A PRADEEP RAM

v.

THE STATE OF JHARKHAND & ANR.

(Criminal Appeal Nos. 816-817 of 2019)

B JULY 01, 2019

[ASHOK BHUSHAN AND K. M. JOSEPH, JJ.]

Code of Criminal Procedure, 1973:

ss. 437(5) and 439(2) – Arrest of accused who was on bail – C *After addition of further cognizable and non-bailable offence – Whether permissible without seeking cancellation of the bail earlier granted – Held: The court in exercise of power u/ss. 437(5) and 439(2) can direct arrest of accused who was already on bail, after addition of graver and non-cognizable offences, even without cancelling earlier bail – It is not open to the investigating authority* D *to proceed to arrest without the permission of the Court, on addition of further offences – In the present case, the investigating agency had approached the Court seeking arrest of the accused after addition of further offences – There was no error in the procedure adopted by Special Judge in remanding the accused to judicial* E *custody.*

s. 167 and 309(2) – Remand of accused to judicial custody – In a case where cognizance has already been taken by the Chief Judicial Magistrate – Whether has to be in exercise of power u/s. 167 or u/s. 309(2) – Held: Accused can be remanded u/s. 167(2) F *during investigation till cognizance is taken by the Court – After cognizance has been taken and the accused was in custody at the time of taking cognizance or when inquiry or trial was being held in respect of him, he can be remanded to judicial custody only u/s. 309(2) – Thus, in the present case, accused could have been remanded only u/s. 309(2)– However, the remand order in the present* G *case, does not mention the provision under which remand was granted – Therefore, the remand order has to be treated as order passed in exercise of power u/s. 309(2).*

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FIR:

Re-registration of FIR – After addition of offences under Unlawful Activities (Prevention) Act, to the FIR – Whether barred being a second FIR – Held: Second FIR with regard to the same offences is barred – But, in the facts of the present case, re-registration of the FIR cannot be called second FIR – It was, in fact, re-registration of FIR to give effect to the provisions of National Investigation Agency Act – Therefore, re-registration of FIR was not barred.

Investigation:

Further investigation – By National Investigation Agency (NIA) – On addition of further offences under Unlawful Activities (Prevention) Act, 1967 in the FIR – After investigation in the previous FIR was over – Permissibility – Held: Investigation by NIA was permissible as offences under 1967 Act were not added when charges were framed in the previous FIR – Even u/s. 173(2) of Cr.P.C., it is open to the police authorities to conduct further investigation and submit a report u/s. 173(8) – There was no lack of jurisdiction in NIA to carry on further investigation and submit a supplementary report in the facts of the present case – Criminal Procedure Code, 1973 – s. 173(2) and (8).

Dismissing the appeals, the Court

HELD : 1.1 Both Sections 437(5) and 439(2) of Cr.P.C. empowers the Court to arrest an accused and commit him to custody, who has been released on bail under Chapter XXXIII. There may be numerous grounds for exercise of power under Sections 437(5) and 439(2). A person against whom serious offences have been added, who is already on bail can very well be directed to be arrested and committed to custody by the Court in exercise of power under Sections 437(5) and 439(2). Cancelling the bail granted to an accused and directing him to arrest and taken into custody can be one course of the action, which can be adopted while exercising power under Sections 437(5) and 439(2), but there may be cases where without cancelling the bail granted to an accused, on relevant consideration, Court can direct the accused to be arrested and committed to custody. The addition of serious offences is one of such circumstances, under which

A **the Court can direct the accused to be arrested and committed to custody despite the bail having been granted with regard to the offences with which he was charged at the time when bail was considered and granted. [Para 21] [841-D-G]**

1.2 Sub-section (5) of Section 437 of Cr.P.C uses expression B **'if it considers it necessary so to do, direct that such person be arrested and commit him to custody'. Similarly, sub-section (2) of Section 439 of Cr.P.C. provides: 'may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody'. A plain reading of the aforesaid provisions indicates that provision does not mandatorily provide** C **that the Court before directing arrest of such accused who has already been granted bail must necessary cancel his earlier bail. A discretion has been given to the Court to pass such orders to direct for such person be arrested and commit him to the custody which direction may be with an order for cancellation of earlier** D **bail or permission to arrest such accused due to addition of graver and non-cognizable offences. [Para 25] [843-H; 844-A-D]**

1.3 It may be true that by mere addition of an offence in a criminal case, in which accused is bailed out, investigating authorities itself may not proceed to arrest the accused and need E **to obtain an order from the Court, which has released the accused on the bail. It is also open for the accused, who is already on bail and with regard to whom serious offences have been added to apply for bail in respect of new offences added and the Court after applying the mind may either refuse the bail or grant the bail with regard to new offences. In a case, bail application of the** F **accused for newly added offences is rejected, the accused can very well be arrested. In all cases, where accused is bailed out under orders of the Court and new offences are added including offences of serious nature, it is not necessary that in all cases earlier bail should be cancelled by the Court before granting** G **permission to arrest an accused on the basis of new offences. The power under Sections 437(5) and 439(2) are wide powers granted to the court by the Legislature under which Court can permit an accused to be arrested and commit him to custody without even cancelling the bail with regard to earlier offences.**

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Sections 437(5) and 439(2) cannot be read into restricted manner that order for arresting the accused and commit him to custody can only be passed by the Court after cancelling the earlier bail. [Para 27] [845-C-F]

1.4 The appellant in the present case was already into jail custody with regard to another case and the investigating agency applied before Special Judge, NIA Court to grant production warrant to produce the accused before the Court. The Special Judge having accepted the prayer of grant of production warrant, the accused was produced before the Court on 26.06.2018 and remanded to custody. Thus, in the present case, production of the accused was with the permission of the Court. Thus, the present is not a case where investigating agency itself has taken into custody the appellant after addition of new offences rather accused was produced in the Court in pursuance of production warrant obtained from the Court by the investigating agency. Thus there is no error in the procedure which was adopted by the Special Judge, NIA Court with regard to production of appellant before the Court. In the facts of the present case, it was not necessary for the Special Judge to pass an order cancelling the bail dated 10.03.2016 granted to the appellant before permitting the accused appellant to be produced before it or remanding him to the judicial custody. [Para 28] [845-F-H; 846-A-B]

1.5 In a circumstance where, after grant of bail to an accused, further cognizable and non-bailable offences are added:- (i) The accused can surrender and apply for bail for newly added cognizable and non-bailable offences. In event of refusal of bail, the accused can certainly be arrested. (ii) The investigating agency can seek order from the court under Section 437(5) or 439(2) of Cr.P.C. for arrest of the accused and his custody. (iii) The Court, in exercise of power under Section 437(5) or 439(2) of Cr.P.C., can direct for taking into custody the accused who has already been granted bail after cancellation of his bail. The Court in exercise of power under Section 437(5) as well as Section 439(2) can direct the person who has already been granted bail to be arrested and commit him to custody on addition 'of' graver and non-cognizable offences which may not be necessary always

A **with order of cancelling of earlier bail. (iv) In a case where an accused has already been granted bail, the investigating authority on addition of an offence or offences may not proceed to arrest the accused, but for arresting the accused on such addition of offence or offences it need to obtain an order to arrest the accused from the Court which had granted the bail. [Para 29] [846-B-G]**

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Prahlad Singh Bhati v. NCT, Delhi and Another **(2001) 4 SCC 280 : [2001] 2 SCR 684 ;** *Hamida v. Rashid alias Rasheed and Others* **(2008) 1 SCC 474 : [2007] 5 SCR 937 – relied on.**

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Sukhpal v. State of Rajasthan **1988 (1) RLW 283 ;** *Dhivan v. State* **(2010) 2 MWN (Cr.) ;** *Dhivan v. State* **(2010) 2 MWN (Cr.) ;** *Bijendra and Ors. v. State of U.P. and Ors.* **(2006) CriLJ 2253 ;** *Bankey Lal Sharma v. State of U.P. and Ors.* **(2008) CriLJ 3779 – approved.**

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Sita Ram Singh and Anr. v. State of Bihar **2002 (2) BLJR 859 ;** *Fayaz Ahmad Khan and Ors. v. State* **CRMC No. 270/2018 ;** *Mithabhai Pashabhai Patel and others v. State of Gujarat* **(2009) 6 SCC 332 : [2009] 7 SCR 1126 ;** *Manoj Suresh Jadhav & Ors. v. The State of Maharashtra* **SLP (Crl.) No. 10179 of 2017 – referred to.**

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2.1 There cannot be any dispute to the proposition that second FIR with regard to same offences is barred. In the present case, the charge-sheet in the case Crime No.02/2016 (earlier FIR) was submitted by the investigating agency on 10.03.2016 and cognizance was taken on 11.03.2016. Charges were framed on 19.09.2016. The offences under Unlawful Activities (Prevention) Act, 1967 were added for the first time on 09.04.2017. Thus, there was no occasion for investigation of offences under Unlawful Activities (Prevention) Act, 1967 prior to April, 2017. The charge-sheet dated 10.03.2016 and charges framed on 19.09.2016 were not with respect to offences under Unlawful Activities (Prevention) Act, 1967, thus, when the Central Government directed the NIA to investigate the offence under scheduled offences, NIA was fully competent to investigate the

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offences and submit a supplementary report. Present is not a case where any charges for offences punishable under the Unlawful Activities (Prevention) Act, 1967 were available prior to April, 2017. Thus, NIA was fully competent to investigate further in the case as per the directions issued by the Central Government vide order dated 13.02.2018. [Para 42] [855-C-E]

