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People’s Union for Civil Liberties & Anr.

Vs.
Union of India
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DECEMBER 16, 2003.
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S. RAJENDRA BABU & G.P. MATHUR
&
J U D G M E N T

[With
W.P.(Crl.) 89/2002, W.P.(Crl.)
129/2002, W.P.(Crl.) 28/2003 &
W.P.(Crl.) 48/2003]

RAJENDRA BABU, J. :

W.P.(C) No. 389/2002 & W.P.(Crl) No.
89/2002 :

In this batch of Writ Petitions before us the Constitutional validity of various provisions of the Prevention of Terrorism Act, 2002 (hereinafter POTA) is in challenge.

The Petitioners’ contended before us that since the provisions of POTA, in pith and substance, fall under the Entry 1 (Public Order) of List II Parliament lacks legislative competence. To authenticate this contention, the decision in Rehman Shagoo & others V. State of Jammu Kashmir, 1960 (1) SCR 680, is relied upon. According to them, the menace of terrorism is covered by the Entry "Public Order" and to explain the meaning thereof, our attention is invited to decisions in Romesh Thaper V. State of Madras, 1950 SCR 594, Dr. Ram Manohar Lohia V. State of Bihar, 1966 (1) SCR 709, and Madhu Limaye V. SDM, Monghyr, (1970) 3 SCC 746. The Petitioners thus submitted that terrorist activity is confined only to State(s) and therefore State(s) only have the competence to enact a legislation.

The learned Attorney General refuting this contention submitted that acts of terrorism, which are aimed at weakening the sovereignty and integrity of the country cannot be equated with mere breaches of law and order and disturbances of public order or public safety. He argued that the concept of "sovereignty and integrity of India" is distinct and separate from the concepts of "public order" or "security of State" which fall under List II enabling States to enact legislation relating to public order or safety affecting or relating to a particular State. Therefore, the legislative competence of a State to enact laws for its security cannot denude Parliament of its competence under List I to enact laws to safeguard national security and sovereignty of India by preventing and punishing acts of terrorism. Learned Attorney General distinguished

the decision in Rehman Shagoo and submitted that the legislation dealt with therein is fundamentally and qualitatively different from POTA. He also argued before us that Rehman Shagoo cannot mitigate the binding ratio and unanimous conclusion reached by this Court on the point of legislative competence in Kartar Singh V. State of Punjab, 1994 (3) SCC 569 = 1994 (2) SCR 375, that Parliament can enact such law.

In deciding the point of legislative competence, it is necessary to understand the contextual backdrop that led to the enactment of POTA, which aims to combat terrorism. Terrorism has become the most worrying feature of the contemporary life. Though violent behavior is not new, the present day 'terrorism' in its full incarnation has obtained a different character and poses extraordinary challenges to the civilized world. The basic edifices of a modern State, like - democracy, state security, rule of law, sovereignty and integrity, basic human rights etc are under the attack of terrorism. Though the phenomenon of terrorism is complex, a 'terrorist act' is easily identifiable when it does occur. The core meaning of the term is clear even if its exact frontiers are not. That is why the anti-terrorist statutes - the earlier Terrorism and Disruptive Activities (Prevention) Act, 1987 (TADA) and now POTA do not define 'terrorism' but only 'terrorist acts.' (See : Hitendra Vishnu Thakur V. State of Maharashtra, (1994) 4 SCC 602).

Paul Wilkinson, an authority on terrorism related works, culled out five major characteristics of terrorism. They are:

1. It is premeditated and aims to create a climate of extreme fear or terror.
2. It is directed at a wider audience or target than the immediate victims of violence.
3. It inherently involves attacks on random and symbolic targets, including civilians.
4. The acts of violence committed are seen by the society in which they occur as extra-normal, in literal sense that they breach the social norms, thus causing a sense of outrage; and
5. Terrorism is used to influence political behavior in some way - for example to force opponents into conceding some or all of the perpetrators demands, to provoke an over-reaction, to serve as a catalysis for more general conflict, or to publicize a political cause.

In all acts of terrorism, it is mainly the psychological element that distinguishes it from other political offences, which are invariably accompanied with violence and disorder. Fear is induced not merely by making civilians the direct target of violence but also by exposing them to a sense of insecurity. It is in this context that this Court held in Mohd. Iqbal M. Shaikh V. State of Maharashtra, (1998) 4 SCC 494, that:

"...it is not possible to give a precise definition of terrorism or to lay down what constitutes terrorism. But... it may be possible to describe it as a use of violence when its most important

result is not merely the physical and mental damage of the victim but the prolonged psychological effect it produces or has the potential of producing on the society as a whole. ... if the object of the activity is to disturb harmony of the society or to terrorize people and the society, with a view to disturb even tempo, tranquility of the society, and a sense of fear and insecurity is created in the minds of a section of society at large, then it will, undoubtedly be held to be terrorist act..."

Our country has been the victim of an undeclared war by the epicenters of terrorism with the aid of well-knit and resourceful terrorist organizations engaged in terrorist activities in different States such as Jammu & Kashmir, North-East States, Delhi, West Bengal, Maharashtra, Gujarat, Tamilnadu, Andhra Pradesh. The learned Attorney General placed material to point out that the year 2002 witnessed 4038 terrorist related violent incidents in J&K in which 1008 civilians and 453 security personnel were killed. The number of terrorist killed in 2002 was 1707 out of which 508 were foreigners. In the year 2001 there were as many as 28 suicide attacks while there were over 10 suicide attacks in 2002 in which innocent persons and a large number of women and children were killed. The major terrorist incidents in the recent past includes attack on Indian Parliament on 13th December 2001, attack on Jammu & Kashmir Assembly on 1st October, 2001, attack on Akshardham temple on 24th September 2002, attack on US Information Center at Kolkatta on 22nd January 2002, Srinagar CRPF Camp attack on 22nd November 2002, IED blast near Jawahar Tunnel on 23rd November 2002, attack on Raghunath Mandir on 24th November 2002, bus bomb blast at Ghatkopar in Mumbai on 2nd December 2002, attack on villagers in Nadimarg in Pulwama District in Jammu Kashmir on the night of 23rd-24th March 2003 etc. There were attacks in Red Fort and on several Government Installations, security forces' camps and in public places. Gujarat witnessed gruesome carnage of innocent people by unleashing unprecedented orgy of terror. People in Bihar, Andhra Pradesh, and Maharashtra etc have also experienced the terror trauma. The latest addition to this long list of terror is the recent twin blast at Mumbai that claimed about 50 lives. It is not necessary to swell this opinion by narrating all the sad episodes of terrorist activities that the country has witnessed.

All these terrorist strikes have certain common features. It could be very broadly grouped into three.

1. Attack on the institution of democracy, which is the very basis of our country. (By attacking Parliament, Legislative Assembly etc). And the attack on economic system by targeting economic nerve centers.
2. Attack on symbols of national pride and on security / strategic installations. (eg. Red Fort, Military installations and camps, Radio stations etc.)

3. Attack on civilians to generate terror and fear psychosis among the general populace. The attack at worshipping places to injure sentiments and to whip communal passions. These are designed to position the people against the government by creating a feeling of insecurity.

