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IN THE HIGH COURT OF DELHI AT NEW DELHI*Reserved on: 24th January, 2025**Pronounced on: 18th February, 2025*

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CRL.A. 439/2024**ZAHOOR AHMAD PEER**

.....Appellant

Through: Mr. Kartik Venu and Mr. R.
Jude Rohit, Advocates (M-
9655612276).

versus

NATIONAL INVESTIGATION AGENCYRespondentThrough: Ms. Shilpa Singh, SPP with Ms.
Priyam Agarwal, Adv. for NIA
with Mr. Anil Kumar, DSP &
Mr. Hari Om, Inspector for
NIA**CORAM:****JUSTICE PRATHIBA M. SINGH****JUSTICE AMIT SHARMA****JUDGMENT****AMIT SHARMA, J.**

1. The present appeal filed by the appellant under Section 21(4) of the National Investigation Agency Act, 2008 (hereinafter “NIA Act”) seeks the following prayers:

A. Set aside the order dated 06.02.2024 passed by the Ld. Additional Sessions Judge — 03 / Ld. Special Court (NIA) — New Delhi, Patiala House Courts, Delhi in NIA Case No. 1/2017 titled ‘National Investigation Agency vs. Bahadur Ali & Ors.’; emanating from RC - 11/2016/NIA/DLI dated 27.07.2016, registered by PS NIA, New Delhi Branch, and consequently pass directions to release the Appellant on regular bail in the captioned case, on such terms and conditions as this Hon’ble Court may deem fit; and /or



B. Pass any other order(s) as deemed fit in the facts and circumstances of this case.

2. The appeal has been filed assailing the impugned order dated 06.02.2024 passed by the learned ASJ-03/Special Court (NIA), Patiala House Courts, Delhi in NIA Case No.1/2017 arising out of RC - 11/2016/NIA /DLI under Sections 18/20/38 of the Unlawful Activities (Prevention) Act, 1967 (hereinafter “UAPA”), Section 14 of the Foreigners Act, 1946 (hereinafter “*Foreigners Act*”) and Section 32 of the Indian Wireless and Telegraphy Act, 1933 (hereinafter “*Wireless Act*”) registered at P.S. NIA whereby, the bail application of the Appellant was dismissed by the learned Trial Court.

BREIF BACKGROUND

3. Brief facts which are necessary for the disposal of the present appeal are as follows:

- i. It is alleged that the present case relates to a conspiracy hatched by the Lashkar-e-Taiba (hereinafter “*LeT*”), a proscribed terrorist organization, based in Pakistan, to commit terror attacks in India. As a part of the said conspiracy one Bahadur Ali @Saifullah Mansoor (hereinafter “*co-accused no.1*”) along with his two associates Abu Saad and Abu Darda illegally infiltrated into Indian territory (J&K) by crossing the LoC on intervening night of 12.06.2016 and 13.06.2016. Based on reliable sources on 25.07.2016 J&K Police and army conducted



a joint search operation in village Yahama, Tehsil Langate (Handwara), District Kupwara (J&K) and arrested co-accused no.1. Thereafter FIR No. 50/2016 dated 25.07.2016 under Section 14 Foreigners Act and Section 32 of the Wireless Act was filed at P.S. Qalamabad, Handwara (J&K).

- ii. Subsequently, in compliance with the order No. 11011/20/2016-IS.IV, dated 27.07.2016, issued by the Government of India (Ministry of Home Affairs), under Section 6(5) read with Section 8 of the NIA Act, the investigation of case FIR No. 50/2016 was taken over by the NIA and present FIR was registered.
- iii. During the investigation of the present case the appellant was arrested on 19.09.2017 and has been in judicial custody since then. It alleged that the present Appellant had direct links with co-accused no.1 and had provided him food and shelter during his stay in village Yahama (J&K). Further two protected witnesses have also stated the role of the present appellant and Nazir Ahmed Peer (hereinafter “*co-accused no.5*”).
- iv. It is alleged that the grid reference noted by the co-accused no.1 in his diary is very close to the house of the present appellant in Yahama (J&K). Further during the course of investigation several photographs were shown to co-accused no.1 in the presence of independent witnesses, and out of the photographs



shown to co-accused no.1 he recognized the present appellant and co-accused no.5.

- v. Based on the aforesaid investigation and the evidence on record a supplementary chargesheet dated 17.03.2018 was filed before the learned Trial Court *qua* the appellant and other co-accused persons. *Vide* order dated 19.02.2021 charges were framed by the learned Trial Court *qua* the appellant and other co-accused persons. The charges which were framed against the Appellant and the other co-accused are set out below:

Name of accused	Offences punishable
Bahadur Ali & Saifullah Mansoor (A-1)	120B of IPC r/w Sections 17,18,20 & 38 of The Unlawful Activities (Prevention) Act, 1967 and substantive offences thereof, Section 121-A and 489 (C) of the Indian Penal Code, 1860, Section 9B of the Explosives Act, 1884, Section 4 of the Explosives Substances Act, 1908, Section 7/25 & 10/25 of the Arms Act, 1959, Section 14 of the Foreigners Act, 1946 and Section 6 (IA) of the Indian Wireless Telegraphy Act, 1933
Zahoor Ahmad Peer (A-4)	18, 19 and 39 of The Unlawful Activities (Prevention) Act, 1967.



Nazir Ahmad Peer @ Nazir Ahmad Pirzada @ Bashir (A-5)	18, 19 and 39 of The Unlawful Activities (Prevention) Act, 1967.
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- vi. It is pertinent to note that co-accused no.1 in the present case was convicted on a plea of guilt by the learned Trial Court by *vide* judgment dated 22.03.2021 for the offences punishable under Sections 120-B of the IPC read with Sections 17/18/20/38 of the UAPA and Section 121-A and 489(C) of the IPC, Section 9B of the Explosives Act, 1884, Section 4 of the Explosives Substances Act, 1908, Section 7 and Section 10 read with Section 25 of the Arms Act, Section 14 of the Foreigners Act and Section 6(1A) of the Wireless Act.
- vii. The prosecution to establish its case against the present applicant examined the first witness before the learned Trial Court on 25.08.2022 and since then a total of 35 witnesses have been examined till the date of filing this appeal.
4. For the sake of completeness, the case of the NIA against the present appellant, as per the reply dated 23.07.2024, filed to the present appeal is reproduced hereinunder:



PRELIMINARY SUBMISSIONS

1. That the instant case is related to a larger conspiracy hatched by the Pakistan based Laksahar-e-Taiba (hereinafter referred to as "LeT", a proscribed terrorist organization, based in Pakistan, aimed at committing terror attacks in India for waging war against the Government of India. As a part of this conspiracy, accused Bahadur Ali @ Saifullah Mansoor along with his two associates namely Abu Saad and Abu Darda, all trained terrorists of 'LeT', had illegally infiltrated into territory of India, particularly, in Jammu and Kashmir by crossing the LoC on or around the intervening night of 12.06.2016 & 13.06.2016. Upon entering Indian territory, these terrorists were equipped with navigation, combat, communication, and other materials, including Grid References (GR) and GPS devices provided by their LeT handlers to reach their final destination in Kashmir. They intended to carry out terrorist attacks in Jammu and Kashmir and various other locations, including Delhi, as per the instructions from their LeT handlers.

2. The investigation has revealed that the LeT has set up well-organized machinery for the recruitment of vulnerable young men from different provinces of Pakistan to join as active cadres/terrorists. LeT also recruit and engage the local youth of Kashmir as their Over Ground Workers (hereinafter referred to as "OGWs" to provide all necessary local supports to 3 the terrorists of LeT, who infiltrated in Indian Territory (Kashmir) by crossing LoC, illegally, as part of a conspiracy to carry out terror acts.

3. That on 25.07.2016, based on the information provided by the reliable sources, the J&K Police at Handwara and the Army (30 RR) conducted a joint search operation in the area of village Yahama, Tehsil Langate (Handwara), District Kupwara and arrested the accused namely Bahadur Ali @ Saifullah Mansoor (A-1), a Pakistani national and a trained terrorist of the LeT. Several incriminating materials were recovered and seized from his possession. In this regard, an FIR number 50/2016 dated 25.07.2016 under Section 14 of the Foreigners' Act and Section 6 (1A) of the Wireless Act was registered at Police Station Qalamabad, Handwara (J&K). Further recoveries of arms, ammunition and other incriminating materials were made from a



forest, near village Yahama, on the disclosure made by the Bahadur Ali under Section 27 of the Indian Evidence Act.

4. On 26.07.2016, based on information revealed by the accused Bahadur Ali regarding presence / movement of LeT terrorists in the area of Bandy Monabal Forest area under P.S. Qalamabad, Police District Handwara and District Kupwara (J&K), a joint search operation was conducted by the J&K Police and Army (30 RR) in the said area. During the course of joint search operation, four unknown Pakistani militants were killed in encounter and a large quantity of combat, communication, navigation, Indian Currency Notes and other materials were recovered and seized from the bodies of the killed militants. In this regard a Case FIR No. 51/2016 dated 26.07.2016 under Section 307 RPC, Section 7/27 of Arms Act and Sections 16/18 of ULA (P) Act was registered at Police Station Qalamabad, Police District Handwara (J &K).

5. Subsequently, In compliance with Order No. 11011/20/2016-IS.IV dated 27.07.2016 issued by the Government of India, Ministry of Home Affairs, New Delhi, under section 6(5) read with section 8 of the NIA Act, 2008, the investigation of Case FIR Nos. 50/2016 and 51/2016 of P.S. Qalamabad (J&K) was taken over by the National Investigation Agency. The cases were re-registered as FIR Nos. RC- 11/2016/NIA/DLI and RC-12/2016/NIA/DLI, and the original FIRs were filed in the Hon'ble NIA Special Court, Patiala House Courts, New Delhi. The true and correct copy of the Order No. 11011/20/2016-IS.IV dated 27.07.2016 issued by the Government of India, Ministry of Home Affairs, New Delhi is annexed herewith and marked as ANNEXURE R-1.

The true and correct copy of the re-registered FIR No. RC-11/2016/NIA/DLI and RC-12/2016/NIA/DLI are annexed herewith and marked as ANNEXURE R-2 (COLLY).

6. That the investigation established that Bahadur Ali is a Pakistani national and he was recruited by local cadres of LeT, in a mosque 'Abu Baqar' at his village Jia Bagga, Tehsil Raiwind, District Lahore, Punjab, Pakistan. Thereafter, Bahadur Ali (A-1) attended three trainings viz (i) Duara-e- Talba (May-June, 2012) at Point-2 Camp of LeT, Manshera, Khyber Pakhtunkhwa, (ii) Duara-e- Ama (Sept.-Oct.,2014) in Aksa- Maskar Camp of LeT,



near Muzaffarabad, PoK and (iii) Duara-e- Khas (April, 2016) in Tabook Camp of LeT, at Muzaffarabad, PoK, organised by LeT. Upon completing the Daura-e-Khas training on or around 07.06.2016, Bahadur Ali (A-1) was sent to the LeT 'launching pad' in the village of Mandakuli, Leepa Valley, District Muzaffarabad, PoK, under the command of Abu Haider. From there, the Accused, along with two other LeT cadres, Abu Darda and Abu Saad, was sent to the Kashmir Valley.

7. That infiltrating party consisting of the Bahadur Ali (A-1), Abu Saad and Abu Darda were each provided, inter alia, AK-47 assault rifle (01 each), AK-47 magazines (5 each), AK-47 ammunition (150 rounds each), hand grenades (2 each), GPS devices (01 each), wireless sets with detachable and extendable antenna (01 each), map sheets (01 each), matrix sheets (01 each) compasses (01 each), one Under Barrel Grenade Launcher (UBGL) with five shells and a night vision device (NVD). Besides, the group was also provided eight Grid References to reach their final destination in Kashmir Valley.

8. That after crossing the LoC fence, the said terrorists were in contact with their handlers based in PoK and were sending messages by pairing the mobile phone with the wireless set, a communication technique which is referred to as 'Wi-SMS'.

9. That on or around 22.06.2016, Abu Darda and Abu Saad went to the village Wadar for arranging food, leaving Bahadur Ali on a nearby hill. Shortly after, Bahadur Ali heard gunfire. On hearing the gunfire, he rushed towards a nearby hilltop as a precautionary measure and waited for the return of Abu Darda and Abu Saad. However, they did not come back. The next morning, he contacted Alfa-3, the LeT control station based in PoK, through his wireless set and reported his situation. Alfa-3 directed him to continue his journey and reach the final destination at the eighth Grid Reference (8th GR).