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T.T. Antony v. State of Kerala and Others **(2001) 6 SCC 181 : [2001] 3 SCR 942 ;** *Babubhai v. State of Gujarat and Others* **(2010) 12 SCC 254 : [2010] 10 SCR 651 ;** *Chirra Shivraj v. State of Andhra Pradesh* **(2010) 14 SCC 444 : [2010] 15 SCR 673 ;** *Amitbhai Anilchandra Shah v. Central Bureau of Investigation & Anr.* **(2013) 6 SCC 348 : [2013] 6 SCR 623 – referred to.**

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2.2 Sub-section (6) of Section 6 of the NIA Act Section 6 prohibits State Government or any police officer of the State Government to proceed with the investigation. In the present case, when order was issued by Central Government on 13.02.2018, it was not competent for police officer of the State Government to proceed with the investigation. Therefore, the FIR, which was re-registered by NIA on 16.02.2018 cannot be held to be second FIR of the offences rather it was re-registration of the FIR to give effect to the provisions of the NIA Act and re-registration of the FIR is only procedural act to initiate the investigation and the trial under the NIA Act. The re-registration of the FIR, thus, is neither barred nor can be held that it is second FIR. [Para 43] [855-F-G]

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3. It cannot be said that NIA cannot conduct any investigation or submit any report, since investigation was already completed and charge sheet was submitted, because the charge sheet was submitted on 16.03.2016 and charges were framed on 19.09.2016 by which date offences under Unlawful Activities (Prevention) Act, 1967 were not even added. The Scheme as delineated by Section 173 Cr.P.C. itself indicates that even after report under Section 173(2) is submitted, it is always open for the police authorities to conduct further investigation and collect both documentary and oral evidence and submit a report under Section 173(8). Thus, there is no lack of jurisdiction in NIA to

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A **carry on further investigation and submit a supplementary report in the facts of the present case. [Paras 44 and 47] [856-A-C; 858-E]**

Vinay Tyagi v. Irshad Ali alias Deepak and Others **(2013) 5 SCC 762 : [2012] 13 SCR 1005 ;** *Amrutbhai Shambhubhai Patel v. Sumanbhai Kantibhai Patel and Others* **(2017) 4 SCC 177 : [2017] 4 SCR 105 – relied on.**

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4.1 The accused can be remanded under Section 167(2) Cr.P.C during investigation till cognizance has not been taken by the Court. Even after taking cognizance when an accused is subsequently arrested during further investigation, the accused can be remanded under Section 167(2) Cr.P.C. When cognizance has been taken and the accused was in custody at the time of taking cognizance or when inquiry or trial was being held in respect of him, he can be remanded to judicial custody only under Section 309(2) Cr.P.C. Thus, in the present case, accused could have been remanded only under Section 309(2) Cr.P.C. [Paras 63 (i) (ii) (iii) and 63] [866-H; 867-B]

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Gouri Shankar Jha v. State of Bihar and others **1972 (1) SCC 564 : [1972] 3 SCR 129 ;** *Central Bureau of Investigation, Special Investigation Cell-I, New Delhi v. Anupam J. Kulkarni* **(1992) 3 SCC 141 : [1992] 3 SCR 158 ;** *Dinesh Dalmia v. Central Bureau of Investigation* **(2007) 8 SCC 770 : [2007] 9 SCR 1124 ;** *Mithabhai Pashabhai Patel and Others v. State of Gujarat* **(2009) 6 SCC 332 : [2009] 7 SCR 1126 – relied on.**

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State through CBI v. Dawood Ibrahim Kaskar and Others **(2000) 10 SCC 438 : [1997] 1 Suppl. SCR 212 – distinguished.**

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Mohd. Ahmed Yasin Mansuri v. State of Maharashtra **1994 Crl.LJ 1854 (Bom.) – referred to.**

4.2 In the present case, the special Judge in his remand order has neither referred to Section 309 nor Section 167 Cr.P.C. under which accused was remanded. When the Court has power to pass a particular order, non-mention of provision of law or

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wrong mention of provision of law is inconsequential. As the special Judge could have only exercised power under Section 309(2), the remand order dated 25.06.2018 has to be treated as remand order under Section 309(2) Cr.P.C. The special Judge being empowered to remand the accused under Section 309(2) in the facts of the present case, there is no illegality in the remand order dated 25.06.2018 when the accused was remanded to the judicial custody. The High Court, thus, committed error in holding that the order of remand dated 25.06.2018 was in exercise of power under Section 167 Cr.P.C. [Paras 65 and 66] [867-G-H; 868-A-B]

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Case Law Reference

2002 (2) BLJR 859	**referred to**	**Para 10**
[2001] 2 SCR 684	**relied on**	**Para 10**
1988 (1) RLW 283	**approved**	**Para 11**
(2010) 2 MWN (Cr.)	**approved**	**Para 12**
(2006) CriLJ 2253	**approved**	**Para 13**
(2008) CriLJ 3779	**approved**	**Para 14**
CRMC No. 270/2018	**referred to**	**Para 15**
[2007] 5 SCR 937	**relied on**	**Para 17**
[2009] 7 SCR 1126	**referred to**	**Para 23**
SLP (Crl.) No.10179 of 2017	**referred to**	**Para 26**
[2001] 3 SCR 942	**referred to**	**Para 32**
[2010] 10 SCR 651	**referred to**	**Para 32**
[2010] 15 SCR 673	**referred to**	**Para 32**
[2013] 6 SCR 623	**referred to**	**Para 32**
[2012] 13 SCR 1005	**relied on**	**Para 44**
[2017] 4 SCR 105	**relied on**	**Para 45**
[1972] 3 SCR 129	**relied on**	**Para 52**
[1992] 3 SCR 158	**relied on**	**Para 53**

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A	**[1997] 1 Suppl. SCR 212**	**distinguished**	**Para 54**
	1994 Crl.LJ 1854 (Bom.)	**referred to**	**Para 54**
	[2007] 9 SCR 1124	**relied on**	**Para 58**
	[2009] 7 SCR 1126	**relied on**	**Para 60**

B CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 816-817 of 2019.

From the Judgment and Order dated 26.09.2018 of the High Court of Jharkhand at Ranchi in W.P. (Crl.) No. 277 of 2018 and Cr.M.P. No. 1114 of 2016.

C Abhinav Mukerji, Ms. Bihu Sharma, Siddharth Garg, Ms. Pratishtha Vij, Advs. for the Appellant.

Aman Lekhi, ASG, Tapesh Kumar Singh, Aditya N. Das, Aditya Pratap Singh, Ms. Suhasini Sen, Rajat Nair, Ms. Kanu Agarwal (for B. V. Balaram Das), Advs. for the Respondents.

D The Judgment of the Court was delivered by

ASHOK BHUSHAN, J.

1. These appeals have been filed against the judgment dated 26.09.2018 of High Court of Jharkhand dismissing the Writ Petition (Crl.) E No. 277 of 2018 and Crl. Misc. Petition No. 1114 of 2016 under Section 482 Cr.P.C. filed by the appellant.

2. Brief facts of the case and sequence of events are:-

2.1 On 11.01.2016, a First Information Report No. 02/2016, Police Station Tandwa was lodged for offences under F Sections 414, 384, 386, 387, 120-B I.P.C. read with Sections 25(1-B)(a), 26, 35 of the Arms Act and Section 17(1) and (2) of the Criminal Law Amendment Act. Apart from petitioner, there were 11 other named accused. The allegations made against the accused were that G applicant by showing fear of extremist of TPC Group recovered levy from the contractors, transporters and coal businessman. It was also alleged that on information received from a co-accused, a search was also conducted in the house of the appellant, during which search, an amount of Rs.57,57,510/- was recovered from the bag kept in the H

room of the appellant alongwith four mobiles. No satisfactory explanation was given by the appellant.

2.2 By order dated 10.03.2016, the appellant was granted regular bail by the High Court after he was taken into custody. On 10.03.2016, a charge sheet was submitted under Sections 414, 384, 386, 387, 120-B I.P.C. read with Sections 25(1-B)(a), 26, 35 of the Arms Act and Sections 17(1) and (2) of the Criminal Law Amendment Act. Chief Judicial Magistrate, Chatra took cognizance of the offences under Sections 414, 384, 386, 387, 120-B I.P.C. read with Sections 25(1-B)(a), 26, 35 of the Arms Act and Section 17(1) and (2) of the Criminal Law Amendment Act on 11.03.2016. A Crl.M.P. No. 1114 of 2016 was filed by the appellant on 10.05.2016 in the High Court under Section 482 Cr.P.C. praying for quashing the entire criminal proceeding including the order taking cognizance dated 11.03.2016. On 19.09.2016, the Chief Judicial Magistrate framed charges against the appellant under Sections 414, 384, 386, 387, 120-B I.P.C. Charges were also framed under Sections 25(1-B)(a), 26, 35 of the Arms Act as well as under Section 17(1) and (2) of the Criminal Law Amendment Act. The High Court passed an interim order on 15.12.2016 staying the further proceedings in Tandwa P.S. Case No.2/2016.