Terrorist acts are meant to destabilize the nation by challenging its sovereignty and integrity, to raze the constitutional principles that we hold dear, to create a psyche of fear and anarchism among common people, to tear apart the secular fabric, to overthrow democratically elected government, to promote prejudice and bigotry, to demoralize the security forces, to thwart the economic progress and development and so on. This cannot be equated with a usual law and order problem within a State. On the other hand, it is inter-state, inter-national or cross-border in character. Fight against the overt and covert acts of terrorism is not a regular criminal justice endeavor. Rather it is defence of our nation and its citizens. It is a challenge to the whole nation and invisible force of Indianness that binds this great nation together. Therefore, terrorism is a new challenge for law enforcement. By indulging in terrorist activities organized groups or individuals, trained, inspired and supported by fundamentalists and anti-Indian elements were trying to destabilize the country. This new breed of menace was hitherto unheard of. Terrorism is definitely a criminal act, but it is much more than mere criminality. Today, the government is charged with the duty of protecting the unity, integrity, secularism and sovereignty of India from terrorists, both from outside and within borders. To face terrorism we need new approaches, techniques, weapons, expertise and of course new laws. In the above said circumstances Parliament felt that a new anti-terrorism law is necessary for a better future. This parliamentary resolve is epitomized in POTA.

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

and suppress terrorist acts' and also to 'prevent and suppress the financing of terrorist acts.' India is a party to all these resolves. Anti-terrorism activities in the global level are mainly carried out through bilateral and multilateral cooperation among nations. It has thus become our international obligation also to pass necessary laws to fight terrorism.

The attempts by the State to prevent terrorism should be based on well-established legal principles. The 'Report of the Policy Working Group of the United Nations and Terrorism' urged the global community to concentrate on a triple strategy to fight against terrorism. They are:

a). Dissuade disaffected groups from embracing terrorism;

b). Deny groups or individuals the means to carry out acts of terrorism; and

c). Sustain broad-based international cooperation in the struggle against terrorism.

Therefore, the anti-terrorism laws should be capable of dissuading individuals or groups from resorting to terrorism, denying the opportunities for the commission of acts of terrorism by creating inhospitable environments for terrorism and also leading the struggle against terrorism. Anti - terrorism law is not only a penal statue but also focuses on pre-emptive rather than defensive State action. At the same time in the light of global terrorist threats, collective global action is necessary. Lord Woolf CJ in A, X and Y, and another V. Secretary of the State for the Home Department (Neutral Citation Number: [2002] EWCA Civ. 1502) has pointed out that "...Where international terrorists are operating globally and committing acts designed to terrorize the population in one country, that can have implications which threaten the life of another. This is why a collective approach to terrorism is important."

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

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

..So, first of all, the question that I would like to pose to all of you and which we have posed to the nation is: 'Is it just in Jammu and Kashmir an aggravated law and order situation

that we are facing or is it really when we say it a proxy war, do we really believe that it is a proxy war?'...But when you have terrorist organizations being trained, financed by a State and it becomes State-sponsored terrorism and all of them are enabled to infiltrate into our country, it becomes a challenge of a qualitatively different nature..."
(Emphasis supplied)

>From this it could be gathered that Parliament has explored the possibility of employing the existing laws to tackle terrorism and arrived at the conclusion that the existing laws are not capable. It is also clear to Parliament that terrorism is not a usual law and order problem.

The protection and promotion of human rights under the rule of law is essential in the prevention of terrorism. Here comes the role of law and Court's responsibility. If human rights are violated in the process of combating terrorism, it will be self-defeating. Terrorism often thrives where human rights are violated, which adds to the need to strengthen action to combat violations of human rights. The lack of hope for justice provides breeding grounds for terrorism.

Terrorism itself should also be understood as an assault on basic rights. In all cases, the fight against terrorism must be respectful to the human rights. Our Constitution laid down clear limitations on the State actions within the context of the fight against terrorism. To maintain this delicate balance by protecting 'core' Human Rights is the responsibility of Court in a matter like this. Constitutional soundness of POTA needs to be judged by keeping these aspects in mind.

Now, we will revert to the issue of legislative competence. Relying on Rehman Shagoo Petitioners argued that Parliament lacks competence since the 'terrorism' in pith and substance covered under the Entry 1 (Public Order) of List II. Conclusion of this contention depends upon the true meaning of the Entry - 'Public Order'.

A constitution Bench of this Court in Rehman Shagoo examined the constitutionality of the Enemy Agents (Ordinance), No. VIII of S. 2005 promulgated by His Highness the Maharaja under Section 5 of Jammu Kashmir Constitution Act, S. 1996. For a proper understanding of the ratio in Rehman Shagoo, it is necessary to understand the background in which the impugned Ordinance was promulgated. (See : Prem Nath Kaul V. The State of Jammu & Kashmir, 1959 Supp. (2) SCR 270, to understand the background that prevailed in the then Kashmir). Because any interpretation divorced from the context and purpose will lead to bad conclusions. It is a well-established canon of interpretation that the meaning of a word should be understood and applied in accordance with the context of time, social and conditional needs. Rehman Shagoo was concerned with the interpretation of Instrument of Accession and the power of

Maharaja to issue the impugned Ordinance therein. The same was promulgated to protect the state of Kashmir from external raiders and to punish them and those who assist them. The situation that prevailed during the latter half of 1940s is fundamentally different form today. The circumstances of independence, partition, state re-organization, and the peculiar situation prevailing in the then Kashmir etc. need to be taken into account. It is only in that context this Court said in Rehman Shagoo that the impugned Ordinance:

" ...In pith and substance deals with public order and criminal law procedure; the mere fact that there is an indirect impact on armed forces in s. 3 of the Ordinance will not make it in pith and substance a law covered by item (1) under the head 'Defence' in the Schedule."

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

"Having regard to the limitation placed by Article 245 (1) on the legislative power of the Legislature of the State in the matter of enactment of laws having application within the territorial limits of the State only, the ambit of the field of legislation with respect to 'public order' under Entry 1 in the State List has to be confined to disorders of lesser gravity having an impact within the boundaries of the State. Activities of a more serious nature which threaten the security and integrity of the country as a whole would not be within the legislative field assigned to the States under Entry 1 of the State List but would fall within

the ambit of Entry 1 of the Union List relating to defence of India and in any event under the residuary power conferred on Parliament under Article 248 read with Entry 97 of the Union List.

..

The terrorism, the Act (TADA) contemplates, cannot be classified as mere disturbances of 'public order' disturbing the 'even tempo of the life of community of any specified locality' - in the words of Hidayathulla, C J in Arun Ghosh v. State of West Bengal (1970) 1 SCC 98 but it is much more, rather a grave emergent situation created either by external forces particularly at the frontiers of this country or by anti-nationals throwing a challenge to the very existence and sovereignty of the country in its democratic polity.

...

In our view, the impugned legislation does not fall under Entry 1 of List II, namely, Public Order. No other Entry in List II has been invoked. The impugned Act, therefore, falls within the legislative competence of Parliament in view of Article 248 read with Entry 97 of List I and it is not necessary to consider whether it falls under any of the entries in List I or List III. We are, however, of the opinion that the impugned Act could fall within the ambit of Entry 1 of List I, namely, 'Defence of India'." [pp. 633, 634, 635]

While this is the view of the majority of Judges in Kartar Singh's case (supra), K. Ramaswamy,J. held that Parliament does possess power under Article 248 and Entry 97 of List I of the Seventh Schedule and could also come within the ambit of Entry 1 of List III. Sahai,J. held that the legislation could be upheld under Entry 1 of List III. Thus, all the Judges are of the unanimous opinion that Parliament had legislative competence though for different reasons.

