***IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on : 24th October, 2016

% **Date of Decision: 04th November, 2016**

Crl.M.A.No.15239/2016 in

\+ **CRL.A. No.715/2013**

MAHENDER YADAV ..... Appellant

Through: Mr. Vikas Singh, Senior Advocate with Mr. Vikas Arora, Mr. Radhika Arora, Mr. Manish Sharma, Advocates.

versus

CENTRAL BUREAU OF INVESTIGATION ... Respondent

Through: Mr. R.S. Cheema, Senior Advocate (SPP) with Mr. D.P. Singh, Ms. Tarannum Cheema, Ms. Hiral Gupta, Mr. Manu Mishra & Mr. Harinder Bains, Advocates for CBI.
Mr. H.S. Phoolka Senior Advocate with Ms. Kamna Vohra, Ms. Shilpa Dewan, Advocates for the Complainant.
Mr.Gurbaksh Singh & Mr. Lakhmi Chand, Advocates for victim Jagsher Singh.

Crl.M.A.No.15233/2016 in

\+ **CRL.A. No.753/2013**

KRISHAN KHOKAR ..... Appellant

Through: Mr. Vikas Arora, Ms. Radhika Arora & Mr. Manish Sharma, Advocates.

versus

C B I ..... Respondent

Through: Mr. R.S. Cheema, Senior Advocate (SPP) with Mr. D.P. Singh, Ms. Tarannum

Cheema, Ms. Hiral Gupta, Mr. Manu Mishra, Mr. Harinder Bains, Advocates for CBI.
Mr. H.S. Phoolka Senior Advocate with Ms. Kamna Vohra & Ms. Shilpa Dewan, Advocates for the Complainant.
Mr.Gurbaksh Singh & Mr. Lakhmi Chand, Advocates for victim Jagsher Singh.

Crl.M.A.No.15236/2016 in

\+ **CRL.A. 1099/2013**

STATE THROUGH C B I ..... Appellant

Through: Mr. R.S. Cheema, Senior Advocate with Mr. D.P. Singh, Ms. Tarannum Cheema, Ms. Hiral Gupta, Mr. Manu Mishra, Mr. Harinder Bains, Advocates for CBI.
Mr. H.S. Phoolka Senior Advocate with Ms. Kamna Vohra & Ms. Shilpa Dewan, Advocates for the Complainant.
Mr.Gurbaksh Singh & Mr. Lakhmi Chand, Advocates for victim Jagsher Singh.

versus

SAJJAN KUMAR & ORS ..... Respondents

Through: Mr. Salman Khurshid, Senior Advocate with Mr. Anil Kumar Sharma, Mr. S.A. Hashmi, Mr. Apoorav Kumar Sharma, Mr. Salman Hashmi, Mr. Anuj Sharma, Advocates for Respondent No. 1.

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL
HON'BLE MR. JUSTICE P.S.TEJI

JUDGMENT

Crl.M.A.No.15239/2016 in CRL.A. No.715/2013
Crl.M.A.No.15233/2016 in CRL.A. No.753/2013
Crl.M.A.No.15236/2016 in CRL.A. 1099/2013

Gita Mittal and P.S. Teji JJ.

> ***"All we would ask is that those who criticize us will remember that, from the nature of our office, we cannot reply to their criticism. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication. Exposed as we are to the winds of critic, nothing which is said by this person or that nothing which is written by this pen or that, will deter us from doing what we believe is right; nor, I would add, from saying what the occasion requires provided that it is pertinent to the matter in hand. Silence is not an option when things are ill done."***
>
> - *(Lord Denning in R. v. Metropolitan Police Commissioner ex p. Blackburn (1968) 2 All England Reporter 319)*

1. By the following judgment we propose to decide applications filed under Section 482 of the CrPC, one by Sajjan Kumar being Crl.M.A. 15236/2016 in Crl.A. 1099/2013 seeking recusal by one of us (*P.S. Teji J.*) from hearing the appeal and applications filed by Krishan Khokhar and Mahender Yadav being Crl.M.A. 15233/2016 in Crl.A. 753/2013 and Crl.M.A. 15239/2016

in Crl.A. 715/2013 respectively seeking transfer of the matters to another bench of which one of us (*P.S. Teji J.*) is a member.

We propose to decide the issues pressed before us in the following manner :

Per Gita Mittal and P.S. Teji, JJ.

I. ***Result of trial and brief history of the appeal*** *(paras 2 to 19)*

II. ***Judicial duty*** *(paras 20 to 37)*

III. ***Submissions of the applicants*** *(paras 38 to 39)*

IV. ***Whether it is sufficient to merely allege an apprehension of bias that therefore, justice will not be done and judge must recuse himself from hearing the case?*** *(paras 40 to 52)*

V. ***Reasonable apprehension of bias – tests*** *(paras 53 to 72)*

VI. ***Consideration of the applications on merits*** *(para 73)*

-***Per P.S. Teji, J.*** *(paras 74 to 117)*

- ***Per Gita Mittal, J.*** *(paras 118 to 214)*

(i) ***Grounds on which the applications are premised*** *(paras 119 to 130)*

(ii) ***Order on anticipatory bail application dated 15th February, 2010 – whether a binding adjudication on merits*** *(paras 131 to 139)*

(iii) ***Whether the order dated 15th February, 2010 disposing the applications for anticipatory bail is a final adjudication binding even on the trial judge or any other court seized of the matter at a later stage*** *(paras 140 to 156)*

I. Result of trial and brief history of the appeal

2. Six persons had been sent up for trial in the trial case bearing SC No.26/10 arising out of RC 24/2005-SIU-1/SIC-1/CBI/N.D., namely, Sajjan Kumar, Balwan Khokhar, Mahender Yadav, Capt. Bhagmal, Girdhari Lal and Krishan Khokar.

3. In the same trial, by a common judgment dated 30th April, 2013, the trial court has convicted them for separate offences and they have been differentially sentenced by the order dated 9th of May 2013. For expediency, we extract hereunder the undisputed tabulation as handed over by Mr. R.S. Cheema, learned Senior Counsel for the CBI setting out the convictions and sentences :

No.	Accused	Charged U/s	Conviction	Sentence
A-1	**Sajjan Kumar** **Crl. Appeal No.1099/2013** ***(applicant in Crl.M.A No 15236/2016)***	1. U/s 120B r/w 147, 148, 302, 395, 427, 436, 449, 153A, 295, 505 IPC 2. U/s 109 r/w 147, 148, 302, 395, 427, 436, 449, 153A, 295, 505 IPC 3. A separate charge for offence punishable under Section 153A. 4. A separate charge for offence punishable under Section 505.	Acquitted	Acquitted
A-2	Balwan Khokar Crl. Appeal No.861/2013	1. U/s 120B r/w 147, 148, 302, 395, 427, 436, 449, 153A, 295, 505 IPC 2. U/s 147 IPC 3. U/s 148 IPC 4. U/s 302 r/w 149 IPC 5. U/s 427 r/w 149 IPC	U/s 147, 148, 302 r/w 149 IPC.	***Life imprisonment with fine of Rs.1,000/- and on default of the same six months rigorous imprisonment***. Further awarded sentence of 2 years and 3 years RI U/s

		6. U/s 436 r/w 149 IPC 7. U/s 449 r/w 149 IPC 8. U/s 395 r/w 149 IPC 9. U/s 295 r/w 149 IPC		147 & 148 IPC with fine of Rs.1000/- under each head on default of payment of fine, six months imprisonment.
A-3	**Mahender Yadav** **Crl. Appeal No.715/2013** ***(applicant in Crl.M.A No 15239/2016)***	1. U/s 120B r/w 147, 148, 302, 395, 427, 436, 449, 153A, 295, 505 IPC 2. U/s 147 IPC 3. U/s 148 IPC 4. U/s 302 r/w 149 IPC 5. U/s 427 r/w 149 IPC 6. U/s 436 r/w 149 IPC 7. U/s 449 r/w 149 IPC 8. U/s 395 r/w 149 IPC 9. U/s 295 r/w 149 IPC	U/s 147, 148 IPC.	RI of 2 years and 3 years u/s 147 & 148 IPC with fines of Rs.1000/- under each head on default of payment of fine, six months imprisonment.
A-4	Capt. Bhagmal Crl. Appeal No.851/2013	1. U/s 120B r/w 147, 148, 302, 395, 427, 436, 449, 153A, 295, 505 IPC 2. U/s 147 IPC 3. U/s 148 IPC 4. U/s 302 r/w 149 IPC 5. U/s 427 r/w 149 IPC 6. U/s 436 r/w 149 IPC 7. U/s 449 r/w 149 IPC 8. U/s 395 r/w 149 IPC 9. U/s 295 r/w 149 IPC	U/s 147, 148, 302 r/w 149 IPC.	***Life imprisonment with fine of Rs.1,000/- and on default of the same six months rigorous imprisonment.*** Further awarded sentence of 2 years and 3 years RI U/s 147 & 148 IPC with fine of Rs.1000/- under each head on default of payment of fine, six months imprisonment.
A-5	Girdhari Lal Crl. Appeal No.710/2014	1. U/s 120B r/w 147, 148, 302, 395, 427, 436, 449, 153A, 295, 505 IPC 2. U/s 147 IPC 3. U/s 148 IPC	U/s 147, 148, 302 r/w 149 IPC.	***Life imprisonment with fine of Rs.1,000/- and on default of the same six months rigorous imprisonment.***

		4. U/s 302 r/w 149 IPC 5. U/s 427 r/w 149 IPC 6. U/s 436 r/w 149 IPC 7. U/s 449 r/w 149 IPC 8. U/s 395 r/w 149 IPC 9. U/s 295 r/w 149 IPC		Further awarded sentence of 2 years and 3 years RI U/s 147 & 148 IPC with fine of Rs.1000/- under each head on default of payment of fine, six months imprisonment.
A-6	**Krishan Khokar** **Crl. Appeal No.753/2013** ***(applicant in Crl.M.A No 15233/2016)***	1. U/s 120B r/w 147, 148, 302, 395, 427, 436, 449, 153A, 295, 505 IPC 2. U/s 147 IPC 3. U/s 148 IPC 4. U/s 302 r/w 149 IPC 5. U/s 427 r/w 149 IPC 6. U/s 436 r/w 149 IPC 7. U/s 449 r/w 149 IPC 8. U/s 395 r/w 149 IPC 9. U/s 295 r/w 149 IPC	U/s 147, 148 IPC.	RI of 2 years and 3 years u/s 147 & 148 IPC with fines of Rs.1000/- under each head on default of payment of fine, six months imprisonment.

4. The above tabulation shows that Crl.A.Nos.715/2013 and 753/2013 stand filed by Mahender Yadav and Krishan Khokhar who have been sentenced merely to rigorous imprisonment for two years and three years for commission of the offences under Sections 147 and 148 with fine which sentence stands suspended.

5. As one of the persons accused, Sajjan Kumar was acquitted, the CBI had filed Crl.L.P.No.385/2013 wherein leave to appeal was granted vide order dated 27th August, 2013 and was converted to Crl.A.No.1099/2013 assailing the acquittal.

6. Apart from the above appeals, Crl.A.No.831/2013 has been filed by victims Jagdish Kaur & Anr. against Balwan Khokhar & Ors.

7. Inasmuch as these appeals arise from a common trial and assail a common judgment, the Bench as previously constituted (*Sanjiv Khanna, Ashutosh Kumar, JJ.)* passed an order dated 26th May, 2015 in Crl.M.A.No.6720/2015 in Crl.Appeal.No.851/2013 filed by Capt. Bhagmal directing all the appeals to be listed on 1st July, 2015. The operative direction reads thus :

> *"Let this application be listed on 1st July, 2015, after the summer vacations.* ***Connected appeals will be also listed on the same date and Court notice will be issued to the counsel appearing in the said appeals****."*

8. Thereafter, the appeals were listed before the Bench constituting *Sanjiv Khanna and R.K. Gauba, JJ.* on 1st July, 2015 whereupon the appeals were directed to be re-listed on 21st July, 2015.

9. On 21st July, 2015, the same Bench ordered the matters to be shown in the Regular List in the week commencing 10th of August 2015. We extract hereunder the relevant portion of the order :

> *"**Crl.A.Nos.715/2013, 753/2013, 831/2013, 710/2014 & 1099/2013***
>
> *To be shown in 'Regular List (Part-A)' at the end of the Board in the week commencing 10th August, 2015."*

10. By the roster allocation dated 30th June, 2016 by Hon'ble the Chief Justice, there was change of roster and criminal appeals were

directed to be listed before the Bench constituting of *Gita Mittal, R.K. Gauba, JJ* with effect from 7th July, 2016.

11. In Crl.A.No.851/2013, the appellant Capt. Bhagmal (Retired) filed Crl.M.B.No.1284/2016 which was listed before the previous constitution of this Bench (*Gita Mittal, R.K. Gauba, JJ.*) seeking suspension of the sentence imposed upon him *inter alia* on the following averments :

> *"3. That it will be pertinent to submit here that the applicant/appellant is a senior citizen, aged about 88 years and he has been suffering from enlarged prostrate along with various other ailments like severe back pain, deaf ears and he has been getting treatment from jail Hospital as well as DDU Hospital and his condition deteriorating further day by day and as such he needs to stay under the care of his loved ones i.e. family members so that his day to day needs including the medical treatment can be looked after and he can die in peace."*

12. By the common order dated 20th July, 2016, the Bench (constituted as above) directed listing of all the appeals and connected matters for directions on 8th August, 2016.

13. Upon the listing of all these matters on 8th August, 2016 before the same Bench (*Gita Mittal, R.K. Gauba, JJ.*), the following common order was recorded in all these appeals (Crl.A.Nos.715/2013, 753/2013, 851/2013, 861/2013, 710/2014, 1099/2013, 831/2013) in presence of counsel for Mahender Yadav, Krishan Khokhar and Sajjan Kumar:

"O R D E R

% 08.08.2016

*1. The appellant Girdhari Lal, appellant in **Crl.Appeal No. 710/2014** was represented by Mr. Rajneesh Bhaskar, counsel assigned by the Delhi High Court Legal Services Committee. The order sheet reflects that he has not appeared in the case on several dates of hearing. He is not present today as well. A direction is issued to the Secretary, Delhi High Court Legal Services Committee to appoint another counsel to represent him who shall collect the paper book from the Registry and be ready with his arguments in the matter on the next date.*

2. The Registry shall issue production warrants of Girdhari Lal for the next date.

3. All these appeals arise from a common trial and assail the judgment dated 30th April, 2013. It is obvious therefore, that the paper book will be common in all these matters.

4. A paper book stands prepared in Crl.Appeal No. 715/2013. It is agreed that this paper book in Crl.Appeal No. 715/2013 shall be read in all appeals.

5. Mr. R.N. Sharma and Mr. Rakesh Vatsa, counsels for respondent in Crl.Appeal Nos. 851/2013 & 861/2013 submit that they have already collected the paper book.

6. The Registry shall furnish the copy of the paper books to Mr. Anil Sharma or his representative who has filed the vakalatnama for the respondent in Crl.Appeal No. 1099/2013 as requested. The same shall also be furnished to the counsel to whom the case is assigned by the Secretary, Delhi High Court Legal Services Committee in Crl.Appeal No.710/2014.

7. Additionally, a direction is issued to Ms. Kamna Vohra, Advocate in Crl.Appeal No. 831/2013 to supply a copy of the appeal to Mr. Anil Kumar Sharma, Advocate within one week from today.

8. Similarly, the State shall furnish a copy of its appeal bearing ***Crl.Appeal No. 1099/2013*** *to Mr. Anil Kumar Sharma, Advocate within one week from today.*

9. With the consent of the parties, it is directed that hearing in these matters shall commence on 5th September, 2016.

List these appeals at the end of the Board in the category of "After Notice Miscellaneous Matters".

Crl.M.(Bail) No. 1284/2016 in Crl.A.No. 851/2013

Heard.

No grounds for suspension of sentence are made out. ***The appeal itself has been set down for hearing.***

The application is dismissed."

14. It may be noted that the appeal itself was set down for hearing and Crl.M.B.No.1284/2016 which was filed by Capt. Bhagmal for suspension of sentence was dismissed. We have noted above that the appellant had pleaded in para 3 of his application for suspension of sentence that he was 88 years of age. This old appellant had stated that he was in custody since 30th of April 2013 when the impugned judgment was passed.

15. On the 5th of September 2016, the Division Bench (*Gita Mittal, R.K. Gauba, JJ.*) was informed by counsels that some of the exhibits have not been made part of the paper book and liberty was given to the counsels to inform the Registrar (Appellate), in writing, within three days, about such exhibits that are not part of the paper book. The Registry was directed to prepare a

supplementary paper book and ensure that the same were furnished to all the counsels.

16. In the meantime, by the order dated 5th September, 2016, Hon'ble the Chief Justice was pleased to reconstitute the Bench with effect from 7th September, 2016 and it was directed that, i*nter alia*, criminal appeals would be listed before the Bench as presently constituted (*Gita Mittal, P.S. Teji, JJ.*).

17. As such these appeals were listed before us on the 19th September, 2016. This was at a stage when the paper books were ready and the appeals were ripe for hearing. On this date, Mr. Anil Kumar Sharma, learned counsel (appearing for Sajjan Kumar in Crl.A.No.1099/2013) prayed for an adjournment of the case for the reason that he wished to file an application seeking recusal from hearing of these matters by one of us (my learned Brother, P.S. Teji, J.). In as much as the appearance on 10th September, 2011 in the case is pertinent, we extract hereunder the complete order dated 19th September, 2016 :

> **"+** ***CRL.A. No.715/2013***
>
> *MAHENDER YADAV ..... Appellant*
> *Through: Mr. Dinesh Mathur, Senior Advocate with Mr. Vikram Panwar, Mr. Atul Guleria, Ms. Kajal Dalal, Advocates.*
>
> *versus*
>
> *CBI .. Respondent*
> *Through: Mr. R.S. Cheema, Senior Advocate with Mr. D.P. Singh,*

Ms. Tarannum Cheema, Ms. Hiral Gupta, Mr. Manvendra Singh, Mr. Harinder Singh, Advocates for CBI Mr. Gurbaksh Singh, Mr. Lakhmi Chand, Advocate for the victim Jagsher Singh

\+ ***CRL.A. No.753/2013***

KRISHAN KHOKAR ..... Appellant

Through: with Mr. Vikram Panwar, Mr. Atul Guleria, Ms. Kajal Dalal, Advocates.

versus

C B I ..... Respondent

Through: Mr. R.S. Cheema, Senior Advocate with Mr. D.P. Singh, Ms. Tarannum Cheema, Ms. Hiral Gupta, Mr. Manvendra Singh, Mr. Harinder Singh, Advocates for CBI Mr. Gurbaksh Singh, Mr. Lakhmi Chand, Advocate for the victim Jagsher Singh

\+ ***CRL.A. 831/2013***

JAGDISH KAUR & ANR. ..... Appellant

Through: Ms. Kamna Vohra, Advocate for Appellant No.1.

versus

BALWAN KHOKHAR & ORS. ..... Respondent

Through: Mr. R.S. Cheema, Senior Advocate with Mr. D.P. Singh,

Ms. Tarannum Cheema, Ms. Hiral Gupta, Mr. Manvendra Singh, Mr. Harinder Singh, Advocates for CBI Mr. Anil Kumar Sharma, Mr. Apoorv Kumar Sharma, Advocate for Respondent No.2. Mr. Gurbaksh Singh, Mr. Lakhmi Chand, Advocate for the victim Jagsher Singh.