2.3 On the prayer made by the Investigating Officer on 09.04.2017, offences under Sections 16, 17, 20 and 23 of the Unlawful Activities (Prevention) Act, 1967 were added against the accused. Central Government issued an order dated 13.02.2018 in exercise of power conferred under sub-section 5 of Section 6 read with Section 8 of the National Investigation Agency Act, 2008 suo-moto directing the National Investigation Agency to take up investigation of case F.I.R. No.02/2016, in which Sections 16, 17, 20 and 23 of the Unlawful Activities (Prevention) Act, 1967 were added, which were scheduled offences. In pursuance of the order of the Central Government dated 13.02.2018, National Investigation Agency re-registered the First Information Report as FIR No.RC-06/2018/NIA/DLI dated 16.02.2018 under the above noted sections. The appellant being under custody in some other case, request was made

A on behalf of the National Investigating Agency before the Special Judge, NIA, Ranchi on 22.06.2018 praying for issuance of production warrant. The Special Judge allowed the prayer. Consequently, the appellant was produced from Chatra Jail on 25.06.2018 and was remanded to judicial custody by order of Special Judge dated 25.06.2018.

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2.4 A Writ Petition (Crl.) No.277 of 2018 was filed by the appellant praying for quashing the entire criminal proceedings in connection with Special NIA Case No.03 of 2018 including the First Information Report being No.RC-06/2018/NIA/DLI. A further prayer was also made for quashing the order dated 25.06.2018 remanding the appellant to the judicial custody by order of the Judicial Commissioner-cum-Special Judge, NIA, Ranchi. The High Court by the impugned judgment dated 26.09.2018 dismissed both, the Writ Petition (Crl.) No.277 of 2018 as well as Crl.M.P. No.1114 of 2016, aggrieved against which judgment, these appeals have been filed by the appellant.

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3. We have heard Shri Abhinav Mukherji, learned counsel appearing for the appellant and Shri Aman Lekhi, learned Additional Solicitor General for the Union of India. We have also heard learned counsel appearing for the State of Jharkhand.

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4. Learned counsel for the appellant submits that investigation against the appellant in P.S. Case No.02 of 2016 having been completed and charge sheet having been submitted by the investigating agency on 10.03.2016, NIA could not have registered second F.I.R. on 16.02.2018 being FIR No.RC-06/2018/NIA/DLI. It is submitted that the Special Judge committed error in passing the order dated 25.06.2018 remanding the appellant to judicial custody under Section 167 Cr.P.C. When cognizance has already been taken on 11.03.2016, order could have only been passed under Section 309 Cr.P.C. It is submitted that by re-registration of the F.I.R., NIA cannot carry on any re-investigation into the offence incorporated in the F.I.R. dated 10.03.2016. It is further submitted that appellant having been already granted bail on 10.03.2016, he cannot be re-arrested by virtue of addition of new offences under Sections 16, 17, 20 and 23 of the Unlawful Activities (Prevention) Act, 1967. The only course open for the NIA was to file an application for cancellation of the bail dated 10.03.2016. It was only after cancellation

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of the bail that appellant could have been re-arrested or taken into judicial custody.

5. Learned ASG refuting the submissions of the counsel for the appellant contends that present is not a case of registration of any second F.I.R. It is submitted that NIA has only re-registered the F.I.R. as per the provisions of National Investigation Agency Act, 2008. The re-registration of the F.I.R. by NIA cannot be said to be a second F.I.R. It is further submitted that the mere fact that charge sheet has been submitted in P.S. Case No.02 of 2016 and cognizance has been taken by the Chief Judicial Magistrate shall not preclude the NIA from carrying out further investigation and submit a supplementary report. It is submitted that by virtue of Section 173(8) of Cr.P.C., even when report under Section 173(2) is submitted, the investigation agency can carry on further investigation and collect oral or documentary evidence and submit a supplementary report. It is further submitted that as per the NIA Act, when scheduled offence is committed, the investigation is handed over to different investigation agency. Present is a case where scheduled offences were committed and have already been added in P.S. Case No.02/2016 for which it is NIA, which has to carry on the investigation as per the order of the Central Government dated 13.02.2018. There is no lack of jurisdiction in the NIA to conduct further investigation and submit a supplementary report. It is further submitted that NIA has concluded the investigation and already submitted a charge sheet on 21.12.2018. Whenever a scheduled offence is reported, the Central Government has a wide amplitude of power to direct the NIA to investigate into such offence and while taking over the investigation, the FIR is re-registered, as only the nomenclature changes. It is further submitted that the bail granted to the appellant on 10.03.2016 in P.S. Case No. 02 of 2016 cannot enure to the benefit of the appellant in reference to offences under Sections 16, 17, 20 and 23 of the Unlawful Activities (Prevention) Act, 1967. The appellant had to apply for grant of fresh bail in respect of newly added offences. It is further submitted that the Special Judge has rightly remanded the appellant exercising power under Section 167 Cr.P.C., during further investigation by NIA. The mere fact that the cognizance was taken earlier by Chief Judicial Magistrate cannot preclude the Special Judge to exercise power under Section 167 Cr.P.C. for further investigation by NIA.

6. Learned counsel for the parties in support of their respective submissions placed reliance on various judgments of this Court as well

as judgments of High Courts, which shall be considered while considering the submissions in detail.

7. From the submissions of the learned counsel for the parties and the pleadings on the record, following are the issues, which arise for consideration in these appeals:-

(i) Whether in a case where an accused has been bailed out in a criminal case, in which case, subsequently new offences are added, is it necessary that bail earlier granted should be cancelled for taking the accused in custody?

(ii) Whether re-registration of F.I.R. No.RC-06/2018/NIA/DLI is a second F.I.R. and is not permissible there being already a FIR No. 02/2016 registered at P.S. Tandwa arising out of same incident?

(iii) Whether N.I.A. could conduct any further investigation in the matter when investigation in the P.S. Case No.02/2016 having already been completed and charge sheet has been submitted on 10.03.2016 with regard to which cognizance has already been taken by Chief Judicial Magistrate, Chatra on 11.03.2016?

(iv) Whether the order dated 25.06.2018 passed by Judicial Commissioner-cum-Special Judge, NIA, Ranchi remanding the appellant to judicial custody is in accordance with law?

(v) Whether the power under Section 167 Cr.P.C. can be exercised in the present case, where the cognizance has already been taken by Chief Judicial Magistrate on 11.03.2016 or the accused could have been remanded only under Section 309(2) Cr.P.C.?

Issue No.1

8. In the facts of the present case, appellant was granted bail on 10.03.2016 in F.I.R. No.02/2016 under Sections 414, 384, 386, 387, 120-B I.P.C. read with Sections 25(1-B)(a), 26, 35 of the Arms Act and Section 17(1) and (2) of the Criminal Law Amendment Act. In the present case, the appellant was not arrested by the investigation agency after addition of Sections 16, 17, 20 and 23 of the Unlawful Activities (Prevention) Act, 1967, rather he was already in jail in connection with some other case and an application was filed in the Court of Special

Judge by the prosecution praying for production warrant, which application having been allowed, the appellant was produced in the Court on 26.06.2018 and was remanded in judicial custody.

9. The question, as to whether when an accused is bailed out in a criminal case, in which new offences have been added, whether for arresting the accused, it is necessary to get the bail cancelled, has arisen time and again, there are divergent views of different High Courts on the above question. On one side, the High Courts have taken the view that for arresting the accused, who is already on bail, in event of addition of new offences, the earlier bail need to be cancelled whereas the other line of opinion is that for new offences accused has to obtain a fresh bail order and the earlier bail order shall not enure to the benefit of the accused.

10. Learned counsel for the parties have also relied on several judgments of different High Courts in regard to the circumstance when new cognizable and non-bailable offences are added. We may briefly refer to few of the decisions of the High Courts in the above regard. Patna High Court in **Sita Ram Singh and Anr. Vs. State of Bihar, 2002 (2) BLJR 859** had considered the case where case was initially instituted under Section 307 I.P.C. FIR was lodged on 24.08.2000 under Section 307 I.P.C. The accused was granted bail on 01.09.2000. Thereafter, due to death of the injured on 06.09.2000, Section 302 I.P.C. was added. Informant had applied for cancellation of the bail. The bail earlier granted was cancelled in view of subsequent development. In the above context, Patna High Court relying on judgment of this Court in **Prahlad Singh Bhati Vs. NCT, Delhi and Another, (2001) 4 SCC 280** held that on a serious change in the nature of the offence, the accused becomes disentitled to the liberty granted to him in relation to a minor offence and in such circumstances, the correct approach of the Court concerned would be to apply its mind afresh as to whether the accused is entitled for grant of bail, in the changed circumstances.

11. Rajasthan High Court in **Sukhpal Vs. State of Rajasthan, 1988 (1) RLW 283** has also made following observations in paragraph No.4:-

> "**4.** I am, therefore, of the opinion that the legal position is beyond doubt that once an accused is ordered to be released on bail under any of the Section of Chapter XXXIII of the Cr.P.C. the police had no power to arrest him by merely adding another section which may be non-bailable. The police must seek an order from

A the Court for cancellation of bail granted to a person……."

12. Another judgment of Madras High Court in **Dhivan Vs. State, (2010) 2 MWN (Cr.)** also took the same view. In paragraph No.11, following was observed:-

B "**11.** In view of the above discussions, I have no hesitation to hold that simply because a penal provision is added in the case in respect of a serious non-bailable offence, the bail granted earlier shall not automatically stand cancelled and therefore, the police shall not have the power to re-arrest the accused until the bail granted C earlier is cancelled by way of a positive order by the appropriate court……."