10. After receiving instructions from Alfa-3, Bahadur Ali reached the eighth Grid Reference, located on a hill near the village of Mukam, Yahama, District Handwara. Upon arrival, Bahadur Ali contacted Alfa- 3 several times. Alfa-3 provided him with an additional Grid Reference and instructed him to contact a local person with the code name 'Doctor,' who would provide food, safe stay, and other support in the Kashmir Valley.



11. Upon receiving the coordinates (GR) for the local contact 'Doctor' from Alfa-3, Bahadur Ali went to the designated location in the Kashmir Valley. There, he met accused Zahoor Ahmad Peer (A-4) and Nazir Ahmad Peer (A-5) near a mosque towards a school in Yahama Mukam. Introducing himself as 'Saifullah' from Pakistan and a member of LeT, Bahadur Ali asked them for food and a safe place to stay. A-4 and A-5, who initially introduced himself as Bashir, provided the Accused with food and arranged for him to stay on a regular basis, at the rear of the Government School, Yahama, located near a forested area outside the village. The grid reference given by Alfa-3 for the contact 'Doctor' was located near Zahoor Ahmad Peer's house.

12. That during the course of investigation, accused Zahoor Ahmed Peer and accused Nazir Ahmad Peer were arrested on 19.09.2017. During their interrogation, both of them stated that they had met Bahadur Ali and provided him food and a safe hide out and helped during his stay in Kashmir Vally. This fact has already been stated by Bahadur Ali himself before the Hon'ble NIA Special Court. A true copy of the Statement dated 12.03.2021 recorded by the Ld. Principal District and Sessions Judge/Special Judge (NIA), Patiala House Courts, New Delhi is annexed herewith and marked as ANNEXURE R-3.

13. That during the course of the investigation, the photographs of Zahoor Ahmad Peer and Nazir Ahamd Peer mixed with other persons were shown to Bahadur Ali in the Central Jail, Tihar, New Delhi in presence of independent witnesses, during his judicial custody. Out of all the photographs Bahadur Ali identified the photographs of Zahoor Ahmad Peer, Nazir Ahmad Peer as Bashir, the same persons who had met him at village Yahama Mukam. A true copy of Photo Identification Memo dated 09.10.2017 is annexed herewith and marked as ANNEXURE R-4.

14. Besides, after arrest of applicant accused Zahoor Ahmad Peer and his associate Nazir Ahmad Peer, both were confronted to accused Bahadur Ali, while all these accused were in judicial custody in Central Jail No. 8 & 9 Tihar, New Delhi, on 27.02.2018. Bahadur Ali stated that accused Zahoor Ahmad Peer and Nazir Ahmad Peer had provided him safe shelter and food etc. Accused Zahoor Ahmad Peer and Nazir Ahmad Peer have



also stated that they had provided shelter and food to accused Bahadur Ali in their village Yahama Mukam. One day two more terrorists Abu Saad and Abu Darda both associates of accused Bahadur Ali had come in a house at village Yahama Mukam, Bahadur also met them during their meeting applicant accused Zahoor Peer and accused Nazir Peer also present there.

A Copy of Confrontation Memo dated 27.02.2024 is annexed herewith and marked as ANNEXURE R-5.

It is submitted that the evidence of the relevant independent witnesses has also been recorded by the Hon'ble NIA Special Judge, during the trial in the instant case.

That investigation revealed that mobile numbers 9419059187, 849159510 and 9797944850 are subscribed in name of Nazir Ahmad Pakeirs @ Bashir (A-5) H in contact with akistani phone numbers 923012348219, 923335069405, 923155069405 and 923455407687 from the month April to November, 2016. His associate accused Zahoor Ahmad Peer (A-4) was using mobile phone numbers 9596320141 (subscribed in the name of Hilal Ahmad Peer, his brother), 9107357520 and 9018902160 (subscribed in his name). He was also in contact of Pakistan Mobile Nos. 923005332830 and 923165654493 through his mobile phone number 9596320141. CDR analysis is also revealed that both the accused persons have frequently changed the several mobile cell phones.

15. That accused Zahoor Ahmed Peer is a close associate of accused Nazir Ahmad Peer @ Bashir, who was in contact with the Kashmiri persons who had illegally crossed the LoC and entered in PoK and Pakistan and joined there terrorist organizations viz. Hizb-ulMujahideen (HM) and LeT and have been residing in Pakistan/ PoK. The terrorists of HM and LeT are continuously carrying out terror acts in India with the support of their supporters and sympathisers such as accused Nazir Ahmad Peer and Zahoor Ahmad based in Kashmir valley.

16. The instant case involves a larger conspiracy by the proscribed terrorist organization LeT, based in Pakistan, with the support of Pakistani-trained LeT terrorists and their supporters/OGWs in the Kashmir Valley, to commit terror attacks in India and wage war against the Government of India.



17. To execute these attacks in Kashmir and Delhi, LeT handlers initially sent a group of three terrorists: the Accused i.e. Bahadur Ali, Abu Saad, and Abu Darda. Subsequently, another group of four terrorists was sent to assist the Accused's group; these four were killed in an encounter by the Army and JK Police on 26.07.2016. Later, on 14.02.2017, during a search operation conducted by the JK Police and Army, Abu Saad and Abu Darda, associates of Bahadur Ali, were killed in an encounter, during which a senior Army officer was martyred.

18. That based on the evidence came on records, Charge sheet has been filed against applicant accused and his associate accused Nazir Ahmad Peer under sections-18, 19 and 39 of the Unlawful Activities (Prevention) Act, 1967 and substantive offences, before this Hon'ble Court, on 17.03.2018. Charges have also been framed against accused persons including the applicant accused person u/s under sections-18, 19 and 39 of UA(P) Act vide Order dated 19.02.2021 passed by the Hon'ble NIA Special Court, New Delhi. The Accused Bahadur Ali has pleaded guilty for all the charges framed against him and was sentenced for 10 years vide Court Order dated 26.03.2021. The case is under trial against applicant accused and his associate accused Nazir Ahmad Peer.