\+ ***CRL.A. 851/2013***

CAPT. BHAGMAL RETD ..... Appellant
Through: Mr. R.N. Sharma, Adv.
versus
C B I ..... Respondent
Through: Mr. R.S. Cheema, Senior Advocate with Mr. D.P. Singh, Ms. Tarannum Cheema, Ms. Hiral Gupta, Mr. Manvendra Singh, Mr. Harinder Singh, Advocates for CBI Mr. Gurbaksh Singh, Mr. Lakhmi Chand, Advocate for the victim Jagsher Singh

\+ ***CRL.A. 861/2013 & Crl.M.A. No.710/2014***

BALWAN KHOKHAR ..... Appellant
Through: Mr. Rakesh Vatsa, Ms. Poonam Bhardwaj, Advocates
versus
C B I ..... Respondent
Through: Mr. R.S. Cheema, Senior Advocate with Mr. D.P. Singh, Ms. Tarannum Cheema, Ms. Hiral Gupta, Mr. Manvendra Singh, Mr. Harinder Singh, Advocates for CBI Mr.

Gurbaksh Singh, Mr. Lakhmi Chand, Advocate for the victim Jagsher Singh.

\+ ***CRL.A. 710/2014***

GIRDHARI LAL ..... Appellant
Through: Mr. Aditya Vikram, Advocate

versus

STATE THROUGH CBI ..... Respondent
Through Mr. R.S. Cheema, Senior Advocate with Mr. D.P. Singh, Ms. Tarannum Cheema, Ms. Hiral Gupta, Mr. Manvendra Singh, Mr. Harinder Singh, Advocates for CBI Mr. Gurbaksh Singh, Mr. Lakhmi Chand, Advocate for the victim Jagsher Singh

\+ ***CRL.A. 1099/2013***

STATE THROUGH C B I..... Appellant
Through: Mr. R.S. Cheema, Senior Advocate with Mr. D.P. Singh, Ms. Tarannum Cheema, Ms. Hiral Gupta, Mr. Manvendra Singh, Mr. Harinder Singh, Advocates for CBI Mr. Gurbaksh Singh, Mr. Lakhmi Chand, Advocate for the victim Jagsher Singh.

versus

SAJJAN KUMAR & ORS ..... Respondents
Through: Mr. Anil Kumar Sharma, Mr. Apoorv Kumar Sharma,

Advocate for Respondent No. 1. Mr. Dinesh Mathur, Senior Advocate with Mr. Atul Guleria, Advocate for Respondent No. 5. Mr. Vikram Panwar, Ms. Kajal Dalal, Advocates for Respondent No. 6. Mr. Gurbaksh Singh, Mr. Lakhmi Chand, Advocate for the victim Jagsher Singh.

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL
HON'BLE MR. JUSTICE P.S. TEJI

O R D E R

% 19.09.2016

1. It is submitted by ***Mr. Anil Kumar Sharma****, learned counsel appearing for* ***Shri Sajjan Kumar*** *(in Crl. A. No.1099/2013) that the appeal may be adjourned as he* ***wishes to file an application seeking recusal from hearing of these matters by one of us (Justice P.S. Teji)****.*

2. We have querried the other counsels, who are appearing for other private parties with regard to any objection on hearing these matters by this Bench. The counsels appearing for all other private parties in this bunch of appeals have no objection if this Bench continues to hear these appeals. Mr. Dinesh Mathur, Senior Advocate and Mr. R.N. Sharma, Advocates have specifically stated that hearing in the matter should commence.

3. We had noted on earlier occasions that delay has been occasioned in adjudication of these matters, which have their genesis in offences of the year 1984. Certainly a quietus needs to be brought to the entire litigation at the earliest. It has been repeatedly submitted on behalf of Capt. Bhagmal, Appellant in Crl.A. No. 851/2013 that he is aged and mentally incapacitated person. For this reason, Mr. R.N.

Sharma, learned counsel has made repeated prayers for expeditious hearing in these appeals. It was keeping these gamut of facts, which had persuaded this court to fix all these matters for hearing.

4. However, keeping the interest of justice in mind and the prayer made on behalf of Mr. Sajjan Kumar through his counsel Mr. Anil Kumar Sharma, Advocate we grant one opportunity to him to make such application as he may deem fit and proper.

5. It may be noted that this is the only Bench in the court which, at present, is hearing such criminal appeals. Postponement of hearing or recusal from this Bench may result to the delay in adjudication of these appeals.

6. Mr. Anil Kumar Sharma, learned counsel appearing for the appellant in Crl. A. No.1099/2013 seeks three days time to file an application. The application shall be taken on record, only if the same is filed within three days from today. An advance copy of the application be served upon the learned counsel for the Sate, who may file reply, if any, before the next date of hearing.

7. Renotify on 3rd October 2016."

(Emphasis supplied)

18. Thereafter, on 22nd September, 2016, Crl.M.A.No.15236/2016 was filed by Sajjan Kumar in Crl.A.No.1099/2016 seeking recusal from hearing of the appeals by my ld. Brother (P.S. Teji, J.). Crl.M.A.No.15233/2016 was filed by Krishan Khokhar in Crl.A.No.753/2016 and Crl.M.A.No.15239/2016 was filed by Mahender Yadav in Crl.A.No.715/2013, both on the 23rd September, 2016, seeking transfer of the cases from this Bench as presently constituted.

19. The CBI has filed replies in opposition. The applicants have filed rejoinders supporting their pleas.

II. Judicial duty

20. We had pondered over how to proceed when these applications were placed before us. To succumb to the prayer made would be giving in to unjustified and irresponsible allegations having no basis on record.

21. We have been guided in the course adopted by us by the decision dated 4th October, 2007 in Crl.M.No.9955/2007 in ***W.P.(Crl.)No.796/2007, Court on its own Motion v. State***. This decision was rendered on an application seeking discharge of one of the members of the Division Bench to recuse from hearing the above matter which request was rejected holding that there was no factual basis or any foundation for nurturing any apprehension of bias, leave aside any reasonable basis therefore, which element was altogether missing. It was also observed that no inference or possibility or likelihood apprehension of bias could be drawn from the averments in the application. It is the following solemn reminder of the duty of judge in this decision which persuades us to pen our judgments:

> *"28. The path of recusal is very often a convenient and a soft option. This is especially so since a Judge really has no vested interest in doing a particular matter. However, the oath of office taken under Article 219 of the Constitution of India enjoins the Judge to duly and faithfully and to the best of his knowledge and judgment,*

perform the duties of office without fear or favor affection or ill will while upholding the constitution and the laws. ***In a case, where unfounded and motivated allegations of bias are sought to be made with a view of forum hunting/Bench preference or brow-beating the Court, then, succumbing to such a pressure would tantamount to not fulfillling the oath of office****."*

(Emphasis supplied)

22. These observations (in para 28 of the High Court judgment) were reproduced and approved by the Supreme Court in the judgment reported at ***(2009) 8 SCC 106 R.K. Anand v Registrar, Delhi High Court*** in para 262 and 263 which require to be extracted in extenso and read thus :

> ***"262.*** *Having thus dealt with the rest of the allegations made in the recusal application, the order, towards its end, said something which alone was sufficient to reject the request for recusal. It was pointed out that the applicant had a flourishing practice; he had been frequently appearing in the Court of Sarin, J. ever since he was appointed as a Judge and for the past twelve years was getting orders, both favourable and unfavourable, for his different clients. He never complained of any unfair treatment by Sarin, J. but recalled his old "hostility" with the Judge only after the notice was issued to him.*
>
> ***263. In the order the Judge concerned further observed:***
>
> > ***"The path of recusal is very often a convenient and a soft option....."***
>
> ***The above passage, in our view, correctly sums up what should be the court's response in the face of a request for recusal made with the intent to intimidate the court or to get better of an "inconvenient" Judge or to obfuscate the issues or to cause obstruction and delay***

the proceedings or in any other way frustrate or obstruct the course of justice.*"*

(Emphasis supplied)

23. Reinforcement of the above, the duty of the judge by virtue of the oath which he has taken while assuming office as well as the standards which must guide us in undertaking this exercise of examining those applications are best stated in the following words in pronouncement reported at ***(2001) 1 All ER 65 Locabail (UK) Ltd. V. Bayfield Properties Ltd. & Anr.:***

> *"The* ***reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience****. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions.* ***They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves****. At the same time, it must never be forgotten that an* ***impartial judge is a fundamental prerequisite for*** *a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."*
>
> (Emphasis by us)

24. We may also usefully extract the reliance on the judicial precedent in para 24 of ***(2001) 1 All ER 65 Locabail (UK) Ltd. V. Bayfield Properties Ltd. & Anr.*** which reiterates the above mandate upon a judge and reads thus :

> *"24. In the Clenae case [1999] V.S.C.A. 35 Callaway J.A. observed, at paragraph 89(e): [*480]*

> *"As a general rule, it is the* ***duty of a judicial officer to hear and determine the cases allocated to him or her by his or her head of jurisdiction****. Subject to certain limited exceptions, a judge or magistrate should not accede to an unfounded disqualification application."*
>
> (Emphasis supplied)

25. The law on recusal by a judge is authoritatively laid down in the pronouncement of the Supreme Court reported at ***(2016) 5 SCC 808, Supreme Court Advocates on Record Association & Anr. v. Union of India*** **(*recusal matter*)**. In this case, it was alleged that the presiding judge of the Constitution Bench which was considering the constitutional validity of the 99th Constitutional Amendment could be said to be interested in the cause of the petitioners i.e. to have the amendment under challenge struck down and the collegium system of appointment of judges restored as he was the member of the said collegiums and he would cease to enjoy the "*significant constitutional power*" vested in such capacity thereunder, which he would not enjoy under the scheme for appointment of judges as was sought to be ushered in by the 99th Amendment. This prayer was rejected by the Constitutional Bench.

26. Three separate opinions were delivered by the court. We first advert to the decision delivered by *Chelameswar, J.* (speaking for himself as well as *Goel, J.*) The court summed up the

principles in para 25 of the judgment on which a judge may be disqualified from hearing a case which is reproduced hereunder :

> ***"25.*** *From the above decisions, in our opinion, the following principles emerge:*
>
> ***25.1.*** *If a Judge has a financial interest in the outcome of a case, he is automatically disqualified from hearing the case.*
>
> ***25.2.*** *In cases where the interest of the Judge in the case is other than financial, then the disqualification is not automatic but an enquiry is required whether the existence of such an interest disqualifies the Judge tested in the light of either on the principle of "real danger" or "reasonable apprehension" of bias.*
>
> ***25.3.*** *The Pinochet case [R. v. Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No. 2), (2000) 1 AC 119 : (1999) 2 WLR 272 : (1999) 1 All ER 577 (HL)] added a new category i.e. that the Judge is automatically disqualified from hearing a case where the Judge is interested in a cause which is being promoted by one of the parties to the case."*

27. We may also usefully refer to the concurring opinion rendered by *J.S. Khehar, J.* whose recusal had been sought in ***Supreme Court Advocates On Record Association v Union of India***. The dilemma faced by the ld. Judge in is to be found in the following observations in paras 55 and 56 :

> ***"55.*** *After the order was pronounced, I disclosed to my colleagues on the Bench that I was still undecided whether I should remain on the Bench, for I was toying with the idea of recusal, because a prayer to that effect had been made in the face of the Court. My colleagues on the Bench would have nothing of it. They were unequivocal in their protestation.*
>
> ***56.*** *Despite the factual position noticed above, I wish to record that it is not their persuasion or exhortation, which*

made me take a final call on the matter. The decision to remain a member of the reconstituted Bench was mine, and mine alone. The choice that I made, was not of the heart, but that of the head. The choice was made by posing two questions to myself. Firstly, whether a Judge hearing a matter should recuse, even though the prayer for recusal is found to be unjustified and unwarranted? Secondly, whether I would stand true to the oath of my office, if I recused from hearing the matters?"

(Underlining by us)

28. We may also note the impact of acceding to a misdirected prayer of recusal as has been observed by *J.S. Khehar, J.* in para 57 of the judgment in the following terms :

***"57.** ... In my considered view, the prayer for my recusal is not well founded. **If I were to accede to the prayer for my recusal, I would be initiating a wrong practice, and laying down a wrong precedent**. A Judge may recuse at his own, from a case entrusted to him by the Chief Justice. That would be a matter of his own choosing. But recusal at the **asking of a litigating party, unless justified, must never to be acceded to**. For that would give the impression, of the Judge had been scared out of the case, just by the force of the objection. **A Judge before he assumes his office, takes an oath to discharge his duties without fear or favour. He would breach his oath of office, if he accepts a prayer for recusal, unless justified. It is my duty to discharge my responsibility with absolute earnestness and sincerity. It is my duty to abide by my oath of office to uphold the Constitution and the laws. My decision to continue to be a part of the Bench, flows from the oath which I took, at the time of my elevation to this Court**."*

(Emphasis by me)

29. In ***Supreme Court Advocate on Record Association v. Union of India***, a separate judgment was rendered by *Kurien Joseph, J*. from para 66, concurring entirely with the judgment rendered by *Chelameswar* and *Goel, JJ*. The observations of the Bench in para 74, 76, 77 noting the judgment of the Constitutional Court of ***South Africa*** shed valuable light on our consideration and read thus :

> ***"74.*** *There may be situations where mischievous litigants wanting to avoid a Judge may be because he is known to them to be very strong and thus making an attempt for forum shopping by raising baseless submissions on conflict of interest. The Constitutional Court of South Africa in President of the Republic of South Africa v. South African Rugby Football Union [President of the Republic of South Africa v. South African Rugby Football Union, (1999) 4 SA 147 : 1999 ZACC 9] , has made two very relevant observations in this regard: (ZACC para 46)*
>
> > *"46. ... 'Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a Judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.' ...*
> >
> > *'It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party.' [**Ed.**: See also JRL, ex p CJL, In re, (1986) 161 CLR 342, 352 : (1986) 66 ALR 239.] "*
> >
> > *xxx*

76. *These issues have been succinctly discussed by the Constitutional Court in* ***President of the Republic of South Africa [President of the Republic of South Africav. South African Rugby Football Union****, (1999) 4 SA 147 : 1999 ZACC 9] , on an application for recusal of four of the Judges in the Constitutional Court. After elaborately considering the factual matrix as well as the legal position, the Court held as follows: (ZACC para 104)*

> *"104. ... While litigants have the right to apply for the* ***recusal*** *of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, this* ***does*** *not give them the right to object to their cases being* ***heard by particular judicial officers simply because they believe that such persons will be less likely to decide the case in their favour, than would other judicial officers drawn from a different segment of society. The nature of the judicial function involves*** *the performance of difficult and at times unpleasant tasks. Judicial officers are nonetheless required to 'administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law'. To this end they must resist all manner of pressure, regardless of where it comes from. This is the constitutional duty common to all judicial officers. If they deviate, the independence of the judiciary would be undermined, and in turn, the Constitution itself."*
>
> *(emphasis supplied)*

77. *The above principles are universal in application. Impartiality of a Judge is the sine qua non for the integrity institution. Transparency in procedure is one of the major factors constituting the integrity of the office of a Judge in conducting his duties and the functioning of the court. The litigants would always like to know though they may not have a prescribed right to know, as to why a Judge has recused from hearing the case or despite request, has not recused to hear his case. Reasons are required to be indicated broadly. Of course, in case the disclosure of the reasons is likely to affect prejudicially any case or cause or*

interest of someone else, the Judge is free to state that on account of personal reasons which the Judge does not want to disclose, he has decided to recuse himself from hearing the case."

(Emphasis by us)

30. In an opinion concurring with the above two, certain additional aspects were pointed out by *Madan B. Lokur, J.* observing that the decision to remain a member of the Constitution Bench was that of *J.S. Khehar, J.* and his alone. In para 60, it has been observed that "*when an application was made for the recusal of a Judge from hearing a case, the application is made to the Judge concerned and not to the Bench as a whole."* Two decisions of the courts in the United States have been adverted to wherein the motion to recuse has been treated as addressed to the judge concerned and not to the court as a whole. In para 65, it was observed that the issue of recusal was a significant question and that such applications were gaining frequency and therefore, certain procedural and substantive rules were required to be framed in this regard. In para 64, a view was expressed that giving reasons may be fraught with some difficulties and therefore, *Madan. B. Lokur, J.* has not joined the issue.

31. It has been urged by Mr. R.S. Cheema, learned senior counsel that recusal is not merely a matter of propriety but of legality as well. We find substance in this submission.

32. Our attention has been drawn to a pronouncement of the Supreme Court reported at ***(2016) 3 SCC 370, Usmangani Adambhai Vahora v. State of Gujarat & Anr.*** This case arose out

of a consideration of an application under Section 408 Cr.P.C. for transfer of a Sessions case to another court at the same Sessions Division which was rejected by the Principal Sessions Judge which order came to be reversed by the High Court. Our attention is drawn to the following observation of the Supreme Court in para 11 of the judgment which must guide our consideration :

> ***"11.*** *In the instant case, we are disposed to think that apprehension that has been stated is absolutely* ***mercurial*** *and cannot remotely be stated to be reasonable. The learned Single Judge has taken an exception to the remarks given by the learned trial Judge and also opined about non-examination of any witness by him. As far as the first aspect is concerned, no exception can be taken to it. The learned Sessions Judge, while hearing the application for transfer of the case, called for remarks of the learned trial Judge, and in such a situation, he is required to give a reply and that he has done. He is not expected to accept the allegations made as regards his conduct and more so while nothing has been brought on record to substantiate the same.* ***The High Court could not have deduced that he should have declined to conduct the trial. This kind of observation is absolutely impermissible in law, for there is no acceptable reason on the part of the learned trial Judge to show his disinclination. Solely because an accused has filed an application for transfer, he is not required to express his disinclination. He is required under law to do his duty. He has to perform his duty and not succumb to the pressure put by the accused by making callous allegations. He is not expected to show unnecessary sensitivity to such allegations and recuse himself from the case. If this can be the foundation to transfer a case, it will bring anarchy in the adjudicatory process. The unscrupulous litigants will indulge themselves in court hunting. If they are allowed such room, they do not have to face the trial before a court***

in which they do not feel comfortable. The High Court has gravely erred in this regard."

(Emphasis supplied)

33. The applicants have also placed reliance on the pronouncement of the Supreme Court reported at ***(1998) 4 SCC 577, Chetak Construction Ltd. v. Om Prakash & Ors.*** rendered in exercise of contempt of court jurisdiction. In this case, while recusing from hearing the matter, the learned judge made some observations on conduct of lawyers and litigants in the court which are important and read as follows :

> ***"15.*** *Dealing with the conduct of lawyers and litigants in the Court, this Court in Jaswant Singh v. Virender Singh [1995 Supp (1) SCC 384] observed: (SCC pp. 403-04, para 33)*
>
> > *"It is most unbefitting for an advocate to make imputations against the Judge only because he does not get the expected result, which according to him is the fair and reasonable result available to him. Judges cannot be intimidated to seek favourable orders. Only because a lawyer appears as a party in person, he does not get a licence thereby to commit contempt of the court by intimidating the Judges or scandalising the courts. He cannot use language, either in the pleadings or during arguments, which is either intemperate or unparliamentary. These safeguards are not for the protection of any Judge individually but are essential for maintaining the dignity and decorum of the courts and for upholding the majesty of law. Judges and courts are not unduly sensitive or touchy to fair and reasonable criticism of their judgments. Fair comments, even if, outspoken, but made without any malice or attempting to impair the administration of justice and made in good faith, in proper language, do not attract any punishment*

for contempt of court. However, when from the criticism a deliberate, motivated and calculated attempt is discernible to bring down the image of judiciary in the estimation of the public or to impair the administration of justice or tend to bring the administration of justice into disrepute the courts must bestir themselves to uphold their dignity and the majesty of law. The appellant, has, undoubtedly committed contempt of court by the use of objectionable and intemperate language. No system of justice can tolerate such unbridled licence on the part of a person, be he a lawyer, to permit himself the liberty of scandalising a court by casting unwarranted, uncalled for and unjustified aspersions on the integrity, ability, impartiality or fairness of a Judge in the discharge of his judicial functions as it amounts to an interference with the due course of administration of justice."

