriate to recollect the statements of PW-80 and PW-149 who have stated about the stay of accused No.12 at Devlali camp in the house of accused No.11 between the period of 14/15.09.2008 to 16/17.09.2008. From the statements of above witnesses it emerges that being paid worker of Abhinav Bharat, accused No.12 attended the meeting in the Bhosla Military School on 16.09.2008. There was a discussion about the camp scheduled at Pachmadhi between 16.10.2008 to 20.10.2008.

195. Statement of PW-162 shows that on 16.07.2008, accused No.5 Sameer Kulkarni stayed in his hotel at Pachmadhi in Room No.2 along with this accused. Statement PW-162 further shows that again on 12.08.2008, this accused has resided in his hotel. If statements of PW-162 and PW-166 are considered together, it appears that as per direction of accused No.9 Lt. Col Prasad Purohit, accused No.12 initially met accused No.5 Sameer Kulkarni at Bhopal and then booth of them went to Pachmadhi on 16.07.2008 which was the first meeting of this accused with accused No.5 and accused No.9. If statement of PW-164 coupled with statement of PW-162 is considered, it appears that prior to taking room of PW-164 on rent, accused took halt in the hotel of PW-162 between the night hours of 12.08.2008 to 13.08.2008.

196. PW-165 and PW-167 to PW-169 are participants of the camp arranged at Pachmadhi between 16.10.2008 to 20.10.2008. Admittedly, this is the period after the incident of bomb-blast at Malegaon. Statement of above witnesses show that this accused was engaged in making logistic and other arrangements of the participants. All above material collected by ATS if accepted as it is, it has to be said that this accused came in contact with accused No.5, accused No.9 and accused No.11 after July 2008. He was working as a paid servant of Abhinav Bharat and in his capacity as a servant he made logistic and other arrangement in the camp. There is no material to show that really this accused had knowledge about the conspiracy or there is any involvement of this accused in commission of crime. I have pointed out that Investigating officer of NIA also exonerated this accused from all charges. In view of all above reasons, I hold that accused Praveen Takkalki is entitled for the discharge from all charges.

Accused No.07 :

197. So far as accused No.7 Rakesh Dhawde is concerned; learned SPP submitted that accused No.7 is found in possession of weapons without any licence. According to him, he accepted the donation or received the cash from Abhinav Bharat Trust. He gave training of preparing the fuse of bomb to accused No.12. He also gave training in 2003 for assembling bomb and handling explosive. He was present at Raigad Fort in 2006 along with accused No.9 and accused No.6 and took the oath of not to stop till formation of Hindutvawadi Rashtra. Accused No.7 utilized the funds of Abhinav Bharat Trust for his institution.

198. As against this, advocate of accused No.7 submitted that in fact, there is absolutely no evidence against accused No.7 about his involvement in this crime. According to him, only to invoke the offences under the provisions of MCOC Act, ATS officer have implicated the accused in this crime. He submitted that circumstances alleged by learned SPP are not useful to show the involvement of accused No.7 in conspiracy of Malegaon bomb-blast.

199. At this stage it will appropriate to mention that during the course of further investigation by NIA no any additional material is brought against accused No.7. It is also notable that Investigating officer of NIA exonerated accused No.12 Praveen Takkalki from all charges to whom it is alleged that this accused gave training to prepare fuse of bomb. In such circumstances, it has to be seen that whether there is material on record to show the involvement of this accused in conspiracy to commit bomb blast at Malegaon. First of all it is pertinent

to note that nowhere it is the case of prosecution that this accused was present in Faridabad (Anangpur) meeting, Bhopal meeting or in any other meetings alleged by the prosecution. It is true that statement of PW-40 shows that in June, 2006 this accused was present at Raigad fort along with accused No.9 Lt. Col. Prasad Purohit, accused No.6 Ajay Rahirkar, this witness and some other persons. Statement of this witness further shows that all of them took oath of not to stop till formation of Hindutvawadi Rashtra. Then this witness stated about the formation of Abhinav Bharat Trust. Admittedly, this accused is not the trustee of the said Abhinav Bharat Trust.

200. Statement of PW-40 further shows that one lady by name Mangal Kulkarni who was acquainted with Ninad Bedekar donated the amount of Rs.4,50,000/- to the Abhinav Bharat Trust by executing will and after her death this amount was transferred in the name of the Trust in the bank. Statement of this witness further shows that out of this amount, half of the amount i.e. Rs.2,25,000/- was given to the institution of accused No.7 having name “Institute of Research and Development in Oriental State of Arms and Armors” as a donation by the Trust. Nowhere it is the case of ATS that this amount was used by the accused No.7 for commission of crime in present case. In fact, this transaction is between two institutions hence no adverse conclusion in respect of this transaction can be drawn at this stage also.

201. Prosecution has also relied on the statement of PW-38 & PW-39 to say that accused No.7 is one of the conspirator. While considering the case of accused No.12 Praveen Takkalki, I have already pointed out that these two witnesses have stated in their respective statements under section 161 of CrPC that accused No.7 informed them

in August, 2008 that when he had gone to Pachmadhi at the time of Gurupornima towards accused No.9, he had given training to assistant of accused No.9 by name Praveen and two local persons having Hindi mother-tongue about making of fuse of the bomb.

202. I have already pointed out that this part of the statement of PW-38 & PW-39 cannot be accepted because they have not stated this fact in their statements before learned Metropolitan Magistrate, Mumbai recorded under section 164 of the CrPC. Moreover when NIA has come with the case that there is no involvement of accused No.12 in this crime; this part of statement of PW-38 and PW-39 cannot be said as incriminating against the accused No.7 Rakesh Dhawde.

203. It is true that PW-38 and PW-39 in their respective statements have deposed about the incident of year 2003 regarding testing the bomb by causing its blast by accused No.7 and some other persons but certainly this incident is not related to this case. Nowhere it is case of the prosecution that other persons who were alleged to be in the company of accused No.7 at that time have caused bomb-blast at Malegaon. Any how, it is clear that statement of PW-38 & PW-39 cannot be said as sufficient at this prima facie stage also to show the involvement of accused No.7 in alleged conspiracy.

204. It is true that memorandum panchanama and seizure panchanama dated 02.11.2008, (Volume-I, page No.55) show that at the instance of this accused four fire arms and eighty-nine live cartridges were seized from the house of this accused. But nowhere it is the case of prosecution that these arms and ammunition have any concerned with blast at Malegaon or the conspiracy in present case.

There is previous sanction of District Magistrate for institution of proceeding against this accused under the provisions of Arms Act as per section 39 of the said Act.

205. In view of all above discussion now it is clear that accused No.7 is entitled for the discharge from the offences under the provisions of UAP Act as well as Explosive Substance Act and offences under the provisions of Indian Penal Code also. I have already pointed out that this accused is also entitled for the discharge from the offences under the provisions of MCOC Act.

206. Accused No.7 is required to be tried for the offences only under the provisions of Arms Act. I have pointed out that nowhere it is the case of the prosecution that the fire arms and live cartridges found in the possession of this accused have any connection with the bomb-blast hence this offence cannot be tried along with other offences under the provisions of UAP Act and MCOC Act. As per my discussion relating to accused No.8 case of accused No.7 also required to be transferred to the competent Court having jurisdiction over the Dhayari Gaon, Pune where alleged weapons and cartridges were found in the house of accused.

207. During the course of argument it is submitted on behalf of accused No.9 that he was working as a intelligence officer at the relevant time. Discussion in the meeting is nothing but loose talks of the participants in the meeting who have expressed their general opinion about the present political and social situation. He submitted that by taking participation in the said meeting in fact accused No.9 was discharging his duty as an intelligence officer. According to him

accused No.9 generated counter intelligence. PW-112 was working for I.B. but he was not satisfied hence with the object of creating PW-112 as a source of intelligence, accused No.9 made certain statements in the said meeting. According to him, in fact, these statements are nothing but the cover story for generating the counter intelligence.

208. It is further submitted by advocate of accused No.9 that documents in the Court of Enquiry as well as documents filed by Ministry of Defence show that accused No.9 and his source accused No.11 had informed superior officer of Army about formation of Abhinav Bharat as well as meeting at Faridabad in advance. He submitted that documents in Court in Enquiry particularly statement of witnesses in the Court of Enquiry against accused No.9 show that after the meeting accused No.9 gave information of the said meeting to his Superior officer Col. Raikar and Col. Pachpure. According to him, this fact is also stated by PW-121.

