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HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.706 of 2022

1. Shailendra Bhadouriya S/o Late R.S. Bhadouriya, aged about 39 years, R/o Riddhi Siddhi Face-1, Dongargaon Road, Rajnandgaon, District Rajnandgaon (CG)
2. Komal Verma S/o Kirtanlal Verma, aged about 36 years, R/o Tappa Telitola, Police Station Chhuriya, District Rajnandgaon (CG)

---- Appellants
(In Jail)

Versus

State of Chhattisgarh Through Station House officer, Police Station Siksod, District North Bastar Kanker (CG)

---- Respondent

For Appellants: Mr.T.K.Tiwari, Advocate
For Respondent/State: Mr.Sunil Otwani, Additional Advocate General

Hon'ble Shri Justice Sanjay K. Agrawal and
Hon'ble Smt. Justice Rajani Dubey

Judgment on Board
(13.5.2022)

Sanjay K. Agrawal, J.

1. This criminal appeal under Section 21(4) of the National Investigation Agency Act, 2008 is directed against the order dated 30.3.2022 passed by the Special Judge (NIA Act), Kanker, District-Uttar Bastar Kanker in Bail Application No.79/2022 by which the appellants application under Section 439 of the CrPC seeking bail for offences under Sections 149, 201 & 120B/34 of the IPC, Section 8(2)(3)(5) of the

Chhattisgarh Vishesh Jan Surksha Adhiniyam, 2005 (hereinafter called as 'Act of 2005') and Sections 10,13,17,38(1) (2), 40 and 22(A)(C) of the Unlawful Activities Prevention Act, 1967 (hereinafter called as 'UAPA') has been rejected finding no merit.

2. As per case of the prosecution, on 24.3.2020 on the basis of secret information, the respondent searched a vehicle bearing registration No.CG 07 AH 6555 driven by Tapas Kumar Palit. In that search, 95 pairs of shoes, green black printed cloths for uniform, 2 bundles of electric wires each of 100 meter, LED lens, walki talki and other articles were found in his possession (Tapas Kumar Palit). Seizure was made accordingly. It is further case of the prosecution that these articles were to be supplied by Tapas Kumar Palit to naxalites in order to support their illegal and disruptive activities. It is further case of the prosecution that said Tapas Kumar Palit was working with Rudransh Earth Movers Road Construction Company, a partnership firm of appellant No.2-Komal Verma and one co-accused Ajay Jain. It is further case of the prosecution that Tapas Kumar Palit provided information that articles were being provided on the instructions/consent of Ajay Jain and Komal Verma, who were given consent/permission to do so by Varun Jain,

Director of M/s Landmark Royal Engineering (India) Private Limited. It is also the case of the prosecution that the accused were providing funds as well to naxalites though no cash was recovered on the said date, but the police arrested all of them including appellant No.1-Shailendra Bhadouriya on 4.5.2020 and appellant No.2-Komal Verma on 23.4.2020. It is also case of the prosecution that appellant No.2-Komal Verma is partner of Rudransh Earth Movers Road Construction Company and appellant No.1-Shailendra Bhadouriya was working as supervisor in that firm. The appellants herein have filed an application under Section 439 of the CrPC for grant of bail before the Special Court under NIA Act, which has been rejected by the Special Judge (NIA) Act, Kanker by the impugned order, against which, this criminal appeal has been filed.