16. *Indeed, no lawyer or litigant can be permitted to browbeat the court or malign the presiding officer with a view to get a favourable order. Judges shall not be able to perform their duties freely and fairly if such activities were permitted and in the result administration of justice would become a casualty and rule of law would receive a setback. The Judges are obliged to decide cases impartially and without any fear or favour. Lawyers and litigants cannot be allowed to "terrorize" or "intimidate" Judges with a view to "secure" orders which they want. This is basic and fundamental and no civilised system of administration of justice can permit it. We certainly, cannot approve of any attempt on the part of any litigant to go "forum-shopping". A litigant cannot be permitted "choice" of the "forum" and every attempt at "forum-shopping" must be crushed with a heavy hand.*

17. At the same time, it is of utmost importance to remember that Judges must act as impartial referees and decide cases objectively, uninfluenced by any personal bias or prejudice. A Judge should not allow his judicial position to be compromised at any cost. This is essential

for maintaining the integrity of the institution and public confidence in it. The credibility of this institution rests on the fairness and impartiality of the Judges at all levels. It is the principle of highest importance for the proper administration of justice that judicial powers must be exercised impartially and within the bounds of law. Public confidence in the judiciary rests on legitimacy of judicial process. <u>Sources of legitimacy are in the impersonal application by the Judge of recognised objective principles</u> which owe their existence to a system as distinguished from subjective moods, predilections, emotions and prejudices. Judges must always ensure that they do not allow the credibility of the institution to be eroded. We must always remember that justice must not only be done but it must also be seen to be done."

(Emphasis by us)

34. The repeated submission before us that there should be voluntary recusal would be wholly inappropriate. In fact, given the principles laid down in the authoritative judicial precedents, doing so would tantamount to abdicating a solemn judicial function and failing to perform the judicial duty to consider these applications in accordance with law.

35. We are supported in this view by the words of ***John Marshall, J., fourth Chief Justice of the Supreme Court of the United States*** in ***Cohens v. Virginia, 19 US 264 (1821)*** who stated as follows :

> *"It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with*

> *whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment and conscientiously to perform our duty."*

36. In the view that we have taken, we may point out that we are only following the mandate of *Bhagwati, J*. in the First Judges case (***AIR 1982 SC 149 S.P. Gupta v. Union of India***) wherein he had stated that *"Judges should be of stern stuff and tough fibre, unbending before power, economic or political, and they must uphold the core principle of the rule of law which says 'Be you ever so high, the law is above you'."*

37. So reminded of our solemn duty to discharge functions constitutionally mandated, we first set down the legal principles which must guide the consideration of these applications.

III. Submissions of the applicants

38. Mr. Salman Khurshid, ld. Senior Counsel appearing for the applicant – Sajjan Kumar has painstakingly emphasized a very fair proposition before us that it is insufficient for recusal by the trial judge to have merely touched the case. Learned Senior Counsel would urge that however, the entirety of the system would be served if there was voluntary recusal of one of us (*P.S. Teji, J.*) from hearing the appeals. Mr. Khurshid has placed the order dated

15th of February 2010 whereby the six anticipatory bail applications of accused persons (including these three applicants) came to be rejected.

39. Mr. Vikas Singh, learned Senior Counsel appearing for Mahender Yadav has however, submitted that in the present case, the learned Judge had dealt with the case on merits on 15th February, 2010 and 27th March, 2010 justifying the apprehension in the mind of the applicant that justice would not be done to him. It is contended that the apprehension has to be tested not from the perspective of the judge concerned but that of the litigant. In support of this submission, reliance has been placed on the pronouncements of the Supreme Court reported at ***(1998) 9 SCC 677, S.K. Warikoo v. State of J&K.; AIR 1966 SC 1418, Gurcharan Dass Chadha v. State of Rajasthan; (2011) 8 SCC 380, P.D. Dinakaran v. Judges Inquiry Committee; (2011) 14 SCC 770, State of Punjab v. Davinder Pal Singh Bhullar; (1877) 2 QBB 558 (562), Serjeant & Ors. v. Dale; (1998) 4 SCC 577, Chetak Construction Ltd. v. Om Prakash & Ors.; (1987) 4 SCC 611, Ranjit Thakur v. UOI; (2001) 2 SCC 330, State of Punjab v. V.K. Khanna & Ors.*** and ***(2010) 15 SCC 714, Trishala v. M.V. Sunder Raj.*** Placing reliance on these judgments, it is pressed by Mr. Singh, ld. Senior Counsel that if the subsequent proceedings before a judge are when he is in a higher court, then the judge must recuse from hearing the cause.

IV. Whether it is sufficient to merely allege an apprehension of bias that therefore, justice will not be done and judge must recuse himself from hearing the case?

40. Before considering the factual submissions, we undertake an examination of the law placed before us. Let us first and foremost examine the correctness of the submission of Mr. Vikas Singh, learned senior counsel that it is sufficient to only allege an apprehension of bias and therefore, justice would not be done and the judge must recuse from hearing the case?

41. Our attention stands drawn to the pronouncement in ***AIR 1966 SC 1418, Gurcharan Dass Chadha v. State of Rajasthan***. In this case, the Supreme Court was seized of a petition under Section 527 of the Cr.P.C. for transfer of Criminal Case No.2/1964 pending against the petitioner in the court of Special Judge, Bharatpur, Rajasthan to another criminal court of equal or superior jurisdiction subordinate to High Court other than the High Court of Rajasthan. The petitioner stated in the petition that he apprehends that he was "*not likely to get a fair, just and impartial trial in the State of Rajasthan owing to the hostility and influence of the then Law Minister who was also Minister incharge of Home Department of the State; the Additional Inspector General of Police, Anti-Corruption, and the Deputy Inspector General of Police, Ajmer Range, Jaipur*" who would interfere in the trial of the case in the State of Rajasthan. In para 12 of the judgment the Supreme Court has noted the allegations underlying the hostility, the relevant portion whereof reads as follows :

> *"12. This brings us to the question of the merits of the petition. The petitioner is being prosecuted for offences under Section 120-B/161 of the Indian Penal Code and Section 5(1)(a)(d) and 5(2) of the Prevention of Corruption Act. His apprehension is that the case against him is the result of the machination of two Police Officers and one Mr Mathura Dass Mathur who was the Home Minister in 1962. He also alleges hostility on the part of the State Government. He has given instances which in his opinion prove that the above two officers, the Home Minister and the State Government are hostile to him. In relation to the State Government he has alleged that when he was appointed Commandant of the 8th Batallion of Rajasthan Armed Constabulary the State Government down-graded his Post otherwise he would have received a higher starting pay. He also alleges that his suspension and prosecution were made to coincide with his assumption of new duties so that he might not be able to join his new post."*

In para 13, the appellant gave five instances in which he apparently crossed the Minister's path giving him room for annoyance. In regard to the two police officers, he had averred that the DIG of Police, Ajmer Range and he had differences on three occasions. He had also given similar instances of hostility towards him entertained by Sultan Singh, DIG of Police.

42. We find that the Supreme Court has laid down that the mere apprehension that justice would not be done is not sufficient and that the court has to be satisfied whether the expressed apprehension is reasonable or not. We extract hereunder the observations of the Supreme Court on this important aspect :

> *"13. With regard to the Home Minister Petition he has given five instances in which he apparently crossed the minister's path and gave him room for annoyance. In regard to the two Police Officers he has averred that the Deputy Inspector General of Police, Ajmer Range (Hanuman Prasad Sharma) and he had some differences on three occasions. He has also given similar instances of hostility towards him entertained by Sultan Singh, Deputy Inspector General of Police. On the basis of these he says that he entertains an apprehension that he will not receive justice in the State of Rajasthan. The* ***law with regard to transfer of cases is well-settled. A case is transferred if there is a*** *reasonable apprehension on the part of a party to a case that justice will not be done.* ***A petitioner is not required to demonstrate that justice will inevitably fail****. He is* ***entitled to a transfer if he shows circumstances from which it can be inferred that he entertains an apprehension and that it is reasonable in the circumstances alleged****. It is one of the principles of the administration of justice that justice should not only be done but it should be seen to be done.* ***However, a mere allegation that there is apprehension that justice will not be done in a given case does not suffice. The Court has further to see whether the apprehension is reasonable or not.*** *To judge of the reasonableness of the apprehension the state of the mind of the person who entertains the apprehension is no doubt relevant but that is not all.* ***The apprehension must not only be entertained but must appear to the Court to be a reasonable apprehension****."*
>
> (Emphasis supplied)

43. We may note that despite the several specific factual instances detailed in paras 12 and 13 of the judgment in ***Gurcharan Dass Chadha***, the Supreme Court rejected the prayer for transfer holding as follows :

> ***"14.*** *Applying these principles it may be said that there is a possibility that the petitioner entertains an apprehension that certain persons are hostile to him but his apprehension that he will not receive justice in the State of Rajasthan is not in our opinion reasonable. All the facts which he has narrated bear upon past events in his official life. Nothing has been said* ***which will show*** *that there is in any manner an interference direct or indirect with the investigation of the offences alleged against him or the trial of the case before the Special Judge, Bharatpur.* ***A general feeling that some persons are hostile to the petitioner is not sufficient. There must be material from which it can be inferred that the*** *persons who* ***are so hostile*** *are interfering or are likely to interfere either directly or indirectly with the course of justice. Of this there is no trace either in his petition or in the arguments which were advanced before us. Nor does the petitioner allege anything against the Special Judge who is trying the case. In this view of the matter we decline to order transfer of the case from the Special Judge, Bharatpur. The petition accordingly fails and will be dismissed."*
>
> (Underlining by us)

44. *Per contra* Mr. R.S. Cheema, learned Senior Counsel appearing for the CBI has submitted that there is no question of a person merely expressing an apprehension and the judge being required to recuse. It is submitted that it is the duty of every judge to decide a case which is placed before him and that the oath of office of a judge mandates so. In this regard, our attention is drawn to the following observations in ***(2001) 1 All ER 65, Locabail (UK) Ltd v. Bayfield Properties Ltd. & Anr.*** :

> *"4. There is, however, one situation in which, on proof of the requisite facts, the existence of bias is effectively*

presumed, and in such cases it gives rise to what has been called automatic disqualification. That is where the judge is shown to have an interest in the outcome of the case which he is to decide or has decided. The principle was briefly and authoritatively stated by Lord Campbell in ***Dimes v. The Proprietors of the Grand Junction Canal (1852) 3 HL Cas 759 at 793****, when orders and decrees made by and on behalf of the Lord Chancellor were set aside on the ground that he had had at the relevant times a substantial shareholding in the respondent company:*

> *"No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest. Since I have had the honour to be Chief Justice of the Court of Queen's Bench, we have again and again set aside proceedings in inferior tribunals because an individual, who had an interest in a cause, took a part in the decision. And it will have a most salutary influence on these tribunals when it is known that this high Court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence."*

XXX XXX XXX

21. In any case giving rise to ***automatic disqualification*** *on the authority of the* ***Dimes case, 3 H.L.Cas. 759 and Ex parte Pinochet (No. 2) [2000] 1 A.C. 119****, the judge should* ***recuse himself from the case before any*** *objection is raised. The same course should be followed if, for solid reasons,* ***the judge feels personally embarrassed in hearing the case****. In either event it is highly desirable, if extra cost, delay and inconvenience are to be avoided, that the judge should stand down at the earliest possible stage, not waiting until the eve or the day of the hearing. Parties should not be confronted with a last-minute choice between adjournment and waiver of an otherwise valid objection. If, in any case not giving rise to automatic disqualification and not causing personal embarrassment to the judge, he or she is or becomes aware of any matter which could arguably be said to give rise to a real danger of bias, it is generally desirable that disclosure should be made to the parties in advance of the hearing.* ***If*** ***[*479] objection is then made, it will be the duty of the judge to consider the objection and exercise his judgment upon it. He would be as wrong to yield to a tenuous or frivolous*** *objection as he would to ignore an objection of substance."*

(Emphasis by us)

45. Further discussion in ***Locabail,*** wherein reliance has been placed on pronouncements by the Constitutional Court of South Africa, shed valuable light on how a prayer for recusal must be examined :

> *"We find force in observations of the* ***Constitutional Court of South Africa in President of the Republic of South Africa v. South African Rugby Football Union, 1999 (4) S.A. 147****, 177, even though these observations were directed to the reasonable suspicion test:*

> *"It follows from the foregoing that the **correct approach to this application for the recusal of members of this court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case**, that is a mind open to persuasion by the evidence and the submissions of counsel."*

46. We find ***Locabail*** extracts further observations from ***President of Republic of South Africa v. South African Rugby Football Union*** emphasising the duty of the judges as well as those in judgments rendered by the High Court of Australia and the Federal Court which deserve to be considered in extenso and read as follows :

> "xxx
> *22. We also find great persuasive force in three extracts from Australian authority. Mason J., sitting in the **High Court of Australia**, said in **In re J.R.L., Ex parte C.J.L. (1986) 161 C.L.R. 342, 352**:*
>
> > *"Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."*
>
> *23. In **In re Ebner (1999) 161 A.L.R.** 557, 568, para. 37, the Federal Court asked:*

"Why is it to be assumed that the confidence of fair-minded people in the administration of justice would be shaken by the existence of a direct pecuniary interest of no tangible value, but not by the waste of resources and the delays brought about by setting aside a judgment on the ground that the judge is disqualified for having such an interest?"

47. In the pronouncement reported at ***(2012) 6 SCC 369, Chandra Kumar Chopra v. Union of India,*** it was held thus :

> ***"25.*** *...* ***It cannot be a facet of one's imagination. It must be in accord with the prudence of a reasonable man.***
>
> *xxx xxx xxx*
>
> ***26.*** *It is worth noting that despite the sanctity attached to the non-biased attitude of a member of a tribunal or a court and in spite of the principle that justice must not only be done but must seen to have been done,* ***it is to be scrutinised on the basis of material brought on record whether someone makes wild, irrelevant and imaginary allegations to frustrate a trial or it is in consonance with the thinking of a reasonable man which can meet the test of real likelihood of bias.*** *The principle cannot be attracted in vacuum.*
>
> (Emphasis by us)

48. On the question raised in ***(1974) 3 SCC 459, S. Parthasarathi v. State of A.P.,*** it was held thus :

> ***"14.*** *The test of likelihood of bias which has been applied in a number of cases is based on the "****reasonable apprehension" of a reasonable man fully cognizant of the facts****. The courts have quashed decisions on the strength of the reasonable suspicion of the party aggrieved without having made any finding that a real likelihood of bias in fact*

existed (see R. v. Huggins [(1895) 1 QB 563] ; R. v. Sussex, JJ., ex. p. McCarthy [(1924) 1 KB 256]; Cottle v. Cottle [(1939) 2 All ER 535]; R. v. Abingdon, JJ. ex. p. Cousins [(1964) 108 SJ 840] .) But in R. v. Camborne, JJ. ex. p Pearce [(1955) 1 QB 41 at 51] the Court, after a review of the relevant cases held that ***real likelihood of bias was the proper test*** *and that a real likelihood of bias* ***had to be made to appear not only from the materials in fact ascertained by the party complaining, but from such further facts as he might readily have ascertained and easily verified in the course of his inquiries****.*

15. *The question then is: whether a real likelihood of bias existed is to be* ***determined on the probabilities to be inferred from the circumstances by court objectively, or, upon the basis of the impressions that might reasonably be left on the minds of the party aggrieved or the public at large****.*

16. *The tests of "real likelihood" and "reasonable suspicion" are really inconsistent with each other. We think that the* ***reviewing authority*** *must* ***make a determination on the basis of the whole evidence before it, whether a reasonable man would in the circumstances infer that there is real likelihood of bias****. The Court must look at the impression which other people have. This follows from the principle that justice must not only be done but seen to be done. If right minded persons would think that there is real likelihood of bias on the part of an inquiring officer, he must not conduct the enquiry; nevertheless, there must be a real likelihood of bias.* ***Surmise or conjecture would not be enough. There must exist circumstances from which reasonable men would think it probable or likely that the inquiring officer will be prejudiced against the delinquent****. The Court will not inquire whether he was really prejudiced. If a reasonable man would think on the basis of the existing circumstances that he is likely to be prejudiced, that is sufficient to quash the decision [see per Lord Denning, H.R. in Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon*

[(1968) 3 WLR 694 at 707]] We should not, however, be understood to deny that the ***Court might with greater propriety apply the "'reasonable suspicion" test in criminal or in proceedings analogous to criminal proceedings****."*

(Emphasis by us)

49. An objection was made to a member of the Enquiry Committee on the ground of apprehensions of bias in the pronouncement reported at ***(2011) 8 SCC 380, P.D. Dinakaran v. Judges Enquiry Committee & Ors***. After a detailed consideration of the judicial pronouncements on this subject, the court has summed up the test in paras 71 and 72 of the pronouncement in the following terms :

> ***"71.*** *The principles which emerge from the aforesaid decisions are that no man can be a judge in his own cause and justice should not only be done, but manifestly be seen to be done. Scales should not only be held even but they must not be seen to be inclined.* ***A person having interest in the subject-matter of cause is precluded from acting as a Judge. To disqualify a person from adjudicating on the ground of interest in the subject-matter of lis, the test of real likelihood of the bias is to be applied. In other words, one has to enquire as to whether there is real danger of bias on the part of the person against whom such apprehension is expressed in the sense that he might favour or disfavour a party. In each case, the court has to consider whether a fair-minded and informed person, having considered all the facts would reasonably apprehend that the Judge would not act impartially. To put it differently, the test would be whether a reasonably intelligent man fully apprised of all the facts would have a serious apprehension of bias.*** *In cases of non-pecuniary bias, the "****real likelihood****" test has been preferred over the*

> *"**reasonable suspicion**" test and the courts have consistently held that in deciding the question of bias one has to take into consideration human probabilities and ordinary course of human conduct.* ***We may add that real likelihood of bias should appear not only from the materials ascertained by the complaining party, but also from such other facts which it could have readily ascertained and easily verified by making reasonable inquiries.*****"**
>
> (Emphasis by us)

50. The principles laid down in ***Locabail*** have been cited with approval by the Supreme Court in ***(2011) 14 SCC 770, State of Punjab v. Davinder Pal Singh Bhullar***, wherein the court delineated on the manner in which a review on a recusal prayer should be made in para 34 which reads thus :

> ***"34.*** *In Locabail (U.K.) Ltd. v. Bayfield Properties Ltd. [2000 QB 451 : (2000) 2 WLR 870 : (2000) 1 All ER 65 (CA)] the House of Lords (sic Court of Appeal) considered the issue of disqualification of a* ***Judge on the ground of bias and held that in applying the real danger or possibility of bias test, it is often appropriate to inquire whether the Judge knew of the matter in question. To that end, a reviewing court may receive a written statement from the Judge. A Judge must recuse himself from a case before any objection is made or if the circumstances give rise to automatic disqualification or he feels personally embarrassed in hearing the case. If, in any other case, the Judge becomes aware of any matter which can arguably be said to give rise to a real danger of bias,*** *it is generally desirable that disclosure should be made to the parties in advance of the hearing. Where objection is then made, it will be* ***as wrong for the Judge to yield to a tenuous or frivolous objection as it will be to ignore an objection of substance****. However, if there is real ground*

for doubt, that doubt must be resolved in favour of recusal. Where, following appropriate disclosure by the Judge, a party raises no objection to the Judge hearing or continuing to hear a case, that party cannot subsequently complain that the matter disclosed gives rise to a real danger of bias."