Considering all the above said aspects, the challenge advanced by Petitioners of want of legislative competence of Parliament to enact POTA is not tenable.

Another issue that the Petitioner has raised at the threshold is the alleged misuse of TADA and the large number of acquittals of the accused charged under TADA. Here we would like to point out that this Court cannot go into and examine the 'need' of POTA. It is a matter of policy. Once legislation is passed the Government has an obligation to exercise all available options to prevent terrorism within the bounds of the Constitution. Moreover, we would like to point out that this Court has repeatedly held that mere possibility of abuse cannot be counted as a ground for denying the vesting of powers or for declaring a statute unconstitutional. (See: State of Rajasthan V. Union of India, (1978) 1 SCR 1, Collector of Customs V. Nathella Sampathu Chetty, AIR 1962 SC 316, Keshavananda

Bharati V. State of Kerala, 1973 (4) SCC 225; Mafatlal Industries V. Union of India, (1997) 5 SCC 536 etc).

Meaning of the word 'abets' in the context of POTA:

Pertaining to the validity of individual sections, petitioners primarily contended that Section 3(3) of POTA provides that whoever 'abets' a terrorist act or any preparatory act to a terrorist act shall be punishable and this provision, fails to address the requirement of 'mens rea' element. They added that this provision has been incorporated in POTA in spite of the contrary observation of this Court in Kartar Singh, wherein it was held that the word 'abets' need to have the requisites of intention or knowledge. Consequently, they want us to strike down Section 3(3) as the same is prone to misuse.

In Kartar Singh, this Court was concerned with the expression "abet" as defined under Section 2(1)(a) of TADA and hence considered the effect of different provisions of the TADA to ascertain true meaning thereof. As the meaning of the word "abet" as defined therein is vague and in precise, actual knowledge or reason to believe on the part of the person to be brought within the definition should be brought into that provision instead of reading down that provision. That kind of exercise is not necessary in POTA.

Under POTA the word "abets" is not defined at all. Section 2(1)(i) of POTA says "words and expressions used but not defined in this Act and defined in the Code shall have the meaning respectively assigned to them in the Code." According to Section 2(1)(a) of POTA "Code" means 'Code of Criminal Procedure, 1973 (2 of 1974).' Whereas, Section 2(y) Cr.P.C. refers to Indian Penal Code for meaning of the word 'abets'. Therefore, the definition of 'abets' as appears in the IPC will apply in a case under POTA. In order to bring a person abetting the commission of an offence, under the provisions of IPC it is necessary to prove that such person has been connected with those steps of the transactions that are criminal. 'Mens rea' element is sine qua non for offences under IPC. Learned Attorney General does not dispute this position. Therefore, the argument advanced pertaining to the validity of Section 3(3) citing the reason of the absence of mens rea element stands rejected.

Section 4:

Section 4 provides for punishing a person who is in 'unauthorised possession' of arms or other weapons. The petitioners argued that since the knowledge element is absent the provision is bad in law. A similar issue was raised before a Constitution Bench of this Court in Sanjay Dutt V. State (II), (1994) 5 SCC 410. Here this Court in Para 19 observed that:

"... Even though the word 'possession' is not preceded by any adjective like 'knowingly', yet it is common ground that in the context the word 'possession' must mean possession with the requisite mental element, that is, conscious possession and not mere custody without the awareness of the nature of such possession. There is a mental element in the concept of possession. Accordingly, the ingredient of 'possession' in Section 5 of the TADA Act means conscious possession. This is how the ingredient of possession in similar context of statutory offence importing strict liability on account of mere possession of an unauthorised substance has been understood."

The finding of this Court squarely to the effect that there exists a mental element in the word possession itself answers the Petitioners argument. The learned Attorney General also maintains the stand that Section 4 presupposes conscious possession. Another aspect pointed out by the petitioners is about the 'unauthorized' possession of arms and argued that unauthorized possession could even happen; for example, by non-renewal of license etc. In the light of Sanjay Dutt's case (supra) this Section presupposes knowledge of terrorist act for possession. There is no question of innocent persons getting punished. Therefore, we hold that there is no infirmity in Section 4.

Sections 6, 7, 8, 10, 11, 15, 16 and 17:

Contentions have been raised in regard to provisions relating to seizure, attachment and forfeiture of proceeds of terrorism.

Provisions relating to seizure, attachment and forfeiture have to be read together. Section 2(c) of POTA sets out the meaning of 'proceeds of terrorism' and reads as follows:

" 'proceeds of terrorism' shall mean all kinds of properties which have been derived or obtained from commission of any terrorist act or have been acquired through funds traceable to a terrorist act, and shall include cash irrespective of person in whose name such proceeds are standing or in whose possession they are found."

Explanation to Section 3 gives the meaning of 'a terrorist act' in the context of sub-section (1) of Section 3 so as to include the act of raising funds intended for the purpose of terrorism. Section 6 debars a person from holding or possessing any proceeds of terrorism and also makes it clear that it is liable to be forfeited. Section 7 authorises an investigating officer, not below the rank of Superintendent of Police with

the prior approval in writing of the Director General of Police of the State, to seize such property or attach the same and serve a copy of such an order on the person concerned, if he has reason to believe that any property in relation to which an investigation is being conducted represents proceeds of terrorism. Section 8 provides for forfeiture of the proceeds of terrorism by a court irrespective of the fact whether or not the person from whose possession it is seized or attached is prosecuted in a Special Court for an offence under POTA. Section 9 provides for issue of show cause notice before forfeiture of proceeds of terrorism and an order for forfeiture cannot be made if such person establishes that he is a bona fide transferee of such proceeds for value without knowing that they represent proceeds of terrorism. Under Section 10, an appeal lies against an order made under Section 8 of POTA. Sub-section (2) thereof states that where an order made under Section 8 is modified or annulled by the High Court, the person against whom an order of forfeiture has been made under Section 8 is acquitted, such property shall be returned to him and in either case if it is not possible for any reason to return the forfeited property, adequate compensation should be paid to him, which will be equivalent to the price and interest from the date of seizure of the property. Although the petitioners have challenged the various provisions of POTA relating to seizure, forfeiture and attachment of the property, ultimately they did not pursue with that argument and submitted that the various facets of challenge to the aforesaid provisions can only be examined in the context of an actual fact situation and for the present they wanted an interpretation of the expressions used in Section 10(2) to apply even to a case of forfeiture of the proceeds of terrorism against a person who is prosecuted under POTA. Even that aspect can only be considered when an actual situation arises and not in the abstract. Therefore, we need not examine in detail these provisions except to notice the background in which these provisions have been enacted.

The order of forfeiture, by reason of Section 11, has been made independent of imposition of other punishments to which a person may be liable. Under Section 12, Designated Authority has been permitted to investigate the claims made by a third party. These provisions have to be seen as against Section 16, which provides for forfeiture of property of any person prosecuted and ultimately convicted. Here only on conviction, forfeiture of property can take place. In this connection, it is relevant to take note of the provisions of Sections 15, 16 and 17. Section 15 renders certain transfers to be null and void in cases where after the issue of an order under Section 7 or notice under Section 9 any property is transferred by any mode whatsoever, such transfer shall for the purpose of the Act be ignored and if such property is subsequently forfeited, the transfer of such property shall be deemed to be

null and void. Section 16 enables a special court trying a person for an offence under the Act to pass an order that all or any of the properties, movable or immovable or both belonging to him, during the period of such trial, be attached, if not already attached under the Act. On conviction of such person, the special court may, by an order, declare that any property, movable or immovable or both belonging to the accused and specified in the order, shall stand forfeited to the Central Government or the State Government, as the case may be. Section 17 provides that in cases where any share of a company shall stand forfeited, then, the company shall, on receipt of the order of the special court, notwithstanding anything contained in the Companies Act, 1956 or the articles of association of the company, forthwith register the Central Government or the State Government, as the case may be, as the transferee of such shares.