13. There are few decisions of Allahabad High Court also where the issue has been addressed. One judgment of the High Court namely **Bijendra and Ors. Vs. State of U.P. and Ors., (2006) CriLJ 2253** D has also been referred to and relied in the impugned judgment. In paragraph No.25, following observations have been made by Allahabad High Court:-

"25. After hearing the learned Counsels for the both sides at a great length and after analyzing Section 437 Cr. P. C. it transpires E that Section 437 relates with bail in cases of non-bailable offence by the magistrate. So far as the first contention which the learned Counsel for the applicants advanced, that because the bail has been granted in the same crime number and therefore by mere change of section accused cannot be sent to jail is concerned it is to be noted that case crime number is nowhere mentioned in the F aforesaid section, which is the number of police for identification of the case and is a procedural number of the police station. Crime number has no relation with bail under Cr. P. C. In this view of the matter the contention of learned Counsel for the applicant cannot be accepted and is therefore rejected.

G Coming to the second contention of the learned Counsel for the applicant that there is no bar for this Court to direct the Magistrate to accept fresh bail bonds for the newly added offence triable by Court of Session's it is noted that this direction will amount to asking the Magistrate to do something de-hors the law. The contention is devoid of merit. Section 437 Cr.P.C. relates to an H

offence, therefore, on addition of a new offence, the accused is required to appear before the court and seek bail. His bail cannot be considered unless and until he surrenders and is in custody in that offence. Any accused who is not in custody in an offence cannot be granted bail. Custody is sine qua non for consideration of bail prayer. Consequently when the accused is guilty of an added offence and is not on bail, he cannot be allowed to furnish bond without being in custody in that offence. For getting bail in newly added offences the accused has to surrendered in that offence……..”

14. In another case of Allahabad High Court in **Bankey Lal Sharma Vs. State of U.P. and Ors., (2008) CriLJ 3779** rejecting the submission that the applicant should not be required to obtain fresh bail on addition of new offences, following was observed in paragraph No.14:-

“**14.** At this stage, learned Counsel for the applicant submits that the applicant should not be required to obtain fresh bail under the newly added section. This relief cannot be granted in view of the decision of the Apex Court in Hamida v. Rashid alias Rasheed and Ors. (LVIII)2007 ACC 577, wherein it has been mentioned that without surrender prayer for bail in the newly added Section cannot be considered.”

15. Learned counsel for the appellant has also relied on judgment of High Court of Jammu & Kashmir in **CRMC No.270/2018 - Fayaz Ahmad Khan and Ors. Vs. State,** decided on 03.10.2018, where Jammu and Kashmir High Court relying on judgment of this Court in **Manoj Suresh Jadhav & Ors. (supra)** took the view that simply because a penal provision is added in respect of a serious non-bailable offence, the bail granted earlier shall not automatically stand cancelled and therefore, the police shall not have the power to re-arrest the accused until the bail granted earlier is cancelled by way of a positive order by the appropriate court.

16. We may also notice a pertinent observation made by this Court in **Prahlad Singh Bhati (supra).** In the above case, a case was registered under Sections 306 and 498-A I.P.C. Application for anticipatory bail was dismissed, however, while dismissing the application, the Additional Sessions Judge had observed that if on facts a case under Section 302 is made out against the accused, State shall be at liberty to

A arrest the accused. After investigation, charge sheet was filed under Sections 302, 406 and 498-A. The accused was directed to appear before the Magistrate since he did not appear, non-bailable warrants were issued. The accused had filed an application under Section 482 Cr.P.C. in the High Court. Subsequently, the accused appeared before the Magistrate, he was admitted on bail even in a case under Section 302 IPC. The
B revision petition was dismissed by the High Court against the order releasing the accused on bail. The complainant had approached this Court. In paragraph Nos. 4 and 9, following observations have been made by this Court:-

C **"4.** From the facts, as narrated in the appeal, it appears that even for an offence punishable under Section 302 IPC, the respondent-accused was never arrested and he manipulated the prevention of his arrest firstly, by obtaining an order in terms of Section 438 of the Code and subsequently by a regular bail under Section 437 of the Code from a Magistrate.

D **9.** ……..With the change of the nature of the offence, the accused becomes disentitled to the liberty granted to him in relation to a minor offence, if the offence is altered for an aggravated crime……..."

17. This Court in **Hamida Vs. Rashid alias Rasheed and**
E **Others, (2008) 1 SCC 474** held that an accused after addition of serious non-cognizable offence is required to surrender and apply for bail for newly added offences. It is, thus, clear that the bail granted to an accused earlier to addition of new non-bailable offence shall not enure to the benefit of the accused insofar as newly added offences are
F concerned and he is required to surrender and obtain a bail with regard to newly added offences to save him from arrest.

18. Whether after addition of new non-bailable offence, police authority can straightaway arrest the accused, who is already granted bail by the Court, in reference to offences prior to addition of new offences
G or the police is to necessarily obtain an order from the Court either of cancellation of the bail or permission to arrest the accused in changed circumstances are questions where different views have been expressed by different High Courts. In the present case, the appellant was not arrested by the police after addition of offences under the Unlawful Activities (Prevention) Act, 1967, rather the police authorities had made
H an application before the Court for issue of production warrant since the

accused was already in custody in jail in reference to another case.

19. We may refer to the relevant provisions of the Cr.P.C. regarding grant of bail. Chapter XXXIII of the Code of Criminal Procedure, Sections 436 to 439 deals with bail. Section 437 deals with the provision when bails can be taken in case of non-bailable offence. Section 437(5), which is relevant for the present controversy is as follows:-

> "(5) Any Court which has released a person on bail under sub-section (1) or sub- section (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody."

20. Section 439 deals with special powers of High Court or Court of Session regarding bail. Section 439(2) is to the following effect:-

> "(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody."

21. Both Sections 437(5) and 439(2) empowers the Court to arrest an accused and commit him to custody, who has been released on bail under Chapter XXXIII. There may be numerous grounds for exercise of power under Sections 437(5) and 439(2). The principles and grounds for cancelling a bail are well settled, but in the present case, we are concerned only with one aspect of the matter, i.e., a case where after accused has been granted the bail, new and serious offences are added in the case. A person against whom serious offences have been added, who is already on bail can very well be directed to be arrested and committed to custody by the Court in exercise of power under Sections 437(5) and 439(2). Cancelling the bail granted to an accused and directing him to arrest and taken into custody can be one course of the action, which can be adopted while exercising power under Sections 437(5) and 439(2), but there may be cases where without cancelling the bail granted to an accused, on relevant consideration, Court can direct the accused to be arrested and committed to custody. The addition of serious offences is one of such circumstances, under which the Court can direct the accused to be arrested and committed to custody despite the bail having been granted with regard to the offences with which he was charged at the time when bail was considered and granted.

22. One of the judgments, which needs to be noticed in the above reference is **Hamida Vs. Rashid alias Rasheed and Others (supra).**

A In the above case, the accused was granted bail for offences under Sections 324, 352 and 506 IPC. The victim succumbed to his injuries in the night intervening 16.06.2005 and 17.06.2005. The offence thereafter was converted into Section 304 IPC. An application was filed in the High Court by the accused to permit them to remain on same bail even after conversion of the offence into one under Section 304 IPC, which B was allowed by the High Court. The complainant filed an appeal by special leave in this Court against the judgment of the Allahabad High Court. This Court allowed the appeal and set aside the order of the High Court and directed the accused to be taken into custody with liberty to apply for bail for the offences for which he was charged before proper C Court in accordance with law. This Court further held that accused could apply for bail afresh after the offence had been converted into one under Section 304 IPC. This Court laid down following in paragraph Nos. 10, 11 and 12:-

> **"10.** In the case in hand, the respondents-accused could apply D for bail afresh after the offence had been converted into one under Section 304 IPC. They deliberately did not do so and filed a petition under Section 482 CrPC in order to circumvent the procedure whereunder they would have been required to surrender as the bail application could be entertained and heard only if the accused were in custody. It is important to note that no order adverse to E the respondents-accused had been passed by any court nor was there any miscarriage of justice or any illegality. In such circumstances, the High Court committed manifest error of law in entertaining a petition under Section 482 CrPC and issuing a direction to the subordinate court to accept the sureties and bail F bonds for the offence under Section 304 IPC. The effect of the order passed by the High Court is that the accused after getting bail in an offence under Sections 324, 352 and 506 IPC on the very day on which they were taken into custody, got an order of bail in their favour even after the injured had succumbed to his injuries and the case had been converted into one under Section G 304 IPC without any court examining the case on merits, as it stood after conversion of the offence. The procedure laid down for grant of bail under Section 439 CrPC, though available to the respondents-accused, having not been availed of, the exercise of

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power by the High Court under Section 482 CrPC is clearly illegal and the impugned order passed by it has to be set aside.

11. Learned counsel for the appellant has submitted that charge under Section 302 IPC has been framed against the respondents-accused by the trial court and some subsequent orders were passed by the High Court by which the accused were ordered to remain on bail for the offence under Section 302 read with Section 34 IPC on furnishing fresh sureties and bail bonds only on the ground that they were on bail in the offence under Section 304 IPC. These orders also deserve to be set aside on the same ground.

12. In the result, the appeal is allowed. The impugned order dated 1-7-2005 passed by the High Court and all other subsequent orders whereby the respondents-accused were directed to remain on bail for the offence under Section 302 read with Section 34 IPC on furnishing fresh sureties and bail bonds are set aside. The respondents-accused shall be taken into custody forthwith. It is, however, made clear that it will be open to the accused-respondents to apply for bail for the offences for which they are charged before the appropriate court and in accordance with law."