(Emphasis by us)

51. The above judgments establish that a duty is cast on the judge to objectively consider the objection and exercise judgment upon it, rejecting tenuous and frivolous objections, acceding only to a reasonable objection of substance. The onus of establishing reasonable apprehension of bias rests on the applicant. Such bias may be established by materials ascertained by the applicant as well as by such other facts as could be "*readily ascertained and easily verified by making reasonable inquiries*". The review court may call for a written response from the judge concerned.

52. In view of the above, the submissions by Mr. Vikas Singh, ld. Senior Counsel that it is only the expressed apprehension of bias on the part of a judge by a litigant which is relevant and that the same cannot be subjected to a scrutiny if a request for recusal by a judge is made, is completely devoid of any legal merit. There must be material placed on record and it is for the court to be satisfied that the apprehension is reasonable.

The submission on behalf of the applicants that it would be sufficient for them to merely state that an applicant apprehended bias mandating recusal by the judge is hereby rejected.

V. Reasonable apprehension of bias - tests

53. We now consider what would constitute '*bias*' of an authority or a court? We also examine what would be the parameters on which reasonability of an assertion of apprehension of bias has to be examined.

54. On the issue of bias of the authority, it is important to refer to the pronouncement of the Supreme Court reported at ***(1987) 4 SCC 611, Ranjit Thakur v. Union of India*** wherein the applicable tests of the likelihood of bias have been authoritatively laid down in the following terms :

> ***"17.*** *As to the tests of the likelihood of bias what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. The proper approach for the Judge is not to look at his own mind and ask himself, however, honestly, "Am I biased?"; but to look at the mind of the party before him.*
>
> ***18.*** *Lord Esher in Allinson v. General Council of Medical Education and Registration [(1894) 1 QB 750, 758-59] said:*
>
> > *"The question is not, whether in fact he was or was not biased. The court cannot inquire into that. . . . In the administration of justice, whether by a recognised legal court or by persons who, although not a legal public court, are acting in a similar capacity, public policy requires that, in order that there should be no doubt about the purity of the administration, any person who is to take part in it should not be in such a position that he might be suspected of being biased."*
>
> ***19.*** *In Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon [(1969) 1 QB 577, 599] Lord Denning M.R. observed:*

". . . in considering ***whether there was a real likelihood of bias, the court does not look at the mind of the justice himself*** *or at the mind of the chairman of the tribunal,* ***or whoever it may be, who sits in a judicial capacity.*** *It* ***does not look to see if there was a real likelihood that he would, or did, in fact favour one side*** *at the expense of the other.* ***The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit.****"*

20. *Frankfurter, J. in Public Utilities Commission of the District of Columbia v. Pollak [343 US 451, 466-67 : 96 L Ed 1068, 1079] said:*

"The judicial process demands that a ***Judge move within the framework of relevant legal rules and the covenanted modes of thought for ascertaining them. He must think dispassionately and submerge private feeling on every aspect of a case. There is a good deal of shallow talk that the judicial robe does not change the man within it. It does.*** *The fact is that on the whole* ***Judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted****. But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, Judges recuse themselves. They do not sit in judgment."*

21. *Referring to the proper test, Ackner, L.J. in Regina v. Liverpool City Justices, ex parte Topping [(1983) 1 WLR 119 : (1983) 1 All ER 490, 494] said:*

"Assuming, therefore, that the magistrates had applied the test advised by Mr Pearson: 'Do I feel prejudiced?' then they would have applied the wrong test, exercised their discretion on the wrong principle and the same result, namely, the quashing of the conviction, would follow."

(Emphasis by us)

The objection in the present case has to be tested in the light of these principles.

55. Mr. Vikas Singh, learned Senior Counsel has also placed the pronouncement of the Supreme Court reported at ***(2001) 2 SCC 330, State of Punjab v. V.K. Khanna & Ors.*** wherein we find that the court has observed that no strait jacket formula can be evolved for assessing the common man's perception in its proper perspective. The court has held in para 8 thus :

"8. *The test, therefore, is as to whether there is a mere apprehension of bias or there is a real danger of bias and it is on this score that the surrounding circumstances must and ought to be collated and necessary conclusion drawn therefrom. In the event, however, the conclusion is otherwise that there is existing a real danger of bias administrative action cannot be sustained. If on the other hand allegations pertain to rather fanciful apprehension in administrative action, question of declaring them to be unsustainable on the basis therefor, would not arise."*

(Emphasis by us)

56. In para 7 of this judgment, the court has extracted paras 30 to 33 of the judicial pronouncement reported at ***(2001) 1 SCC 182, Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant.***

57. We find that in paras 32 to 34 of the ***Girja Shankar Pant*** case, reference to observations in ***(2000) 1 AC 119, R. V. Bow Street Metropolitan Stipendiary Magistrate, exp Pinochet Ugarte (No.2)*** and ***(2001) 1 All ER 65, Locabail (UK) Ltd v. Bayfield Properties Ltd. & Anr.*** have been extensively made :

> *"34. The Court of Appeal judgment in Locabail [2000 QB 451] though apparently as noticed above sounded a different note but in fact, in more occasions than one in the judgment itself, it has been clarified that* ***conceptually the issue of bias ought to be decided on the facts and circumstances of the individual case*** *— a slight shift undoubtedly from the original thinking pertaining to the concept of bias to the effect that a mere apprehension of bias could otherwise be sufficient."*

58. On this issue, we extract hereunder consideration of the Supreme Court in ***P.D. Dinakaran*** in the following terms :

> **"*72.*** *In Halsbury's Laws of England [Vol. 29(2), 4th Edn., Reissue 2002, para 560, p. 379],* ***the test of disqualification due to apparent*** *bias has been elucidated in the following words:*
>
> > *"560. Test of disqualification by apparent bias.—The test applicable in all cases of apparent bias, whether concerned with Justices, members of inferior tribunals, jurors or with arbitrators, is whether, having regard to the relevant circumstances,* ***there is a real possibility of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard with favour, or disfavour, the case of a party to the issue under consideration by him****. In considering this question all the circumstances which have a bearing on the suggestion that the Judge or Justice is biased must be considered. The question is whether a fair-minded and informed observer, having considered the facts, would*

conclude that there was a real possibility that the tribunal was biased. Cases may occur where all the Justices may be affected by an appearance of bias, as, for instance, where a fellow Justice or the Justices' clerk is charged with an offence; where this occurs, it has been recommended that Justices from another petty-sessional division should deal with the case, or, if the offence is indictable, that it should be committed for trial by a jury.

It is because the court in the majority of cases does not inquire whether actual bias exists that the maxim that justice must not only be done but be seen to be done is applied, and the ***court gives effect to the maxim by examining all the material available and concluding whether there is a real possibility of bias****…."*

(Emphasis by us)

59. We find that the court emphasised that the apprehension of bias has to be considered. It was so stated in para 75 which reads thus :

"75. It is true that the Judges and lawyers are trained to be objective and have the capacity to decipher grain from the chaff, truth from the falsehood and *we have no doubt that Respondent 3 possesses these qualities. We also agree with the Committee that objection by both sides perhaps "alone apart from anything else is sufficient to confirm his impartiality". However, the* ***issue of bias*** *of Respondent 3 has not to be seen from the viewpoint of this Court or for that matter the Committee.* ***It has to be seen from the angle of a reasonable, objective and informed person. What opinion would he form? It is this apprehension which is of paramount importance.*** *From the facts narrated in the earlier part of the judgment it can be said that the* ***petitioner's apprehension of likelihood of bias against Respondent 3***

is reasonable and <u>not fanciful</u>, though, in fact, he may not be biased.*"*

(Emphasis supplied)

60. The court has reiterated that the test is real likelihood of bias which objection must be made at the earliest. It has been held that silence and delay in making an objection of apprehension of impartiality and bias on the part of the decision maker would militate against the bonafides of the objection. Such delay may lead to an irresistible inference that the petitioner had waived his right to object to the appointment of respondent no.3 as member of the Committee; and that such right was personal to him and it was always open to him to waive the same. We may usefully extract also the observations of the Supreme Court in para 83 of the pronouncement which reads thus :

83. *In* ***Manak Lal v. Dr. Prem Chand Singhvi [AIR 1957 SC 425****] this Court held that the* ***constitution of the Tribunal was vitiated due to bias because the Chairman of the Tribunal*** *had appeared against the appellant in a case* ***but declined to nullify the action taken against him on the recommendations of the Tribunal on the ground that he will be deemed to have waived the right to raise*** *objection of bias. Some of the observations made in that case are extracted below: (AIR pp. 431-32, paras 8-9)*

> *"8. … The* ***alleged bias in a member of the Tribunal does not render the proceedings invalid if it is shown that the objection against the presence of the member in question had not been taken by the party even though the party knew about the circumstances giving rise to the***

> ***allegations about the alleged bias and was aware of his right to challenge*** *the presence of the member in the Tribunal. It is true that waiver cannot always and in every case be inferred merely from the failure of the party to take the objection. Waiver can be inferred only if and after it is shown that the party knew about the relevant facts and was aware of his right to take the objection in question. As Sir John Romilly, M.R., has observed in Vyvyan v. Vyvyan [(1861) 30 Beav 65 : 54 ER 813] : (ER p. 817)*
>
> *'... Waiver or acquiescence, like election, presupposes that the person to be bound is fully cognizant of his rights, and that being so, he neglects to enforce them, or chooses one benefit instead of another, either, but not both, of which he might claim.'*
>
> (Emphasis supplied)

61. The observations of the Supreme Court in ***(2011) 14 SCC 770, State of Punjab v. Davinder Pal Singh Bhullar & Ors.*** and connected appeals are also topical on this issue and shed valuable light on the issues under consideration. The importance of the training of the judicial mind and ability of a judge to identify a prejudice or a bias and keep it aside while adjudicating have been noticed. We find the court observes, that a reasonable, fair minded person may still perceive an apprehension of impartiality or bias in the outcome of the case. If such apprehension is made out, the judge ought to recuse from the hearing. We extract hereunder the relevant portions of the pronouncement :

> ***"26.*** *To recall the words of Mr Justice Frankfurter in Public Utilities Commission v. Pollak [96 L Ed 1068 : 343 US 451 (1952)] , L Ed p. 1079 : US at p. 466:*

> *"The Judicial process demands that a Judge moves within the framework of relevant legal rules and the covenanted modes of thought for ascertaining them. He must think dispassionately and submerge private feeling on every aspect of a case. There is a good deal of shallow talk that the judicial robe does not change the man within it. It does.* ***The fact is that, on the whole, Judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted."***

27. *In Bhajan Lal v. Jindal Strips Ltd. [(1994) 6 SCC 19] , this Court observed that there* ***may be some consternation and apprehension in the mind of a party and undoubtedly, he has a right to have fair trial****, as guaranteed by the Constitution.* ***The apprehension of bias must be reasonable i.e. which a reasonable person can entertain. Even in that case, he has no right to ask for a change of Bench, for the reason that such an apprehension may be inadequate and he cannot be permitted to have the Bench of his choice.*** *The Court held as under: (SCC pp. 26-27, para 23)*

> *"23. Bias is the second limb of natural justice. Prima facie no one should be a judge in what is to be regarded as 'sua causa', whether or not he is named as a party.* ***The decision-maker should have no interest by way of gain or detriment in the outcome of a proceeding. Interest may take many forms. It may be direct, it may be indirect, it may arise from a personal relationship or from a relationship with the subject-matter, from a close relationship or from a tenuous one****."*

28. *The* ***principle*** *in these cases is derived from the legal maxim—****nemo debet esse judex in propria sua causa****. It applies only when the interest attributed is such as to render the case his own cause. This principle is required*

to be observed by all judicial and quasi-judicial authorities as non-observance thereof is treated as a violation of the principles of natural justice. (Vide Rameshwar Bhartia v. State of Assam [AIR 1952 SC 405 : 1953 Cri LJ 163] , Mineral Development Ltd. v. State of Bihar [AIR 1960 SC 468] , Meenglas Tea Estate v. Workmen [AIR 1963 SC 1719] and Transport Deptt. v. Munuswamy Mudaliar [1988 Supp SCC 651 : AIR 1988 SC 2232] .)

29. *The failure to adhere to this principle creates an apprehension of bias on the part of the Judge. The question is not whether the Judge is actually biased or, in fact, has really not decided the matter impartially, but* ***whether the circumstances are such as to create a reasonable apprehension in the mind of others that there is a likelihood of bias affecting the decision****. (Vide A.U. Kureshi v. High Court of Gujarat [(2009) 11 SCC 84 : (2009) 2 SCC (L&S) 567] and Mohd. Yunus Khan v. State of U.P. [(2010) 10 SCC 539 : (2011) 1 SCC (L&S) 180])*

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31. *The* ***test of real likelihood of bias*** *is* ***whether a reasonable person, in possession of relevant information, would have thought that bias was likely and whether the adjudicator was likely to be disposed to decide the matter only in a particular way****.* ***Public policy requires that there should be no doubt about the purity of the adjudication process/administration of justice****. The Court has to proceed observing the minimal requirements of natural justice i.e. the Judge has to act fairly and without bias and in good faith. A judgment which is the result of bias or want of impartiality, is a nullity and the trial coram non judice. Therefore, the consequential order, if any, is liable to be quashed. (Vide Vassiliades v. Vassiliades [AIR 1945 PC 38] , S. Parthasarathi v. State of A.P. [(1974) 3 SCC 459 : 1973 SCC (L&S) 580] and Ranjit Thakur v. Union of India [(1987) 4 SCC 611 : 1988 SCC (L&S) 1] .)"*

> ***xxx*** ***xxx*** ***xxx***
> ***36.*** *Thus, it is evident that the allegations of judicial bias are required to be scrutinised taking into consideration the factual matrix of the case in hand.* ***The court must bear in mind that a mere ground of appearance of bias and not actual bias is enough to vitiate the judgment/order. Actual proof of prejudice in such a case may make the case of the party concerned stronger,*** *but such a proof is not required. In fact, what is relevant* ***is the reasonableness*** *of the apprehension in that regard in the mind of the party.* ***However, once such an apprehension exists, the trial/judgment/order, etc. stands vitiated for want of impartiality. Such judgment/order is a nullity and the trial coram non judice****."*
>
> (Emphasis supplied)

62. In ***Davinder Pal Singh Bhullar,*** the Supreme Court further observed with regard to the judicial propriety and judicial bias – its source, mode, norms of determination as well as bar of waiver or acquiescence when attracted against the plea of bias. In a given case, if a party knowing the material facts and is conscious of his legal rights fails to take the plea of bias at the earliest stage in the proceedings, it creates the effective bar of waiver against him which was so observed in the judgment in the following terms:

> ***"38.*** *Thus, in a given case* ***if a party knows the material facts and is conscious of his legal rights in that matter, but fails to take the plea of bias at the earlier stage of the proceedings, it creates an effective bar of waiver against him****. In such facts and circumstances, it would be clear that the party wanted to take a chance to secure a favourable order from the official/court and when he found that he was confronted with an unfavourable order, he adopted the device of raising the issue of bias.*

The issue of bias must be raised by the party at the earliest. (See Pannalal Binjraj v. Union of India [AIR 1957 SC 397] and P.D. Dinakaran (1) v. Judges Enquiry Committee [(2011) 8 SCC 380] .)

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43. *Thus, from the above, it is apparent that the* ***issue of bias*** *should be* ***raised by the party at the earliest, if it is aware of it and knows its right to raise the issue at the earliest, otherwise it would be deemed to have been waived.*** *However, it is to be kept in mind that acquiescence, being a principle of equity must be made applicable where a party knowing all the facts of bias, etc. surrenders to the authority of the Court/Tribunal without raising any objection. Acquiescence, in fact, is sitting by, when another is invading the rights. The acquiescence must be such as to lead to the inference of a licence sufficient to create rights in other party. Needless to say that the question of waiver/acquiescence would arise in a case provided the person apprehending the bias/prejudice is a party to the case. The question of waiver would not arise against a person who is not a party to the case as such person has no opportunity to raise the issue of bias."*

(Emphasis supplied)

63. It is well settled that an objection of bias has to be taken at the earliest else it is deemed to have been waived. In this regard, in pronouncement reported at ***(2001) 1 All ER 65, Locabail (UK) Ltd v. Bayfield Properties Ltd. & Anr.***, it was observed as follows:

"26. We do not consider that waiver, in this context, raises special problems: see Shrager v. Basil Dighton Ltd. [1924] 1 K.B. 274, 293; Rex v. Essex Justices, Ex parte Perkins [1927] 2 K.B. 475, 489; Ex parte Pinochet (No. 2) [2000] 1 A.C. 119, 136-137; the Auckland Casino case [1995] 1 N.Z.L.R. 142, 150, 151; Vakauta v. Kelly, 167 C.L.R. 568, 572, 577. If,

appropriate disclosure having been made by the judge, a party raises no objection to the judge hearing or continuing to hear a case, that party cannot thereafter complain of the matter disclosed as giving rise to a real danger of bias. It would be unjust to the other party and undermine both the reality and the appearance of justice to allow him to do so. What disclosure is appropriate depends in large measure on the stage that the matter has reached. If, before a hearing has begun, the judge is alerted to some matter which might, depending on the full facts, throw doubt on his fitness to sit, the judge should in our view inquire into the full facts, so far as they are ascertainable, in order to make disclosure in the light of them. But, if a judge has embarked on a hearing in ignorance of a matter which emerges during the hearing, it is in our view enough if the judge discloses what he then knows. He has no obligation to disclose what he does not know. Nor is he bound to fill any gaps in his knowledge which, if filled, might provide stronger grounds for objection to his hearing or continuing to hear the case. If, of course, he does make further inquiry and learn additional facts not known to him before, then he must make disclosure of those facts also. It is, however, <u>generally undesirable that hearings should be aborted unless the reality or the appearance of justice requires that they should</u>."

(Underlining by us)

64. Mr. Vikas Singh, learned Senior Counsel has placed before us the judicial precedent reported at ***(1877) 2 QBB 558, Serjeant and Ors. v. Dale.*** With regard to an objection as to whether there is a prohibition upon the court hearing the matter, this judgment sets out the applicable Common Law in the following terms :

*"... **By the common law, a judge who has an interest in the result of a suit is disqualified from acting except in cases of necessity, where no other judge has jurisdiction**. The 16th section contemplates and provides for this contingency by giving jurisdiction in such a case to the archbishop, and requiring him to act in the place of the bishop so disqualified.*

Whether the party could have waived the objection by consenting to the bishop acting, as a party can waive the common law objection of interest in the judge, we need not determine. It is certain that Mr. Dale did not know the fact that the patronage of the living had been transferred from the dean and chapter to the bishop until after sentence had been given against him and monition issued.