Funding and financing play a vital role in fostering and promoting terrorism and it is only with such funds terrorists are able to recruit persons for their activities and make payments to them and their family to obtain arms and ammunition for furthering terrorist activities and to sustain the campaign of terrorism. Therefore, seizure, forfeiture and attachment of properties are essential in order to contain terrorism and is not unrelated to the same. Indeed, it is relevant to notice a resolution passed by the United Nations Security Council [Resolution No.1373 dated 28.9.2001] which emphasized the need to curb terrorist activities by freezing and forfeiture of funds and financial assets employed to further terrorist activities. It will also be interesting to notice the United Nations International Convention for the Suppression of the Financing of Terrorism but at the same time it is not necessary to go into those details in the present context. The scheme of the provisions indicate that the principles of natural justice are duly observed and they do not confer any arbitrary power and forfeiture can only be made by an order of the court against which an appeal is also provided to the High Court and the rights of bona fide transferee are not affected. Therefore, for the present, it is not necessary to pronounce the constitutional validity of these provisions and we proceed on the basis that they are valid.

Number of changes have been made in the provisions which existed in TADA and which exist in POTA. The relevant discussion in the challenge to Section 8 of TADA by majority in Kartar Singh is contained in paras 149-157 and para 452 by Justice Sahai who has concurred with the majority. The validity of Section 8 of TADA was upheld, only if it was applied in the manner indicated in Para 156 of the judgment which is as under :-

"The discretionary power given to the Designated Court under Section 8(1) and (2)

is to be exercised under strict contingencies, namely, that (1) there must be an order of forfeiture and that order must be in writing; (2) the property either movable or immovable or both must belong to the accused convicted of any offence of TADA Act or rule thereunder; (3) the property should be specified in the order; (4) even though attachment can be made under Section 8(2) during the trial of the case, the forfeiture can be ordered only in case of conviction and not otherwise."

However, ultimately, they do not press these contentions to be considered in these proceedings by stating that the various facets as set above can really be seen in actual fact situation and for the present, they call upon the Court to clarify that the expression "modified" or "annulled" used in Section 10(2) shall apply even in a case of forfeiture of the proceeds of terrorism against a person who is not prosecuted under POTA.

It is not necessary to interpret these expressions and as and when an appropriate case arises, appropriate interpretation can be given on the said expressions. There is a scheme for forfeiture of the proceeds of terrorism followed by a show cause notice to be issued and thereafter on a decision being made, an appeal lies thereto and the order of forfeiture, by itself, will not prevent the court from inflicting any other punishment for which the person may be liable under the Act. The effect of modification and annulment of an order made by court under Section 8 of the Act is set out in sub-section (2) of Section 10. Therefore, as rightly submitted on behalf of the petitioners, these aspects can appropriately be dealt with depending upon the fact situation arising in a given case. Therefore, it is not necessary to express any opinion on these aspects of the matter.

Section 14:

The constitutional validity of Section 14 is challenged by advancing the argument that it gives unbridled powers to the investigating officer to compel any person to furnish information if the investigating officer has reason to believe that such information will be useful or relevant to the purpose of the Act. It is pointed out that the provision is without any checks and is amenable to misuse by the investigating officers. It is also argued that it does not exclude lawyers or journalists who are bound by their professional ethics to keep the information rendered by their clients as privileged communication. Therefore, the Petitioners submitted that Section 14 is violative of Articles 14, 19, 20(3) and 21 of the Constitution. Learned Attorney General maintained that the Act does not confer any arbitrary or unguided powers; that such power is restricted to furnish information in one’s possession in relation to terrorist offence ’on points or matters where

the investigating officer has reason to believe (not suspect) that such information would be useful for or relevant to the purposes of the Act'; that this provision is essential for the detection and prosecution of terrorist offences; and that the underlying rationale of the obligation to furnish information is the salutary duty of every citizen.

Section 39 of the Code of Criminal Procedure, 1973 casts a duty upon every person to furnish information regarding offences. Criminal justice system cannot function without the cooperation of people. Rather it is the duty of every body to assist the State in detection of the crime and bringing criminal to justice. Withholding such information cannot be traced to right to privacy, which itself is not an absolute right (See : Sharda V. Dharmpal, 2003 (4) SCC 493). Right to privacy is subservient to that of security of State. Highlighting the necessity of people's assistance in detection of crime this Court observed in State of Gujarat V. Anirudhsing, 1997 (6) SCC 514, that:

"...It is the salutary duty of every witness who has the knowledge of the commission of the crime, to assist the State in giving evidence..."

Section 14 confers power to the investigating officer to ask for furnishing information that will be useful for or relevant to the purpose of the Act. Further more such information could be asked only after obtaining a written approval from an officer not below the rank of a Superintendent of Police. Such power to the investigating officers is quiet necessary in the detection of terrorist activities or terrorist.

It is settled position of law that a journalist or lawyer does not have a sacrosanct right to withhold information regarding crime under the guise of professional ethics. A lawyer cannot claim a right over professional communication beyond what is permitted under Section 126 of the Evidence Act. There is also no law that permits a newspaper or journalist to withhold relevant information from Courts though they have been given such power by virtue of Section 15(2) of the Press Council Act, 1978 as against Press Council. (See also : Pandit M.S.M Sharma V. Shri Sri Krishan Sinha, 1959 Supp (1) SCR 806, and Sewakram Sobhani V. R.K Karanjia, 1981 (3) SCC 208, which quoted Arnold V. King Emperor 1913-14 (41) IA 149, with approval and also B.S.C V. Granada Television, 1981 (1) All E.R 417 (HL) and Branzburg V. Hayes, 1972 (408) US 665). Of course the investigating officers will be circumspect and cautious in requiring them to disclose information. In the process of obtaining information, if any right of citizen is violated, nothing prevents him from resorting to other legal remedies.

In as much as the main purpose of Section14 of POTA is only to allow the investigating officers

to procure certain information that is necessary to proceed with the further investigation we find there is no merit in the argument of the petitioners and we uphold the validity of Section 14.

Sections 18 & 19:

Sections 18 and 19 deals with the notification and de-notification of terrorist organizations. Petitioners submitted that under Section 18(1) of POTA a schedule has been provided giving the names of terrorist organization without any legislative declaration; that there is nothing provided in the Act for declaring organizations as terrorist organization; that this provision is therefore, unconstitutional as it takes away the fundamental rights of an organization under Articles 14, 19(1)(a) and 19(1)(c) of the Constitution; that under Section 18(2) of the Act, the Central Government has been given unchecked and arbitrary powers to 'add' or 'remove' or 'amend' the Schedule pertaining to terrorist organizations; that under the Unlawful Activities (Prevention) Act, 1967 an organization could have been declared unlawful only after the Central Government has sufficient material to form an opinion and such declaration has to be made by a Notification wherein grounds have to be specified for making such declaration: that therefore such arbitrary power is violative of Articles 14, 19 and 21 of the Constitution. Pertaining to Section 19 the main allegation is that it excessively delegates power to Central Government in the appointment of members to the Review Committee and they also pointed out that the inadequate representation of judicial members will affect the decision-making and consequently it may affect the fair judicial scrutiny; that therefore Section 19 is not constitutionally valid.