209. He further submitted that Hon'ble Apex Court while releasing the accused No.9 on bail has also accepted above facts. According to advocate of accused No.9, it is improbable to accept that officer like accused No.9 would inform the details of meetings if really he would have been part of conspiracy to commit the bomb-blast at Malegaon and said conspiracy was made in meetings as alleged by prosecution. In short, according to him, accused No.9 while participating in the alleged meeting was acting or purporting to act in discharge of his official duty within the meaning of section 197 of the Criminal Procedure Code being intelligence officer to generate counter intelligence.

210. Now, question is whether this contention of the accused No.9 can be accepted at this stage. Advocate of accused No.9 in support of his submission mostly relied on certain documents in Court of Enquiry. These documents are called under section 91 of the Code from the concerned department of the Military as well as Ministry of Defence. He also relied upon the statement of PW-121.

211. I have already pointed out that in view of the law laid down in the recent judgment by Hon'ble Apex Court in case of ***Nitya Dharmendra alias K. Lenin (cited supra)*** at the stage of hearing under section 227 / 228 of the Code of Criminal Procedure documents withheld by the prosecution having sterling quality can be called under section 91 of Code and can be considered while passing the order. It is true that documents relied by accused No.9 in Court of Enquiry are not called from the custody of the prosecution. Statement made by the IO of NIA in the charge-sheet shows that he had collected those documents of Court of Enquiry against accused No.9 during the course of investigation but, he has not filed those documents on record. It is pertinent to note that prosecution had given no objection to call the documents of Court of Enquiry from the concerned department of the military. Considering this fact keeping in the mind the law laid down by Hon'ble Apex Court in case of ***Nitya Dharmendra alias K. Lenin (cited supra)*** I am going to consider the documents relied by the accused No.9 in Court of Enquiry for examining his contention.

212. Prior to considering the documents relied by the accused No.9 and statement of PW-121 it will appropriate to refer the observations of Hon'ble Apex Court relied by the prosecution as well as accused No.9 in case of ***P. K. Pradhan Vs. State of Sikkim, (2001) 6***

SCC 704. In this case FIR was registered against Ex. Chief Minister and then Secretary of Rural Development Department under the provisions of Prevention of Corruption Act and under section 120-B of IPC. Some contractors were also co-accused.

It was alleged in the charge-sheet that above two accused and co-accused contractors made the conspiracy and above two accused made the favour to the said contractors while giving certain contracts to them by practicing corrupt or illegal means or by otherwise abusing their position as Chief Minister and Secretary.

Chief Minister and Secretary took the preliminary objection before the trial Court that as they were acing in discharge of their duty at the time of commission of alleged offence sanction under section 197 of the Code was necessary and as sanction is not obtained proceeding is required to be dropped.

Trial Court did not accept the prayer of the accused. Hon'ble High Court also in appeal confirmed the order of the trial Court hence matter came before Hon'ble Apex Court. After considering the scope of section 197 of CrPC and various authorities, Hon'ble Apex Court in para No.15 of the judgment observed that

> 15. Thus, from a conspectus of the aforesaid decisions, it will be clear that for claiming protection under Section 197 of the Code, it has to be shown by the accused that there is reasonable connection between the act complained of and the discharge of official duty. An official act can be performed in the discharge of official duty as well as in dereliction of it. For invoking protection under Section 197 of the Code, the acts of the accused complained of must be such that the same cannot be separated from the discharge of official duty, but if there was no reasonable connection between them and the performance of those duties, the official status

furnishes only the occasion or opportunity for the acts, then no sanction would be required. If the case as put forward by the prosecution fails or the defence establishes that the act purported to be done is in discharge of duty, the proceedings will have to be dropped. It is well settled that question of sanction under Section 197 of the Code can be raised any time after the cognizance; may be immediately after cognizance or framing of charge or even at the time of conclusion of trial and after conviction as well. But there may be certain cases where it may not be possible to decide the question effectively without giving opportunity to the defence to establish that what he did was in discharge of official duty. In order to come to the conclusion whether claim of the accused that the act that he did was in course of the performance of his duty was a reasonable one and neither pretended nor fanciful, can be examined during the course of trial by giving opportunity to the defence to establish it. In such an eventuality, the question of sanction should be left open to be decided in the main judgment which may be delivered upon conclusion of the trial".

213. In that case Hon'ble Apex Court held that the contention of Ex. Chief Minister and then Secretary can be examined and considered during the course of trial in the main judgment.

214. In present case the incriminating circumstance against the accused No.9 is not only his presence in the meetings but the manner in which he participated in the meetings and the actual discussion or utterances made by him. On the basis of actual talks of accused No.9 coupled with all other circumstances mentioned in para No.100 it has to be seen whether there is prima facie case of conspiracy. Keeping this in mind it is necessary to examine the documents relied by accused No.9 in

Court of Enquiry and statement of PW-121 to ascertain that if this material is accepted as it is contention of accused No.9 can be accepted or not.

215. Relying on the statement of witness in Court of Enquiry on Page No.52 & 53 in Volume-I (names of witnesses in Court of Enquiry are not mentioned to keep the confidentiality) it is submitted that service record of the accused No.9 was excellent and he was discharging his duties well. It is true that this witness in Court of Enquiry has stated that work of accused No.9 was well appreciated by all concerned and he was providing good intelligence inputs pertaining to his area of responsibility.

216. Statement of witness in Court of Enquiry on page No.367, Volume-II shows that Intelligence officer can temporarily associated with various organization in the society. Relying on this statement it is submitted that association of accused No.9 with Abhinav Bharat Trust as well as Abhinav Bharat Sanghatan was not illegal and was as a part of his duty.

217. Statement of witness in Court of Enquiry on Page No.477, Volume-III shows that after joining the duty by accused No.9 at Devlali as a Intelligence officer the team which was not producing any result earlier was energized. This witness has also stated that in December, 2005 accused No.9 had asked for permission to become trustee of Charitable trust. According to this witness he advised the accused No.9 to be a member of such organization by staying within the Relevant provisions of Regulation and Army Rules and seek official permission.

It is submitted on the basis of above statement that accused

No.9 had informed his superior that he wanted to be a trustee of Abhinav Bharat Trust.

218. There is statement of the aforesaid witness in Volume-V, Page No.81 and 82 of Court of Enquiry also. The copies of the said pages No.81 and 82 are also filed by Ministry of defence along with Exh.2993. Majority portion of the said copies filed along with Exh.2993 is un- truncated hence those copies are considered. It is pertinent to note that the answers given by this witness are to the questions put by accused No.9. Accused has mainly relied on the answers to the question No.3 & 4.

219. So far as question No.4 is concerned it was asked to the witness that whether witness recollect that after source meeting at Delhi he had called this witness and gave inputs with regards to Maoist activities and this witness answered in the affirmative.

It is submitted on behalf of accused No.9 that this statement shows that accused No.9 gave input of Anangpur Faridabad meeting to his superior and on the basis of that further action was taken by military.

220. So far as question No.3 is concerned it was asked to this witness by the accused No.9 whether he had informed on telephone to this witness about certain group as mentioned in this question and this witness answered in the affirmative.

It is submitted on behalf of accused No.9 that the source of this group was generated on the basis of information given by PW-112. According to him, the object of participation in Faridabad meeting was to create the PW-112 as intelligence source.

221. Letter dated 16.01.2008 at page No.970 in Volume - IV.B of Court of Enquiry is also relied. Relying on the said letter it is submitted that advance information was given to the superiors regarding the meeting at Faridabad hence it is improbable to say that said meeting is conspiracy meeting.

222. Statement of PW-121 shows that after the meeting at Anangpur-Faridabad, accused No.9 talked with two officers informing them about the names of people present in the meeting and according to this witness, accused No.9 in this way briefed about the Faridabad meeting to one Col. Raikar and Col. Pachpure.

Relying on this part of the statement it is submitted that accused No.9 informed his superior officers about the said meeting at Faridabad.