*We cannot yield to the argument which was much pressed by Mr. Jeune, that because the Bishop of London has not the next presentation he is not a patron of the benefice within the meaning of the statute. That which accelerates the turn of one of the patrons who present alternately accelerates the turn of the other. **The law does not measure the amount of interest which a judge possesses. If he has any legal interest in the decision of the** question one way he is disqualified, no matter how small the interest may be. The law, in laying down this strict rule, has regard not so much perhaps to the motives which might be supposed to bias the judge as to the susceptibilities of the litigant parties. **One important object, at all events, is to clear away everything which might engender suspicion and distrust of the tribunal, and so to promote the feeling of confidence in the administration of justice which is so essential to social order and security**. ..."*

(Emphasis by us)

This pronouncement therefore, prohibits a judge interested in the result from hearing the matter.

65. We find that in the judgment reported at ***(2016) 5 SCC 808, Supreme Court Advocate on Record Association v. Union of India***, in para 30, the Supreme Court has considered a right to object to a disqualified adjudicator and noted case law that such objection can be waived, even so where the disqualification is statutory. We extract hereunder the relevant portion of para 30 of the judgment :

> ***"30.*** *No precedent has been brought to our notice, where courts ruled at the instance of the beneficiary of bias on the part of the adjudicator, that a judgment or an administrative decision is either voidable or void on the ground of bias. On the other hand, it is a well-established principle of law that an objection based on bias of the adjudicator can be waived. Courts generally did not entertain such objection raised belatedly by the aggrieved party:*
>
> > *"The* ***right to object to a disqualified adjudicator may be waived, and this may be so even where the disqualification is statutory****. [Wakefield Local Board of Health v. West Riding and Grimsby Railway Co., (1865) LR 1 QB 84] The court normally insists that the objection shall be taken as soon as the party prejudiced knows the facts which entitle him to object. If, after he or his advisors know of the disqualification, they let the proceedings continue without protest, they are held to have waived their objection and the determination cannot be challenged." [R. v. Byles, ex p Hollidge, (1912) 77 JP 40; R. v. Nailsworth Licensing Justices, ex p Bird, (1953) 1 WLR 1046; R. v. Lilydale Magistrates Court, ex p*

Ciccone, 1973 VR 122; and see R. v. Antrim Justices, (1895) 2 IR 603; Tolputt (H.) & Co. Ltd. v. Mole, (1911) 1 KB 836 (CA); Corrigan v. Irish Land Commission, 1977 IR 317]"

(Emphasis by us)

66. In ***(2010) 15 SCC 714, Trishala v. M.V. Sundar Raj & Anr.,*** an objection was raised that one of the appellants in the High Court was a municipal corporator and the learned judge of the High Court who passed the impugned order was, whilst practicing at the Bar, a Standing Counsel for the Municipal Corporation and therefore, should have recused himself from hearing the appeal. It was pointed out that in another RFA between different parties, the learned judge has recused himself on his own from hearing that RFA. For this reason, it was prayed that the impugned order be set aside and the matter be remanded back to the High Court for hearing afresh. This plea was rejected by the Supreme Court holding as follows :

*"**7.** For the reasons stated hereinafter we are not inclined to entertain this plea of the learned counsel for the petitioner:*

***7.1.** Firstly, **the attention of the learned Judge of the High Court should have been invited to the relevant facts and there is no reason to hold why the learned Judge would not have recused himself, if at all a ground for doing** so would have been made out and if only he would have been alive or made alive to such facts. A Judge may not necessarily remember the cases in which he had appeared for a party whilst at the Bar and in all fairness to the Judge, the parties and the learned counsel owe a duty to him to bring to*

his notice such facts as would disable him from hearing a case placed before him.

7.2. *So far as another RFA (Annexure P-4, p. 36), wherein the learned Judge has recused himself, is concerned, we are not satisfied that that has any relevance to the present case.*

7.3. On the material placed on record we cannot hold that simply because the learned Judge whilst at the Bar was a Standing Counsel for the Municipal Corporation he is precluded either in law or on propriety from hearing any case in which a Corporator is a party in his personal capacity; more so, when the relevant facts were not brought to his notice."

(Emphasis by us)

67. It is well settled that a distinction has to be drawn between a case where a judge would stand automatically disqualified from hearing a case. This has been established by judicial pronouncement, in a case where the judge is shown to have an interest in the outcome of the case (***para 4 of Locabail)*** manifesting the principle that no man can be a judge in his own cause. Such disqualification is not confined only to a cause in which the judge is a party but applies to a cause in which he has an interest.

68. There would be cases where an objection is raised to hearing of case by a judge or authority on the ground that the party apprehends impartiality or bias upon the judge in fairly deciding the case.

69. The judicial precedents have laid down that it is not every assertion of apprehension of bias but only apprehension of bias

which is of substance and could be entertained by a reasonable, objective, informed and fair minded person having considered all facts that ought to persuade a judge to recuse from hearing a case.

70. It is also well settled that every application expressing apprehension of bias must by decided on the facts and circumstances of the individual case.

These are the principles which must guide the consideration of these applications.

71. It is therefore, trite that the issue of bias has to be raised at the earliest and carefully scrutinized taking into consideration the factual matrix of the case from the perspective of a reasonable, well informed person. The court would test the reasonableness of the apprehension in delving into the minds of the applicant and examine the material placed before it, even by calling for a written report by the judge concerned.

72. We may note that in the present case there is no assertion of bias on the ground that there was any personal or financial interest in the matter. So what could be an apprehension of bias which could persuade the sought recusal?

GITA MITTAL, J

P.S.TEJI, J

NOVEMBER 04, 2016
aj

VI. Consideration of the applications on merits

73. In view of the above well established principle that the recusal prayer must be considered by the judge concerned and reasons recorded, we record our reasons separately for the order on the merits of the applications, in the light of the above mandate and principles.

P.S. Teji, J.

74. Crl.M.A. No.15236/2016 which has been filed by Sajjan Kumar (in Crl.A. No.1099/2013), has sought recusal from hearing of the appeals by me while Crl.M.A. Nos.15233/2016 and 15239/2016, filed by Krishan Khokhar and Mahender Yadav in Crl.A. No.753/2013 and 715/2013 respectively seek transfer of appeals for the reason that when posted as District Judge-VI/Additional Sessions Judge, East District I have passed the order dismissing six anticipatory bail applications on 15.02.2010 and order dated 27.03.2010 on an application taking a preliminary objection to the territorial jurisdiction of the courts at Karkardooma. As required by law, I pen down hereunder the circumstances in which these applications were then listed before me and my decision on the prayers in these applications.

75. On completion of investigation into FIR No. RC-SI 1 2005 S0024 (dated 22.11.2005 registered by the CBI/SC-1/New Delhi), a final report under Section 173 Cr.P.C. being the charge sheet No.102010 came to be filed by the CBI on the 13.01.2010 before

Ms. Kaveri Baweja, Chief Metropolitan Magistrate, Tis Hazari Court, Delhi.

76. The charge sheet was filed against Sajjan Kumar, Balwan Khokhar, Mahender Yadav, Mahavir Singh, Capt. Bhagmal, Sunita Rani, Girdhari Lal and Krishan Khokhar under Sections 109 read with 147, 148, 149, 153A, 295, 302, 396, 427, 436, 449, 505 and 201 IPC.

77. The learned Chief Metropolitan Magistrate assigned the matter to the Court of Sh.Lokesh Kumar, Additional Chief Metropolitan Magistrate, North East District, Karkardooma Courts, Delhi.

78. On 01.02.2010, Sh. Lokesh Kumar, Additional Chief Metropolitan Magistrate took cognizance and issued summons to all the accused persons, returnable on 17.02.2010 except to the accused Mahender Yadav who accepted the notice on the very same day. The relevant portion of the order is extracted below:

> *"... Let summons be issued against all the accused persons except Mahinder Yadav on whose behalf notice has been accepted by Ld. Counsel. Process is returnable on 17.2.10 at 11am."*

79. In the year 2010 the system in the District Courts was that Delhi was having separate Civil Districts while the entire Delhi was one Sessions Division. Karkardooma Court Complex was having two Districts i.e. District East headed by me as the then District Judge-VI/Additional Sessions Judge) and District North

East headed by Hon'ble Ms. Justice Sunita Gupta (the then District Judge-VII/Additional Sessions Judge).

80. The Incharge of District East was designated as District Judge-VI/Additional Sessions Judge on the criminal side on the basis of delegation of power by the District & Sessions Judge-I. While the incharge of the District North East was so designated as District Judge-VII/Additional Sessions Judge on the criminal side.

81. In the month of February 2010, I was functioning as District Judge-VI-cum-Additional Sessions Judge, incharge of the criminal work of East District apart from Special Judge (Prevention of Corruption Act) on the basis of investigation conducted by CBI. Apart from this regular functioning, the District & Sessions Judge-I, incharge of entire Session work of Delhi, assigned the duty pertaining to the criminal matters of East District.

82. The power of allocation vested with the District & Sessions Judge-I. Instead of seeking files, the list of cases with the proposed markings used to be sent to the District & Sessions Judge-I.

83. The District & Sessions Judge-I used to fix the bail duty subject wise. The District & Sessions Judge had assigned the bail duty of all the matters of CBI to the District Judge-VI (East)/Additional Sessions Judge.

84. Therefore it was the District & Sessions Judge who had assigned the anticipatory bail applications in CBI cases to my then court being the court of District Judge-VI (East).

85. After the summoning order in the first week of February, 2010, six applications as aforementioned under Section 438

Cr.P.C. seeking anticipatory bail were moved (including by Mahender Yadav and Krishan Khokar) in FIR No.SI 1 2005 S 0024, RC 7(DS)/05/SCB-II/DLI 2005, RC-8(S)/05/SCB-II/DLI 2005 and RC-25(S)/05/SCU-I/SCR-1/DLI 2005 before me as the then District Judge-VI.

86. The arguments were advanced on behalf of these applicants at length on 11.02.2010 and the anticipatory bail applications were listed for orders on 15.02.2010.

87. In the meantime Sajjan Kumar filed four applications on 11.02.2010 which were also listed before the same court on 15.02.2010. Inasmuch as the applications all related to the same matters and arguments were same, these applications were also taken up for hearing.

88. These applications came to be dismissed by the order dated 15.02.2010 giving the liberty to the applicants to seek bail before the appropriate court which had taken cognizance in the matter in accordance with law.

89. It appears that instead of approaching the trial court under Section 437 Cr.P.C., the applicants along with one Brahmanand Gupta thereafter filed applications Bail Application Nos.306/2010, 311/2010, 312/2010, 313/2010 (by Sajjan Kumar), Bail Application No.307/2010 (by Mahendra Yadav & Ors.), Bail Application Nos.308/2010, 309/2010, 310/2010 (by Brahmanand Gupta & Ors.) before this court which came to be allowed by the order dated 26.02.2010.

90. In the meantime before the learned Additional Chief Metropolitan Magistrate, the presence of the accused were secured and compliance of the provisions of Section 207 Cr.P.C. was effected.

91. The applicants most unfortunately do not deal with the orders and proceedings thereafter.

92. In the proceedings pending before him, the ***learned Additional Chief Metropolitan Magistrate (NE)*** thereafter passed an order dated 20.03.2010 directing as follows:

> *"Since the charge sheet as well as documents supplied to the accused persons are complete and offences involved in the present case are exclusively triable by the court of sessions, hence, the* ***case is committed to the court of Ld. District Judge-VI/ASJ, Incharge, East (Special Court CBI), Karkardooma Courts through Ld. District Judge-VII/ASJ/Incharge N.E. Accused are directed to appear before the said court on 27.3.10.*** *Ahlmad is directed to sent the file complete in all respects before the said court. Prosecution be also notified accordingly."*

(Emphasis by me)

93. It was therefore the learned Additional Chief Metropolitan Magistrate who had committed the case to the District Judge-VI/Additional Sessions Judge, Incharge (East)/(Special Judge, CBI) routing the file through the District Judge (North East) with the direction to the accused persons to appear before me. This

order was passed in the presence of the accused persons and fully within their knowledge. It was passed after I had rejected the anticipatory bail applications on 15.02.2010. The applicants had made no allegation of bias and it shows that they did not have objection to the trial being conducted by me.

94. Pursuant to the above directions of the learned Additional Chief Metropolitan Magistrate (North East) dated 20.03.2010, t he file was placed before the ***District Judge-VII/North East/Additional Sessions Judge/Karkardooma Courts, Delhi*** who on ***25.03.2010*** recorded the following order :

> *"File has been put up before me today.*
> *Perused the report of Ld. ACMM, North-East District.*
>
> ***File be sent to Ld. District Judge-VI/ASJ/Incharge/East (Spl. Court CBI), Karkardooma Courts, Delhi."***

(Emphasis supplied)

95. In terms of the above order, on 27.03.2010 the matter was thereafter placed before the District Judge-VI/Additional Sessions Judge/Incharge (East)/Special (court CBI) which court was at that time being presided over by me. I had nothing to do with the listing of the case. All the accused persons including Sajjan Kumar, Mahendra Yadav and Krishan Khokhar in person along with their counsel were present in court on that date. They again made no objection to my impartiality, independence or competence.

96. It is settled procedure that on receipt of a file after committal, the sessions court concerned scrutinizes the papers and directs its registration as a sessions case, in other words takes cognizance of the case.

97. On 27.03.2010, before I could undertake this exercise, only one of the accused Captain Bhagmal made an application dated 27.03.2010 under Section 177 read with Sections 178 and 179 of the Cr.P.C. submitting in paras 6 to 8 as follows:

> *"6. That as already submitted,* ***propriety demands that no case should be committed directly by the A.C.M.M. to any Session Court. The cases can be assigned/allocated only by the District & Sessions Judge, Delhi.***
>
> *7. That the* ***intent, object and basic spirit of segregation/bifurcation of the Court into different Districts is of course and definitely with the sole motive that justice is provided at the door step. Therefore, the cases as per law shall be tried and decided by the concerned Competent Courts, in whose jurisdiction, the offence has been committed.*** *The basic principle of creating different ensures that the litigants or the parties to the suit/cases face no inconvenience or hardship in covering long distance. In the* ***present case, the parties to the case, witnesses, etc. are from South West District and the South West District is at the distance of much more than 30 Km****. from this Court i.e. Karkardooma Courts, Delhi and this Hon'ble Court would appreciate that if the cases are* ***enquired and tried in the respective Districts having local jurisdiction over the alleged cases****, it would save the time, inconvenience and hardship of the parties, witnesses and the counsels.*

8. That the essence of having ***C.B.I. Courts in all the Districts*** *is of course with the basic foundation that the* ***cases should be tried and decided, in whose local jurisdiction the offences have been committed****. It is respectfully submitted that the* ***offences have not been committed within the local jurisdiction of this Hon'ble Court i.e. Karkardooma Courts, Delhi which covers the area of East District i.e.*** *basically the cases of Trans Yamuna area.*

P R A Y E R :

It is, therefore, most respectfully prayed that this Hon'ble Court may kindly ***be pleased to send the present case to the Court of Shri G.P. Mittal, District & Sessions Judge, Delhi (Tis Hazari Courts) for its assignment/allocation to the concerned Competent Court, in whose jurisdiction, the alleged offences have been committed, in the interest of justice."***

(Emphasis by me)

98. Thus a preliminary objection with regard to jurisdiction of Karkardooma Courts was raised submitting that the parties and witnesses were from South West District which was at a distance of more than 30 kilometers from Karkardooma.

99. On 27.03.2010, I did not take the case on my Sessions board and did not direct its registration as a Sessions Case in my court. In view of propriety and in accordance with law, only this application taking the preliminary object was taken up for consideration as is evident from the following order which was passed:

"The ***case has been received by commitment made by Addl. Chief Metropolitan Magistrate, Kakardooma*** *Courts, Delhi.*

> ***<u>Arguments advanced</u>*** *by the counsel for the accused/applicant Capt. Bhagmal heard. I have heard learned PP for the CBI also in the matter. Now to* ***<u>come up for the order at 3.00 p.m.</u>****"*
>
> *(Emphasis by me)*

100. The preliminary objection was disposed of by me on the same day i.e. 27.03.2010 pointing out the legal position in the following terms:

> *"It is established position that the* ***entire Delhi is having one session division and it is headed by Shri G.P. Mittal, Ld. District & Sessions Judge, Delhi.*** *It is pertinent to mention that* ***under the bifurcation scheme, District Judge/Additional Sessions Judge of particular police district is made the Incharge of session cases also****. The power has been given to the Additional Sessions Judge to deal with the session trials, criminal appeals and criminal revisions at the end of Additional Sessions Judge, Incharge of that district concerned. The* ***necessary order has been passed by the Ld. District & Sessions Judge vide order No.85975-86050/5539/Bail Power/Gaz/08 dated 3.11.2008****."*
>
> (Emphasis by me)

101. Having held so I could have very well proceeded with the registration of the case in view of the order dated 20.03.2010 of the learned Additional Chief Metropolitan Magistrate and order dated 25.03.2010 of the learned District Judge-VII/Additional Sessions Judge/Incharge/North East. However it was deemed appropriate

and prudent not to do so and the following directions for marking the case were made :

> *"In the light of above mentioned factual position, the ground taken in the* ***application that the present court is not competent to try the case, is without any force as every Additional Sessions Judge is competent to try every session trial pertaining to entire area in the territorial jurisdiction of Delhi. The arguments advanced that this court is not having jurisdiction, is without any basis and not acceptable****.*
>
> *It is pertinent to mention that this court is fully competent to try the present session trial being Additional Sessions Judge in respect of territorial jurisdiction of any police district.*
>
> *Keeping* ***in view the factual position*** *mentioned above, a request is hereby sent forthwith to the Ld. District & Sessions Judge, Delhi* ***to issue instructions to proceed with the*** *matter.*
>
> *The case is adjourned to 1.4.2010 to await for instructions from the Ld. District & Sessions Judge."*
>
> (Emphasis supplied)

102. In the above order where has the court dealt with the matter on merits? Delhi being one Session District at the time, a view was taken with regard to competency and jurisdiction of an Additional Sessions Judge who was also the District Judge and was Incharge of the District concerned, to deal with session trials.

103. The matter was sent to the District & Sessions Judge to make the directions for proceeding in the matter.

104. It is also essential to note that I had no role in the listing of the case before my court and no knowledge as to events, proceedings and orders in the case.

105. The matter was then placed before the District & Sessions Judge on 01.04.2010. On that date, the convicts Sajjan Kumar, Brahmand Gupta, Ved Prakash, Peerya, Khushal Singh, Krishan Khokhar and Bhagmal were present through counsel.

106. On 01.04.2010, the learned Sessions Judge heard the counsel for the parties and also went through the records and thereafter agreed with my reasoning on Delhi being one sessions division and that any Additional Sessions Judge could try any case which may be assigned to him by the Sessions Judge but for the reason that the charge sheet was assigned to the Additional Chief Metropolitan Magistrate of North East District and the matter was not one under the Prevention of Corruption Act, allocated the matter to the learned District Judge-VII/Additional Sessions Judge/Karkardooma, Delhi.