The Learned Attorney General contended that there is no requirement of natural justice which mandates that before a statutory declaration is made in respect of an organization which is listed in the schedule a prior opportunity of hearing or representation should be given to the affected organization or its members: that the rule of audi alteram partem is not absolute and is subject to modification; that in light of post-decisional hearing remedy provided under Section 19 and since the aggrieved persons could approach the Review Committee there is nothing illegal in the Section; that furthermore the constitutional remedy under Articles 226 and 227 is also available; that therefore, having regard to the nature of the legislation and the magnitude and prevalence of the evil of terrorism cannot be said to impose unreasonable restrictions on the Fundamental Rights under Article 19(1)(c) of the Constitution.

The right of citizens to form association or union that is guaranteed by Article 19(1)(c) of the Constitution is subject to the restriction provided

under Article 19(4) of the Constitution. Under Article 19(4) of the Constitution the State can impose reasonable restrictions, inter alia, in the interest of sovereignty and integrity of the country. POTA is enacted to protect sovereignty and integrity of India from the menace of terrorism. Imposing restriction under Article 19(4) of the Constitution also includes declaring an organization as a terrorist organization as provided under POTA. Hence Section 18 is not unconstitutional.

It is contended that before making the notification whereby an organization is declared as a terrorist organization there is no provision for pre-decisional hearing. But this cannot be considered as a violation of audi alteram partem principle, which itself is not absolute. Because in the peculiar background of terrorism it may be necessary for the Central Government to declare an organization as terrorist organization even without hearing that organization. At the same time under Section 19 of POTA the aggrieved persons can approach the Central Government itself for reviewing its decision. If they are not satisfied by the decision of the Central Government they can subsequently approach Review Committee and they are also free to exercise their Constitutional remedies. The post-decisional remedy provided under POTA satisfies the audi alteram partem requirement in the matter of declaring an organization as a terrorist organization. (See: Mohinder Singh Gill V. Chief Election Commissioner, 1978 (1) SCC 405; Swadeshi Cotton Mills V. Union of India, 1981 (1) SCC 664; Olga Tellis V. Bombay Municipal Corporation, 1985 (3) SCC 545; Union of India V. Tulsiram Patel, 1985 (3) SCC 398). Therefore, the absence of pre-decisional hearing cannot be treated as a ground for declaring Section 18 as invalid.

It is urged that Section 18 or 19 is invalid based on the inadequacy of judicial members, in the Review Committee. As per Section 60, Chairperson of the Review Committee will be a person who is or has been a Judge of High Court. The mere presence of non-judicial members by itself cannot be treated as a ground to invalidate Section 19. (See: Kartar Singh' case (supra) at page 683, para 265 of SCC).

As regards the reasonableness of the restriction provided under Section 18, it has to be noted that the factum of declaration of an organization as a terrorist organization depends upon the 'belief' of Central Government. The reasonableness of the Central Government's action has to be justified based on material facts upon which it formed the opinion. Moreover the Central Government is bound by the order of the Review Committee. Considering the nature of legislation and magnitude or presence of terrorism, it cannot be said that Section 18 of POTA imposes unreasonable restrictions on fundamental right guaranteed under Article 19(1)(c) of the Constitution. We uphold the

validity of Sections 18 and 19.

Sections 20, 21 & 22:

Petitioners assailed Sections 20, 21 and 22 mainly on the ground that no requirement of mens rea for offences is provided in these Sections and the same is liable to misuse therefore it has to be declared unconstitutional. The Learned Attorney General argued that Section 21 and its various sub-sections are penal provisions and should be strictly construed both in their interpretation and application; that on a true interpretation of the Act having regard to the well settled principles of interpretation Section 21 would not cover any expression or activity which does not have the element or consequence of furthering or encouraging terrorist activity or facilitating its commission; that support per se or mere expression of sympathy or arrangement of a meeting which is not intended or designed and which does not have the effect to further the activities of any terrorist organization or the commission of terrorist acts are not within the mischief of Section 21 and hence is valid.

Here the only point to be considered is whether these Sections exclude mens rea element for constituting offences or not. At the outset it has to be noted that Sections 20, 21 and 22 of POTA is similar to that of Sections 11, 12 and 15 of the Terrorism Act, 2000 of United Kingdom. Such provisions are found to be quite necessary all over the world in anti-terrorism efforts. Sections 20, 21 and 22 are penal in nature that demand strict construction. These provisions are a departure from the ordinary law since the said law was found to be inadequate and not sufficiently effective to deal with the threat of terrorism. Moreover, the crime referred to herein under POTA is aggravated in nature. Hence special provisions are contemplated to combat the new threat of terrorism. Support either verbal or monetary, with a view to nurture terrorism and terrorist activities is causing new challenges. Therefore Parliament finds that such support to terrorist organizations or terrorist activities need to be made punishable. Viewing the legislation in its totality it cannot be said that these provisions are obnoxious.

But the Petitioners apprehension regarding the absence of mens rea in these Sections and the possibility of consequent misuse needs our elucidation. It is the cardinal principle of criminal jurisprudence that mens rea element is necessary to constitute a crime. It is the general rule that a penal statute presupposes mens rea element. It will be excluded only if the legislature expressly postulate otherwise. It is in this context that this Court said in Kartar Singh’s case (supra) (at page 645 para 115 of SCC) that:
"Unless a statue either expressly or by necessary implication rules out ’mens rea’ in case of this kind, the element of mens rea

must be read into the provision of the statute."

Mens rea by necessary implication could be excluded from a statue only where it is absolutely clear that the implementation of the object of the Statue would otherwise be defeated. Here we need to find out whether there are sufficient grounds for inferring that Parliament intended to exclude the general rule regarding mens rea element. (See: State of Maharashtra V. M H George, AIR 1965 SC 722, Nathulal V. State of MP, AIR 1966 SC 43, Inder Sain V. State of Punjab, (1973) 2 SCC 372, for the general principles concerning the exclusion or inclusion of mens rea element vis-'-vis a given statute). The prominent method of understanding the legislative intention, in a matter of this nature, is to see whether the substantive provisions of the Act requires mens rea element as a constituent ingredient for an offence. Offence under Section 3(1) of POTA will be constituted only if it is done with an -'intent'. If Parliament stipulates that the 'terrorist act' itself has to be committed with the criminal intention, can it be said that a person who 'profess' (as under Section 20) or 'invites support' or 'arranges, manages, or assist in arranging or managing a meeting' or 'addresses a meeting' (as under Section 21) has committed the offence if he does not have an intention or design to further the activities of any terrorist organization or the commission of terrorist acts? We are clear that it is not. Therefore, it is obvious that the offence under Section 20 or 21 or 22 needs positive inference that a person has acted with intent of furthering or encouraging terrorist activity or facilitating its commission. In other words, these Sections are limited only to those activities that have the intent of encouraging or furthering or promoting or facilitating the commission of terrorist activities. If these Sections are understood in this way, there cannot be any misuse. With this clarification we uphold the constitutional validity of Sections 20, 21 and 22.