19. That Sections 43D (5) and (6) of the Unlawful Activities (Prevention) Act, 1967 (hereinafter referred to as "UAPA") read as under

- "43-D (. . .)

(5) Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release: Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true.

(6) The restrictions on granting of bail specified in subsection (5) is in addition to the restrictions under the Code or any other law for the time being in force on granting of bail."



20. That, the proviso to Section 43D(5) UA(P) Act, lays the test for bail as held in NIA v. Zahoor Ahmad Shah Watali, (2019) 5 SCC 1 where the accusations against the Appellant are prima facie true.”

SUBMISSIONS ON BEHALF OF THE APPELLANT

5. Learned counsel appearing on behalf of the appellant submitted that the allegations against the appellant were that he was a driver who is accused of giving food and arranging accommodation for co-accused no.1 in Yahama village (J&K). Further it is submitted that the appellant has been in judicial custody since 19.09.2017, for more than 7 years and the trial in the present case is pending at the early stages of prosecution evidence and no material witnesses have been examined so far. In the prevailing circumstances it is unlikely that the trial will conclude soon. It was argued that the appellant while being presumed innocent has undergone a lengthy period of pre-conviction incarceration and the same is in violation of Article 21 of the Constitution of India. Reliance was placed on the orders of the learned Trial Court dated 25.04.2022, 06.02.2023, and 28.10.2022 wherein it was recorded that the trial is not being conducted in an expeditious or diligent manner by the NIA.

6. Learned counsel appearing on behalf of the appellant submitted that in cases of violation of Part III of the Constitution of India, the Court need not go into the merits of the case while adjudicating bail application. Rather the grant or refusal of a bail application on the



prism of Constitutional principles is an exercise independently of the available statutory mechanism.

7. It is argued that through a catena of judgments it has been established that mere invocation of the provisions of UAPA does not warrant identical treatment of all accused persons and it is imperative that varied roles and evidence on record are considered.

8. Learned counsel appearing on behalf of the appellant submitted that co-accused no.1 has been sentenced to rigorous imprisonment of 10 years by the learned Trial Court and the present appellant has already undergone incarceration for more than 7 years. It is argued that the sentence meted out to the co-accused no.1 in the present case can be a relevant consideration in determining sufficient period undergone by the appellant.

9. It is submitted that the role attributed to the appellant of providing food and suggesting an isolated spot near a school are completely innocuous and cannot by any stretch tantamount to acting in furtherance of terror activities, or committing acts with intention to further terror activities. Furthermore, reliance is placed on the statement of the appellant and co-accused no.5 recorded on 31.03.2022 to argue that the act of the appellant of giving food and harbouring co-accused no.1 was done under coercion and duress, in which case, the provisions of the UAPA cannot be attracted. Further the statement of PW-X-1 clearly reflects that the conduct of the



appellant was under force and coercion as his ID cards were taken away.

10. It is pointed out that in paragraph 17.32 of the supplementary chargesheet the allegation against the appellant is that co-accused no.1 was directed towards to a particular location where he could stay. Learned counsel for the appellant submitted that this cannot constitute harbouring as co-accused no.1 did not stay with the appellant at his own residence.

11. Learned counsel appearing on behalf of the appellant submitted that merely on account of charges having been framed against the appellant under Sections 18, 19 and 39, UAPA, the appellant is neither barred from preferring his case for bail, nor the Court while adjudicating such bail applications is barred or impaired in any manner from granting regular bail.

12. It is submitted that the appellant is neither a member, associate, or supporter of the LeT and was a driver before his arrest. It is pointed out that admittedly the supplementary chargesheet indicates that the appellant is not the individual known as “Doctor” but a mere local. Further it is submitted that the allegations *qua* the appellant are negligible and would not constitute as offences under Section 18, 19 and 39 of the UAPA.



13. Paragraphs 17.33, 17.35, 17.37 and 17.39 of the supplementary chargesheet were referred to argue that though one telephone is in the name of the Appellant, the other three telephone numbers which are standing in the name of the brother of the Appellant have not been established as being used by the Appellant. Insofar as the grid reference is concerned, it was submitted that the supplementary charge-sheet itself records that the grid reference reflected that the location is close to the house of the appellant which is not sufficient.

14. Reliance has been placed on the following judgments by the learned counsel for the appellant:

- i. **Shaheen Welfare Association vs. Union of India**¹
- ii. **Union of India vs. KA Najeeb**²
- iii. **Mohd. Hakim vs. State (NCT of Delhi) passed by a Co-ordinate Bench of this Court in CRL.A. 170/2021 on 06.10.2021**
- iv. **Sudesh Kedia vs. Union of India**³
- v. **Javed Gulam Nabi Shaikh vs. State of Maharashtra and Anr.**⁴
- vi. **Sangram Sadashiv Suryavanshi vs The State of Maharastra**⁵

¹ 1996 2 SCC 616

² 2021 3 SCC 713

³ 2021 4 SCC 704

⁴ (2024) 9 SCC 813

⁵ 2024 INSC 899



SUBMISSIONS ON BEHALF OF THE RESPONDENT/NIA

15. *Per contra* learned SPP appearing on behalf of the NIA submitted that the appellant is an active Over Ground Worker (OGW) of the LeT, which is a banned terrorist organization. Co-accused no.1 was given grid references, google maps and satellite phone by his handlers and contacts in Pakistan and was told that one “Doctor” would help him and give support while he is in J&K. It was further submitted that harbouring a terrorist is a very serious offence and the devices which were seized from the co-accused no.1 also had grid references of the residence of the appellant which clearly show that he is an active supporter of the LeT. Also, it is pointed out that this case is directly linked to an incident which took place where four terrorists were killed and a senior army official had been martyred.

16. Learned SPP appearing on behalf of the NIA submitted, that during investigation several photographs were shown to co-accused no.1 in the presence of independent witnesses, and out of the photographs shown he recognized the present appellant and co-accused no.5.

17. It was submitted that under Section 19 of the UAPA if harbouring is proved, the punishment can extend to life imprisonment, but the minimum punishment is 3 years. The said provision is similar to Section 3(4) of Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter “TADA”). The Hon’ble Supreme Court in **Kalp Nath**



*Rai v. State (through CBI)*⁶ had dealt with harboring under TADA and had considered four factors on the basis of which a person can be considered to be harbouring a terrorist.