23. We may notice one more judgment of this Court reported in **Mithabhai Pashabhai Patel and others vs. State of Gujarat, (2009) 6 SCC 332.** Two Judge Bench of this Court in paragraph 18 laid down following:

"18. The appellants had been granted bail. They are not in custody of the court. They could not be taken in custody ordinarily unless their bail was not (*sic*) cancelled. The High Court, in our opinion, was not correct in holding that as further investigation was required, sub-section (2) of Section 167 of the Code gives ample power for grant of police remand."

24. What this Court said in the above case is that accused who have been granted bail and are not in custody could not be taken in custody ordinarily unless their bail was not cancelled. Can from the above observation it can be held that unless the bail earlier granted is cancelled the Court has no power to direct the accused to be taken into custody.

25. We may have again to look into provisions of Sections 437(5) and 439(2) of Cr.P.C. Sub-section (5) of Section 437 of Cr.P.C uses

A expression 'if it considers it necessary so to do, direct that such person be arrested and commit him to custody'. Similarly, sub-section (2) of Section 439 of Cr.P.C. provides: 'may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody'. A plain reading of the aforesaid provisions indicates that provision does not mandatorily provide that the Court before directing B arrest of such accused who has already been granted bail must necessary cancel his earlier bail. A discretion has been given to the Court to pass such orders to direct for such person be arrested and commit him to the custody which direction may be with an order for cancellation of earlier bail or permission to arrest such accused due to addition of graver and C non-cognizable offences. Two Judge Bench judgment in **Mithabhai Pashabhai Patel (supra)** uses the word 'ordinarily' in paragraph 18 of the judgment which cannot be read as that mandatorily bail earlier granted to the accused has to be cancelled before Investigating Officer to arrest him due to addition of graver and non-cognizable offences.

D 26. Learned counsel for the appellant has relied on an order of this Court dated 07.05.2018 in **SLP (Crl.) No.10179 of 2017 – Manoj Suresh Jadhav & Ors. Vs. The State of Maharashtra**. In the above case, the petitioners were granted bail for offence punishable under Section 509 read with Section 34 IPC. During the course of investigation, the police added another offence under Section 376 IPC and re-arrested E the accused. The petitioners filed writ petition before the High Court, which was dismissed. This Court in the above case while disposing the special leave petition observed as under:-

> "……
>
> F We have heard learned counsel appearing for the parties and perused the record.
>
> It is not permissible for the respondent-State to simply re-arrest the petitioners by ignoring order dated 02.06.2016 passed by the learned Additional Sessions Judge, Pune, which was in force at G that time.
>
> We direct that the petitioners shall be released on bail on the same condition/s as imposed in the aforesaid order dated 02.06.2016 by the learned Sessions Judge, Pune.
>
> Having regard to the provision of Section 439(2) of the Code H of Criminal Procedure, the respondent-State is at liberty to apply

for cancellation of bail and seek the custody of the petitioners-accused.

With the aforesaid directions, the special leave petition is disposed of."

27. Relying on the above said order, learned counsel for the appellant submits that respondent State ought to get first the order dated 10.03.2016 granting bail to appellant cancelled before seeking custody of the appellant. It may be true that by mere addition of an offence in a criminal case, in which accused is bailed out, investigating authorities itself may not proceed to arrest the accused and need to obtain an order from the Court, which has released the accused on the bail. It is also open for the accused, who is already on bail and with regard to whom serious offences have been added to apply for bail in respect of new offences added and the Court after applying the mind may either refuse the bail or grant the bail with regard to new offences. In a case, bail application of the accused for newly added offences is rejected, the accused can very well be arrested. In all cases, where accused is bailed out under orders of the Court and new offences are added including offences of serious nature, it is not necessary that in all cases earlier bail should be cancelled by the Court before granting permission to arrest an accused on the basis of new offences. The power under Sections 437(5) and 439(2) are wide powers granted to the court by the Legislature under which Court can permit an accused to be arrested and commit him to custody without even cancelling the bail with regard to earlier offences. Sections 437(5) and 439(2) cannot be read into restricted manner that order for arresting the accused and commit him to custody can only be passed by the Court after cancelling the earlier bail.

28. Coming back to the present case, the appellant was already into jail custody with regard to another case and the investigating agency applied before Special Judge, NIA Court to grant production warrant to produce the accused before the Court. The Special Judge having accepted the prayer of grant of production warrant, the accused was produced before the Court on 26.06.2018 and remanded to custody. Thus, in the present case, production of the accused was with the permission of the Court. Thus, the present is not a case where investigating agency itself has taken into custody the appellant after addition of new offences rather accused was produced in the Court in pursuance of production warrant obtained from the Court by the

A investigating agency. We, thus do not find any error in the procedure which was adopted by the Special Judge, NIA Court with regard to production of appellant before the Court. In the facts of the present case, it was not necessary for the Special Judge to pass an order cancelling the bail dated 10.03.2016 granted to the appellant before permitting the accused appellant to be produced before it or remanding him to the judicial custody.

B

29. In view of the foregoing discussions, we arrive at following conclusions in respect of a circumstance where after grant of bail to an accused, further cognizable and non-bailable offences are added:-

C

(i) The accused can surrender and apply for bail for newly added cognizable and non-bailable offences. In event of refusal of bail, the accused can certainly be arrested.

(ii) The investigating agency can seek order from the court under Section 437(5) or 439(2) of Cr.P.C. for arrest of the accused and his custody.

D

(iii) The Court, in exercise of power under Section 437(5) or 439(2) of Cr.P.C., can direct for taking into custody the accused who has already been granted bail after cancellation of his bail. The Court in exercise of power under Section 437(5) as well as Section 439(2) can direct the person who has already been granted bail to be arrested and commit him to custody on addition of graver and non-cognizable offences which may not be necessary always with order of cancelling of earlier bail.

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F

(iv) In a case where an accused has already been granted bail, the investigating authority on addition of an offence or offences may not proceed to arrest the accused, but for arresting the accused on such addition of offence or offences it need to obtain an order to arrest the accused from the Court which had granted the bail.

G

30. The issue No.1 is answered accordingly.

Issue Nos.2 and 3

31. The Central Government in exercise of its power under sub-section 5 of Section 6 read with Section 8 of the National Investigation Agency Act, 2008 passed following order:-

H

"F. No. 11011/08/2018/NIA

Government of India

Ministry of Home Affairs

CTCR Division

North Block,

New Delhi

Dated, the 13th February, 2018

ORDER

Whereas, the Central Government has received information regarding registration of a Case FIR No. 02/2016 dated 11.01.2016 at Tandwa PS, District Chatra, Jharkhand u/s 414, 384, 386, 387, 120B of the Indian Penal Code, sections 25(1-B)(a), 26, 35 of Arms Act and section 17(1)(2) of Criminal Law Amendment Act relating to incidents of extortion/levy collection/money laundering by the Maoist cadres in the LWE affected States like Jharkhand and Bihar.

And whereas, sections 16,17,20,23 of the Unlawful Activities (Prevention) Act, 1967 were added later during the course of investigation.

And whereas, the Central Government having regard to the gravity of the said offence is of the opinion that the offence involved is a scheduled offence which is required to be investigated by the National Investigation Agency in accordance with the National Investigation Agency Act, 2008.

Now, therefore, in exercise of the powers conferred under sub-section 5 of section 6 read with section 8 of the National Investigation Agency Act, 2008, the Central Government hereby suo-motu directs the National Investigation Agency to take up investigation of the aforesaid case.

Sd/- Illegible
(Dharmender Kumar)
Under Secretary to the Government of India"

32. The NIA, which registered the FIR No.RC-06/2018/NIA/DLI dated 16.02.2018, in pursuance of the order of the Central Government

A dated 13.02.2018, the submission which has been made by the learned counsel for the appellant is that the FIR dated 16.02.2018 is a second FIR, hence could not have been registered. It is submitted that with regard to one incident only one FIR can be registered and registration of second FIR is illegal. Learned counsel for the appellant in support of his submission has placed reliance on judgments of this Court in **T.T. Antony** B **Vs. State of Kerala and Others, (2001) 6 SCC 181; Babubhai Vs. State of Gujarat and Others, (2010) 12 SCC 254; Chirra Shivraj Vs. State of Andhra Pradesh, (2010) 14 SCC 444** and **Amitbhai Anilchandra Shah Vs. Central Bureau of Investigation & Anr., (2013) 6 SCC 348.**

C

33. In **T.T. Antony (supra)** with regard to an occurrence which took place on 25.11.1994 – Crime No. 353 of 1994 and Crime No. 354 of 1994 were registered at Kuthuparamba Police Station in District Kannur. The State Government appointed the commission of inquiry under Commissions of Inquiry Act, 1952, which submitted a report on D 27.05.1997. The Government accepted the report of the Commission. As a follow up action, the Additional Chief Secretary to the Government of Kerala wrote to the Director General of Police regarding acceptance of the report of the Commission by the Government and directed that legal action be taken against those responsible on the basis of the findings of the Commission. The Director General of Police issued orders to the E Inspector General of Police on 02.07.1997 to register a case immediately and have the same investigated by a senior officer. On 04.07.1997 the Inspector General of Police noted that firing without jurisdiction by which people were killed amounted to murder and issued direction to the Station House Officer to register a case under the appropriate sections and F forward the investigation copy of the FIR to the Deputy Inspector General of Police. Subsequently, another case was registered as Crime No.268 of 1997, which was challenged by filing a writ petition before the Kerala High Court. Learned Single Judge directed for re-investigation by CBI. The Division Bench on appeal directed fresh investigation by the State police headed by one of the three senior officers instead of investigation G by CBI. Appeal was filed against the said judgment in this Court. One of the questions, which was noted for consideration by this Court in para 15(i) is as follows:-

"15. On these contentions, four points arise for determination:

H *(i)* whether registration of a fresh case, Crime No. 268 of

1997, Kuthuparamba Police Station on the basis of the letter of the DGP dated 2-7-1997 which is in the nature of the second FIR under Section 154 CrPC, is valid and it can form the basis of a fresh investigation;

xxxxxxxxxxx"

34. This Court laid down that as per the scheme of Code of Criminal Procedure only the earliest or the first information report in regard to the commission of a cognizable offence satisfies the requirements of FIR and there can be no second F.I.R. In paragraph No.20, following has been laid down:-

"20. From the above discussion it follows that under the scheme of the provisions of Sections 154, 155, 156, 157, 162, 169, 170 and 173 CrPC only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154 CrPC. Thus there can be no second FIR and consequently there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences. On receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering the FIR in the station house diary, the officer in charge of a police station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 CrPC."