Section 27:

Under Section 27, a police officer investigating a case can seek a direction through the Court of Chief Judicial Magistrate or the Court of a Chief Metropolitan Magistrate for obtaining samples of handwriting, finger prints, foot-prints, photographs, blood, saliva, semen, hair, voice of any accused person reasonably suspected to be involved in the commission of an offence under the Act. The Court can also draw adverse inference if an accused refuses to do so.

Petitioners argued that this Section falls foul of Articles 14, 20(3) and 21 of the Constitution for the reason: that no power has been left with the Court to decide whether the request for samples from a suspect person sought for by investigating office is reasonable or not; that no power has been given to the Court to refuse the request of the investigating officer; that it is not obligatory for the Court to record any reason while allowing

the request; and that the Section is a gross violation of Article 20(3) because it amounts to compel a person to give evidence against himself. Relying mainly on State of Bombay V. Kathi Kalu Oghad, 1962 (3) SCR 10, learned Attorney General submitted that the argument pertaining to the violation of Article 20(3) is not sustainable.

We do not think, as feared by the Petitioner, that this Section fixes a blanket responsibility upon the Court to grant permission immediately upon the receipt of a request. Upon a close reading of the Section it will become clear that upon a 'request' by an investigating police officer it shall only 'be lawful' for the Court to grant permission. Nowhere it is stated that the Court will have to positively grant permission upon a request. It is very well within the ambit of Court's discretion. If the request is based on wrong premise, the Court is free to refuse the request. This discretionary power granted to the Court presupposes that the Court will have to record its reasoning for allowing or refusing a request. Pertaining to the argument that the Section per se violates Article 20(3), it has to be noted that a bench consisting of 11 judges in Kathi Kalu Oghad's case (supra) have looked into a similar situation and it is ruled therein (at pages 30 -32) that:

"...The giving of finger impression or of specimen signature or of handwriting, strictly speaking, is not 'to be a witness'...when an accused person is called upon by the Court or any other authority holding an investigation to give his finger impression or signature or any specimen of his handwriting, he is not giving any testimony to the nature of a personal testimony. The giving of a personal testimony must depend upon his volition. He can make any kind of statement or may refuse to make any statement. But his finger impressions or his handwriting, in spite of efforts at concealing the true nature of it by dissimulation cannot change their intrinsic character. Thus the giving of finger impression or of specimen writing or of signatures by an accused person, though it may amount to furnishing evidence in the larger sense, is not included within the expression 'to be a witness'...

..They are only materials for comparison in order to lend assurance to the Court that its inference based on other pieces of evidence is reliable..."

(Emphasis Supplied)

This being the position in law, the argument of the Petitioners pertaining to the violation of Article 20(3) is not sustainable. It is meaningful to look into Section 91 of Cr. PC that empowers a criminal court as also a police officer to order any person to produce a document or other thing in his possession for the purpose of any inquiry or trial. (See: Shyamlal Mohanlal V. State of Gujarat, AIR 1961 SC 1808, in this regard). Moreover, this Section is only a step in aid for

further investigation and the samples so obtained can never be considered as conclusive proof for conviction. Consequently we uphold the constitutional validity of Section 27.

Section 30:

Section 30 contains provision for the protection of witness. It gives powers to the Special Court to hold proceedings in camera and to taking measures for keeping the identity of witness secret.

Petitioners challenged the constitutional validity of this Section by leveling the argument; that the right to cross-examine is an important part of fair trial and principles of natural justice which is guaranteed under Article 21; that even during emergency fundamental rights under Article 20 and 21 cannot be taken away; that Section 30 is in violation of the dictum in Kartar Singh's case (supra) because it does not contain the provision of disclosure of names and identities of the witness before commencement of trial; that fair trial includes the right for the defence to ascertain the true identity of an accuser; that therefore the same has to be declared unconstitutional. Learned Attorney General submitted that such provisions or exercise of such powers are enacted to protect the life and liberty of a person who is able and willing to give evidence in prosecution of grave criminal offences; that the Section is not only in the interest of witness whose life is in danger but also in the interest of community which lies in ensuring that heinous offences like terrorist acts are effectively prosecuted and punished; that if the witnesses are not given immunity they would not come forward to give evidence and there would be no effective prosecution of terrorist offences and the entire object of the Act would be frustrated; that cross-examination is not a universal or indispensable requirement of natural justice and fair trial; that under compelling circumstances it can be dispensed with natural justice and fair trial can be evolved; that the Section requires the Court to be satisfied that the life of witness is in danger and the reasons for keeping the identity of the witness secret are required to be recorded in writing; that, therefore, it is reasonable to hold that the Section is necessary for the operation of the Act.

Section 30 of POTA is similar to Section 16 of TADA, the constitutional validity of which was upheld by this Court in Kartar Singh's case (supra) (see pages 683 - 689 of SCC). In order to decide the constitutional validity of Section 30 we don't think it is necessary to go into the larger debate, which learned Counsel for both sides have argued, that whether right to cross-examine is central to fair trial or not. Because right to cross-examination per se is not taken away by Section 30. This Section only confers discretion to the concerned Court to keep the identity of witness secret if the life of such witness is in danger. We cannot shy away from the unpleasant reality that often witnesses do not come forward to depose before Court even in serious cases. This

precarious situation creates challenges to our criminal justice administration in general and terrorism related cases in particular. Witnesses do not volunteer to give evidence mainly due to the fear of their life. Ultimately, the non-conviction affects the larger interest of community, which lies in ensuring that the executors of heinous offences like terrorist acts are effectively prosecuted and punished. Legislature drafted Section 30 by taking all these factors into account. In our view a fair balance between the rights and interest of witness, rights of accused and larger public interest has been maintained under Section 30. It is also aimed to assist the State in justice administration and encourage others to do the same under the given circumstances. Anonymity of witness is not general rule under Section 30. Identity will be withheld only in exceptional circumstance when the Special Court is satisfied that the life of witness is in jeopardy. Earlier this Court has endorsed similar procedure. (See: Gurbachan Singh V. State of Bombay, 1952 SCR 737, Hira Nath Mishra V. Principal, Rajendra Medical College, 1973 (1) SCC 805, A. K. Roy V. Union of India, 1982 (1) SCC 271). While deciding the validity of Section 16 of TADA, this Court quoted all these cases with approval. (See also the subsequent decision in Jamaat-e-Islami Hind V. Union of India, 1995 (1) SCC 428.

The need for the existence and exercise of power to grant protection to a witness and preserve his or her anonymity in a criminal trial has been universally recognised. Provisions of such nature have been enacted to protect the life and liberty of the person who is able and willing to give evidence in support of the prosecution in grave criminal cases. A provision of this nature should not be looked at merely from the angle of protection of the witness whose life may be in danger if his or her identity is disclosed but also in the interest of the community to ensure that heinous offences like terrorist acts are effectively prosecuted and punished. It is a notorious fact that a witness who gives evidence which is unfavourable to an accused in a trial for terrorist offence would expose himself to severe reprisals which could result in death or severe bodily injury or that of his family members. If such witnesses are not given appropriate protection, they would not come forward to give evidence and there would be no effective prosecution of terrorist offences and the entire object of the enactment may possibly be frustrated. Under compelling circumstances this can be dispensed with by evolving such other mechanism, which complies with natural justice and thus ensures a fair trial.