3. Mr.T.K.Tiwari, learned counsel for the appellants, would submit that the present case is covered by the decision of this Court rendered in Criminal Appeal No.328 of 2022 (**Ajay Jain v. State of Chhattisgarh**), decided on 4.5.2022 in which criminal appeal filed by co-accused Ajay Jain has been allowed and he was released on bail. He would further submit that appellant No.2-Komal Verma is partner of Ajay Jain of

Rudransh Earth Movers Road Construction Company and appellant No.1-Shailendra Bhadouriya was working as supervisor of that firm and no incriminating article has been seized from them. Appellant No.1 is in jail since 4.5.2020 and appellant No.2 is in jail since 23.4.2020. He would further would submit that the alleged offence registered against the appellants under Sections 10 and 13 of the UAPA falls in Part III of the UAPA, thus, the Bar of granting bail under Section 43(D) 5 of the UAPA would not be applicable. He would also submit that Section 17 deals with punishment for raising funds for the terrorist Act and Section 22A & 22C fixes the responsibility of any offence committed under the said Act. Thus, the said sections does not constitute any separate offence. He would also submit that Section 38(1)(2) deals with offence for being a member of the terrorist organization and Section 40 of the UAPA deals with offence for raising funds for a terrorist organization. He would also submit that charge under Section 8(2)(3)(5) of the Act of 2005 deals with membership, management of a banned organization, which is not even supported by the charge-sheet, which categorically says that the appellants were providing money and articles in lieu of smooth functioning of the road construction contracts. In any case, there is

no bar like Section 43D(5) of the UAPA in the Act of 2005. He would further submit that the main accusation against co-accused Ajay Jain is that he paid levy/extortion amount to naxalites for undertaking road construction work in Kanker, but in the light of decision of the Supreme Court in the matter of **Sudesh Kedia v. Union of India**[1], payment of extortion money to a banned/terror organization does not amount to terror funding and even if the charge-sheet is taken as whole along with other material on record that the appellants were paying the extortion amounts for letting them work smoothly in the said area. At the best, it will constitute extortion money only as held by the Supreme Court in **Sudesh Kedia** (supra) that payment of extortion money to naxalites/banned organization as a return for smooth functioning of business does not amount to terror funding under the UAPA and relied upon paras-13.1, 13.2 and 13.3 of **Sudesh Kedia's** case (supra). He would further submit that the appellants have been implicated in this case merely on the basis of confessional statement recorded during the investigation by the respondent, which is inadmissible in law in view of provisions contained in Sections 25 and 26 of the Indian Evidence Act. He would also submit that not a single incriminating

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material i.e. money, cloths, wireless etc. were recovered from the appellants on the basis of co-accused confession. He would submit that mere association with a terrorist organization as a member is not sufficient to attract Section 38 of the UAPA as held by the Supreme Court in the matter of **Thwaha Fasal v. Union of India**[2]. The respondent has miserably failed to show any incriminating evidence which can remotely suggest that the appellants were raising fund for naxalites being a member of the said organization and was continuously participating with them in their meetings with the intention to further activity of terror organization and as such, charge under Sections 17, 38 and 40 of the UAPA is misconceived, as such, the impugned order is liable to be set aside and the appellant is entitled to be released on regular bail.

4. On the other hand, Mr.Sunil Otwani, learned Additional Advocate General for the respondent/State would oppose the submissions made by learned counsel for the appellants.

5. We have heard the learned appearing for the parties, considered their rival submissions made herein-above and also went through the records with utmost circumspection.

6. The application filed by the appellant herein under

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Section 439 of the CrPC has been rejected by the learned Special Judge (NIA Act). Section 43D(5) of the UAPA provides that an accused of an offence punishable under the provisions of the UAPA shall not be on bail or on his own bond if the Court, on a perusal of the case diary or the report made under Section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is *prima facie* true. Sub-section (6) of Section 43D of the UAPA further provides that the restrictions on granting of bail specified in sub-section (5) is in addition to the restrictions under the Code or any other law for the time being in force on granting of bail. However, the bar provided in Section 43D(5) of the UAPA does not operate against the Constitutional Courts power to ensure fundamental rights guaranteed under Part III of the Constitution of India.