223. Now, question is on the basis of above material can it be said at this stage that accused No.9 had participated in the meetings in discharge of his duty. I think that such conclusion cannot be drawn at this stage for more than one reasons.

i) I have already pointed out the topics of the discussions in the said meetings. I have also specifically mentioned the page numbers of the transcripts. It appears that most of the talks (opinion or thoughts) are of accused No.9 Lt. Col. Prasad Purohit, accused No.4 Major Ramesh Upadhyay and accused No.10 Swami A. D. Tirth. Nowhere the above statements of the witnesses in Court of Enquiry relied by the accused No.9 show that he had provided them information about the actual discussion in the said meetings.

ii) Recording and transcript of the meeting show that this

meeting was conducted under the leadership of accused No.9 treating accused No.10 as a chairperson. It appears that accused No.9 was ready with homework on the topics discussed in the meeting. There is no material to show that really the superior officers of accused No.9 had any idea about the all above facts i.e. actual topics discussed in the meeting.

iii) Letter dated 16.01.2008 shows that it was not sent by accused No.9 but some other officer. If intelligence department of Army had previously decided to send their officer on duty to attend this meeting then certainly it would have been stated by the witnesses in Court of Enquiry who are the superior officers of accused No.9 that they had decided to send the accused No.9 but it is not the fact.

iv) There is no material to show that by obtaining prior permission of the superiors accused No.9 had gone to attend the meeting at Faridabad. It is pertinent to note that at that time he was on deputation at Pachmadhi for training.

v) There is no material on record to show that accused No.9 had informed about the meeting at Bhopal and the topics discussed in the said meeting. At that time also he was posted at Pachmadhi for training.

vi) There is no record to show that while attending the above meetings as well as other meetings alleged by the prosecution accused No.9 was on duty. On the contrary, it appears from the leave record of accused No.9 that most of the time he was on leave or meetings were scheduled on public holidays.

vii) I have already pointed out that statement of one witness in Court of Enquiry (Page No.477, Volume-III) shows that he had permitted the accused No.9 to be a member of Charitable Trust by following the provisions of Army Rules and Regulations. I have already pointed out that material on record shows that accused No.9 had control over the financial transaction of the Abhinav Bharat Trust and accused No.6 was providing the Trust amount to the accused No.9 and other accused persons at the instance of accused No.9. I have also pointed out that Trust amount was used for arranging the meeting at Bhopal as well as to meet the expenses of traveling at various places by the accused persons including the accused No.9. Nowhere there is material on record to show that all these acts were done by the accused No.9 with the consent of his superiors or with their permission.

224. During the course of argument it is submitted on behalf of accused No.9 that military intelligence do not work as per the ordinary procedure of other Government offices and it has its own way of working. In short, according to him, on the basis of material on record conclusion should be drawn that accused No.9 was discharging his duty while doing all these acts. It may be true that military intelligence do not work like other Government agencies but it has to be ascertain whether official status of accused No.9 furnishes only the occasion or opportunity to him for doing all alleged acts against him or really he was doing his duty. Certainly someone out of the superior officers of the accused No.9 acquainted with all these facts should come forward and say that everything done by accused No.9 including opinions and thoughts expressed by him in the meetings were in discharge of his official duty. For this purpose as observed by Hon'ble Apex Court in case of ***P. K. Pradhan (cited supra)*** opportunity is required to be given

to accused No.9 Lt. Col. Prasad Purohit to lead evidence on this point during the trial and this point is required to be left open to be decided in the main judgment which may be delivered upon conclusion of trial.

225. During the course of argument it is submitted by advocates of accused No.1 that if in the hit of the anger anything is stated or any reaction is given it does not attract section 120-B of the IPC or the offence of conspiracy. In support of this submission advocates of accused No.1 relied on the judgment of Hon'ble Apex Court in case of ***Kehar Singh and Dr. Dattatraya Narayan Samant (cited supra)***. In case of ***Kehar Singh***, prosecution had relied upon certain expressions given by accused Balbir Singh in respect of the incident of "Blue Star Operation" to say that he was also one of the conspirator of the offence to commit the murder of then Prime Minister Smt. Indira Gandhi. The evidence on record was that after the "Blue Star Operation", Balbir Singh was in agitated mood and he used to say that the responsibility of damaging the Akal Takht lies with Smt. Gandhi and it would be avenged by them. It was held that such expression with anger does not amount to conspiracy.

226. In present case there is no such incident like a "Blue Star Operation" to make expression by the accused persons. On the contrary, tone of discussion shows that accused were advocating certain ideology and according to them, one of the ways to implement the said ideology is to create threat against Muslim and Christian. Moreover in present case there is other material on record against the accused. Whatever opinions and reactions are given by the accused persons are during the course of discussion and not by the emotional outburst hence this authority cannot be said as useful to the accused persons.

227. In case of ***Dattatraya Samant*** also there was a attack on Naval Godrej at his residence by accused No.5. In the said attack, his daughter-in-law was also injured. During the inquiry with informant Naval Godrej he disclosed the fact of having Labour Union Rivalry in the company and fact that Dr. Datta Samant was criticizing the management and had brought morcha of the workers. When accused persons including Dr. Datta Samant were charge-sheeted for the offences under Section 120-B, 307 r/w 115 of the IPC, so far as accused Dr. Datta Samant is concerned prosecution mainly relied upon his speeches in which there was only general exhortation of violence for solving the union problem.

While considering the scope of 120-B of IPC it is held that a conspiracy is not merely a concurrence of wills, but a concurrence resulting from agreement between two. In other words, parties must be put their heads together. It is held that exhortation of violence in general is not same thing as an agreement to commit a particular crime. Dr. Samant's speeches would suggest that he intended violence if the demands regarding his union were not made by the management. It is held that from such general exhortation an inference of specific conspiracy to commit particular crime cannot be drawn.

228. It is true that in present case there is no discussion on the point of causing bomb blast at Malegoan except some talks in Bhopal meeting as stated by witnesses before ATS officers. It is true, later on those witnesses have retracted from their previous statement but certainly as pointed out earlier in present case discussion on record shows that accused were advocating certain ideology and implementation of the same. On this background other incriminating circumstances are required to be considered. As there is other material

on record against accused persons this authority cannot be said useful to them.

229. Advocate of accused No.9 further submitted that as per the prosecution case immediate prior to the incident of bomb-blast there was a meeting at Bhosla Military School, Nashik on 16.09.2008. According to him, material on record clearly shows that there was absolutely no discussion regarding causing bomb-blast at Malegaon in the said meeting. On the contrary, in this meeting topic of starting coaching class for the youth for competitive examination was discussed.

According to him, as per prosecution case immediate after the incident there was meeting at Pachmadhi i.e. camp. He submitted that in the said camp also no single word was uttered by anybody in respect of causing of blast at Malegaon. Not only this, but subject of causing the blast at Malegaon was not discussed in any meeting. He also submitted that call records of mobile phones of all accused do not show that immediate prior to the incident or after the incident there was any talk with each other. According to him, in natural course of conduct generally participants used to be in contact with each other immediate prior to the incident or immediate after the incident. In short, it is submitted on behalf of accused persons that there is no prima facie case to show that accused persons committed the conspiracy to cause bomb blast at Malegaon.

230. It is true that there is no direct evidence regarding discussion of causing bomb blast at Malegaon amongst the accused persons except in Bhopal meeting. But during the course of investigation by NIA witnesses have retracted from their previous statement in which they had stated that there was a discussion of

causing bomb-blast at Malegaon in Bhopal meeting. In view of the principle No.3 in ***State Vs. Nalini*** it is clear that the conspiracy generally is hatched in private or in secrecy. It is rarely possible to establish a conspiracy by direct evidence. Usually, both i.e. existence of the conspiracy and its objects have to be inferred from the circumstances and the conduct of the accused.