35. The same principle has been reiterated in **Babubhai Vs. State of Gujarat (supra)** and **Chirra Shivraj Vs. State of Andhra Pradesh (supra).** This Court in **Amitbhai Anilchandra Shah Vs. Central Bureau of Investigation (supra)** had again occasion to consider the legality of second FIR. After reviewing the earlier decisions under the heading "legal aspects as to permissibility/impermissibility of second FIR". This Court laid down following in paragraph Nos. 36 and 37:-

"36. Now, let us consider the legal aspects raised by the petitioner Amit Shah as well as CBI. The factual details which we have discussed in the earlier paragraphs show that right from the inception of entrustment of investigation to CBI by order dated

12-1-2010[4] till filing of the charge-sheet dated 4-9-2012, this Court has also treated the alleged fake encounter of Tulsiram Prajapati to be an outcome of one single conspiracy alleged to have been hatched in November 2005 which ultimately culminated in 2006. In such circumstances, the filing of the second FIR and a fresh charge-sheet for the same is contrary to the provisions of the Code suggesting that the petitioner was not being investigated, prosecuted and tried "in accordance with law".

37. This Court has consistently laid down the law on the issue interpreting the Code, that a second FIR in respect of an offence or different offences committed in the course of the same transaction is not only impermissible but it violates Article 21 of the Constitution. In *T.T. Antony*[3], this Court has categorically held that registration of second FIR (which is not a cross-case) is violative of Article 21 of the Constitution. The following conclusion in paras 19, 20 and 27 of that judgment are relevant which read as under: (SCC pp. 196-97 & 200)

> "*19.* The scheme of CrPC is that an officer in charge of a police station has to commence investigation as provided in Section 156 or 157 CrPC on the basis of entry of the first information report, on coming to know of the commission of a cognizable offence. On completion of investigation and on the basis of the evidence collected, he has to form an opinion under Section 169 or 170 CrPC, as the case may be, and forward his report to the Magistrate concerned under Section 173(2) CrPC. However, even after filing such a report, if he comes into possession of further information or material, he need not register a fresh FIR; he is empowered to make further investigation, normally with the leave of the court, and where during further investigation he collects further evidence, oral or documentary, he is obliged to forward the same with one or more further reports; this is the import of sub-section (8) of Section 173 CrPC.
>
> *20.* From the above discussion it follows that under the scheme of the provisions of Sections 154, 155, 156, 157, 162, 169, 170 and 173 CrPC only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154 CrPC. Thus there can be no second

FIR and consequently there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences. On receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering the FIR in the station house diary, the officer in charge of a police station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 CrPC.

* * *

27. A just balance between the fundamental rights of the citizens under Articles 19 and 21 of the Constitution and the expansive power of the police to investigate a cognizable offence has to be struck by the court. There cannot be any controversy that sub-section (8) of Section 173 CrPC empowers the police to make further investigation, obtain further evidence (both oral and documentary) and forward a further report or reports to the Magistrate. In *Narang case* it was, however, observed that it would be appropriate to conduct further investigation with the permission of the court. However, the sweeping power of investigation does not warrant subjecting a citizen each time to fresh investigation by the police in respect of the same incident, giving rise to one or more cognizable offences, consequent upon filing of successive FIRs whether before or after filing the final report under Section 173(2) CrPC. It would clearly be beyond the purview of Sections 154 and 156 CrPC, nay, a case of abuse of the statutory power of investigation in a given case. In our view a case of fresh investigation based on the second or successive FIRs, not being a counter-case, filed in connection with the same or connected cognizable offence alleged to have been committed in the course of the same transaction and in respect of which pursuant to the first FIR either investigation is under way or final report under Section 173(2) has been forwarded to the Magistrate, may be a fit case for exercise of power under Section 482 CrPC or

A under Articles 226/227 of the Constitution."

The above referred declaration of law by this Court has never been diluted in any subsequent judicial pronouncements even while carving out exceptions."

36. Paragraph 58.1 to 58.10 contains the summary of judgments.
B In paragraph Nos.58.3 and 58.4 following has been laid down:-

"58.3. Even after filing of such a report, if he comes into possession of further information or material, there is no need to register a fresh FIR, he is empowered to make further investigation normally with the leave of the court and where during further investigation,
C he collects further evidence, oral or documentary, he is obliged to forward the same with one or more further reports which is evident from sub-section (8) of Section 173 of the Code. Under the scheme of the provisions of Sections 154, 155, 156, 157, 162, 169, 170 and 173 of the Code, only the earliest or the first information in regard
D to the commission of a cognizable offence satisfies the requirements of Section 154 of the Code. Thus, there can be no second FIR and, consequently, there can be no fresh investigation on receipt of every subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences.

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58.4. Further, on receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering FIR in the station house diary, the officer in charge of the police station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences
F found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 of the Code. Sub-section (8) of Section 173 of the Code empowers the police to make further investigation, obtain further evidence (both oral and documentary) and forward a
G further report(s) to the Magistrate. A case of fresh investigation based on the second or successive FIRs not being a counter-case, filed in connection with the same or connected cognizable offence alleged to have been committed in the course of the same transaction and in respect of which pursuant to the first FIR either investigation is underway or final report under Section 173(2) has
H been forwarded to the Magistrate, is liable to be interfered with

by the High Court by exercise of power under Section 482 of the Code or under Articles 226/227 of the Constitution."

37. Thus, from the above discussions, it is clear that there cannot be any dispute to the proposition that second FIR with regard to same offences is barred. But whether in the present case, FIR dated 16.02.2018 registered by NIA, can be said to be second FIR. Before answering the above question, we need to look into the scheme of the NIA Act, 2008.

38. NIA Act, 2008 was enacted to constitute an investigation agency at the national level to investigate and prosecute offences affecting the sovereignty, security and integrity of India, security of State, friendly relations with foreign States and offences under Acts enacted to implement international treaties, agreements, conventions and resolutions of the United Nations, its agencies and other international organisations and for matters connected therewith or incidental thereto.

39. Sections 3 to 5 of the Act deal with National Investigation Agency. Chapter III deals with investigation by the National Investigation Agency. Sections 6 to 8, which are relevant for the present case are as follows:-

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

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

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

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

A offence.

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

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

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

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

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

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

F **8. Power to investigate connected offences.**—While investigating any Scheduled Offence, the Agency may also investigate any other offence which the accused is alleged to have committed if the offence is connected with the Scheduled Offence."

40. Further, under Section 6, Central Government has to constitute such Courts and by virtue of sub-section (1) of Section 13 provides that:-

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

H 41. The Schedule of the Act, Item No.2 mentioned "The Unlawful

Activities (Prevention) Act, 1967". Thus, any offence under Unlawful Activities (Prevention) Act, 1967 is a scheduled offence. When the offences under the Unlawful Activities (Prevention) Act, 1967 were added in case Crime No.02/2016 and that the Central Government order issued in exercise of its power under sub-section 5 of Section 6 by entrusting the investigation to NIA, NIA is competent to investigate the offence and submit a supplementary report.

42. Before proceeding further, we may notice few features of the present case, which are necessary to be noticed. As noticed above, a charge sheet in the case Crime No.02/2016 was submitted by the investigating agency on 10.03.2016 and cognizance was taken on 11.03.2016. The offences under Unlawful Activities (Prevention) Act, 1967 were added on 09.04.2017. Charges were framed on 19.09.2016, offences under Unlawful Activities (Prevention) Act, 1967 were added for the first time on 09.04.2017, thus, there was no occasion for investigation of offences under Unlawful Activities (Prevention) Act, 1967 prior to April, 2017. The charge sheet dated 10.03.2016 and charges framed on 19.09.2016 were not with respect to offences under Unlawful Activities (Prevention) Act, 1967, thus, when the Central Government directed the NIA to investigate the offence under scheduled offences, NIA was fully competent to investigate the offences and submit a supplementary report. Present is not a case where any charges for offences punishable under the Unlawful Activities (Prevention) Act, 1967 were available prior to April, 2017, thus, NIA was fully competent to investigate further in the case as per the directions issued by the Central Government vide order dated 13.02.2018.

43. Sub-section (6) of Section 6 prohibits State Government or any police officer of the State Government to proceed with the investigation. In the present case, when order was issued by Central Government on 13.02.2018, it was not competent for police officer of the State Government to proceed with the investigation. We, thus, are of the opinion that FIR, which was re-registered by NIA on 16.02.2018 cannot be held to be second FIR of the offences rather it was re-registration of the FIR to give effect to the provisions of the NIA Act and re-registration of the FIR is only procedural Act to initiate the investigation and the trial under the NIA Act. The re-registration of the FIR, thus, is neither barred nor can be held that it is second FIR.