7. Their Lordships of the Supreme Court in the matter of **Thwaha Fasal** (supra) have held that the restrictions imposed by sub-section (5) of Section 43D *per se* do not prevent a Constitutional Court from granting bail on the ground of violation of Part III of the Constitution. It was observed as under:-

> "26.While we deal with the issue of grant of bail to the accused nos.1 and 2, we will have also to keep in mind the law laid down by this Court in the case of K.A. Najeeb (supra)

> holding that the restrictions imposed by sub-section (5) of Section 43D *per se* do not prevent a Constitutional Court from granting bail on the ground of violation of Part III of the Constitution.
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> 42.As held in the case of K.A. Najeeb (supra), the stringent restrictions imposed by sub-section(5) of Section 43D, do not negate the power of Constitutional Court to grant bail keeping in mind violation of Part III of the Constitution. It is not disputed that the accused no.1 is taking treatment for a psychological disorder. The accused no.1 is a student of law. Moreover, 92 witnesses have been cited by the prosecution. Even assuming that some of the witnesses may be dropped at the time of trial, there is no possibility of the trial being concluded in a reasonable time as even charges have not been framed. There is no minimum punishment prescribed for the offences under Sections 38 and 39 of the 1967 Act and the punishment can extend to 10 years or only fine or with both. Hence, depending upon the evidence on record and after consideration of relevant factors, the accused can be let off even on fine. As regards the offence under Section 13 alleged against accused no.2, the maximum punishment is of imprisonment of 5 years or with fine or with both. The accused no.2 has been in custody for more than 570 days."

8. Apart from this, proviso to Section 43D(5) of the UAPA would be applicable of a person accused of an offence punishable under Chapters V and VI of the UAPA. The appellants have been charged for offences under Sections 10,13, 17, 38(1)(2) and 40 of the UAPA.

9. Now the appellants have also been charged under Sections 38 (1) (2) and 40 of the UAPA as the case against the appellants is that they paid levy/extortion money to nexalites for undertaking road

construction work in Kanker district. It is the case of the appellants that they have been implicated merely on the basis of confessional statement recorded during the investigation. No incriminating material like money, cloths, wireless sets etc. were recovered from the possession of the present appellants and even if the charge-sheet is taken as it is in its face value along with other material available on record that the appellants were paying extortion money for letting them road construction work smoothly in the said area, no offences under Sections 38 and 40 would be made out. Reliance has been placed in the matter of **Sudesh Kedia** (supra).

10. In **Sudesh Kedia** (supra) it has been observed by their Lordships of the Supreme Court that payment of extortion money to a banned/terror organization does not amount to terror funding. It was observed as under:-

> "13. While considering the grant of bail under Section 43-D(5), it is the bounden duty of the Court to apply its mind to examine the entire material on record for the purpose of satisfying itself, whether a prima facie case is made out against the accused or not. We have gone through the material on record and are satisfied that the Appellant is entitled for bail and that the Special Court and High Court erred in not granting bail to the Appellant for the following reasons:
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> 13.1 A close scrutiny of the material placed before the Court would clearly shows that the main accusation against the

appellant is that he paid levy/ extortion amount to the terrorist organization. Payment of extortion money does not amount to terror funding. It is clear from the supplementary charge-sheet and the other material on record that other accused who are members of the terrorist organisation have been systematically collecting extortion amounts from businessmen in Amrapali and Magadh areas. The appellant is carrying on transport business in the area of operation of the organisation. It is alleged in the second supplementary charge-sheet that the appellant paid money to the members of the TPC for smooth running of his business. Prima facie, it cannot be said that the appellant conspired with the other members of the TPC and raised funds to promote the organisation.

13.2 Another factor taken into account by the Special Court and the High Court relates to the allegation of the Appellant meeting the members of the terror organization. It has been held by the High Court that the appellant has been in constant touch with the other accused. The appellant has revealed in his statement recorded under Section 164 CrPC that he was summoned to meet A-14 and the other members of the organisation in connection with the payments made by him. Prima facie, we are not satisfied that a case of conspiracy has been made out at this stage only on the ground that the appellant met the members of the organisation.