The relevant extract of the order dated 01.04.2010 is reproduced hereunder:

> *"5.* ***Undisputedly, Delhi is one Sessions Division and any Additional Sessions Judge can try any case which may be assigned to him by the Sessions Judge, Delhi****. It may, however, be noticed that this is not a case under the Prevention of Corruption Act, to be tried by the Special Judge, CBI.* ***The chargesheet was assigned by learned Chief Metropolitan Magistrate to Shri Lokesh Kumar Sharma who is Addl. Chief Metropolitan Magistrate for the North East District who has conducted the committal proceedings in this case. In this view of the matter, this case is allocated to the court of Ms. Sunita Gupta, learned Addl. Sessions Judge Incharge (North East District),***

Karkardooma Courts, Delhi for trial in accordance with law.
File be sent to the said court immediately. Parties to appear before the said court on 5/4/2010."
(Emphasis by us)

107. The observations in the orders of 27.03.2010 and 01.04.2010 have not been challenged before any further forum.

108. On 05.04.2010, the case listed before the District Judge-VII/ Additional Sessions Judge/Incharge/North East who took cognizance in the case for the first time passed the following order regarding registration of the case:

*"**Case received on transfer** under order of ld. Distt. & Sessions Judge, Delhi. **It be checked and registered**."*

109. The above narration would show that I have not conducted a single step in the case, not even the formal requirement of getting the case papers checked. I did not direct the registration of the case. I did not even take the cognizance in the case, let alone "*apply judicial mind*" to the merits of the case or even considered the matter on merits of the case at any point of time or stage in any order passed by me.

110. The trial of the case was never before me. As such I had no opportunity to do so and have never examined the "*prosecution evidence and the defence*" of the applicants.

111. I was also not a member of the Bench which made directions for hearing of the appeals in these cases along with connected appeals.

112. It is by the order dated 05.09.2010 of Hon'ble the Chief Justice that I have been assigned the present roster w.e.f. 07.09.2010.

113. I have no role at all in listing of either the challan before me or placing the appeals before this Court.

114. I extract the oath of office which every High Court Judge takes while assuming office which is as follows:

> *"I, A.B., having been appointed Chief Justice (or a Judge) of the High Court*
>
> *swear in the name of God at*
>
> *(or of) ---------- do ---------- that I will bear true faith and*
>
> *solemnly affirm*
>
> *allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India, that I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or ill-will and that I will uphold the Constitution and the laws."*

115. I have faithfully, honestly and to the best of my ability without any bias, prejudice and above influence of any kind discharged my judicial functions in consonance with the above oath which I have taken.

116. The present applications are baseless and the apprehensions misconceived and malafide only intended to delay the hearings in these cases as well as connected appeals.

117. I find no merit in these applications which are hereby dismissed.

P.S.TEJI, J

NOVEMBER 04, 2016
dd

Gita Mittal, J.

118. I have had the benefit of going through the narration of facts and reasoning given by my ld. Brother. While respectfully agreeing with the same, I wish to add my own reasons which are as follows.

(i) Grounds on which the applications are premised

119. Before considering these applications on merits, it is necessary first to set out the grounds on which the prayers for recusal and transfer respectively are premised.

120. We first take up Crl.M.A.No.15236/2016 filed in Crl.A.No.1099/2016 by Sajjan Kumar. So far as the facts on which the application is premised, in para 4(e), the applicant refers to the "*order dated 15th of February 2010*" containing "*observations on*

the strength of the chargesheet filed by the CBI and the defence raised by the applicant" in paras 15 and 16 of the order.

121. In para 5(f), the applicant states that the learned judge had "*applied his mind to the merits of the case, including the defence taken by the applicant*".

122. In para 4(g), it is stated that the order on bail has been "*passed after dealing with the merits of the case against the accused persons including the applicant/respondent and after examining the material extensively on merits*".

123. In para 5 of the application, it is contended that the facts relating to the order dated 15th February, 2010 "*demonstrate that the Hon'ble Judge has applied judicial mind to the merits of the case and has considered several of the main planks of the defence of the applicant/respondent*". On this assertion, it is submitted that it would not be in consonance with the requirements of a fair hearing and justice if the same judge hears the matter at the stage of the appeal. On this, such applicant stated that there is a "*real danger of bias*" if the appeal is heard by the same judge.

124. Interestingly, in para 6, the applicant referred to the stated facts "*demonstrate a real danger of bias and suspicion of bias*". Finally the applicant prays that the learned judge may kindly recuse himself and the appeals be placed before the Chief Justice for appropriate orders to secure the ends of justice.

125. This application is thus premised on the consideration of the anticipatory bail application and the order dated 15th February, 2010 which were passed by my ld. Brother.

126. So far as the other two applications being Crl.M.A.No.15239/2016 in Crl.A.No.715/2013 and Crl.M.A.No.15233/2016 in Crl.A.No.753/2013 filed by Mahender Yadav and Krishan Khokhar respectively are concerned, we may note that these applications are identical. Both are captioned as "*Applications u/s Section 482 Cr.P.C. for transfer of matter to another Bench of which Hon'ble Mr. Justice P.S. Teji is not a member*". These applications make for an extremely distressing reading as bald, wild and even false averments have been made which have no bearing in truth. The same is evident from the following identical assertions in both the applications :

> *"5. That after committal proceedings, the matter was committed to court of Hon'ble Mr. Justice P.S. Teji, the then District Judge-VI, East District instead of to the court of District Judge-VII, North East District.*
> *6. That since the matter was being committed from the court of Sh. Lokesh Kumar Sharma, ACMM, North-East District, Karkardooma Courts, Delhi, as such* ***it was pointed to the Hon'ble Judge that the matter has been wrongly committed to that court whereas it should have*** *been committed to the court within whose jurisdiction PS Delhi Cantt falls where the alleged incident had taken place and it was requested that the matter may be transferred to such court."*

127. Most reprehensibly, the applicants make the following further incorrect and baseless assertions :

> *"7. That however Hon'ble Mr. Justice P.S. Teji with* ***predetermined mind to try the matter*** *which pertained to 1984 riots, passed a* ***detailed order dated 27.03.2010***

and held that this court is fully competent to try the present case. ...

8. That the matter was then put up before the District & Sessions Judge. Ld. District & Sessions Judge vide order dated 01.04.2010 ***found force in the arguments and transferred the case*** *to the court of Ms. Sunita Gupta, the .... Copy of the order dated 1.4.2010 is annexed herewith as ANNEXURE-D."*

128. In paras 9 and 10, the applicants refer to the submission on his behalf in court on the 19th of September 2016 to the effect that the applicant would have no objection to the hearing by the present Bench. We propose to deal with this contention separately.

129. On the above incorrect and even false factual narration, in para 10, the applicants Mahender Yadav and Krishan Khokhar also aver that they have "*serious apprehensions*" that they would "*not get fair and impartial hearing and would not get justice in case the matter is heard by the Bench of which Hon'ble Mr. Justice P.S. Teji is a member*".

130. So far as the basis of the apprehension is concerned, that is to be found in the following assertions in paras 11 and 12 of the application wherein it is stated thus :

(i) Apprehension is based "*upon* ***facts that had occurred during the trial proceedings***". (**para 11**)

(ii) While dealing with the bail application of the appellant, the learned judge "*has* ***already given his mind*** *against the appellant*". (**para 11**)

(iii) Thereafter vide order dated 27th March, 2010, the learned judge had "***shown his anxiety to conduct the trial*** *of the matter*". (**para 11**)

(iv) The learned judge has made a request to the District and Sessions Judge to instruct "*him to proceed with trial of the matter*". (**para 11**)

(v) "***Because of all these orders***", a "*reasonable apprehension has crept up*" in the applicant's mind that they "*will not have fair or impartial hearing before this Hon'ble Bench*". (**para 11**)

(vi) The learned judge being the then Additional Sessions Judge has "***already formed*** *and* ***express an opinion on the facts of the case*** *which are subject matter of the present appeal in the form of the bail order*". (**para 12**)

(vii) The "*appeal is an extension of trial*". (**para 13**)

(viii) Bonafide belief that "*serious injustice*" would be done to him. (**para 14**)

Premised on the above averments, these two applicants – Krishan Khokhar and Mahender Yadav have made a prayer to transfer the matter to the court of Hon'ble the Chief Justice of this court to transfer the matter to another Bench of which my learned Brother is not a member.

(ii) Order on anticipatory bail application dated 15th February, 2010 – whether a binding adjudication on merits

131. The applicants by way of these applications have thus expressed the apprehension of bias of my ld. Brother premised on

his having passed the order dated 15th February, 2010 by the six anticipatory bail applications filed. We therefore, propose to consider this order first and foremost. Let us sum up the observations made by the learned judge in the order.

132. The order dated 15th February, 2010 deserves to be considered in some detail. We summarize the parawise observations in the common order dated 15th February, 2010 and set our observations thereon against them :

Order dated 15th February, 2010	***:***	***Our observations***
Paras 1 to 8 : Set out the gist of the prosecution case		The court has noted the undisputed factual position on record that the chargesheet stood filed; observed that the registration of the FIR and the proceeding thereon; filing the chargesheet as well as taking cognizance by the Metropolitan Magistrate were not under challenge by the accused persons.
Para 9 : Notes the filing of the application for anticipatory bail.		
Paras 10 to 12 : Note the submissions made by the CBI.		
Para 15 : Again notes the submissions of the defence.		
Para 16 : Notes the arguments of the defence and the applicants reliance on earlier Government of India order as well as the subsequent order to get the matter investigated afresh. Also noted are the arguments of the CBI on this submission.		
Para 17 : Again notes the arguments of the defence as well as the learned Special P.P. for the CBI		

and the complainants who pointed out that serious allegations had been levelled.		
Para 18 : Notes that the chargesheet and the order of cognizance show that that the ACMM considered the material before him and proceeded in the matter. The judge notes the factual position with regard to the material available on record which and what it "*demonstrates*" regarding the cases.		
Para 19 : An analysis has been effected of a judicial pronouncement with regard to considerations for grant of anticipatory bail. It was observed by the court that one of the grounds for grant of anticipatory bail is that the case against the accused was completely false. It was observed that there was no scope to say "*at this stage*" that the allegations are false in the light of material placed before the court. The court has also observed that the same is the "*subject matter of trial*" but on "*face value*" of the allegations and the material referred to by the CBI which does not suggest so.		While Mr. Vikas Singh, learned Senior Counsel insists that the judge had applied his mind that the allegations were serious and arrived at a conclusion. Mr. Salman Khurshid, ld. Senior Counsel fairly stated that there can be no cavil that the judge had not expressed any opinion on the merits of the allegations but had merely noted that allegations had been levelled and the truth had to be examined during trial. We note that the ld. Judge has only noted the legal and factual position that it could not be stated "*at that stage*" i.e. before the trial that they (the allegations) were false.

		The ld. judge has not concluded that they were true or proved in accordance with law. Conscious of avoiding any prejudice, the order emphasises that it was "***<u>at this stage</u>***" and "***<u>subject matter of trial</u>***" and **"*<u>face value</u>*"** clearly underscoring that it was a prima facie only.
Para 20 : Notes that the question which arises was whether the accused could be granted anticipatory bail after filing of the chargesheet and taking cognizance in the light of the judgment of the Supreme Court in ***AIR 2009 SC 1362, Vaman Narayan Ghiya v. State of Rajasthan.***		
Paras 21 and 23 : Note the arguments of Mr. I.U. Khan, learned counsel for Sajjan Kumar		
Para 22 : Notes the arguments on behalf of CBI.		
Para 25 : Again notes the arguments of the CBI.		
Para 26 : Sets out the submissions of the accused.		
Paras 27 and 28 : Refer to the judicial pronouncements relied upon by the applicants and the observations of the Supreme Court thereon on the scope of Sections 438 and 439 of the Cr.P.C.		
Para 29 : The court dealt with the case law placed before it and		

observed that anticipatory bail is to be granted only for a limited period wherefrom jurisdiction under Section 439 starts that is to say that jurisdiction under Section 438 should not be extended to the period when the accused is to invoke jurisdiction of the trial court under Section 439 for grant of regular bail.		
Para 31 : The order dated 8th February, 2010 in W.P.(C)No.525/2010 has been considered. It was observed that it would be appropriate if the discretion to grant the bail in the present case was left to the trial judge.		
Para 32 : Case law was referred to on the same issue.		

133. Thereafter, placing reliance on the pronouncements of the Supreme Court, all the applications were disposed of leaving discretion to grant bail to the trial court in the following terms :

> *"32. ...I am of the considered opinion that the accused/applicants are not entitled for the grant of anticipatory bail and the discretion to grant the bail should be left with the order of Hon'ble High Court dated 8.2.2010.*
>
> *33. Consequently, the applications of accused/applicants, namely, Sajjan Kumar, Balwan Khokhar, Krishan Khokhar, Mahender Yadav, Ved Prakash Pial @ Vedu Pradhan, Peeru @ Peeriya Sansi @ Peera Ram @ Peeriya Gujrati and Brahma Nand Gupta @ Gupta Telwala are hereby dismissed."*

134. Mr. Vikas Singh, ld. Senior Counsel has staunchly contended that that the ld. Additional Sessions Judge had taken a view on the merits of the matter in para 16 of order dated 15th February, 2010 when he recorded that the Government of India order may not assist the accused persons in establishing innocence.

135. The submission however, is erroneous inasmuch as every court considering a criminal case, in law has to examine the evidence laid before it in the light of statutory provisions and test the same on sound and well settled legal principles. It is a well settled principle of criminal law that the prosecution has to establish its case beyond reasonable doubt by legal evidence.

136. A Government order based on material gathered during investigation cannot in law bind a criminal court seized of the prosecution of a case which has to decide the case on the basis of evidence led by the parties.

137. It is not the case of the applicants before us that such opinion of the Government would tie the hands of the criminal court and it must arrive at the same opinion as may have been expressed in a government order, irrespective of evidence led by the prosecution.

138. We put it to Mr. Salman Khurshid, ld. Senior Counsel for the applicant that if such Government order had been to the contrary i.e. against the accused persons, could the prosecution have contended that the trial court was bound by it? Ld. Senior Counsel rightly did not dispute the legal position that a criminal prosecution has to be tested on the evidence laid before the court and not by Government opinion.

139. The impact or bindingness of a Government of India view or order on a civil matter before a court may be a different matter. Therefore, the observations in para 16 are of no consequence so far as the merits of the case are concerned and do not reflect application of mind or a final view on the trial of the accused.

(iii) Whether the order dated 15th February, 2010 disposing the applications for anticipatory bail is a final adjudication binding even on the trial judge or any other court seized of the matter at a later stage

140. So what is the nature of and bindingness of an order passed on an application under Section 438 of the Cr.P.C. seeking anticipatory bail? Our observations on the order dated 15th February, 2010 are fortified by judicial precedents which we note hereafter.

141. Mr. R.S. Cheema, learned Senior Counsel for the CBI has placed the celebrated pronouncement of the Supreme Court reported at ***(1980) 2 SCC 565, Shri Gurbaksh Singh Sibbia & Ors. v. State of Punjab*** wherein the Supreme Court considered the factors which a court would keep in mind when deciding an application for anticipatory bail holding thus :

> ***"31.*** *In regard to anticipatory bail, if the proposed accusation appears to stem not from motives of furthering the ends of justice but from some ulterior motive, the object being to injure and humiliate the applicant by having him arrested, a direction for the release of the applicant on bail in the event of his arrest would generally be made. On the other hand, if it appears likely, considering the antecedents of the*

applicant, that taking advantage of the order of anticipatory bail he will flee from justice, such an order would not be made. But the converse of these propositions is not necessarily true. That is to say, it cannot be laid down as an inexorable rule that anticipatory bail cannot be granted unless the proposed accusation appears to be actuated by mala fides; and, equally, that anticipatory bail must be granted if there is no fear that the applicant will abscond. There are several other considerations, too numerous to enumerate, the combined effect of which must weigh with the court while granting or rejecting anticipatory bail. The nature and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the applicant's presence not being secured at the trial, a reasonable apprehension that witnesses will be tampered with and "the larger interests of the public or the State" are some of the considerations which the court has to keep in mind while deciding an application for anticipatory bail. The relevance of these considerations was pointed out in State v. Captain Jagjit Singh[AIR 1962 SC 253 : (1962) 3 SCR 622 : (1962) 1 Cri LJ 216] , which, though, was a case under the old Section 498 which corresponds to the present Section 439 of the Code. It is of paramount consideration to remember that the freedom of the individual is as necessary for the survival of the society as it is for the egoistic purposes of the individual. A person seeking anticipatory bail is still a free man entitled to the presumption of innocence. He is willing to submit to restraints on his freedom, by the acceptance of conditions which the court may think fit to impose, in consideration of the assurance that if arrested, he shall be enlarged on bail."

142. Our attention is then drawn by Mr. R.S. Cheema, learned Senior Counsel for the CBI to the pronouncement in ***AIR 1978 SC 527, Babu Singh & Ors. v. State of U.P.*** wherein in para 2, regarding the nature of an order on a bail application, the Supreme Court held thus :

> ***"2.*** *Briefly we will state the facts pertinent to the present petition and prayer and proceed thereafter to ratiocinate on the relevant criteria in considering the* ***interlocutory relief of bail****. Right at the beginning, we must mention that, at an earlier stage, their application for bail was rejected by this Court on September 7, 1977. But* ***an order refusing an application for bail does not necessarily preclude another****, on a later occasion, giving more materials, further developments and different considerations. While we surely must set store by this circumstance, we cannot accede to the faint plea that we are barred from second consideration at a later stage.* ***An interim direction is not a conclusive adjudication****, and updated reconsideration is not over-turning an earlier negation. In this view, we entertain the application and evaluate the merits pro and con."*
>
> (Emphasis by us)

143. On the same aspect, we may also usefully refer to the pronouncement of the Supreme Court reported at ***(2012) 4 SCC 134, Dipak Subhashchandra Mehta v. Central Bureau of Investigation & Anr.*** and ***(2013) 7 SCC 452, Central Bureau of Investigation v. V. Vijay Sai Reddy*** wherein also the court has observed on the nature of consideration at the time of making orders on a bail application.