The observations made in this regard by this Court in the decisions to which we have adverted to earlier have been noticed by this Court in Kartar Singh’s case (supra) and has upheld the validity of a similar provision subject, of course, to

certain conditions which form part of Section 30 now. The present position is that Section 30(2) requires the court to be satisfied that the life of a witness is in danger to invoke a provision of this nature. Furthermore, reasons for keeping the identity and address of a witness secret are required to be recorded in writing and such reasons should be weighty. In order to safeguard the right of an accused to a fair trial and basic requirements of the due process a mechanism can be evolved whereby the special court is obligated to satisfy itself about the truthfulness and reliability of the statement or disposition of the witness whose identity is sought to be protected.

Our attention has been drawn to legal position in USA, Canada, New Zealand, Australia and UK as well as the view expressed in the European Court of Human Rights in various decisions. However, it is not necessary to refer any of them because the legal position has been fully set out and explained in Kartar Singh and provision of POTA in Section 30 clause (2) has been modelled on the guidelines set out therein. We may further notice that the effort of the court has been to balance the right of the witness as to his life and liberty and the right of community in effective prosecution of heinous criminal offences with the right of the accused to a fair trial. This is done by devising a mechanism or arrangement to preserve anonymity of the witness when there is an identifiable threat to the life or physical safety of the witness or others whereby the court satisfies itself about the weight to be attached to the evidence of the witness. In some jurisdictions an independent counsel has been appointed for the purpose to act as amicus curie and after going through the deposition evidence assist the court in forming an opinion about the weight of the evidence in a given case or in appropriate cases to be cross-examined on the basis of the questions formulated and given to him by either of the parties. Useful reference may be made in this context to the recommendations of the Law Commission of New Zealand.

The necessity to protect the identity of the witness is not a factor that can be determined by a general principle. It is dependent on several factors and circumstances arising in a case and, therefore, the Act has left the determination of such question to an appropriate case.

Keeping secret the identity of witness, though in the larger interest of public, is a deviation from the usual mode of trial. In extraordinary circumstances we are bound to take this path, which is less travelled. Here the Special Courts will have to exercise utmost care and caution to ensure fair trial. The reason for keeping identity of the witness has to be well substantiated. It is not feasible for us to suggest the procedure that has to be adopted by the Special Courts for keeping the identity of witness secret. It shall be appropriate for the concerned

Courts to take into account all the factual circumstances of individual cases and to forge appropriate methods to ensure the safety of individual witness. With these observations we uphold the validity of Section 30.

Section 32:

This Section made it lawful of certain confessions made to police officers to be taken into consideration.

Concerning the validity and procedural difficulties that could arise during the process of recording confessions the Petitioners submitted that there is no need to empower the police to record confession since the accused has to be produced before the Magistrate within forty-eight hours, in that case magistrate himself could record the confession; that there is no justification for extended time limit of forty eight hours for producing the person before Magistrate; that it is not clear in the Section whether the confession recorded by the police officer will have the validity after Magistrate has recorded the fact of torture and has sent the accused for medical examination; that it is not clear as to whether both the confession before the police officer as well as confession statement before the Magistrate shall be used in evidence; that the Magistrates cannot be used for mechanically putting seal of approval on the confessional statements by the police; that, therefore, the Section has to be nullified. Validity of this Section was defended by the learned Attorney General by forwarding the arguments that the provisions relating to the admissibility of confessional statements, which is similar to that of Section 32 in POTA was upheld in Kartar Singh's case (supra); that the provisions of POTA are an improvement of TADA by virtue of enactment of Section 32(3) to 32(5); that the general principles of law regarding the admissibility of a confessional statement is applicable under POTA; that the provision which entails the Magistrate to test and examine the voluntariness of a confession and complaint of torture is an additional safeguard and does not in any manner inject any constitutional infirmity; that there cannot be perennial distrust of the police; that Parliament has taken into account all the relevant factors in its totality and same is not unjust or unreasonable.

At the outset it has to be noted that the Section 15 of TADA that was similar to this Section was upheld in Kartar Singh's case (supra) (pages 664-683 of SCC). While enacting this Section Parliament has taken into account of all the guidelines, which were suggested by this Court in Kartar Singh's case (supra). Main allegation of the Petitioners is that there is no need to empower the police to record confession since the accused has to be produced before the Magistrate within forty-eight hours in which case the Magistrate himself could record the statement or confession. In the context of terrorism the need for making such a provision so as to enable Police officers to record the confession was explained and upheld

by this Court in Kartar Singh's case (supra) (page 680 para 253 of SCC). We need not go into that question at this stage. If the recording of confession by police is found to be necessary by Parliament and if it is in tune with the scheme of law, then an additional safeguard under Section 32 (4) and (5) is a fortiori legal. In our considered opinion the provision that requires producing such a person before the Magistrate is an additional safeguard. It gives that person an opportunity to rethink over his confession. Moreover, the Magistrate's responsibility to record the statement and the enquiry about the torture and provision for subsequent medical treatment makes the provision safer. It will deter the police officers from obtaining a confession from an accused by subjecting him to torture. It is also worthwhile to note that an officer who is below the rank of a Superintendent of Police cannot record the confession statement. It is a settled position that if a confession was forcibly extracted, it is a nullity in law. Non-inclusion of this obvious and settled principle does not make the Section invalid. (See : Kartar Singh's case (supra) page 678, para 248 - 249 of SCC). Ultimately, it is for the concerned Court to decide the admissibility of the confession statement. (See : Kartar Singh's case (supra) page 683, para 264 of SCC). Judicial wisdom will surely prevail over irregularity, if any in the process of recording confessional statement. Therefore we are satisfied that the safeguards provided by the Act and under the law is adequate in the given circumstances and we don't think it is necessary to look more into this matter. Consequently we uphold the validity of Section 32.

Section 49:

Section 49 mainly deals with procedure for obtaining bail for an accused under POTA.

Petitioners' main grievance about this Section is that under Section 49(7) a Court could grant bail only if it is satisfied that there are grounds for believing that an accused 'is not guilty of committing such offence', since such a satisfaction could be attained only after recording of evidence there is every chance that the accused will be granted bail only after minimum one year of detention; that the proviso to Section 49(7), which is not there under TADA, makes it clear that for one year from the date of detention no bail could be granted; that this Section has not incorporated the principles laid down by this Court in Sanjay Dutt's case (supra) (at page 439 para 43-48 of SCC) wherein it is held that if a challan is not filed after expiry of 180 days or extended period, the indefeasible right of an accused to be released on bail is ensured, provided that the same is exercised before filing of challan; that the prosecution is curtailing even this right under POTA. Therefore, the petitioners want us to make the Section less stringent according to the settled principles of law. Learned Attorney General submitted that the provisions regarding bail are not onerous nor do they impose any excessive

burden or restriction on the right of the accused; that similar provisions are found in Section 37 of the NDPS Act 1985 and in Section 10 of the UP Dacoity Affected Areas Act; that on a true construction of Section 49(6) and (7) it is not correct to conclude that the accused cannot apply for bail at all for a period of one year; that the right of the accused to apply for bail during the period of one year is not completely taken away; that the stringent provision of bail under Section 49(7) would apply only for the first one year of detention and after its expiry the normal bail provisions under Cr.P.C. would apply; that there is no dispute that the principle laid down by this Court in D.K Basu V. State of West Bengal, 1997 (1) SCC 416, will apply; that in the light of effective safeguards provided in the Act and effective remedies against adverse orders there is no frailty in Section 49.