231. On this background we have to consider the incriminating circumstances discussed above. I have already pointed out that there is sufficient material on record to show that accused No.4, 5, 9, 10 and 11 were present in the meeting at Anangpur, Faridabad. I have also pointed out that the topics which were discussed in the said meeting show the mind-set of the accused persons. Tone of the discussion shows that they want to create Hindu Rashtra excluding the Muslims and Christians. In the said meeting view was expressed to create threat against Muslims and Christians by striking them. Not only this accused No.9 talked about Fantam Organization without having any identity to do the underground activities. In continuation of this discussion there was a meeting at Bhopal in which above accused persons along with accused No.1 Pragya Singh Thakur were present. It is already pointed out that in the said meeting along with other topics there was discussion about Jihadi activities in Aurangabad and Malegaon, and accused No.9 expressed his opinion to do something for its prevention by expanding Abhinav Bharat Sanghatan in the said area. It it also pertinent to note that while discussing about the Faridabad meeting, it is specifically pointed out that object of creating Abhinav Bharat Organization is part of strategy to make double attack for achieving the object of Hindu Rashtra excluding Muslim and Christian.

232. On this background there is involvement of LML Freedom motorcycle belonging to accused No.1 Pragya Singh Thakur in the bomb-blast at Malegaon. There are also certain statements made by the accused No.9 amounting to extra-judicial confession and by accused No.1 indicating her knowledge about involvement of her motorcycle in the bomb-blast. It is also pointed out that accused No.5 Sameer Kulkarni took initiative part for arranging the meeting at Bhopal and conversation particularly statement of accused no.9 show that he was Incharge of Madhya Pradesh unit of Abhinav Bharat Sanghatan. (Volume-III B, Page No.859). I have pointed out that RDX traces found in the house of accused No.11 Sudhakar Chaturvedi were similar to the RDX used in causing bomb-blast at Malegaon. Then there is intercepted conversation between accused No.9 and accused No.4 showing their subsequent conduct indicating involvement in the blast. It is also pointed out that why Abhinav Bharat Trust was formed and how accused No.6 Ajay Rahirkar allowed to use the funds of the said Trust by other accused persons for their activities.

233. In present case, CDR's of mobile phones of accused persons are filed on record. There is statement of PW-140 who has stated the summery of analysis of CDR of accused persons. It appears that most of the mobile phones are not in the name of accused persons hence during the course of trial it is for the prosecution to establish that the said mobile phones were used by the accused persons at the relevant time. But at this prima facie stage if statement of PW-140 coupled with CDR's on record are considered it appears that above accused persons were in contacts with each other. Not only this it appear that accused No.1 Prgyasingh Thakur had more than 20 phone calls with accused No.11 Sudhakar Chaturvedi during the month of July and August, 2008. She

had last phone call with accused No.11 on 19.09.2008. It also appears that accused No.1 had several phone calls with accused No.10 Swami A. D. Tirth in the month of July and August, 2008. It also shows that accused No.1 also had several phone calls with absconding accused Ramchandra Kalsangra and Sandeep Dange in these two months. it appears that there was phone call between accused No.1 and absconding accsued Sandeep Dange on 26.09.2008 as well as on the date of incident on 29.09.2008 and on the next date of incident i.e. on 30.09.2008. It has to bear in the mind that as per the statements of witnesses before ATS officer that accused No.1 had agreed to provide men for causing blast. As per both investigating agencies absconding accused Ramchandra Kalsangra and Sandeep Dange are the planters of the bomb. Hence above material cannot be over looked at this prima facie stage.

234. Cumulative effect of all incriminating circumstances clearly show the strong suspicion against above accused persons i.e. accused No.1, 4, 5, 6, 9, 10 and 11 about their involvement in commission of crime i.e. bomb-blast at Malegaon.

235. During the course of argument it is submitted that the discussion in Faridabad meeting is nothing but loose talks and general opinions about present political and social situations. this submission cannot be accepted because it is already pointed out that in the said meeting there was a discussion about establishing the Government in exile, forming the Fantam organization to do underground activities, creating threat against Muslim and Christian community. On this background involvement of the accused persons in bomb-blast at Malegaon prima facie shows their step towards the object of said

discussion. Moreover, discussion (on Page No.841, Volume-III) in transcript of Faridabad meeting further shows that accused No.9 talked about molding of minds of Youth as per their line of thoughts. There is also talk about training centre and for that purpose, accused No.9 suggested the place at Pachmadhi (Volume-III B, page 857). On this background prosecution case shows that there was a camp at Pachmadhi between 16.10.2008 to 20.10.2008. Statements of PW-55 as well as PW-165, PW-167 to 169 show this fact. It is notable that PW-165 and PW-167 to 169 are the participants in the said camp. Their statements show that in the said camp they made acquainted with atrocities on Hindu as well as Jihadi activities. It was stated to them that Hindu community should be united and answer to the bomb-blast should be given by doing the same act. It was also stated to these youth that Hindu Youh should be united through Abhinav Bharat Sanghatan. If all these facts are considered keeping in mind the discussion in Faridabad meeting certainly it has to be said that it is also the step to achieve the object of discussion in Faridabad meeting. In view of all these reasons at this prima facie stage it is difficult to accept that conversation in Faridabad meeting is just loose talks.

236. During the course of argument it is submitted that PW-112 and other witnesses present in Faridabad meeting put-forth more aggressive thoughts than the accused persons but they are not made an accused in this matter. I think that this submission cannot be accepted to discharge the above accused persons. Impleading the above persons as an accused is one thing and discharging the above accused persons is another thing.

237. During the course of argument it is submitted that the alleged conspiracy to cause bomb-blast cannot be a Terrorist Act within the meaning of section 16 of the UAP Act. It is submitted that written argument given by learned SPP shows that bomb-blast is caused to take revenge of the Muslim community. Prosecution case also shows this fact. It is submitted by advocate of accused No.9 that to attract section 16 of the UAP Act, act must be done with the particular intention mentioned in section 15 of the UAP Act by using the weapons mentioned in that section. According to him, definition of Terrorist Act in section 15 prior to amendment in 2008 & 2013 is required to be considered in this case. It is true that definition of Terrorist Act i.e. section 15 is amended in 2008 and 2013. 2008 Amendment came into force w.e.f. 31.12.2008. This incident took place on 29.09.2008. Due to this certainly definition of Terrorist Act prior to amendment of 2008 is required to be considered to appreciate the submission of advocate of accused.

238. In support of his submission advocate of accused No.9 relied on the judgments of Hon'ble Apex Court in case of ***Niranjan Singh Punjabi*** and ***State of Tamil Nadu Vs. Nalini (cited supra)***. In case of ***State vs Nalini***, accused persons were charge-sheeted for an offence punishable under section 3(1) of the TADA also. Section 3(1) of the TADA provides punishment for terrorist act. Hon'ble Apex Court in para 542 of the judgment observed that

> "No doubt evidence is there that the absconding accused Prabhakaran, supreme leader of LTTE had personal animosity against Rajiv Gandhi and LTTE cadre developed hatred towards Rajiv Gandhi, who was identified with the atrocities allegedly committed by IPKF in Sri Lanka. There was no conspiracy to the indiscriminate killing of persons. There is no evidence directly or circumstantially that Rajiv

Gandhi was killed with the intention contemplated under Section 3(1) of TADA".

239. In view of this Hon'ble Apex Court acquitted accused persons in that case from the charges under the TADA. It is held by Hon'ble Apex Court that if fear, terror or/and panic is caused it is only as a consequence of the criminal act but the intention of committing the particular crime cannot be said to be the one strictly envisaged by Section 3(1), it would be impermissible to try or convict and punish an accused under TADA.

240. In case of ***Niranjan Singh Punjabi*** also it was found that as per prosecution the genesis of the crime was to gain supremacy in the underworld by eliminating the members of the rival gang and not to strike terror in the people or section of the people. It is also held that the consequence of such violence i.e. attack on victim is bound to cause panic and fear but the intention of committing the crime cannot be said to be strike terror in the people or any section of the people. Hence the act of accused persons does not come within the scope of section 3(1) of the TADA.

241. Relying on above two authorities it is submitted that if according to the prosecution case the intention of the accused persons is to take revenge then it does not fall within the scope of section 15 of the UAP Act which is defining section of Terrorist Act.

242. As against this learned SPP submitted that intention of accused persons falls within definition of Terrorist Act. In support of his submission learned SPP relied on the authority reported in ***(1998) 4***

Supreme Court Cases 494, Mohd. Iqbal M. Shaikh and Ors. Vs. State of Maharashtra. In this case shortly after the demolition of Babri Masjid at Ayodhya communal riot erupted in Mumbai and chawl occupied by Hindu situated in Muslim dominating area was set on fire by the people belonging to rival community. On account of fire several people were burnt alive. Hon'ble Apex Court held that it is Terrorist Act.