18. It was argued that the appellant is a close associate of co-accused no.5 who was in regular contact with Kashmiri persons who had illegally crossed the LoC and joined terrorist organizations such as Hizb-ul-Mujahideen and LeT.

19. During investigation it was revealed that mobile numbers subscribed in the name of co-accused no.5 were in contact with certain Pakistani phone numbers from the month of April to November 2016. Further the appellant was using a mobile number (9596320141) subscribed in the name of his brother and he was also in contact with Pakistani phone numbers. The True Caller database of the said number reflects “Zahur Ah (Dr)” which indicates that the appellant was being referred to as “Doctor” and he was the person that co-accused no.1 had to contact. CDR also revealed that both the appellant as well as co-accused no.5 had frequently changed cellphones.

20. learned SPP appearing on behalf of the NIA submitted that the delay in this case cannot be attributed to the prosecution in as much as the appellant had filed an application to plead guilty which was rejected by the learned Trial Court. Thereafter, there was a change in counsels and in any event, out of the more than 110 witnesses, 35



witnesses have already been examined and now only 11-12 witnesses are left to be examined as co-accused no.1 has already pled guilty.

21. It was further submitted that the Appellant also poses a flight risk as he will not be available for trial if he goes back to J&K. One of the protected witnesses who had given his statement has now turned hostile and one more protected witness is yet to be examined. The co-accused no.5 has also travelled several times to Pakistan. Thus, there is a possibility that the said witness may be influenced. The tripod test, according to her, therefore, is not satisfied.

22. Reliance has been placed on the following judgments by learned SPP appearing on behalf of the Respondent:

- i. NIA v. Zahoor Ahmad Shah Watali⁷**
- ii. Shaheen Welfare Association (Supra)**
- iii. Tanveer Ahmed Malik v. Union Territory of J&K passed by High Court of Jammu & Kashmir and Ladakh in W.P. (Crl.) No. 141/2021 on 07.02.2022.**

REJOINDER ON BEHALF OF THE APPELLANT

23. In rejoinder learned counsel for the appellant submits that the allegation of intimidation is merely a speculation or an aspersion. The appellant was in fact in custody when the statement of PW-X-1 was recorded and the said statement could have been given because of



lapse of memory. Further PW-X-1 has made significant disclosures regarding the circumstances under which his statement was obtained. PW-X-1 has explicitly indicated that his testimony, which alleges that he witnessed the appellant providing food to the accused, was not freely given. Instead, it was asserted that his statement was coerced and made under considerable pressure.

24. It is submitted with regard to the allegation that the appellant is “Doctor”, the same is not even a part of the chargesheet or the order on charge and such evidence cannot be relied upon at the time of consideration of bail as it is a matter of trial. It is argued that the allegations ought to be restricted to the chargesheet.

25. Learned counsel appearing on behalf of the appellant reiterated that the 8th grid reference is only points towards the neighbourhood and not specifically the appellant’s house. Even the CDR does not implicate the Respondent in any manner as the mobile number did not belong to the Appellant but his brother. The brother’s statement under Section 161 Cr.P.C. was recorded but he has not been cited as a witness in the present case.

26. It is, finally, argued that the charges were framed in early 2021 and there is no basis for arguing that the list of witnesses has been pruned in any manner and there has been substantial delay in the trial by the State and on these grounds, it is submitted that the appellant is entitled to bail.



ANALYSIS

27. Heard the learned counsel for the parties and perused the record.

28. The present appellant has been charged for offences punishable under Sections 18/19/39 of the UAPA. The said sections read as under:-

“18. Punishment for conspiracy, etc.—Whoever conspires or attempts to commit, or advocates, abets, advises or incites, directly or knowingly facilitates the commission of, a terrorist act or any act preparatory to the commission of a terrorist act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine.

19. Punishment for harbouring, etc.--Whoever voluntarily harbours or conceals, or attempts to harbour or conceal any person knowing that such person is a terrorist shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to imprisonment for life, and shall also be liable to fine:

Provided that this section shall not apply to any case in which the harbour or concealment is by the spouse of the offender.

39. Offence relating to support given to a terrorist organisation.

(1) A person commits the offence relating to support given to a terrorist organisation,—

(a) who, with intention to further the activity of a terrorist organisation, —

(i) invites support for the terrorist organization; and

(ii) the support is not or is not restricted to provide money or other property within the meaning of section 40; or

(b) who, with intention to further the activity of a terrorist organisation, arranges, manages or assists in arranging or managing a meeting which he knows is—



- (i) to support the terrorist organization; or
 - (ii) to further the activity of the terrorist organization; or
 - (iii) to be addressed by a person who associates or professes to be associated with the terrorist organisation; or
 - (c) who, with intention to further the activity of a terrorist organisation, addresses a meeting for the purpose of encouraging support for the terrorist organisation or to further its activity.
- (2) A person, who commits the offence relating to support given to a terrorist organisation under sub-section (1) shall be punishable with imprisonment for a term not exceeding ten years, or with fine, or with both.”

29. The evidence in support of the aforesaid charges relied upon by the prosecution is (1) a photo identification memo dated 09.10.2017 and confrontation memo dated 27.02.2024, whereby co-accused no. 1/Bahadur Ali @ Saifullah Mansoor had identified the photographs of the present appellant as well as co-accused no.5 while he was in judicial custody in the present FIR; (2) statement of two protected witnesses namely PW-X and PW-Y (3) CDR connecting the mobile number seized from him (Personal Search Memo dated 19.09.2017, D-98) belonging to the appellant's brother with certain numbers in Pakistan (4) a copy of a screenshot of True Caller application showing the appellant being described as “Zahur Ah (Dr)” (5) grid reference which was in possession of the co-accused no. 1/Bahadur Ali and the location of which was near the house of the present appellant.