13.3 An amount of Rs. 9,95,000/- (Rupees nine lakh and ninety-five thousand only) was seized from the house of the appellant which was accounted for by the appellant who stated that the amount was withdrawn from the bank to pay salaries to his employees and other expenses. We do not agree with the prosecution that the amount is terror fund. At this stage, it cannot be said that the amount seized from the appellant is proceeds from terrorist activity. There is no allegation that the appellant was receiving any money. On the other hand, the appellant is accused of

providing money to the members of TPC."

11. Similarly, the Supreme Court in the matter of **Thwaha Fasal** (supra) has held that mere association with a terrorist organisation as a member or otherwise will not be sufficient to attract the offence under Section 38 unless the association is with intention to further its activities. It was observed as under:-

> "13. On plain reading of Section 38, the offence punishable therein will be attracted if the accused associates himself or professes to associate himself with a terrorist organisation included in First Schedule with intention to further its activities. In such a case, he commits an offence relating to membership of a terrorist organisation covered by Section 38. The person committing an offence under Section 38 may be a member of a terrorist organisation or he may not be a member. If the accused is a member of terrorist organisation which indulges in terrorist act covered by Section 15, stringent offence under Section 20 may be attracted. If the accused is associated with a terrorist organisation, the offence punishable under Section 38 relating to membership of a terrorist organisation is attracted only if he associates with terrorist organisation or professes to be associated with a terrorist organisation with intention to further its activities. The association must be with intention to further the activities of a terrorist organisation. The activity has to be in connection with terrorist act as defined in Section 15. Clause (b) of proviso to sub-section (1) of Section 38 provides that if a person charged with the offence under sub-section (1) of Section 38 proves that he has not taken part in the activities of the organisation during the period in which the name of the organisation is included in the First Schedule, the offence relating to the membership of a terrorist organisation under sub-section (1) of Section 38 will not be

attracted. The aforesaid clause (b) can be a defence of the accused. However, while considering the prayer for grant of bail, we are not concerned with the defence of the accused.

15.Thus, the offence under sub-section (1) of Section 38 of associating or professing to be associated with the terrorist organisation and the offence relating to supporting a terrorist organisation under Section 39 will not be attracted unless the acts specified in both the Sections are done with intention to further the activities of a terrorist organisation. To that extent, the requirement of mens rea is involved. Thus, mere association with a terrorist organisation as a member or otherwise will not be sufficient to attract the offence under Section 38 unless the association is with intention to further its activities. Even if an accused allegedly supports a terrorist organisation by committing acts referred in clauses (a) to (c) of sub- section (1) of Section 39, he cannot be held guilty of the offence punishable under Section 39 if it is not established that the acts of support are done with intention to further the activities of a terrorist organisation. Thus, intention to further activities of a terrorist organisation is an essential ingredient of the offences punishable under Sections 38 and 39 of the 1967 Act.

38. Now the question is whether on the basis of the materials forming part of the charge sheet, there are reasonable grounds for believing that accusation of commission of offences under Sections 38 and 39 against the accused nos.1 and 2 is true. As held earlier, mere association with a terrorist organisation is not sufficient to attract Section 38 and mere support given to a terrorist organisation is not sufficient to attract Section 39. The association and the support have to be with intention of furthering the activities of a terrorist organisation. In a given case, such intention can be inferred from the overt acts or acts of active participation of the accused in the activities of a terrorist organization which are borne out from the materials forming a

part of charge sheet. At formative young age, the accused nos.1 and 2 might have been fascinated by what is propagated by CPI (Maoist). Therefore, they may be in possession of various documents/books concerning CPI (Maoist) in soft or hard form. Apart from the allegation that certain photographs showing that the accused participated in a protest/gathering organised by an organisation allegedly linked with CPI (Maoist), *prima facie* there is no material in the charge sheet to project active participation of the accused nos.1 and 2 in the activities of CPI (Maoist) from which even an inference can be drawn that there was an intention on their part of furthering the activities or terrorist acts of the terrorist organisation. An allegation is made that they were found in the company of the accused no.3 on 30th November, 2019. That itself may not be sufficient to infer the presence of intention. But that is not sufficient at this stage to draw an inference of presence of intention on their part which is an ingredient of Sections 38 and 39 of the 1967 Act. Apart from the fact that overt acts on their part for showing the presence of the required intention or state of mind are not bo*rne* out from the charge sheet, *prima facie*, their constant association or support of the organization for a long period of time is not borne out from the charge sheet.