243. It will appropriate to reproduce section 15 of UAP Act, 1967 as was standing prior to amendment of 2008 which reproduce as under.

15. Terrorist Act - Whoever, with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people in India or in any foreign country, does any act by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature, in such a manner as to cause, or likely to cause, death of, or injuries to any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community in India or in any foreign country or causes damage or destruction of any property or equipment used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies, or detains any person and threatens to kill or injure such person in order to compel the Government in India or the Government of a foreign country or any other person to do or abstain from doing any act, commits a terrorist act.

244. In case of ***State vs. Nalini*** there was an intention to take revenge against Rajiv Gandhi. In case of ***Niranjan Singh Punjabi*** there

was intention to create supremacy in underworld by killing members of rival group. Considering this specific intention of respective accused persons in both cases it is held that though consequences of the said act may have created panic or terror in the mind of the people the act of the accused persons could not be termed as Terrorist Act within definition of section 3(1) of the TADA. It is true that Section 3(1) of TADA is not exactly same but similar to the definition of terrorist act under the UAP Act.

245. In present case there is no material to show that accused persons had intention to take revenge of specific person indulging in Jihadi Activities. On the contrary, I have already pointed out that there was discussion to create threat against Muslim and Christian community by striking them. Bomb-blast is caused on 29.09.2008 in Holly month of Ramzan in crowded place having Muslim dominating area. It is notable that Holy festival of Navratri was to commence on 30.09.2008. The place and time which was chosen if taken into consideration on the background of above discussion at this prima facie stage it has to be said that the bomb-blast is caused with intention to threaten the unity of people by striking terror in particular section of the people. Intention to take revenge of a particular person is one thing and intention to take revenge of people belonging to particular religion or section is other. The later shows intention to strike terror in the people or in section of the people by causing indiscriminate killing of persons. In view of this reason I do not accept the submission of advocate of accused persons.

246. During the course of argument it is submitted that separate punishment is provided under Section 18 of the UAP Act for the conspiracy hence charge under Section 120-B of the IPC cannot be

framed. It is also submitted that nowhere it is case of the prosecution that the accused persons planted bomb. On the contrary case of the prosecution shows that accused persons are the conspirator hence it cannot be said that accused persons did any act as contemplated under Section 15 of the UAP Act. In short, according to advocates of accused persons substantive section i.e. Section 15 punishable under Section 16 of the UAP Act does not attract against conspirators as it cannot be said that their acts falls within the scope of word "Does any act by using the bombs". According to advocates of accused this section attracts only against planters of bomb.

247. As against this learned SPP submitted that conspiracy itself is an act and if that act is done it falls within definition of Terrorist Act punishable under section 16 of the UAP Act.

248. I do not accept submission of advocate of accused persons for more than one reason; firstly, it is common knowledge that conspirators are the masterminds and architectures of the crime. To commit conspiracy itself is an act of having an agreement with each other. If argument of advocates of accused is accepted as it is then the conspirators who used the persons as the planters of the bomb having no intention contemplated under Section 15 of the UAP Act may go free along with the planters also. Certainly this cannot be an intention of the legislature. Moreover, if there is a conspiracy to commit terrorist act without any further action then Section 18 only will attract but if in pursuance of the said conspiracy terrorist act is committed successfully then I think that the substantive offence as defined under Section 15 and punishable under Section 16 of the UAP Act will also attract against the conspirators if there is requisite intention and terrorist act is caused by using weapons as mentioned in the section.

249. For this purpose support can be taken from the authority relied on behalf of accused No.1 in case of ***Mohd. Khalid (cited supra)***. It is the decision of Three Judge Bench. In this case accused persons were conspirators. Bomb Blast had taken place at Calcutta on 16.03.1993 in the building at Ganguli street. Nowhere it was the case of prosecution that accused had planted the bomb. It was the contention of the accused persons that bombs were prepared for self defence if Hindu and Muslims riots took place. Hon'ble Apex Court confirmed the conviction and sentenced the accused persons for an offence punishable under section 3 (2) (i) of the TADA Act r/w section 34 of IPC, 3(3) of TADA, under section 120-B of IPC and under section 3, 4 of the Explosive Substance Act.

250. Next question is, though accused are the conspirators of the crime can charge against them be framed under section 18 of the UAP Act as well as 120-B of the IPC and under section 16 of the UAP Act on the basis of their act of conspiracy only. For this purpose, sub-section (3) of section 220 of the Criminal Procedure Code is need to be considered which says that, ***if the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offences***. It shows that charge can be framed for the various offences if the one act falls within the definition of those offences and all those offences can be tried in one trial. In view of sub-section (5) of section 220 of the Code the said section is required to be read subject to section 71 of the IPC which provides for limit of punishment of offence made up of several offences.

251. So far as section 17 of UAP Act is concerned, this section provides punishment for raising funds for terrorist act. As per section 17 of the UAP Act prior to amendment 2008 to attract this section funds must be raised for the purpose of committing terrorist act. In present case, nowhere it is the case of prosecution that accused persons had raised funds for commission of terrorist act i.e. causing bomb-blast at Malegaon. It is pointed out that above accused persons used the funds of Abhinav Bharat Trust for their activities relating to the crime but certainly it does not mean that they had collected the funds for Abhinav Bharat Trust to commit the bomb-blast at Malegaon hence I think that though material on record is accepted as it is, it cannot be said that there is sufficient ground to frame the charge under section 17 of the UAP Act against the accused persons.

252. So far as section 20 of the UAP Act is concerned this section provides punishment for being member of terrorist gang or terrorist organization. It is submitted by advocate of accused that to attract this section prosecution must come with the case that particular terrorist gang or terrorist organization is involved in the terrorist act and accused are the members of said gang or organization. According to him, in-fact prosecution has not named specifically any gang or organization in the charge-sheet. Nowhere it is case of the prosecution that these accused persons had involved in terrorist act prior to the alleged offence in this case hence according to him, section 20 of the UAP Act does not attract in this matter.

253 As against this learned SPP submitted that accused persons are involved in the terrorist act by causing blast at Malegaon hence this section attracts.

254. I found substance in the submission of advocate of accused. To attract this section prosecution must come with the case that there is particular terrorist gang or terrorist organization and it is involved in terrorist act and particular accused is the member of said organization or gang. In present case, in fact, prosecution has not come with any specific case on this point. Even prosecution has not named gang or organization which is involved in the terrorist act. It is specific case of the prosecution that accused persons committed the conspiracy to cause bomb-blast at Malegon. It does not mean that prosecution is alleging that all accused persons constitute the gang and is involved in terrorist act even prior to bomb-blast at Malegaon. In view of these reasons, I think that even section 20 of the UAP Act also does not attract in present case.

255. So far as section 23 of the UAP Act is concerned it deals with enhanced penalties. Learned SPP during the course of argument fairly submitted that this section does not attract in present case.

Sanction under section 45(1) of the UAP Act :

256. During the course of argument on behalf of accused persons it is submitted that prosecution of accused persons under the provisions of UAP Act is bad in law for want of valid sanction hence charge under the provision of UAP Act cannot be framed against them. According to advocate of accused, amendment in section 45 of the UAP Act came into force from 31.12.2008. By way of said amendment, sub-section (2) is inserted in section 45. By way of said sub-section (2), it is made mandatory on the part of Sanctioning Authority to consider the independent review report of the authority created by sub-section (2).

According to the accused, very purpose of this amendment is to check misuse of the stringent provision under this Act by the prosecution. It is submitted that in present case sanction under section 45 (1) of the UAP Act is granted on 17.01.2009 by Additional Chief Secretary (Home) and Secretary Incharge of Home Department, Government of Maharashtra, Mumbai. Nowhere in the said order (Page No.77, Volume-I A) there is reference of report of Reviewing Authority under sub-section (2) of section 45 of the UAP Act.

257. It is further submitted that copy of the gazette notification dated 28.05.2010 shows that by notification dated 26.05.2010, Director of Prosecution, Maharashtra State is appointed as an Authority to make an independent review as contemplated under sub-section (2) of section 45 of the UAP Act. It is submitted that Dy. Secretary of the Home Department has filed these documents on record in response to the summons issued under section 91 of the Code. There is no review report on record prior to 17.01.2009. In fact Reviewing Authority under section 45(2) was not appointed by Government of Maharashtra hence the sanction dated 17.01.2009 is invalid and granted without following mandatory procedure.