30. It is pertinent to note that the co-accused no.1/Bahadur Ali stands convicted by the learned Trial Court for offences punishable under Section 120B of IPC r/w Sections 17,18,20 & 38 of the UAPA and substantive offences thereof, Sections 121-A and 489 (C) of the IPC Section 9B of the Explosives Act, 1884, Section 4 of the



Explosives Substances Act, 1908, Sections 7 and 10 read with Section 25 of the Arms Act, Section 14 of the Foreigners Act and Section 6 (IA) of the Wireless Act and has been sentenced to undergo RI for 10 years. The said co-accused no.1 had plead guilty and in his statement before the learned Special Court it was recorded as under:-

“In our village there is a masjid called Abu Baqr masjid. There in the year around 2008-2009, I met certain people namely Mohd. Bilal, Nawaz, Mohd. Khalid and Mohd. Yusuf. There these people used to show videos to small children including me showing alleged torture on the Muslims in Kashmir and they also used to motivate the children to go to Kashmir in the name of jihad. On being such motivated, I myself alongwith some other children agreed to join these people and go to Kashmir. Bilal continued to show such videos to the children including me, despite being scolded by the elders, and continued to motivate us to join him in the name of jihad. I myself and another child Nawaz! agreed to join Bilal. We were taken to Lahore bus stand and from there we were made to sit in a bus and the driver was instructed to allow us to get down only at Muzaffarabad and not at any other place. At Muzaffarabad one Mohsin met us. He made us to sit in a covered vehicle from which nothing from outside was visible and then locked the vehicle. We were taken to a camp at Shabainaal where there were small rooms. On the camp, "Aksai Maskar" was written. There in the camp for some days we were kept in isolation. After that we were allowed to mix with another ten occupants of the camp. There we were given training about handling of weapons including AK 47 and pistol. We were given training for around fifteen days. After some days, we were taken back to our home and after staying for some days at home, we were taken back to Muzaffarabad by the same mode in a covered vehicle. Thereafter we were taken to another camp which is called Tabook camp and here also we were given training about handling of weapons. We were again sent back to home for some days. We were called again at Tabook camp after some days. Then we were kept in Ta book camp for around two and two and half months and then we were told that we are ready to go to Kashmir. These camps were organised by Lashkar-e-Taiba and I joined /Lasbkar-e-



Taiba Tanzeem. I was selected to go to Kashmir alongwith Abu Saad and Abu Darda. We were taken in a vehicle and on the way we got down from the vehicle at a place called Reshiya for drinking water. Then we were taken to a place called Mandakuli "Dett". There we stayed for some days. There I met Abu Haider, Marshad and Anas. Abu Haider was incharge of that place. Abu Haider then provided us arms and ammunities and eatables for going to Kashmir. **Then I myself, Abu Saad and Abu Darda alongwith arms and ammunities and eatables were sent to Kashmir. Abu Haider and Marshad accompanied us for crossing the border. We were also provided with a wireless set and were asked to be in touch with Alfa 3. We were also given some GR points which we used to operate through OPS. Abu Saad used to lead us and we used to follow him. Then we all reached a village called Wadar. There since our food had finished, Darda and Saad went to the village for fetching food but they did not come back. When they did not come back, I came to know that firing had taken Place in the village. Abu Saad and Abu Darda got separated from me and I kept on looking for them for three - four days.** In those days, I realized that the situation in Kashmir was not as such as shown to us through videos in Pakistan. Then I talked to Alfa 3 and told him that there is nothing like in Kashmir as being told to us in Pakistan. **I requested Alfa 3 to send me back but I was told to complete the mission for which I am being send. I again contacted Alfa 3 and told him that I do not have food on which he told me that in the village I will meet a person namely Doctor who would arrange food for me, Since, Doctor did not meet me, in the evening I went to village Mukam. There I met three-four boys from whom I ask for food. One of them told me his name as Tanvir. I took food from one house and came back. Next day when I again went back to village Mukam, I met Zahoor and Nazir. I kept on taking food from Zahoor and Nazir for around seven days. I had told my name as Saifullah to Zahoor and Nazir and told them that I am from Pakistan.** I had a verbal dual with Alfa 3 and told him that we were told lies in Pakistan about situation in Kashmir. I could not meet Doctor. After some days, I kept my arms and ammution including AK47, magazine, UBG, grenade, GPS , map, wireless set, compass in the forest and came to the I village where I met Head Constable Gulab Khan and surrendered before him. I was taken to the police



station and after interrogation, **I got recovered the articles including AK47, magazine, UBG, grenade, GPS, map, wireless set, compass. I had also provided the GR numbers available with me to the police.**

I have made this statement voluntarily without any fear, force or coercion. I have made this statement before this court in Hindi and Urdu which has been translated & dictated by this court in my, presence and I have no objection over the same. I plead guilty with folded hands and request for the minimum punishment so that I can spend my remaining life with my family peacefully. My family is in a bad shape in Pakistan.”

(emphasis supplied)

31. In the aforesaid statement made by the co-accused no.1, it has come on record that the present appellant was not the “doctor” who was supposed to provide logistics to aforesaid co-accused no.1 as a member of LeT but it has come on record that he was given food by the Appellant and other co-accused no.5. Out of the two protected witnesses one has already been examined before the Trial Court as PW-X-1 and has not supported the case of the prosecution. It has been argued on behalf of the NIA that the said witness had turned hostile at the instance of the present appellant and therefore the other protected witness who has to be examined can also be influenced in the similar manner.

32. The next piece of evidence relied upon by the prosecution are the CDRs of the appellant and his brother. It is stated that the present appellant was using a mobile number 9596320141 (subscribed in the name of Hilal Ahmad Peer, his brother), 9107357520 and 9018902160 (subscribed in Appellant’s name). It is the case of the prosecution that the present appellant was in contact with Pakistani mobile numbers



923005332830 and 923165654493 through the aforesaid mobile number 9596320141 (registered in the name of appellant's brother). Although this mobile number belongs to the brother of the appellant who has not been cited as a witness but was seized from the Appellant during his personal search. It is pertinent to note that it is with respect to this number which is subscribed in the name of the appellant's brother, that the screenshot on the True Caller application shows the user as "Zahur Ah (Dr)".