44. As far as the submissions of the learned counsel for the

A appellant that NIA cannot conduct any investigation or submit any report, since investigation was already completed and charge sheet was submitted, the charge sheet was submitted on 16.03.2016 and charges were framed on 19.09.2016 by which date offences under Unlawful Activities (Prevention) Act, 1967 were not even added, since for the first time the offences under Unlawful Activities (Prevention) Act, 1967
B were added on 09.04.2017. The Scheme as delineated by Section 173 Cr.P.C. itself indicates that even after report under Section 173(2) is submitted, it is always open for the police authorities to conduct further investigation and collect both documentary and oral evidence and submit a report under Section 173(8). In this context, reference is made to
C judgment of this Court in **Vinay Tyagi Vs. Irshad Ali alias Deepak and Others, (2013) 5 SCC 762**, in which case after examining the provisions and elaborating the scheme as delineated by Section 173 Cr.P.C., following was laid down by this Court in paragraph No.15:-

> **"15.** A very wide power is vested in the investigating agency to
D conduct further investigation after it has filed the report in terms of Section 173(2). The legislature has specifically used the expression "nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under Section 173(2) has been forwarded to the Magistrate", which unambiguously indicates the legislative intent that even after filing
E of a report before the court of competent jurisdiction, the investigating officer can still conduct further investigation and where, upon such investigation, the officer in charge of a police station gets further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such
F evidence in the prescribed form. In other words, the investigating agency is competent to file a supplementary report to its primary report in terms of Section 173(8). The supplementary report has to be treated by the court in continuation of the primary report and the same provisions of law i.e. sub-section (2) to sub-section
G (6) of Section 173 shall apply when the court deals with such report."

45. This Court again in **Amrutbhai Shambhubhai Patel Vs. Sumanbhai Kantibhai Patel and Others, (2017) 4 SCC 177** statutorily noticed the provisions of Section 173(8) as added in the Cr.P.C., 1973. After noticing the 41st Report of the Law Commission of India in
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reference to Section 173, this Court laid down following in paragraph Nos. 20 and 21:-

> **"20.** The newly added sub-section (8), as its text evinces, permits further investigation by the officer in charge of the police station concerned in respect of an offence after a report under sub-section (2) had been forwarded to the Magistrate and also to lay before the Magistrate a further report, in the form prescribed, whereupon such investigation, he obtains further evidence, oral or documentary. It is further ordained that on submission of such further report, the essentialities engrafted in sub-sections (2) to (6) would apply also in relation to all such report or reports.
>
> **21.** The integration of sub-section (8) is axiomatically subsequent to the 41st Report of the Law Commission Report of India conveying its recommendation that after the submission of a final report under Section 173, a competent police officer, in the event of availability of evidence bearing on the guilt or innocence of the accused ought to be permitted to examine the same and submit a further report to the Magistrate concerned. This assumes significance, having regard to the language consciously applied to design Section 173(8) in the 1973 Code. Noticeably, though the officer in charge of a police station, in categorical terms, has been empowered thereby to conduct further investigation and to lay a supplementary report assimilating the evidence, oral or documentary, obtained in course of the said pursuit, no such authorisation has been extended to the Magistrate as the Court is in seisin of the proceedings. It is, however no longer res integra that a Magistrate, if exigent to do so, to espouse the cause of justice, can trigger further investigation even after a final report is submitted under Section 173(8). Whether such a power is available suo motu or on the prayer made by the informant, in the absence of request by the investigating agency after cognizance has been taken and the trial is in progress after the accused has appeared in response to the process issued is the issue seeking scrutiny herein."

46. In paragraph No.31, it was reiterated that the right of the police to further investigate even under the 1898 Code was not exhausted and it could exercise such right often as necessary, when fresh information

A would come to light. In paragraph No.31, following has been laid down:-

> **"31.** This Court also recounted its observations in *Ram Lal Narang, (1979) 2 SCC 332,* to the effect that on the Magistrate taking cognizance upon a police report, the right of the police to further investigate even under the 1898 Code was not exhausted
B and it could exercise such right often as necessary, when fresh information would come to light. That this proposition was integrated in explicit terms in sub-section (8) of Section 173 of the new Code, was noticed. The desirability of the police to ordinarily inform the Court and seek its formal permission to make further investigation, when fresh facts come to light, was stressed upon
C to maintain the independence of the judiciary, the interest of the purity of administration of criminal justice and the interest of the comity of the various agencies and institutions entrusted with different stages of such dispensation.

D 47. We, thus, do not find any lack of jurisdiction in NIA to carry on further investigation and submit a supplementary report. In the counter affidavit, it has been stated by the Union of India that NIA has concluded investigation and already a charge sheet has been submitted on 21.12.2018 vide first supplementary charge sheet. We, thus, do not find any lack of jurisdiction in the NIA to carry on further investigation in the
E facts of the present case.

Issue Nos. 4 and 5

48. Both the issues being interrelated are being taken together.

49. We may recapitulate the essential facts for deciding the above
F issues. F.I.R. No. 2 of 2016 dated 11.01.2016 was registered on 11.01.2016. The appellant was taken into custody on 11.01.2016 itself. On 10.03.2016, the appellant was granted bail by the order of High Court. Charge sheet dated 10.03.2016 was submitted before the Court of C.J.M., Chatra, on which chargesheet C.J.M. took cognizance on 11.03.2016 under Sections 414, 384, 386, 387, 120(B) I.P.C., Sections 25(1-B)(a),
G 26, 35 Arms Act and 17(1)(2) Criminal Law Amendment Act. The prayer of investigation officer on 09.04.2017 to add offences under Section 16, 17, 20 and 23 of Unlawful Activities (Prevention) Act was allowed. After notification of Central Government dated 13.02.2018 transferring the investigation to NIA, NIA took over the investigation and re-registered
H FIR No.RC-06/2018/NIL/DLI. The case stood transferred to court of

Judicial Commissioner-cum-Special Judge NIA, Ranchi. The appellant being in custody in some other case, NIA prayed before Special Judge for issue of production warrant. On 25.06.2018 on the strength of production warrant appellant was produced before the Special Judge on 25.06.2018 by superintendent, Chatra Jail, Chatra. The Special Judge vide his order dated 25.06.2018 remanded the appellant to B.M.C. Jail Ranchi and directed to be produced on 26.06.2018. On 26.06.2018, the appellant was produced from Jail custody on which order was paved to put up on 11.07.2018.

50. The submission made by the learned counsel for the appellant is that in the present case the cognizance having already been taken by the Chief Judicial Magistrate on 11.03.2016, Section 167 could not have been resorted to by the Special Judge and provision, which was applicable in the facts of the present case, was Section 309. At this juncture, we may notice the provisions of Section 167(1) and sub-section (2) Cr.P.C., which are as follows:-

> "(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 57, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub- inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.
>
> (2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has no jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:
>
> Provided that-
>
> (a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond

A the period of fifteen days; if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding,-

(i) ninety days, where the investigation relates to an B offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused C person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub- section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;

D (b) no Magistrate shall authorise detention in custody of the police under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remained in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the E medium of electronic video linkage;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

F Explanation I.- For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail;.

Explanation II.- If any question arises whether an accused person G was produced before the Magistrate as required under clause (b), the production of the accused person may be proved by his signature on the order authorising detention or by the order certified

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by the Magistrate as to production of the accused person through the medium of electronic video linkage, as the case may be. A

Provided further that in case of a woman under eighteen years of age, the detention shall be authorized to be in the custody of a remand home or recognized social institution."

51. Section 309 on which reliance has been placed by learned counsel for the appellant is as follows:- B

"309. Power to postpone or adjourn proceedings.—(1) In every inquiry or trial, the proceedings shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded: C

Provided that when the inquiry or trial relates to an offence under section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA or section 376DB of the Indian Penal Code (45 of 1860), the inquiry or trial shall be completed within a period of two months from the date of filing of the charge sheet. D

(2) If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody: E

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Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time :

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing: G

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A Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him.

Provided also that –

B (a) no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party;

(b) the fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment;

C (c) where a witness is present in Court but a party or his pleader is not present or the party or his pleader though present in Court, is not ready to examine or cross-examine the witness, the Court may, if thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be.

D

Explanation 1.- If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

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Explanation 2.- The terms on which an adjournment or postponement may be granted include, in appropriate cases, the payment of costs by the prosecution or the accused."

52. The issue to be answered in the present case is as to whether F for remanding the accused (appellant), Section 167(2) Cr.P.C. could have been resorted to by the Special Judge or remand could have been done only under Section 309(2) Cr.P.C. This Court had occasion to consider the provisions of Section 167 and Section 309 Cr.P.C. in large number of cases. In the old code, there was a provision namely Section 344 which was akin to Section 309 of present Code. Section 167 of Code of Criminal G Procedure, 1973, corresponds to Section 167 of the old Code. This Court had occasion to consider Section 167 and Section 344 of the old Code in ***Gouri Shankar Jha vs. State of Bihar and others, 1972 (1) SCC 564***. This Court in paragraph No. 12 laid down following: -

H *"**12.** Thus, Section 167 operates at a stage when a person is arrested and either an investigation has started or is yet to*

start, but is such that it cannot be completed within 24 hours. Section 344, on the other hand, shows that investigation has already begun and sufficient evidence has been obtained raising a suspicion that the accused person may have committed the offence and further evidence may be obtained, to enable the police to do which, a remand to jail custody is necessary. "

53. This Court in ***Central Bureau of Investigation, Special Investigation Cell-I, New Delhi Vs. Anupam J. Kulkarni, (1992) 3 SCC 141,*** had occasion to consider Section 309 Cr.P.C. This Court held that Section 309 comes into operation after taking cognizance and not during the period of investigation. Remand order under this provision (Section 309) can only be with judicial custody.