258. In support of the submission that as sanction dated 17.01.2009 is invalid accused are entitled for the discharge under provisionss of UAP Act, advocate of accused No.9 relied on the authorities reported in (A) **(1995) 5 Supreme Court Cases 302, Anirudhsinhji Karamsinhji Jadeja and another Vs. State of Gujarat** (B) **(2014) 8 Supreme Court Cases 425, Hussein Ghadially alias M.H.G.A. Shaikh and others Vs. State of Gujrat.** (C) **(2012) 11 Supreme Court Cases 606, Ashrafkhan alias Babu Munnekhan**

Pathan and another Vs. State of Gujarat. (D) **2012 Cri LJ (NOC 44) 73 : 2011 SCC OnLine Ori 61 Subhashree Das @ Mili Panda and others Vs. State of Orissa.** (E) **I.L.R. Vol. LXIII 372 Indian Appeals, Nazir Ahmad Vs. The King-Emperor** (F) **Judgment in Criminal Application No.2277 of 2016 By Hon'ble Bombay High Court, in Jafar Hussain Iqbal Hussain Qureshi Khatri Vs. The State of Maharashtra.**

259. As against this learned SPP submitted that in-fact documents filed by Dy. Secretary, Home Department, State of Maharashtra as well as Director of Prosecution, Maharashtra State, Mumbai in pursuance to the summons issued against them under section 91 of the Code cannot be considered at this stage in view of the law laid down in ***Debendra Nath Padhi's case***. He further submitted that already this question was raised by the accused persons at the time of their applications for bail. According to him, Division Bench of Hon'ble Bombay High Court in ***Criminal Appeal No.664 of 2016, Lt. Col. Prasad Purohit Vs. National Investigation Agency (NIA), New Delhi*** has considered the authorities relied by the accused No.9 as well as prosecution and specifically observed in para No.89 of the Judgment that this question can be decided only after the sanctioning Authority is given an opportunity at the time of trial. He further submitted that Hon'ble Apex Court while deciding the appeal preferred by accused No.9 against the order of rejection of his bail by the Hon'ble Bombay High Court in Criminal Appeal No.1448 of 2017 has also observed that this question can be decided during the trial. In short, according to learned SPP again and again the same issue is raised by the accused persons which is already considered and decided by Hon'ble High Court as well as Hon'ble Apex Court.

260. Learned SPP further submitted that for the sake of argument though the documents filed by Dy. Secretary of Home Department and Director of Prosecution are considered, it appears that prior to giving sanction on 17.01.2009, Sanctioning Authority has considered the report of Dy. Secretary to the Government, Law and Judiciary Department, dated 16.01.2009. According to him, later on while submitting the supplementary charge-sheet against accused No.12, report of the Reviewing Authority appointed under section 45 (2) of the UAP Act was called and Director of Prosecution has submitted the report to that effect on 18.04.2011. He submitted that thereafter again sanction is accorded by the Additional Chief Secretary (Home) and Secretary Incharge of Home Department on 20.04.2011. In short, according to him, considering these facts, the question of validity of sanction cannot be considered and decided at this stage without giving an opportunity to the Sanctioning Authority and it can be done only during the course of trial.

261. In reply to this submission it is submitted on behalf of accused persons that review report submitted by the Director of Prosecution, Maharashtra State dated 18.04.2011 shows that it is of only one paragraph. It does not reflect the application of mind by Reviewing Authority. Moreover, this review report as well as sanction dated 20.04.2011 cannot be useful to cure the defect as these orders are post-cognizance.

262. I have gone through the judgment of Division Bench of Hon'ble Bombay High Court in Criminal Appeal No.664 of 2016 (Exh.4154). Hon'ble High Court has considered same points raised by the accused persons in Para Nos.69 to 89 of the judgment. It appears

that accused persons had cited all above authorities before their Lordships except the judgment in case of ***Jafar Hussain Vs State of Maharashtra***. After considering the authorities relied by accused No.9 as well as authorities cited on behalf of prosecution, their Lordships came to the conclusion that point raised by accused is required to be decided after giving an opportunity to the Sanctioning Authority during the course of trial. It is pertinent to note that Hon'ble Apex Court also confirmed the said view in Criminal Appeal No.1448 of 2017.

263. In case of J***afar Hussain (cited supra)*** it was argued before Hon'ble Bombay High Court that as sanction under section 45 of the UAP Act was not granted within time limit as provided in the Rules accused is entitled to be released on bail. In para No.10 and 11 of the judgment it is held that the Rule 4 which provides for time limit is not mandatory but directory. It is also held that unless charge is framed it cannot be inferred that the Court has taken cognizance against the accused. Certainly, this authority is not useful to the accused.

264. Now only question is due to filing of the document by Dy. Secretary, Home Department and Director of Prosecution can again at this stage point raised by the accused persons about validity of sanction be decided. First of all it is clear that as submitted by learned SPP these documents cannot be considered at this stage in view of the law laid down in ***Debendra Nath Padhi's case***. Though for the sake of the argument these documents are considered I think that several questions which are involved cannot be decided at this prima facie stage unless opportunity is given to the Sanctioning Authority. Firstly, it appears from the documents filed by Home Department along with list at Exh.4578 that report of Law and Judiciary Department was called and

accordingly, Dy. Secretary to the Government had submitted the report dated 16.01.2009. It is for the Sanctioning Authority to explain as to why this report is called.

265. Moreover, though for the sake of argument it is accepted that in the year 2009, there was no Reviewing Authority appointed by the State Government under section 45(2) of the UAP Act still question remains whether Sanctioning Authority had lost the jurisdiction to grant the sanction as per the pre-amendment provision till the Authority under section 45(2) of the UAP Act is appointed or comes into existence. Certainly, this question requires more consideration and cannot be decided at this prima facie stage in absence of opportunity to the Sanctioning Authority.

266. Moreover, documents filed by the Director of Prosecution along with Exh.4534 show that it has given report under 45(2) of the UAP Act on 18.04.2011. Page No.7 of the supplementary charge-sheet against accused No.12 shows that on 20.04.2011 i.e. after the report of Reviewing Authority there is sanction under section 45(1) of the UAP Act. There is also reference of the sanction dated 17.01.2009 in this order. Effect of these two documents also cannot be decided unless opportunity is given to the Sanctioning Authority during the course of trial.

267. On this point observations of his Lordship in Para No.10 of the judgment in case of ***Jafar Hussain (cited supra)*** are material to consider.

> 10. Plain reading of above rule does not speak of any penal consequence, if the time prescribed in the said rules is not

adhered to. If said rule is to be interpreted in the background of section 45 of the Act of 1967, which provides for taking cognizance by the Court, admittedly, in the present case, the charge against the applicant or any of the co-accused is not yet framed. Once the charge is not framed, it cannot be inferred that the Court has taken cognizance as against the present applicant in the crime in question. Appropriate support can be taken from the judgment of the Apex Court in the matter of **Sonu Gupta Vs. Deepak Gupta and others reported in 2015(3) SCC 424".**

268. Considering the above observations it is clear that unless charge is framed it cannot be inferred that the Court has taken the cognizance against the accused. If this is the position then in present case yet charge is not framed against the accused and there is a report of authority under section 45 (2) dated 18.04.2011 and sanction dated 20.04.2011 on record.

269. In view of these reasons I think that after considering the above documents filed by Home Department and Director of Prosecution final conclusion cannot be drawn at this prima facie stage and this question can be decided completely and finally after conclusion of the trial in main judgment. Hence, I do not accept the submission on behalf of accused persons that they are entitled for discharge under the provisions of U.A.P. Act for want of valid sanction.

270. So far as offences under Explosive Substance Act is concerned it is submitted of behalf of accused persons that there is no case of the prosecution that any explosive substance was found in possession of any of the accused persons. There is also no material so

show that any explosive is carried by any of the accused persons or supplied by the accused persons to the absconding accused. In short, according to accused persons i.e. accused Nos.1, 4 to 6 and 9 to 11 charge cannot be framed against them under any of the provision of Explosive Substance Act.