39. The act of raising funds for the terrorist organisation has been alleged in charge sheet against both the accused. This is a separate offence under Section 40 of the 1967 Act of raising funds for a terrorist organisation which again contains intention to further the activity of terrorist organisation as its necessary ingredient. The offence punishable under Section 40 has not been alleged in this case."

12. It is pertinent to mention here that two co-accused persons namely Hitesh Agrawal and Varun Jain have been granted bail (interim) by their Lordships of the Supreme Court in SLP (Crl.) Nos.8147-8148/2021 by

order dated 3.1.2022 by directing as under:-

> "After going through the pleadings, hearing the learned counsel for the parties and considering that the petitioners have been in custody for over 17 months, we deem it appropriate to pass orders directing that the petitioners be granted interim bail on such terms and conditions as may be imposed by the Trial Court as also the conditions (i) the petitioners shall not leave the jurisdiction of the Trial Court without prior leave of the Trial Court; (ii) the petitioners shall surrender their passports, if any; (iii) the Petitioners shall report to the concerned police station at lease twice a week, that is, every Monday and every Friday between 9.30 a.m. to 12.00 Noon, or at any other time as directed by the Officer-in-Charge of the Police Station; and (iv) the Petitioners shall appear in the Trial Court on the dates on which they are required to appear."

13. Reverting to the facts of the present case in the light of aforesaid position, it is quite vivid that main accusation against co-accused Ajay Jain and appellant No.2-Komal Verma, partners of Rudransh Earth Movers Road Construction Company is that they were paid levy/extortion money to naxalities for undertaking road construction work in Kanker, whereas in **Sudesh Kedia** (supra) their Lordships of the Supreme Court have clearly held that payment of extortion money to a banned/terror organization does not amount to terror funding. It is not apparent from the charge-sheet and other documents that the appellants were paying extortion money for letting them work smoothly as no incriminating material in terms of money,

cloths, wireless set etc. were recovered from their possession.

14. Considering the role of appellant No.1-Shailendra Bhadouriya who was supervisor of Rudransh Earth Movers Road Construction Company and appellant No.2-Komal Verma, who is partner of co-accused Ajay Jain, who has been granted bail by this Court in Criminal Appeal No.328 of 2022 on 4.5.2022 and also considering the fact that trial is likely to take time and considering the nature of evidence available on record with regard to meeting of the appellants with terrorist/banned organization and no objectionable material/cash was recovered from possession of the appellants and appellant No.1 is in custody since 4.5.2022 and appellant No.2 is in custody since 23.4.2022 i.e. for more than two years and there case being similar to that of Ajay Jain, we are inclined to set-aside the impugned order.

15. Accordingly, the impugned order is set-aside and application filed by the appellants under Section 439 of the CrPC is allowed. It is directed that the appellants shall be released on bail on their furnishing a personal bond in the sum of **₹1,00,000/-** each with one surety in the like sum to the satisfaction of the concerned Special Judge, for their

appearance as and when directed. Appeal is allowed.

16. It is made clear that any observation made in this order is only for the purpose of deciding the application under Section 439 of the CrPC and this Court has not made any observation on the merits of the matter and the Special Judge (NIA Act) will decide the matter strictly as per material available on record without being influenced by any observation made in this order.

Sd/- Sd/-

(Sanjay K. Agrawal) (Rajani Dubey)
Judge Judge

B/-