144. In ***(2012) 4 SCC 134, Dipak Subhashchandra Mehta,*** the court had observed as follows :

> ***"32.*** *The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though* ***at the stage of granting bail, a detailed examination of evidence and elaborate documentation of the merits of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted****, particularly, where the accused is charged of having committed a serious offence. The court granting bail has to consider, among other circumstances, the factors such as (a) the nature of accusation and severity of punishment in case of conviction and the nature of supporting evidence; (b) reasonable apprehension of tampering with the witness or apprehension of threat to the complainant; and (c) prima facie satisfaction of the court in support of the charge. In addition to the same, the court while considering a petition for grant of bail in a non-bailable offence, apart from the seriousness of the offence, likelihood of the accused fleeing from justice and tampering with the prosecution witnesses, have to be noted."*
>
> (Emphasis by us)

145. In ***(2013) 7 SCC 452, Central Bureau of Investigation v. V. Vijay Sai Reddy,*** the court had set out the following considerations for grant of bail :

> ***"34.*** *While granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the*

*public/State and other similar considerations. It has also to be kept in mind that for the purpose of granting bail, the legislature has used the words "**reasonable grounds** for believing" **instead of "the evidence**" which means the court dealing with the grant of bail can only satisfy itself as to whether there is a genuine case against the accused and that the prosecution will be able to produce **prima facie evidence** in support of the charge. **It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt**."*

(Emphasis supplied)

146. In this regard, we may also usefully advert to the pronouncement of the Supreme Court reported at ***(2012) 1 SCC 40 Sanjay Chandra v. Central Bureau of Investigation***, wherein the court placed reliance on judicial precedents to note the considerations for grant of bail:

***"37.** The principles, which the Court must consider while granting or declining bail, have been culled out by this Court in Prahlad Singh Bhati v. NCT, Delhi [(2001) 4 SCC 280 : 2001 SCC (Cri) 674] thus: (SCC pp. 284-85, para 8)*

"8. The jurisdiction to grant bail has to be exercised on the basis of well-settled principles having regard to the circumstances of each case and not in an arbitrary manner. While granting the bail, the court has to keep in mind the nature of accusations, the nature of [the] evidence in support thereof, the severity of the punishment which conviction will entail, the character, behaviour, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with,

the larger interests of the public or State and similar other considerations. It has also to be kept in mind that for the purposes of granting the bail the ***legislature has used the words 'reasonable grounds for believing' instead of 'the evidence'*** *which means the court dealing with the grant of bail can only satisfy it (sic itself) as to whether there is a genuine case against the accused and that the prosecution will be able to produce* ***prima facie evidence*** *in support of the charge.* ***It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt****."*

38. *In State of U.P. v. Amarmani Tripathi [(2005) 8 SCC 21 : 2005 SCC (Cri) 1960 (2)] this Court held as under: (SCC pp. 31 & 32, paras 18 & 22)*

"18. It is well settled that the matters to be considered in an application for bail are (i) whether there is any ***prima facie or reasonable ground*** *to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail [see Prahlad Singh Bhati v. NCT, Delhi [(2001) 4 SCC 280 : 2001 SCC (Cri) 674] and Gurcharan Singh v. State (Delhi Admn.) [(1978) 1 SCC 118 : 1978 SCC (Cri) 41 : AIR 1978 SC 179]]. While a vague allegation that the accused may tamper with the evidence or witnesses may not be a ground to refuse bail, if the accused is of such character that his mere presence at large would intimidate the witnesses or if there is material to show that he will use his liberty to subvert justice or tamper with the evidence, then bail will be refused. We may also refer to the following*

principles relating to grant or refusal of bail stated in Kalyan Chandra Sarkar v. Rajesh Ranjan [(2004) 7 SCC 528 : 2004 SCC (Cri) 1977] : (SCC pp. 535-36, para 11)

> *'11. The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:*
>
> > *(a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.*
> >
> > *(b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.*
> >
> > *(c) Prima facie satisfaction of the court in support of the charge. (See Ram Govind Upadhyay v. Sudarshan Singh [(2002) 3 SCC 598 : 2002 SCC (Cri) 688] and Puran v. Rambilas [(2001) 6 SCC 338 : 2001 SCC (Cri) 1124] .)'*

***

22. ***While a detailed examination of the evidence is to be avoided while considering the question of bail, to ensure that there is no prejudging and no prejudice, a brief examination to be satisfied about the***

existence or otherwise of a prima facie case is necessary."

(Emphasis by us)

147. It is therefore, well settled that the consideration at the stage of bail, no detailed examination of evidence or close examination of the documentation is effected. The court is not required to elaborately deal with the merits of the case but the order is passed on a prima facie consideration. This is to ensure that there is no prejudging and no prejudice to the accused. It is in the nature of an interim direction and is certainly not a stage in the trial. It is equally well settled that any order or observation in a bail order does not preclude the second application for the same relief.

148. These principles laid down in these judgments apply equally to decision making on an application for anticipatory bail as well as an order passed on an application for anticipatory bail. Therefore, any observation or order of bail or anticipatory bail is not a final adjudication on any issue and does not impact consideration of the matter on merits at any stage in the trial or bind any higher court in appeal.

149. Not a single word or statement could be pointed out by learned Senior Counsels as well as counsel for the applicants in the order dated 15th February, 2010 passed by my ld. Brother which could be considered even a binding comment, either on the nature of the evidence in support of the charge or the circumstances, let alone an observation which could be held to be a finding on the merits of the case.

150. A reading of the order dated 15th February, 2010 would show that the learned District Judge and Additional Sessions Judge has proceeded extremely cautiously and with self-restraint refraining from returning any finding on the merits of the case or any of the allegations. The learned judge has carefully and objectively observed that the challans having been filed and summons having been issued for the appearance of the applicants, it would be improper to exercise discretion to grant anticipatory bail and that the applicants were required to appear before the trial court in response to the summons and the discretion to grant bail had to be left to the trial court.

151. In this regard, we may note that Section 438 of the CrPC confers concurrent jurisdiction on the High Court as well as Sessions Court to consider applications for grant of anticipatory bail. If an adjudication in a bail application is held to be a consideration on merits of the matter, an anomalous situation would arise. An accused person who had been granted anticipatory bail by the High Court would then rely upon the observations made in such order of bail to defeat his prosecution before the trial court. This is certainly not permissible.

152. Or for that matter, a trial court deciding a bail application would stand disqualified from proceeding with the trial.

153. We may also advert to the power of the Appellate Court in *seisen* of an appeal against conviction, under Section 389 of the Cr.P.C. providing for an order for suspension of execution of sentence or the order appealed against, or, if the convict is

confined, he be released on bail. Section 389(1) postulates the application for such suspension to be filed in the pending appeal. If the proposition pressed by the applicants was accepted, it would require judges who have passed orders on applications under Section 389(1) of the Cr.P.C. to recuse from hearing the substantive appeals against the judgments of conviction.

154. In law therefore, the order dated 15th of February 2010 is a prima facie view, not "*dealing with the merits of the case*". It does not contain any binding finding or observation which could even remotely tie the hands of the trial court. It does not prohibit even a subsequent application for anticipatory bail, let alone the appellate court. It fairly leaves the discretion to grant bail completely to the trial court.

155. The order dated 15th February, 2010 is therefore, neither an application of "*judicial mind to the merits of the case, including the defence*" of the applicants. The order does not show that it is "*examining the material extensively on merits*". There is nothing in the order dated 15th of February 2010 which could convey or create apprehension of bias against the applicants on the part of the ld. Judge who passed the same, let alone reasonable apprehension of bias.

156. Therefore, the pleading that my learned brother has "*given his mind against the appellant*" while rejecting the application for anticipatory bail is premised on a completely misreading of the order dated 15th February, 2010 and ignorance about the

considerations which must weigh with the court while considering for grant or rejection of bail.

(iv) Consideration of a preliminary objection on territorial jurisdiction by the order dated 27th March, 2010 – Whether tantamount to a "definite view" on the merits of the case

157. Keeping in view the nature of objections and submissions made before us, I must elaborate also on the order dated 27th March, 2010 passed by the District Judge (VI)-cum-ASJ(I/C), East. The case was for the first time placed before the District Judge-VI on the 27th of March 2010 in accordance with the order dated 20th March, 2010 of the ACMM pursuant to the specific directions dated 25th March, 2010 made by the Ld. District Judge-VII/NE. This order was thus passed on the very first date when the case was placed before him.

158. Barely 42 days after the rejection of the application for anticipatory bail, the applicants along with the co-accused were present before the learned Judge on the 27th March, 2010 when only Shri Bhagmal (the appellant in Crl.A.No.851/2013) filed the application for transfer on technical grounds. He also did not do so on any apprehension of bias on the part of the learned Judge. This application merely stated that the learned Judge did not have territorial jurisdiction to try the matter on his assessment of jurisdictions of the criminal court.

159. On this application, my ld. Brother proceeded to hear arguments in the presence of the accused persons and fixed the

case at 3:00 pm for orders. The applicants remained present at 3:00 pm on the 27th of March 2010 when the order was passed which has been extracted by my ld. Brother. There is not the remotest reference to the merits of the case.

160. In the order dated 1st April, 2010, the learned Sessions Judge has agreed with the legal position in the order dated 27th March, 2010 that Delhi was one Sessions division headed by District & Sessions Judge and any Additional Sessions Judge can try any case which may be assigned to him by the Sessions Judge, Delhi. It was noted that however, in the present case, the chargesheet had been assigned by the learned Chief Metropolitan Magistrate to the Additional Chief Metropolitan Magistrate for the North-East District who had conducted the committal proceedings and that the case therefore, had to be placed before the Additional Sessions Judge Incharge of the North-East District, Karkardooma Courts, Delhi. Consequently, by the order dated 1st April, 2010, the matter was allocated to the court of learned Additional Sessions Judge (Incharge) (North-East District) for this reason alone.

161. So far as the order dated 27th March, 2010 is concerned, we find that Crl.M.A.No.15236/2016 filed by Sajjan Kumar does not make any specific objection premised thereon. However, inasmuch as Mahender Yadav and Krishan Khokhar in para 11 of their identical applications have unfairly and wrongly urged that the order shows "*anxiety to conduct the trial*".

162. After the dismissal of the bail application on 15th February, 2010, the applicants before us, along with the co-accused Balwan

Khokhar, Capt. Bhagmal and Giridhari Lal appeared before the learned ACMM on the 20th of March 2010 when the order of committal to the same judge was passed in their presence.

163. No objection at all was raised by these applicants to the committal of the case to my ld. Brother as District Judge-VI. This was even though the order dismissing the anticipatory bail stood passed (on 15th February, 2010), yet based on this very order, present applications have been made. At no point of time did the applicants object to my ld. Brother conducting the trial despite the same.

164. The applicants also did not object to the order dated 25th March, 2010 passed by the District Judge-VII/NE/ASJ/KKD Courts sending the case to my ld. Brother. No application or appeal was filed.

165. With regard to hearing of the preliminary objection on 27th March, 2010, in the pronouncement of the Supreme Court reported at ***AIR 1966 SC 1418, Gurcharan Dass Chadha v. State of Rajasthan***, the following principle has been succinctly set down in para 5 of the said judgment :

> ***"5.*** *We shall now take up the* ***objection*** *that this Court* ***lacks jurisdiction to transfer the case*** *pending before the Special Judge Bharatpur. This objection goes to the root of the matter.* ***Questions of inherent jurisdiction must always be decided before the merits are considered because to dismiss the petition after consideration of merits itself involves an assumption of jurisdiction****. We must accordingly consider the objection even though we are satisfied that the petition must fail on merits."*
>
> (Emphasis by us)

166. My ld. Brother therefore, had no option but to decide the application of Capt. Bhagmal before considering the merits of the case.

167. It is important to note that only Capt. Bhagmal filed the application that too premising the same purely on the inconvenience on account of the physical distance between his place of residence and the court as well as the fact that the alleged offence was stated to have been committed in the South-East District and not within the jurisdiction of any court in the Karkardooma District Courts. Despite the correct legal position that Delhi was one Session Division, the case was sent to the District Judge. Even the District Judge did not agree with the Bhagmal's application. It was only on account of the fact that the ACMM had marked the case erroneously to the District Judge of the East District, even though he (ACMM) himself was from the North-East District, the learned District Judge had marked the case to the District Judge (North-East).

168. The averments in the applications are a deliberate misrepresentation inasmuch as the anticipatory bail was filed on 10th February, 2010 when the order of committal dated 20th March, 2010 had not been passed.

169. The above narration shows that the matter was never on the board of my learned brother and was never dealt with by him. Post committal, the accused persons had appeared for the first time when the preliminary objection was taken up, not to his court, but to the jurisdiction of all courts at Karkardooma and suggesting that

the trial should be held in a court having jurisdiction over the South-West District. The matter was sent to the ld. District & Sessions Judge without taking the case on board or dealing with it on merits.

170. We may note that the applicants did not even support this objection of Bhagmal in his application. None joined issues with him. This fact by itself amply establishes that the present applications are a mere ploy to delay hearings and do not stem from any real or reasonable apprehension in the minds of the applicants.

171. No such submission ("*pointed out*") as is set out in para 6 was made. The applicant is clearly mis-stating the facts and has made insinuations which are most unfortunate and improper. The learned ACMM who passed the committal order applied his independent mind. The above narration of facts would show that my learned Brother has no connection at all with either the passing of the order by the learned ACMM or the order of learned District Judge-VII who passed the order on the 25th of March 2010 placing the matter before him on 27th of March 2010.

172. As put by Mr. R.S. Cheema, ld Senior Counsel on behalf of the CBI, on the 27th March, 2010, on a technical plea, an innocuous order stood passed without dealing with the merits of the case.

173. The record does not disclose even a suggestion of an objection by the applicants, let alone, "*request*" as averred in para 11.

(v) ***"Definite opinion on material issues"; "proceedings during trial" or "dealt with the matter at the stage of trial" – whether made out?***

174. During the course of hearing on these applications, we have repeatedly asked learned Senior Counsels for the applicant and learned counsel to point out a single finding on the facts of the case or on the merits of the case. None could be pointed out. Learned senior counsel and counsel also were not able to point out "*definite opinion on material issues*". However, merely an oblique reference to "*proceedings during trial*" has been made.

175. Conscious of judicial discipline and fairness in adjudication, we had made repeated queries to Mr. Vikas Singh, learned counsel to point out the steps taken as a trial judge in the matter by my learned Brother which have evoked no response at all. There was no reference to any order or any provision of the Cr.P.C. Instead, appearing for Mahender Yadav, Mr. Singh, ld. Senior Counsel, has in rejoinder, referred to the pronouncement of the Supreme Court reported at ***(1996) 4 SCC 127, Union of India & Ors. v. Major General Madan Lal Yadav (Retrd.)***. In this case, the court was concerned with an interpretation of the expression "*trial commenced*" under Section 123(2) of the Army Act, 1950. Charges for dereliction of duty were laid against the respondent and action against the Army Act was initiated against the respondent though he had retired. It appears that the respondent took various steps to delay his trial by General Court Martial (GCM) and thereafter challenged the commencement of the GCM proceedings on the

ground that it had not commenced within six months of his ceasing to be subject to the Army Act. The Bombay High Court had issued a writ in his favour. The Supreme Court was concerned with the interpretation as to what would be the meaning of the words "*trial commenced*" as used in sub-section (2) of Section 123 of the Army Act and the determination of as to when it commenced. In para 21, the court observed that the trial before the court martial is deemed to have commenced the moment the GCM assembles and examination of the charge is effected.

176. In para 27, the court referred to Code of Criminal Procedure and observed thus :

> ***"27.*** *Our conclusion further gets fortified by the scheme of the trial of a criminal case under the Code of Criminal Procedure, 1973, viz., Chapter XIV "Conditions requisite for initiation of proceedings" containing Sections 190 to 210, Chapter XVIII containing Sections 225 to 235 and dealing with "**trial before a Court of Sessions**" pursuant to committal order under Section 209 and in Chapter XIX "trial of warrant cases by Magistrates" containing Sections 238 to 250 etc. It is settled law that under the said Code trial commences the moment cognizance of the offence is taken and process is issued to the accused for his appearance etc.* ***Equally, at a sessions trial, the court considers the committal order under Section 209 by the Magistrate and proceeds further. It takes cognizance of the offence from that stage and proceeds with the trial. The trial begins with the taking of the cognizance of the offence and taking further steps to conduct the trial****."*
>
> (Emphasis by us)

177. The observations in para 27 are of no assistance to the appellant inasmuch as the court also refers to Chapter-XVIII and Sections 225 to 235 dealing with the trial of Sessions Case adverted to above.

178. So far as "*trial proceedings*" are concerned, Mr. Cheema, learned Senior Counsel for CBI has drawn our attention to the scheme of the Code of Criminal Procedure (Cr.P.C.). We find that Chapter XVIII of the Cr.P.C. is captioned as "*Trial Before Court of Session*". Sections 225 to 237 are placed in this Chapter. The opening section 225 in the Chapter only provides that in every trial before the court of Session, the prosecution shall be conducted by a Public Prosecutor.

179. So far as the first stage for the trial before a court of session is concerned, the same is provided under the next Section 226 which reads thus :

> *"**226. Opening case for prosecution.** When the **accused appears** or is **brought before the Court** in pursuance of a **commitment** of the case under section 209, the prosecutor **shall** open his case by describing the charge brought against the accused and stating by what evidence he proposes to prove the guilt of the accused."*
>
> (Emphasis by us)

The allegation that the learned judge has "*dealt with the matter at the stage of trial*" is therefore, completely baseless and unfounded.

180. The trial of a Sessions case has to begin with the direction to register the case and the opening statement by the prosecutor. On the 27th March, 2010, this stage was never reached.

181. The above narration of facts in the present case shows that, pursuant to the commitment of the case under Section 209 Cr.P.C., before the ld. Additional Sessions Judge on the 27th of March 2010, even before the first step of registration of the case prior to proceeding in accordance with Section 226 of the Cr.P.C. could take place, Capt. Bhagmal had filed the application making the preliminary objection to territorial jurisdiction and seeking transfer of the case. The prosecutor had no opportunity to open his case in accordance with Section 226 of the Cr.PC. As such, none of the steps prescribed in Chapter-VIII of the Cr.P.C. were undertaken. It is quite clear that on 27th March, 2010, the trial did not commence before the court.

182. Since the case thereafter never placed, its trial was never conducted by my ld. Brother.

183. It is unfortunate in their applications expressions as "*anxiety to conduct the trial*" have been so irresponsibly used by the applicants. The above narration of facts clearly show that it was the ld. ACMM who in the committal order directed that the file be placed before the District Judge-VI. This was followed by the order dated 25th March, 2010 passed by District Judge-VII/NE District directing that the case be placed before the learned District Judge-VI. It so came to be listed before the learned judge. The applicants would point out the use of the expression "*to issue*

instructions to proceed with the matter" in the order dated 27th of March 2010 support their assertions of "*anxiety to conduct trial*".

184. This submission is made in ignorance of the position of the court record. There is no request made in the order dated 27th March, 2010 that instructions were to be issued to my ld. Brother to proceed with the matter. The use of the expressions reflect only a polite term or phrase. In effect, the matter was sent to the ld. District Judge for appropriate marking of the case as per the practice. This is manifested from the fact that the case was sent without any direction to register the case on the Board of ld. District Judge-VI.

185. In this regard, we may borrow the words of my ld. Brother *S. Ravindra Bhatt, J.* in ***(2015 (220) DLT 446, All India Institute of Medical Sciences v. Prof. Kaushal K. Verma*** where he held thus :

> *"25. ...If one may add, the greater the experience of the judge, the more acutely she or he is aware of her or his fallibility and the pitfalls of acting on impulse or prejudice. The journey, which begins with certainty, later leads to a path of many grey areas.* ***Given that language itself is an imperfect medium, words are but vessels giving shape to ideas and that no human being is perfect, no judge can claim to be perfect in communicating ideas. The emphasis on a phrase here or an expression there, bereft of anything more, would not ipso facto disclose a predilection, or pre-disposition to decide in a particular manner.****"*
>
> (Emphasis by us)

Therefore, the mere use of the expressions "*instructions to proceed*" in the order dated 27th March, 2010 is immaterial. The direction was for appropriate marking of the case. The same is

amply manifested from the fact that my ld. Brother did not even register the case on his board.

186. The proceedings conducted by my Ld. Brother reflect utmost fairness and objectivity and there is not the remotest expression of "*anxiety to conduct trial*". The applicants were satisfied if the trial was before my ld. Brother. In filing these applications and making the submissions, the applicants overlook that if he was so predetermined, after recording the correct legal position on 27th March, 2010 that Delhi was one Sessions Division, District Judge-VI could have ordered registration of the case and proceeded to trial. This was not done.

187. Despite making innuendos suggestions and improper suggestions before us in court that the learned judge must recuse from hearing the appeals, no factual basis of the allegations made in the application could be pointed out.

188. What is astounding is that applications asserting apprehensions of bias and alleging deep interest in the case by a judge have been drafted and filed without even inspecting the trial court record. During the course of hearing, we repeatedly put the query to learned counsel as to what was the stage at which the matter was placed on 27th March, 2010 before the Sessions Court concerned? This could not be answered by Mr. Vikas Arora, ld. counsel on record in the application Crl.M.A.Nos.15233/2016 and 15239/2016 (of Mahender Yadav and Krishan Khokhar) who was clueless about the same. We were informed that he needed to inspect the record before he could answer our query. It is evident

therefore, that these allegations have been so irresponsibly made which have no basis in judicial record.