271. So far as Section 3 of Explosive Substance Act is concerned this section provides punishment for causing explosion likely to endanger life or property. In present case I have already come to the conclusion that there is prima facie case to show that in pursuance of the conspiracy made by above accused persons bomb explosion at Malegaon was caused. Hence, this section attracts in present case.

272. Section 4 of Explosive Substance Act provides punishment for attempt to cause explosion, or for making or keeping explosive with intent to endanger life or property. This section also provides that any person who unlawfully and maliciously does any act with intent to cause by an explosive substance or special category explosive substance, or conspires to cause by an explosive substance or special category explosive substance, an explosion of a nature likely to endanger life or to cause serious injury to property is liable for punishment under this section. It shows that the conspirators are also included in this section hence certainly this section also attracts against above accused persons.

273. Section 5 of the Explosive Substance Act provides punishment for making or possessing explosives under suspicious circumstances. In present case according to the prosecution bomb was prepared in the house of accused No.11 Sudhakar Charturvedi at Devlali. RDX traces were found in his house. Considering this fact and

the fact that all above accused persons are conspirators charge can be framed against them under this section also.

274. Section 6 of the Explosive Substance Act provides punishment of abettors for the commission of any offence under this Act. Being conspirators prima facie it can be said that accused persons aided and abetted each others for commission of offence under this Act hence charge can be framed under this section also.

275. During the course of argument it is submitted that sanction order (Volume-IA, Page No.97) under section 7 of the Explosive Substance Act is not according to the said section. As per sanction order consent is given for filing the charge-sheet but section 7 of the Explosive Substance Act shows that consent is required for the trial of offences under this section. In short, it is submitted that as consent is not proper charge cannot be framed against accused persons under the provision of this Act. It appears from the sanction order that it is granted under section 7 of the Explosive Substance Act but it is mentioned that for filing the charge-sheet consent is given. I think that this is the matter of words used while granting sanction. The question whether this sanction is for the trial or not can not be decided during the course of trial by giving an opportunity to the Sanctioning Authority. But at this stage there is no hurdle to frame the charge against the accused persons.

276. So far as accusations under provisions of Arms Act are concerned sanction under section 39 of the Arms Act for instituting the prosecution under section 3 of the Act is granted for accused No.7 Rakesh Dhawde and accused No.8 Jagdish Mhatre only hence first of all it is clear that charge cannot be framed against remaining accused

persons for the offence punishable under section 3 of the Arms Act.

277. So far as section 5 of the Arms Act is concerned this section imposes restriction for selling, or offering to sell firearms without any licence. It is true that in statement of PW-36 there is reference of offering 12 bore double barrel gun by accused No.9 Lt. Col. Prasad Purohit to him without licence. No any other material on this point is shown by prosecution. There is no further investigation by the Investigating officers of ATS as well as NIA on this point. Said vague reference in his statement without mentioning any date, time and without any other material on record is not sufficient to frame the charge against accused No.9 under section 5 of the Arms Act. In view of all above discussion it is clear that except accused No.7 and 8, there is no material against any other accused for offences under the Arms Act.

278. It is submitted on behalf of all accused persons that no one was present on the spot of incident at the time of blast hence offence punishable under sections 302, 307, 324, 326, 427 of the IPC cannot be attracted. As against this, learned SPP submitted that six persons are died due to the blast and more than 100 persons suffered the injuries of various types. According to him considering this fact charge can be framed against accused persons for the above offences.

279. So far as offences under Indian Penal Code is concerned I have already pointed out that there is prima facie case regarding conspiracy against accused No.1, 4 to 6 and 9 to 11 to commit bomb blast at Malegaon. Material on record shows that six persons died in the said blast and more than 100 persons sustained injuries. Some of them sustained grievous injuries. Material on record also shows that damage

to the property was also caused. Intention to cause the said blast can be inferred from all above discussion. It has to be said that blast was caused to cause deaths as well as injuries to other persons residing or having their business in that particular locality or at least it can be said that accused had knowledge about the fact that said blast would resulted in causing death of persons and injuries to them. Moreover, I have already pointed out the conversation between wanted accused Ramchandra Kalsangra and accused No.1 Pragyasingh Thakur in presence of PW-22 which also shows the intention. Hence at this prima facie stage certainly it can be said that there is sufficient material to frame the charge against accused No.1, 4 to 6 and 9 to 11 under the above provisions of Indian Penal Code.

280. So far as section 153-A of the IPC is concerned, it is submitted by advocate of accused that there is no previous sanction as required under section 196 of the Code of Criminal Procedure for prosecuting the accused persons under section 153-A of the IPC. But learned SPP pointed out that sanction is granted by the State Government by an order dated 17.01.2009 while granting sanction under the provisions of UAP Act. It is true that by order dated 17.01.2009 Additional Chief Secretary (Home) and Secretary Incharge of the Home Department, Government of Maharashtra, Mumbai has granted sanction under section 196 of the Code of Criminal Procedure for prosecuting the accused persons under section 153-A of the IPC. Section 153-A provides punishment for promoting enmity between different groups on grounds of religion, race, place of birth, residence, language etc., and doing acts prejudicial to maintenance of harmony. In present case, bomb explosion is caused in the month of Ramzan in crowded place having Muslim dominating area on 29.09.2008. Holy

festival of Navratri was to commence on 30.09.2008. According to the prosecution this blast was caused to strike terror in the people and to create communal rift. If all above facts are considered on the background of the discussion in the meeting it has to be said that at this prima facie stage ingredients of section 153-A of the IPC also attracts in this matter. Hence, charge under section 153-A of IPC also can be framed against accused Nos.1, 4 to 6 and 9 to 11.04.2008.

281. During the course of argument it is submitted on behalf of accused No.10 Swami A. D. Tirth that there is no record to show that his name is "Dayanand Pandey". According to him, ATS officers had obtained the permission of the Court to arrest Dayanand Pandey but instead of arresting said Dayanand Pandey they have implicated him falsely in present case. In short, according to him, he is not the real accused wanted to ATS officers.

282. As against this, learned SPP submitted that the retrieved Data in the laptop seized from the possession of accused No.10 Swami A. D. Tirth clearly show that ATS officers had wanted to arrest accused No.10. According to him, during the course of investigation, initially the name of accused No.10 reflected as a Dayanand Pandey hence ATS officers started investigation on the basis of that name. According to him, ATS officers have arrested the right person i.e. accused No.10.

283. It is true that material on record show that initially ATS officers had started investigation against accused person by name Dayanand Pandey but they arrested the accused No.10. What is the effect of this? Whether really accused No.10 and Dayanand Pandey is the same person or ATS officers had received the information of

incorrect name of accused No.10. All these questions cannot be decided at this stage. I have already pointed out that there is prima facie case against accused No.10 about his involvement in the conspiracy hence this submission cannot be accepted to discharge him.

284. During the course of argument it was submitted on behalf of accused persons as well as accused No.5 in person that ATS officers did not investigate the matter as per Rules and procedure. Several witnesses as well as all accused persons have made complaint of torture against ATS officers. Initially, they detained the accused persons illegally and then showed their arrest. It is also submitted that ATS officers have killed one witness by name Dilip Patedar and now, some of the Investigating officers are facing trial for that purpose.