33. So far as the grid location is concerned, it is a matter of record that the location of the same is near the house of the appellant although not exactly his house. In the supplementary chargesheet in para 17.32 it is stated as under:-

"Investigation has revealed that Bahadur Ali (A-1) after separation from his associates Abu Saad (A-2) and Abu Darda (A-3), had reached the 8th Grid Reference point near village Yahama Mukam as per direction of Alfa-3. Alfa-3 (Control Room of LeT bases in PoK) had also provided Bahadur Ali (A-1) a Grid Reference where he would meet a local person with code 'Doctor' for providing him support. When Bahadur Ali @ Saifullah Mansoor (A-1) was on his way to meet the said 'Doctor' he met three local persons near the Masjid towards a school in Yahama Mukam. One of these persons asked Bahadur Ali (A-1) his name and his antecedents. Bahadur Ali (A-1) introduced himself as 'Saifullah' from Pakistan and belonging to the LeT. These persons introduced themselves as Zahoor Ahmad Peer, Bashir and Tanveer. During the course of the investigation Bashir was identified as Nazir Ahmed Peer (A-5). Bahadur Ali (A-1) asked them to provide him food and a safe place of his stay. In response these persons provided him food and asked him stay at the rear of the Government School,



Yahama which was located on the edge of the village, near a forested area.”

34. This Court has also gone through the statement of the other protected witness PW-Y, recorded under Section 161 of the Cr.P.C. which was placed before this Court in a sealed envelope in which it is categorically stated that the present appellant alongwith co-accused no. 5 were helping co-accused no.1 knowing very well that he was a terrorist from Pakistan and it is further recorded therein that the appellant and co-accused no. 5 had informed him that *“Jihadis are Pakistanis fighting against India for us, for our community and freedom of Kashmir from India, we should support them”*.

35. As pointed out hereinabove, the present appellant has been charged under Section 19 of the UAPA, which provides for punishment of harbouring. Harbouring, although is not defined in UAPA, however, the same is defined in the IPC under Section 52A (now Section 2(13) BNS) which reads as under:

2. “ Definitions.

(13)— “harbour” includes supplying a person with shelter, food, drink, money, clothes, arms, ammunition or means of conveyance, or the assisting a person by any means, whether of the same kind as those enumerated in this clause or not, to evade apprehension;

36. It was argued on behalf of the Respondent-NIA that similar punishment for harbouring was provided in the erstwhile TADA under provisions of Section 3(4), which reads as under:

“ 3. Punishment for terrorist acts. –



3(4) Whoever harbours or conceals, or attempts to harbour or conceal, any terrorist shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.”

37. Reliance was placed on a judgment of Hon’ble Supreme Court in *Kalpnath Rai (supra)* wherein while interpreting Section 3(4) of the TADA, the Hon’ble Supreme Court observed and held as under:

“50. Be that as it may, we would refer to the expression "harbor" as understood in IPC, for, TADA is essentially a penal statute and hence the meaning attached to the words in the IPC can have a bearing on the words used in TADA, unless they are differently defined in the Code.

51. Section 52-A of Indian Penal Code defines the word "harbor" as including:

“Supplying a person with shelter, food, drink, money, clothes, arms, ammunition or means of conveyance, or the assisting a person by any means, whether of the same kind as those enumerated in this section or not to evade apprehension.”

52. Sections 136 and 312 of IPC are the provisions incorporating two of the offences involving "harbor" in which the common words used are "whoever knowing or having reason to believe. Another offence in the Penal Code involving "harbor" is Section 157 wherein also the words "whoever harbors knowing that such person etc." are available. It was contended that mens rea is explicitly indicated in the said provisions in the Penal Code whereas no such indication is made in Section 3(4) of TADA and therefore, the element of mens rea must be deemed to have been excluded from the scope of Section 3(4) of TADA.

53. The word "harbors" used in TADA must be understood in its ordinary meaning as for penal provisions. In Black's Law Dictionary its meaning is shown as "to afford lodging to, to shelter, or to give a refuge to". Quoting from *Susnjari v. U.S.*, 27 F.2d 223, 224, the celebrated



lexicographer has given the meaning of the word harbor as "receiving clandestinely and without lawful authority a person for the purpose of so concealing him that another having a right to the lawful custody of such person shall be deprived of the same." In the other dictionaries the meaning of the said word is delineated almost in the same manner as above. **It is, therefore, reasonable to attribute a mental element (such as knowledge that the harboured person was involved in a terrorist act) as indispensable to make it a penal act.** That apart, there is nothing in the Act, either expressly or even by implication, to indicate that mens rea has been excluded from the offence under Section 3(4) of TADA.

54. There is a catena of decisions which has settled the legal proposition that unless the statute clearly excludes mens rea in the commission of an offence the same must be treated as essential ingredient of the criminal act to become punishable. (State of Maharashtra v. Mayer Hans George, Nathulal v. State of M.P.6.

55. If Section 3(4) is understood as imposing harsh punishment on a person who gives shelter to a terrorist without knowing that he was a terrorist such an understanding would lead to calamitous consequences. Many an innocent person, habituated to offer hospitality to friends and relatives or disposed to zeal of charity, giving accommodation and shelter to others without knowing that their guests were involved in terrorist acts, would then be exposed to incarceration for a long period.

56. For all the above reasons we hold that mens rea is an essential ingredient for the offence envisaged in Section 3(4) of TADA.

57. On the above understanding of the legal position we may say at this stage that there is no question of A-12 - company to have had the mens rea even if any terrorist was allowed to occupy the rooms in Hotel Hans Plaza. The company is not a natural person. We are aware that in many recent penal statutes, companies or corporations are deemed to be offenders on the strength of the acts committed by persons responsible for the management or



affairs of such company or corporations e.g. Essential Commodities Act, Prevention of Food Adulteration Act etc. But there is no such provision in TADA which makes the company liable for the acts of its officers. Hence, there is no scope whatsoever to prosecute a company for the offence under Section 3(4) of TADA. The corollary is that the conviction passed against A-12 is liable to be set aside.

58. A-7 (Sabu V. Chacko) the Regional Manager of A-12 company has been convicted of the offence under Section 3(4) on the strength of a finding that he had harboured A-6 Ahmed Mansoor in Hotel Hans Plaza, New Delhi on different days during a period between February and October 1993. **For proving the said offence against him prosecution should have established four facts. They are: (1) A-6 Ahmed Mansoor had stayed in the Hotel; (2) Such stay was arranged at the behest of A-7; (3) A-6 himself was a terrorist; and (4) A-7 knew that A-6 was a terrorist.**

(emphasis supplied)

38. A perusal of the definition of ‘harbouring’ under Section 52A IPC read with Section 19 of UAPA would show that there are various elements that could constitute ‘harbouring’ including:

- Concealment of a terrorist;
- Attempt to conceal or harbour a terrorist with knowledge that the person is a terrorist;
- Providing shelter;
- Providing food & drinks;
- Providing finances;
- Providing arms and ammunition.
- Or any such similar support, in order to ensure that the person is not apprehended.