54. We may refer to a Three-Judge Bench Judgment of this Court in **State through CBI Vs. Dawood Ibrahim Kaskar and Others, (2000) 10 SCC 438.** In the above case, the Government of India, with the consent of the Government of Maharashtra, issued a notification entrusting further investigation in the above cases to Delhi Special Police Establishment (CBI). The CBI filed applications before the designated Court praying for issuance of non-bailable warrants of arrests against several accused and the applications were rejected by the Designated Court relying on a Bombay High Court judgment in **Mohd. Ahmed Yasin Mansuri v. State of Maharashtra, 1994 Crl.LJ 1854 (Bom.).** In paragraph No.6 of the judgment, this Court has noticed the judgment of Bombay High Court in **Mohd. Ahmed Yasin Mansuri v. State of Maharashtra (supra)** and observations made by the Bombay High Court. Bombay High Court has observed in the said case that in the Code, no power is conferred for police custody after cognizance of an offence is taken.

55**.** The observations made by the High Court as quoted in para 6 of the judgment were not approved by this Court. This Court also noticed the provisions of Sections 167 and 309 Cr.P.C. In paragraph Nos. 10 and 11, following has been laid down:-

10. In keeping with the provisions of Section 173(8) and the above-quoted observations, it has now to be seen whether Section 309(2) of the Code stands in the way of a Court, which has taken cognizance of an offence, to authorise the detention of a person,

who is subsequently brought before it by the police under arrest during further investigation, in police custody in exercise of its power under Section 167 of the Code. Section 309 relates to the power of the Court to postpone the commencement of or adjournment of any inquiry or trial and sub-section (2) thereof reads as follows:

> "309. (2) If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:
>
> Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time:"

11. ……..Since, however, even after cognizance is taken of an offence the police has a power to investigate into it further, which can be exercised only in accordance with Chapter XII, we see no reason whatsoever why the provisions of Section 167 thereof would not apply to a person who comes to be later arrested by the police in course of such investigation. If Section 309(2) is to be interpreted — as has been interpreted by the Bombay High Court in *Mansuri* — to mean that after the Court takes cognizance of an offence it cannot exercise its power of detention in police custody under Section 167 of the Code, the Investigating Agency would be deprived of an opportunity to interrogate a person arrested during further investigation, even if it can on production of sufficient materials, convince the Court that his detention in its (police) custody was essential for that purpose. We are, therefore, of the opinion that the words "accused if in custody" appearing in Section 309(2) refer and relate to an accused who was before the Court when cognizance was taken or when enquiry or trial was being held in respect of him and not to an accused who is subsequently arrested in course of further investigation……."

56. This Court clearly held that Section 309(2) does not refer to an accused, who is subsequently arrested in course of further investigation.

This Court in paragraph No. 11, as noted above, clearly held that even after cognizance is taken of an offence the police has a power to investigate into it further and there is no reason why the provisions of Section 167 thereof would not apply to a person who comes to be later arrested by the police in course of such investigation.

57. In above Three Judge Bench judgment the accused was subsequently arrested during investigation after cognizance was taken. Three Judge Bench explained the words "accused if in custody" to relate to an accused who was before the court when cognizance was taken or when inquiry or trial was being held in respect of him and not to an accused who is subsequently arrested in course of further investigation. There cannot be any dispute to the above proposition laid down by this Court but the above judgment does not help the appellant in facts of the present case. In the present case as noticed above, the accused was before the Court when cognizance was taken or when inquiry or trial was being held in respect of him. In the facts of present case as noted above, the accused was produced in the Court of Special Judge on 25.06.2018, he was produced under production warrant from jail custody. The accused was thus very well in custody on the date when he was produced in the Court. Thus, this was not a case that accused was subsequently arrested during the investigation and was produced before the Court. The accused was arrested on 11.01.2016 immediately after lodging of the FIR and was granted bail on 10.03.2016. Thus, in view of the law as laid down by this Court in ***State through CBI Vs. Dawood Ibrahim Kaskar(Supra),*** the appellant was in custody and the Court could have remanded him in exercise of jurisdiction under Section 309(2) and the present was not a case where Section 167(2) could have been resorted to.

58. A Two Judge Bench judgment in ***Dinesh Dalmia Vs. Central Bureau of Investigation, (2007) 8 SCC 770***, is relevant for the present case where this Court had occasion to interpret sub-Section (2) of Section 167 Cr.P.C vis-à-vis sub-Section (2) of Section 309 Cr.P.C. In paragraph No. 29, this Court laid down: -

> *"**29.** The power of a court to direct remand of an accused either in terms of sub-section (2) of Section 167 of the Code or sub-section (2) of Section 309 thereof will depend on the stages of the trial. Whereas sub-section (2) of Section 167 of the Code would be attracted in a case where cognizance has*

A *not been taken, sub-section (2) of Section 309 of the Code would be attracted only after cognizance has been taken."*

59. After referring to ***Anupan J. Kulkarni(supra) and Dawood Ibrahim (Supra)*****,** this court laid down following in paragraph No. 39: -

B ***"39.*** *The statutory scheme does not lead to a conclusion in regard to an investigation leading to filing of final form under sub-section (2) of Section 173 and further investigation contemplated under sub-section (8) thereof. Whereas only when a charge-sheet is not filed and investigation is kept pending, benefit of proviso appended to sub-section (2) of* C *Section 167 of the Code would be available to an offender; once, however, a charge-sheet is filed, the said right ceases. Such a right does not revive only because a further investigation remains pending within the meaning of sub-section (8) of Section 173 of the Code."*

D 60. Learned counsel for the appellant has relied on a Two Judge Bench judgment of this Court in **Mithabhai Pashabhai Patel and Others Vs. State of Gujarat, (2009) 6 SCC 332**. In paragraph No. 17, this Court made following observations:-

"17. The power of remand in terms of the aforementioned E provision is to be exercised when investigation is not complete. Once the charge-sheet is filed and cognizance of the offence is taken, the court cannot exercise its power under sub-section (2) of Section 167 of the Code. Its power of remand can then be exercised in terms of sub-section (2) of Section 309 which reads as under:

F "309. *Power to postpone or adjourn proceedings*.—

(1) * * * "

62. The above observations do support the submissions raised by the learned counsel for the appellant.

G 63. After having noticed, the relevant provisions of Section 167(2) and Section 309, Cr.P.C and law laid down by this Court, we arrive at following conclusions: -

(i) The accused can be remanded under Section 167(2) Cr.P.C during investigation till cognizance has not been taken by H the Court.

(ii) That even after taking cognizance when an accused is subsequently arrested during further investigation, the accused can be remanded under Section 167(2) Cr.P.C.

(iii) When cognizance has been taken and the accused was in custody at the time of taking cognizance or when inquiry or trial was being held in respect of him, he can be remanded to judicial custody only under Section 309(2) Cr.P.C.

64. We, thus, find substance in submission of learned counsel for the appellant that in the present case accused could have been remanded only under Section 309(2) Cr.P.C. The submission which was taken on behalf of the CBI before us was that the accused was remanded under Section 167(2) Cr.P.C. Since he was produced before Special Judge during further investigation. The stand taken by the CBI is not correct.

65. We, however, have to decide the issue as per law irrespective of the stand taken by CBI. We may notice the order dated 25.06.2018 passed by the Court of Judicial Commissioner-cum-Special Judge NIA, Ranchi, which is to the following effect: -

> "……25.06.2018 On strength of issued production warrant superintend Chatra Jail, Chatra produced accused namely Pradeep Ram @ Pradeep verma S/o Devki Ram, R/o Village. Winglat, P.S. Tandwa, District-Chatra. Let accused Pradeep Ram remanded in the case and sent to B.M.C. Jail, Ranchi to be produced on 26.06.2018. Learned Spl.P.P. is present.
>
> Issued Custody warrant.
>
> Dictated
> Ad/- Illegible
> Spl. Judge(NIA)
> .."

65. The special Judge in his order has neither referred to Section 309 nor Section 167 under which accused was remanded. When the Court has power to pass a particular order, non-mention of provision of law or wrong mention of provision of law is inconsequential. As held above, the special Judge could have only exercised power under Section 309(2), hence, the remand order dated 25.06.2018 has to be treated as remand order under Section 309(2) Cr.P.C. The special Judge being empowered to remand the accused under Section 309(2) in the facts of

A the present case, there is no illegality in the remand order dated 25.06.2018 when the accused was remanded to the judicial custody.

66. We, thus, do not find any error in the order dated 25.06.2018 but for the reasons as indicated above. The High Court, thus, committed error in holding that the order of remand dated 25.06.2018 was in exercise
B of power under Section 167 Cr.P.C. We, however, hold that the remand order dated 25.06.2018 was in exercise of power under Section 309(2). The remand order is upheld for the reasons as indicated above.

67. The issue Nos.4 and 5 are decided accordingly.

68. In view of the foregoing discussions, we do not find any merit
C in the appeals and the appeals are dismissed.

Kalpana K. Tripathy Appeals dismissed.