285. During the course of argument accused No.5 submitted that he was taken into custody illegally from Habibganj railway station, Bhopal. According to him, Magistrate has made enquiry about his allegations and has accepted the allegations made by him against ATS officers. In support of his submission that while arresting him due procedure was not followed and he was detained illegally accused No.5 relied on the authorities reported in (A) **LAWS (ALL) - 1992- 2 - 24 Allahadbad High Court, Birendra Kumar Rai Vs. Union of India.** (B) **(1991) ILR (Kar) 3198 Karnataka High Court, Kultej Singh Vs. Circle Inspector of Police and others.** (C) **AIR 1980 Supreme Court 785, Niranjan Singh & Anr Vs. Prabhakar Rajaram Kharote & Ors.** (D) **AIR 1983 Supreme Court 378, Sheela Barse Vs. State of Maharashtra.** (E) **AIR 1994 Supreme Court 1349, Joginder Kumar Vs. State of U.P. and Ors.** (F) **AIR 1997 Supreme Court 3017, Dilip K. Basu Vs. State of West Bengal & Ors.** (G) **2006 (1) Bom.C.R.**

(Cri.) 286, Dilip Pandurgang Kamath Vs. State of Maharashtra. (H) **1994 CRI. L. J. 134, Madras High Court, Roshan Beevi and Ors Vs. Joint Secretary to the Government of Tamil Nadu.** and (I) **AIR 1964 Supreme Court 33, State of Andhra Pradesh Vs. N. Venugopal & Ors.**

286. I have gone through the all above authorities. Hon'ble Apex Court has summarized the law in case of ***D. K. Basu (cited supra)*** and laid down several directions to avoid the illegal detention and custodial violence. Not only this, but Hon'ble Apex Court also laid down that the failure to comply the direction by the official concerned is liable for departmental action and also liable to be punished for contempt of the Court. It is also laid down by the Hon'ble Apex Court that the proceeding of contempt of Court can be instituted in any High Court of the Country having territorial jurisdiction over the matter.

287. At this stage limited question is to be considered i.e. whether there is prima facie case against accused persons to frame the charge or not. If really accused persons are aggrieved by the behaviour of ATS officers and their illegal actions then certainly proceeding can be initiated by the accused persons against them. But at this stage on the above ground raised by the accused persons including accused No.5 Sameer Kulkarni they cannot be discharged. Moreover, Order of Hon'ble High Court in Criminal Appeal No.402 of 2016 dated 04.07.2016 show that prayer of accused No.5 Sameer Kulkarni to release on bail on the ground of illegal detention by the police was also rejected. Any how, at this stage all above submissions made on behalf of accused persons including accused No.5 can not be said as useful to them.

288. During the course of argument it is also submitted that wanted accused Ramchandra Kalsangra and Sandeep Dange are also involved in Malegaon Bomb-blast Case, 2006 as well as in other blast cases along with some other accused persons. It is submitted that even charge-sheet of NIA shows that accused Nos.15 & 16 were closely associated with wanted accused Ramchandra Kalsangra and Sandeep Dange. NIA has exonerated accused Nos.15 & 16. When this group was active and had caused bomb-blast at Malegon in 2006 it is improbable to accept the case of the prosecution that for causing bomb-blast in 2008 at Malegaon they required help from these accused persons. In support of this argument advocate of accused mostly relied on submission made by Investigating Officer of NIA in investigation report in respect of accused Ramchandra Kalsangra, Sandeep Dange, Lokesh Sharma and Dhansingh at page Nos.49 to 56 under the head of "Evidence against accused persons and its analysis".

289. Perusal of the investigation report filed by the Investigating officer of NIA show that though certain facts were disclosed by Dhansingh during the course of interrogation Investigating officer did not accept these facts. Admittedly, Dhansingh was arrested in connection with this offence but later on after completion of investigation report under Section 169 was filed against him by the Investigating Officer. What it shows that in-fact Investigating officer of NIA also did no find truthness in the facts disclosed by Dhansing. If this is the position then at this prima facie stage it cannot be said that facts disclosed by Dhansing are useful to the accused persons particularly when there is sufficient material against them to frame the charge as discussed above.

290. In view of all above discussion proceed to pass following order :

ORDER

1. Application filed by accused No.7 Rakesh Dattatray Dhawde is hereby allowed.

2. Applications filed by accused No.1 Pragyasingh Chandrapalsingh Thakur @ Swami Purna Chetnanand Giri, No.4 Major Ramesh Shivji Upadhyay, No.5 Sameer Sharad Kulkarni, No.6 Ajay @ Raja Eknath Rahirkar, No.9 Lt. Col. Prasad Shrikant Purohit, No.10 Sudhakar Udaybhan Dhar Dwivedi @ Swami Amrutanand Dev Tirth are hereby partly allowed.

3. Accused No.2 Shivnarayan Gopalsingh Kalsangra, No.3 Shyam Bhavarlal Sahu and No.12 Praveen Venkatesh Takkalki @ Pravin Mutalik @ Pradeep V. Naik are hereby discharged from all offences alleged against them i.e. offence punishable under Sections 302, 307, 326, 324, 427, 153-A and 120-B of the Indian Penal Code, under Sections 3, 4, 5, 6 of the Explosive Substance Act, 1908, under Sections 3, 5 and 25 of Arms Act 1959, under Sections 16, 17, 18, 20 and 23 of Unlawful Activities (Prevention) Act, 1967 and under Sections 3(1)(i), 3(1)(ii), 3(2), 3(4), 3(5) of the Maharashtra Control of Organized Crime Act, 1999 under section 227 of the Code of Criminal Procedure.

4. Accused No.2, No.3 and No.12 are hereby directed to furnish P.R. Bond of Rs.30,000/- (Rupees Thirty Thousand only) with one or more sureties of like-sum amount each as per section 437-A of the Code of Criminal Procedure.

5. Accused No.7 Rakesh Dattatray Dhawde and accused No.8 Jagdish Chintaman Mhatre are hereby discharged from all above offences punishable under provisions of Indian Penal Code, Explosive Substance Act, 1908, Unlawful Activities (Prevention) Act, 1967 and Maharashtra Control of Organized Crime Act, 1999 under section 227 of the Code of Criminal Procedure.

i) Case of accused No.7 for the offences punishable under section 3, 5 read with section 25 of the Arms Act be transferred to the Principal District and Sessions Court, Pune for the assignment to try the above offences by the Competent Court in view of section 11 of the MCOC Act and section 20 of the NIA Act.

ii) Case of accused No.8 for the offence punishable under sections 3, 5 read with section 25 of the Arms Act be transferred to the Principal District and Sessions Court, Thane for the assignment to try the above offences by the Competent Court in view of section 11 of the MCOC Act and section 20 of the NIA Act.

iii) Record and proceeding relating to above offences against the accused No.7 and 8 be sent to the concerned Court immediately.

6. Accused No.1 Pragyasingh Chandrapalsingh Thakur @ Swami Purna Chetnanand Giri, No.4 Major Ramesh Shivji Upadhyay, No.5 Sameer Sharad Kulkarni, No.6 Ajay @ Raja Eknath Rahirkar, No.9 Lt. Col. Prasad Shrikant Purohit, No.10 Sudhakar Udaybhan Dhar Dwivedi @ Swami Amrutanand Dev Tirth and accused No.11 Sudhakar Onkarnath Chatruvedi are hereby discharged from the offences

punishable under sections 3(1)(i), 3(1)(ii), 3(2), 3(4), 3(5) of the Maharashtra Control of Organized Crime Act, 1999. They are also discharged from the offences punishable under section 17, 20 and 23 of the Unlawful Activities (Prevention) Act, 1967 as well as offence punishable under section 3, 5 and 25 of Arms Act 1959.

7. Charge against the above accused Nos.1, 4 to 6 and 9 to 11 be framed for the offences :

i) Punishable under section 18 of the UAP Act and under section 120-B of the Indian Penal Code read with sections 302, 307, 324, 326, 427, 153-A of the Indian Penal Code read with section 3, 4, 5 and 6 of the Explosive Substance Act, 1908 and section 16 of the Unlawful Activities (Prevention) Act, 1967 and

ii) Punishable under section 16 of the Unlawful Activities (Prevention) Act, 1967, sections 302, 307, 324, 326, 427, 153-A of the Indian Penal Code, sections 3, 4, 5 and 6 of the Explosive Substance Act, 1908 read with section 120-B of the Indian Penal Code.

(S.D.Tekale)
The Special Judge
(Under MCOC & NIA Act)
Gr.Bombay

Date : 27/12/2017

Transcription completed on : 27.12.2017
HHJ signed on : 27.12.2017

CERTIFIED TO BE TRUE AND CORRECT COPY OF THE ORIGINAL SIGNED JUDGMENT/ORDER."

28.12.2017, 11.40 pm — UPLOAD DATE AND TIME

Mrs. S. P. Pawar — NAME OF STENOGRAPHER

Name of the Judge (With Court Room No.)	HHJ Shri S.D. Tekale (CR No.26)
Date of Pronouncement of Judgment/ order	27.12.2017
Judgment/Order signed by P.O. on	27.12.2017
Judgment/Order uploaded on	28.12.2017