Such acts would be illegal. The UAPA does not define ‘harbouring’ but uses the said term in Section 19. Thus, the definition of ‘harbour’ under IPC has to be read together with Section 19 of UAPA.

39. In the present case, what has to be examined is (1) whether accused no.1 was staying in the village of the Appellant, (2) whether that stay was arranged by the Appellant, (3) whether accused no.1 was a terrorist and that the (4) appellant knew that he was a terrorist. The following facts are therefore relevant:

39.1. That the co-accused no.1 was staying at the village of the present appellant at a location which has come on record by way of the statement of the protected witness PW-Y as well as the statement of co-accused no.1 recorded before the learned Trial Court. It is also matter of record, that accused no.1 was apprehended from the village of the appellant.

39.2 That the stay of accused no.1 at the appellant’s village was arranged by the present appellant and co-accused no. 5 has again been brought on record by the testimony of protected witness PW-Y who is yet to be examined.

39.3 Co-accused no.1 in his statement has himself stated the fact that he was a terrorist and a member of LeT and had infiltrated into India to carry out the activities of LeT.



39.4 Now the fact that Bahadur Ali @Saifullah Mansoor was a terrorist was in the knowledge of the appellant has also come on record by way of testimony of protected witness PW-Y. Even co-accused no.1 in his statement has clearly stated that he had introduced himself as Saifullah from Pakistan and the residents of the said area would be well aware about Pakistani infiltrators coming into India to carry out terrorist activities. Further, it has come on record that co-accused no.1 i.e Bahadur Ali was heavily armed and AK-47 assault rifle, ammunition, hand grenades, wireless set with antenna, map sheets, matrix sheets, grenade launcher and night vision device (Seizure Memo dated 25.07.2016, D-8) which were recovered at his instance. Thus, *prima facie*, the present appellant knew that co-accused no.1 was a terrorist.

39.5 The statement given by co-accused no.1 is also corroborated by the fact that two of his associates namely Abu Saad and Abu Darda, who had infiltrated into India alongwith him were killed in an encounter during a search operation conducted by the Army and J&K police on 14.02.2017.

39.6 It is pertinent to note that the present appellant alongwith co-accused no. 5 had moved an application pleading guilty to the charges framed and on 31.03.2022, separate statements of the appellant and co-accused no.5 were recorded by the learned Trial Court. In the order dated 31.03.2022, it has been recorded that in their statements they have stated that their only fault was that they have provided food and



shelter to co-accused no.1 i.e Bahadur Ali @Saifullah Mansoor on gun point. Considering the fact that the said plea was not voluntary, the learned Special Judge rejected the same. The fact that whether the shelter given to co-accused no.1 was under duress or voluntary is a matter of trial. However, the fact remains that this statement also corroborates the evidence placed on record by the NIA with respect to co-accused no. 1 being provided food and shelter by the present appellant.

40. Harboursing of terrorists may not be seen to be a serious offence, especially when it is claimed that the same is under duress or coercion. However, a deeper analysis would reveal that harboursing is not an innocent act. It is an act or a series of acts which leads to creation of 'Safe Havens' for terrorists thereby endangering the safety and security of citizens. Persons who harbour terrorists lend support to such organisations like LeT and provide them a 'veil of Secrecy', thereby temporarily integrating them into society, only to let them strike at opportune moments. Harboursing also leads to disturbing society in general and legitimises such unlawful activity, if left unchecked. Providing of food and shelter with a safe place to stay to persons associated with terrorist organisations, encourages terrorism over a long period.

41. Thus, harboursing of terrorists has been treated as a serious offence under the UAPA under Section 19, which can be punished with minimum three years which can extend to life imprisonment.



42. The Appellant has been in judicial custody since 19.09.2017 and a period of more than 7 years has passed and as per the appellant out of a total of 100 plus witnesses only 35 have been examined. However, the learned SPP for the NIA submitted that they only intend to examine 12 witnesses out of the total witnesses cited by the prosecution.

43. The Hon'ble Supreme Court in *Sheikh Javed Iqbal (supra)* has held that even in case of interpretation of a stringent penal statute, the Constitutional Court has to lean in favour of the accused in case of long incarceration. However, it has been also observed that in the given facts of a particular case, the Constitutional Court may decline the grant of bail.

44. In the considered opinion of this Court, co-accused no.1 was a Pakistani national and infiltrated into India with arms and ammunition to conduct a terrorist act. The present appellant, as per the evidence at this stage, continued to harbour him.

45. Although, in the present case, the appellant has not been shown to have been involved in any other similar incident in the past of harbouring a terrorist. However, the fact is that the assistance to the co-accused no.1 in the present case was not a single instance as recorded in the statement of protected witness PW-Y as well as in the statement of co-accused no.1, the present appellant along with the co-



accused no. 5 continued to support him. This Court cannot ignore the aforesaid evidence which have been placed on record and in these circumstances, the satisfaction as required under Section 43D (5) of the UAPA cannot be arrived at. In the considered opinion of this Court the accusation made in the present FIR and the report under Section 173 Cr.P.C. is *prima facie* true. So far as, the trial is concerned, out of 110 witnesses, 35 witnesses have already been examined. The learned SPP had stated that only 11-12 witnesses are to be now examined as co-accused no.1 has already pleaded guilty and therefore, there is no requirement to examine all the witnesses.

46. In these circumstances, it is directed that the learned Trial Court shall conduct day to day trial and complete the same within a period of 4 months from today. In case, for any reason, if the Trial is not completed within a period of 6 months, the appellant will be at liberty to file fresh application for bail before the learned Trial Court, which shall be decided in accordance with law.

47. The appeal is dismissed with the aforesaid direction.

48. Pending application(s), if any, also stands disposed of.

49. Needless to state, nothing mentioned hereinabove is an opinion on the merits of the case and any observations made are only for the purpose of the present appeal.



50. Copy of the judgment be sent to the concerned Jail Superintendent for necessary information and compliance.

51. Copy of the judgment be sent to the concerned learned Trial Court for necessary information and compliance.

AMIT SHARMA, J.

PRATHIBA M. SINGH, J.

FEBRUARY 18,2025/sn/bsr