Section 49 of the Act is similar to that of Section 20 of TADA, constitutional validity of which has been upheld by this Court in Kartar Singh's case (supra) (pages 691-710 of SCC). Challenge before us is limited to the interpretation of Section 49(6) and (7). By virtue of Section 49(8), the powers under Section 49 (6) and (7) pertaining to bail is in addition to and not in derogation to the powers under the Code or any other law for the time being in force on granting of bail. The offences under POTA are more complex than that of ordinary offences. Usually the overt and covert acts of terrorism are executed in a chillingly efficient manner as a result of high conspiracy, which is invariably linked with anti-national elements both inside and outside the country. So an expanded period of detention is required to complete the investigation. Such a comparatively long period for solving the case is quite justifiable. Therefore, the investigating agencies may need the custody of accused for a longer period. Consequently, Section 49 (6) and (7) are not unreasonable. In spite of this, bail could be obtained for an accused booked under POTA if the 'court is satisfied that there are grounds for believing that he is not guilty of committing such offence' after hearing the Public Prosecutor. It is the general law that before granting the bail the conduct of accused seeking bail has to be taken into account and evaluated in the background of nature of crime said to have committed by him. That evaluation shall be based on the possibility of his likelihood of either tampering with the evidence or committing the offence again or creating threat to the society. Since the satisfaction of the Court under Section 49(7) has to be arrived based on the particular facts and after considering the abovementioned aspects, we don not think the unreasonableness attributed to Section 49(7) is fair. (See: Kartar Singh's case (supra) page 707, para 349-352 of SCC).

Proviso to Section 49(7) reads as under:

"Provided that after the expiry of a period of one year from the date of detention of the accused for an offence under this Act, the provisions of sub-section (6) of this Section shall apply."

It is contended that this proviso to Section 49(7) of POTA is read by some of the courts as a restriction on exercise of power for grant of bail under Section 49(6) of POTA and such power could be exercised only after the expiry of the period of one year from the date of detention of the accused for offences under POTA. If the intention of the legislature is that an application for bail cannot be made prior to expiry of one year after detention for offences under POTA, it would have been clearly spelt out in that manner in Section 49(6) itself. Sections 49(6) and 49(7) of POTA have to be read together and the combined reading of these two sections is to the effect that Public Prosecutor has to be given an opportunity of being heard before releasing the accused on bail and if he opposes the application, the court will have to be satisfied that there are grounds for believing that he is not guilty of having committed such offence. It is by way of exception to Section 49(7) that proviso is added which means that after the expiry of one year after the detention of the accused for offences under POTA, the accused can be released on bail after hearing the Public Prosecutor under ordinary law without applying the rigour of Section 49(7) of POTA. It also means that the accused can approach the court for bail subject to conditions of Section 49(7) of POTA within a period of one year after the detention for offences under POTA.

Proviso to Section 49(7) provides that the condition enumerated in sub-section (6) will apply after the expiry of one-year. There appears to be an accidental omission or mistake of not including the word 'not' after the word 'shall' and before the word 'apply'. Unless such a word is included, the provision will lead to an absurdity or become meaningless. Even otherwise, read appropriately, the meaning of the proviso to Section 49(7) is that an accused can resort to ordinary bail procedure under the Code after that period of one year. At the same time, proviso does not prevent such an accused to approach the Court for bail in accordance with the provisions of POTA under Section 49(6) and (7) thereof. This interpretation is not disputed by the learned Attorney General. Taking into account of the complexities of the terrorism related offences and intention of Parliament in enacting a special law for its prevention, we do not think that the additional conditions regarding bail under POTA are unreasonable. We uphold the validity of Section 49.

There is no challenge to any other provisions of the Act.

In the result, these petitions stand dismissed subject, however, to the clarifications that we have set out above on the interpretation of the

provisions of the enactment while dealing with the constitutionality thereof.

W.P.(Crl.) 129/2002 :

A case was registered against the petitioner under Section 13(1)(a) of the Unlawful Activities Prevention Act, 1967, Section 21(2) and (3) of the Prevention of Terrorism Act, 2002 (POTA) read with Sections 109 and 120B of the Indian Penal Code on 4.7.2002. When the petitioner returned to Chennai from Chicago on 11.7.2002, he was arrested at the Chennai Airport and was produced before a Judicial Magistrate, Madurai on 12.7.2002. He had been remanded. He has been detained in jail since then pursuant to the remand order of the Judicial Magistrate, Madurai. A notification was issued constituting Special Court, Chennai at Poonamallee for trial of the offences under POTA. The petitioner was produced before the Special Court on 7.8.2002 and he has been continued to be remanded to jail from time to time. On 9.10.2002, his remand has been extended beyond the period of 90 days.

In this case, though several questions have been raised, two questions have been specifically urged, namely :

(1) Whether Section 21(1) and (3) of the Prevention of Terrorism Act, 2002 are offending Article 19(1)(a) and 19(1)(c) of the Constitution of India and therefore unconstitutional?

(2) Does the mere expression of sympathy for Tamils in Sri Lanka for whom the Liberation of Tigers of Tamil Eelam has become the sole-representative recognised by the International Community amount to support to a terrorist organisation under the Prevention of Terrorism Act, 2002 thereby empower the State to curtail the personal liberty?

We have upheld the constitutional validity of Section 21 of POTA in the decision pronounced by us in Writ Petition (C) No. 389 of 2002 above and, therefore, the first question does not survive for consideration.

So far as the second question is concerned, we have heard Shri F.S. Nariman and Shri Anil B. Divan, learned senior counsel appearing for the petitioner, apart from Shri Rajinder Sachhar and Shri B.S. Malik, the learned senior counsel appearing for the petitioner in connected matters, on the interpretation of Section 21 of POTA. Shri P.P. Rao, appearing for the State of Tamil Nadu, has made elaborate submissions and adverted to various affidavits filed by the Union of India. However, it is not necessary for us to examine any of these aspects in these proceedings. We have carefully considered the arguments advanced by the learned counsel and that of the learned Attorney General for India on this aspect of the matter. We think, the proper course that has to be adopted in a case of this nature where a criminal case has already been lodged and the

same is pending consideration before the Special Court, it would not be appropriate for us to express our views on the question of facts arising in this case. We are sure that the Special Court will decide the matter in the light of decision pronounced by us in Writ Petition (C) No. 389 of 2002 above.

The writ petition is disposed of with aforesaid observations.

W.P.(Crl.) 28/2003 :

The petitioner in this writ petition seeks for declaration that Section 21(2) and the proviso to Section 49(6) and 49(7) of POTA are illegal and ultra vires the Constitution of India.

Inasmuch as we have upheld the constitutional validity of Section 21(2) and proviso to Section 49(6) and 49(7) of POTA in the judgment pronounced by us in Writ Petition (C) No. 389 of 2002 above, this writ petition is dismissed.

W.P.(Crl.) 48/2003 :

In this writ petition, apart from challenging the constitutional validity of Sections 1(4), 3 to 9, 14, 18 to 24, 26, 27, 29 to 33, 36 to 53 which has been upheld by us in the judgment pronounced by us in Writ Petition (C) No. 389 of 2002 above, the constitutional validity of Entry 21 of the Schedule to POTA is also challenged.

On that aspect no specific arguments have been addressed by any of the parties. This matter will have to be heard separately and hence, this writ petition is de-linked from other matters.