189. To our utter consternation, during the course of hearing, Mr. Vikas Singh, learned Senior Counsel submitted that it was not his client's objection to the hearing by my learned Brother for the reason that he belongs to the Sikh community, but was expressing apprehensions otherwise. This aspect had not even remotely touched our minds. In so saying, in essence, Mr. Vikas Singh, ld. Senior Counsel may have spoken about the proverbial "*elephant in the room*" so far as his client is concerned.

190. Despite deep misgivings, we are compelled to note the same because it was peremptorily made in a crowded court room and would create a very wrong impression if left unnoticed.

191. The imputation has been made in para 7 of the applications that the learned judge was working with a "*pre-determined mind to try the matter which pertains to 1984 riots*" which we find is completely baseless and stems from a figment of the applicant's imagination.

The suggestion to this effect completely overlooks the independence of a judicial mind, trained to impartially and fearlessly enforce the constitutional values *inter alia* enshrining justice, liberty, equality, fraternity and the law uninfluenced by any considerations, completely rising above personal predilections or preferences. Judges know no caste, colour, community, creed or gender and are ordained to discharge judicial duty impartially

ensuring equal justice to all. Inability to do so by us would be violative of our oath of office.

192. To say the least, the foregoing averments are most unfortunate, uncalled for and completely unfounded. The assertions are a deliberate attempt to mislead and prejudice and there is no reasonable apprehensions of bias at all, let alone real apprehension. In the given facts, there can be no suspicion of bias even. These applications are therefore, completely devoid of merit.

(vi) When can an order in a case be treated as expressing a final opinion or definite opinion on issues arising therein justifying transfer of the case?

193. Two of the applications (Crl.M.No.15233/2016 and Crl.M.No.15239/2016) placed before us seek an order by us for transfer of their appeal to another Bench on the ground that a definite view i.e. a final opinion stands taken by my learned Brother in the orders aforesaid. Despite repeated queries, the applicants were unable to place any standards on which these orders would require to be tested and it could be held that they constituted a final opinion on the subject matter raised in it.

194. On this aspect, Mr. R.S. Cheema, ld. Senior Counsel has placed the relevant extract from Vol.III, Part-A of Chapter XXVII of the ***Delhi High Court Rules and Orders***. This Chapter provides the power of the High Court to transfer the cases under Section 526 of the earlier Criminal Procedure Code (Section 407 of the new Criminal Procedure Code) from one court subordinate to it to

another, on grounds specified therein. So far as grounds on which the applications for transfer may be made, our attention is drawn to Rule 7 onwards therein.

195. We extract hereafter Rules 7 and 10 which have been placed before us by Mr. Cheema, learned Senior Counsel. Let us first look at Rule 7 which places the grounds on which transfer of a case may be sought :

> *"**7. Common grounds on which applications for transfer are made—**Applications for transfer of criminal cases are frequently made by accused persons on the allegation that such transfer is necessary in the interest of justice. The most common grounds on which such applications for transfer are made are (a) that the Judge or Magistrate is personally interested in the case, or (b) that he is connected with one or the other party to the case by relationship, friendship, etc., and is therefore, likely to be partial, or (c) that he has already formed or expressed an opinion on the subject matter of the enquiry or trial, or (d) that he has conducted himself in such a manner that no fair or impartial enquiry or trial can be expected from him.*
>
> *xxx xxx xxx*
>
> ***10. Cases in which Magistrate has already expressed his opinion—**The same course would be advisable in cases in which the Judge or Magistrate has already formed and expressed a definite opinion on the material issues requiring decisions, against the accused concerned."*

196. In the present case, a prayer for transfer of the case from this Bench is sought. Though no rules on this issue *qua* criminal

appeals are pointed out but the principles and standards laid down in the above rules would provide guidance to our consideration.

197. The above narration of contents of the application and the orders shows that the applicants do not assert the grounds of Rule 7(a) to (c) but suggest that they have apprehension that my ld. Brother would not conduct a fair or impartial inquiry and that a definite opinion on the material issues requiring decisions against the accused stands formed and expressed.

198. We have noted above the well settled legal position that an order of anticipatory bail is made at the investigation stage when a person is apprehending arrest in a non-bailable offence. The law discussed above amply manifests that an order of bail post arrest is an interlocutory order, not based on evaluation of evidence that is a scrutiny of whether the prosecution has proved a case against an accused beyond reasonable doubt or not.

199. The second order dated 27th March, 2010 also does not take any view at all regarding the merits of the case. The same is inconsequential *qua* the applicants as it was not passed on applications filed by them. It also does not press any "*opinion on the subject matter of enquiry or trial nor does it reflect formation or expression of a definite opinion on the material issues requiring decisions against the accused*". The prayer for transfer of these cases is completely unfounded and not tenable in law.

(vii) <u>Whether assertion that "dealt with case/trial" borne out by record?</u>

200. In the present case, the applicants have made blanket allegations that my Learned Brother has "*dealt with the case/trial*" and therefore, must recuse from hearing the appeals. Even if it could be so held, is it necessary to recuse?

201. In support of this submission, Mr. Vikas Singh, ld. Senior Counsel has placed an order dated 7th April, 2011 passed in ***Crl.A.No.753-55/2009, State of Punjab v. Davinder Pal Singh Bhullar*** when a learned judge recused from hearing the matter. The order discloses no reasons for the recusal. Learned senior counsel would inappropriately rely upon an internet report to explain reasons. It is certainly not open to parties to furnish reasons for a judicial order.

In the case in hand, there nothing to this effect has been pointed out.

202. It is well settled that "*the only thing in judge's decision binding as an authority upon the subsequent judge is the principle upon which the case was decided (**Ref. : (1989) 1 SCC 101, Municipal Corporation of Delhi v. Gurnam Kaur**)*

203. Learned Senior Counsel has further placed ***(2007) 10 SCC 491, Kuldeep Singh v. Union of India & Ors.*** wherein a reference was made to one of the judges who was part of the Division Bench which passed the impugned order having considered the matter as a Single Judge. The court has noted the following submission of the

respondent on this objection in para 7 of the judgment which is reproduced hereunder :

> ***"7.*** *Learned counsel for the respondents submitted that the appellant had not pointed out at any point of time before the Division Bench that Justice Kaul had earlier dealt with the matter and, therefore, it will not be open to the appellant to make a grievance. It was submitted that Justice Kaul had not passed the final order and, therefore, the order does not call for any interference, particularly when there is no merit in the appeal."*

204. The Supreme Court considered the precedent reported at ***(1998) 9 SCC 677, S.K. Warikoo v. State of J&K & Ors.*** and finally held thus :

> ***"11. It <u>cannot be laid as a rule of universal application that whenever any learned Single Judge had dealt with a case even for routine purposes like issue of process or rectification of defect or even to pass an order of adjournment, that would preclude him from hearing the appeal</u>.*** *As contended by the respondents, the appellant has not made out a case to interfere. Though it is factually correct, as contended, the learned Single Judge had issued rule, that factual aspect does not appear to have been brought to notice of the Division Bench. But* ***the final view expressed by the learned Single Judge on merit as affirmed*** *by the Division Bench does not suffer from any infirmity to warrant interference."*
>
> (Emphasis supplied)

205. The principles laid down by the Supreme Court in para 11 above supports the very fair stand of Mr. Salman Khurshid, learned Senior Counsel before us who has repeatedly stated before us that

merely because a case may have been touched by a judge, it would not prohibit him from dealing with the appeal therefrom. We, however, completely disagree with ld. Senior Counsel's objection that there is anything in order dated 15th February, 2010 which could be treated as a final or definite view.

206. No view on merits at all has been taken at all. The fact that the matter was listed before my ld. Brother on 27th March, 2010 or that he passed the order dated 15th February, 2010, on the anticipatory bail application in my view does not prohibit or preclude him from dealing with the present appeal.

207. For the above reasons we also find unacceptable, in fact reprehensible, the submission on behalf of the applicants that the hearing before this Bench would entail the hearing by a judge of an appeal in a matter in which he had been a trial judge.

208. The view that we have taken is supported by the observations of the Supreme Court in ***(2016) 5 SCC 808, Supreme Court Advocate on Record Association v. Union of India.*** While concerned with the right to waive the objection to disqualify adjudicator, in para 30, the court has laid down that who can object as well as when such objection would be tenable in the following terms :

> *"30. ...**In our opinion, the implication of the above principle is that only a party who has suffered or is likely to suffer an adverse adjudication because of the possibility of bias on the part of the adjudicator can raise the objection**."*
>
> (Emphasis supplied)

Therefore, it is amply clear that it is "*adverse adjudication*" that is a binding decision on merits on an issue alone, which would justify a prayer for recusal against a judge. Procedural orders or interim order would not give rise to reasonable apprehensions of bias.

209. We find that judicial precedents from England have pointed out that simply because a judge has previously heard or decided a case would not by itself preclude him from hearing the subsequent cause.

210. On this issue, we may usefully extract the factors in the opinion of the court of appeal in the judgment reported at ***(2001) 1 All ER 65, Locabail (UK) Ltd v. Bayfield Properties Ltd. & Anr.,*** the court has made an attempt to lift some factors which may or may not give rise to a real danger of bias. In para 25, we see the following enunciation :

> *"25. It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances*

(whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers (see K.F.T.C.I.C. v. Icori Estero S.p.A. (Court of Appeal of Paris, 28 June 1991, International Arbitration Report, vol. 6, 8/91)). By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, ***in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind*** *(see Vakauta v. Kelly (1989) 167 C.L.R. 568); or if, for any other reason, there were* ***real ground for doubting the ability of the judge to ignore extraneous considerations****, prejudices and predilections and bring an objective judgment to bear on the issues before him.* ***The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection.*** *In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat:*

every application must be decided on the facts and circumstances of the individual case. *The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be."*

(Emphasis by us)

It is expression of views in "*such extreme and unbalanced term*" in the previous consideration by the judge which indicate unreasonableness which would throw doubt on his ability to try the issue with an objective mind, recommending recusal.

211. The applicants do not make an allegation that the order of 15th February, 2010 or 27th March, 2010 were *"extreme and unbalanced"*. The above narration would show that the order was objective, balanced and open ended.

212. In para 11 of ***S.K. Warikoo,*** the Supreme Court has therefore, authoritatively laid down that merely because a case has been dealt by a judge for a routine purpose would not preclude him from hearing the appeal. No part of the trial has ever been conducted by my ld. Brother.

Clearly, there is no prohibition to my ld. Brother hearing the appeals.

(viii) No objection to trial by my ld. Brother even today

213. We may note that we put a query to Mr. Vikas Singh, learned senior counsel appearing for the applicant Mahendra Yadav and Mr. Khokar as well as Mr. Anil Kumar, learned counsel

appearing for the respondent Sajjan Kumar who in response stated that they would have no objection even today if the case was assigned to my learned Brother had he been in the trial court. They have an objection only because he is as member of the Division Bench which is to hear the appeals.

214. It has also been submitted on behalf of the applicants that they have no apprehension at all or objection if the learned judge had proceeded with the trial and it is only qua the hearing of the present appeals that they have reasonable apprehension of bias and are therefore, present the prayer for recusal.

This submission by itself manifests that these applicants have no real apprehension of bias at all.

GITA MITTAL, J

NOVEMBER 04, 2016/aj

Gita Mittal and P.S. Teji, JJ.

VII. No apprehension of bias expressed by the life convicts

215. In view of the offences for which Krishan Khokhar and Mahender Yadav were convicted and consequential sentences, their appeals (Crl.Appeal Nos.715/2013 and 753/2013 respectively) were listed before the Single Benches. It is pursuant to orders dated 31st May, 2013 and 18th September, 2013 by the Single Benches that the appeals were marked by Hon'ble the Chief Justice for placing before the Division Bench.

216. It is to be noted that so far as applicant - Krishan Khokhar in Crl.M.A.No.15233/2016 is concerned, his sentence stands suspended by an order dated 31st May, 2013. The sentence on applicant-Mahender Yadav in Crl.M.A.No.15239/2016 stands suspended by the order dated 28th of May 2013 in his appeal.

As such typically the applicants are interested only in avoiding the hearing and protracting the litigation.

217. The third applicant, Sajjan Kumar, stands acquitted and there is definite interest in delaying the appeals of the CBI against his acquittal as well as that of the complainant which are being heard along with the other appeals.

218. Sajjan Kumar, Mahender Yadav and Krishan Khokhar, the present applicants before us are not in jail.

219. It is noteworthy that no application seeking either transfer or recusal have been filed by the three convicts Balwan Khokhar, Capt. Bhagmal and Girdhari Lal who stand convicted inter alia for commission of offences under Section 302 IPC and are undergoing life imprisonment.

220. Significantly these appellants undergoing life sentences have not expressed apprehension of bias in hearing by the Bench as presently constituted. On the contrary, the convicts have been repeatedly pressing for expedited hearing as they are in jail.

221. The very fact that the life convicts do not express any apprehension of bias by itself establishes that there is no reasonable, let alone any real apprehension of bias in the matter on

the part of the applicants. The pleas set up in the application are dishonest and unfortunate, intended only to avoid adjudication in the matter.

VIII. Impact of filing these applications and granting of prayers in the application

222. We must hereunder set down the impact of filing of these applications on the main and connected appeals. These applicants are conscious that at present there is only one Division Bench in the Delhi High Court which has been assigned hearing of criminal appeals including life sentences and the death penalty. Therefore, the recusal of hearing by either of us would entail either creation of a special bench by Hon'ble the Chief Justice which would then hear these maters only on Fridays as per practice. Or assignment of these appeals to a Bench which is seized of other jurisdictions. Either way, the applicants would have succeeded in their intention of preventing expedition in hearing of these appeals.

223. We may point out that there was no prohibition to our segregating the three appeals of the applicants on 19th September, 2016, and proceeding with the hearings in the other appeals wherein counsels and parties were pressing for urgent hearing. But the view we would have taken would have bound the consideration of these three appeals as all the cases arise from one trial and assail the same judgment. It was because of our sense of ensuring justice that hearing the appeals where no applications were filed, stands deferred.

IX. Effect of statement dated 19th September, 2016 by counsels for Mahender Yadav and Krishan Khokhar

224. We have extracted hereinabove the order recorded in the hearing before us on 19th September, 2016, when adjournment was sought by Mr. Anil Kumar Sharma, Advocate on behalf of Sajjan Kumar to file the application for recusal. We had specifically asked all the other private parties, which included Balwan Khokhar, Capt. Bhagmal, Giridhari Lal as well as counsel for the CBI and the complainant as to whether they had any objection on hearing the matters by the Bench as presently constituted. The counsels appearing for all these parties including counsel for Mahender Yadav and Krishan Khokhar had stated that they had no objection if this Bench continues to hear the matter.

225. Despite the above statement made on behalf of Mahender Yadav and Krishan Khokhar on the 19th of September 2016, these applications (Crl.M.A.Nos.15239/2016 and 15233/2016) have been filed by Mahender Yadav and Krishan Khokhar which are presently being considered.

226. We had questioned the counsels about the maintainability of these applications given the statement made on 19th September, 2016 and were orally informed that the appellants have never consented to the grant of such concessions and the counsels had no authority to make the statements.

227. The authority to conduct any case is granted under a document called the *vakalatnama* and it would remain the same, be it a civil or a criminal case.

228. In this regard, we have perused the identical *vakalatnamas* executed by these applicants (Mahender Yadav and Krishan Khokhar). Mahender Yadav has executed a *vakalatnama* dated 24th May, 2013 signed by him authorizing his counsel Mr. Vikram Singh Panwar, Advocate. A *vakalatnama* dated 29th May, 2013 has been signed and executed by Krishan Khokhar authorizing the same counsel Mr. Vikram Singh Panwar, Advocate who was present on behalf of both the applicants on the 19th of September 2016.

229. Both these *vakalatnamas* contain the following conditions :

> *"... To withdraw or compromise the said case or submit to arbitration any differences or disputes that may arise touching or in any manner relating to the said case.*
>
> *xxx xxx xxx*
>
> *To appoint and instruct any other Legal Practitioner authorising him to exercise the power and authority hereby conferred upon the Advocate whenever he may think fit to do so and to sign the power of attorney on our behalf.*
>
> *And I/We the undersigned do hereby agree to ratify and confirm all acts done by the Advocate or his substitute in the matter as my/our own acts, as if done by me/us to all intents and purpose. ..."*

230. Light is shed on the power of the counsel to make a binding submission on behalf of the respondent by virtue of the *vakalatnama* by the pronouncement of the Supreme Court in the judgment reported at ***(2015) 5 SCC 747, Y. Sleebachen & Ors. v. State of Tamil Nadu Through Superintending Engineer Water***

Resources Organization/Public Works Department & Anr. wherein the court was concerned with the power of counsel to enter into a compromise/settlement on behalf of a client in a civil case.

231. In this judgment, the Supreme Court has ruled in the context of a settlement in a civil case under Order XXIII Rule 3 of the CPC. The principles laid down by the court on the aspect of authority conferred by the *vakalatnama* would guide our consideration in a criminal case as well. We therefore, extract hereunder the consideration of the Supreme Court in paras 18 and 20 wherein judicial precedent with regard to the authority of a counsel to do various acts :

> ***"18.*** *That apart, we find that as per the provisions of Order 3 Rule 4, once the counsel gets power of attorney/authorisation by his client to appear in a matter, he gets a right to represent his client in the court and conduct the case. ...*
>
> *xxx xxx xxx*
>
> ***20.*** *We find that in the present case the Government* ***Pleader was legally entitled*** *to* ***enter into a compromise with the appellant and his written endorsement on the memo filed by the appellant can be deemed as a valid consent of the respondent itself.*** *Hence* ***the counsel appearing for a party is fully competent to put his signature to the terms of any compromise*** *upon which a decree can be passed in proper compliance with the provisions of Order 23 Rule 3 and such decree is perfectly valid. xxx xxx xxx"*
>
> (Emphasis by us)

232. We may also usefully refer hereunder para 25 of the pronouncement reported at ***(2011) 8 SCC 679, Bakshi Dev Raj (2) v. Sudheer Kumar*** :

> *"25. Now, we have to consider the role of the counsel reporting to the court about the settlement arrived at. We have already noted that in terms of Order 23 Rule 3 CPC, agreement or compromise is to be in writing and signed by the parties. The impact of the above provision and the role of the counsel has been elaborately dealt with by this Court in Byram Pestonji Gariwala v. Union Bank of India [Byram Pestonji Gariwala v. Union Bank of India, (1992) 1 SCC 31] and observed that courts in India have consistently recognised the traditional role of lawyers and the extent and nature of implied authority to act on behalf of their clients. Mr Ranjit Kumar, has drawn our attention to the copy of the vakalatnama (Annexure R-3) and the contents therein.* ***The terms appended in the vakalatnama enable the counsel to perform several acts on behalf of his client including withdraw or compromise suit or matter pending before the court. The various clauses in the vakalatnama undoubtedly gives power to the counsel to act with utmost interest which includes to enter into a compromise or settlement****.*
>
> (Emphasis by us)

233. In this regard, we may usefully refer to the further consideration of precedents by the Supreme Court in ***Bakshi Dev Raj (2)*** wherein it has been stated thus :

> ***"26.*** *The following observations and conclusions in paras 37, 38 and 39 are relevant: (****Byram Pestonji case [(1992) 1 SCC 31] , SCC pp. 46-47****)*
>
> *"37. We may, however, hasten to add that it will be prudent for counsel not to act on implied authority*

except when warranted by the exigency of circumstances demanding immediate adjustment of suit by agreement or compromise and the signature of the party cannot be obtained without undue delay. In these days of easier and quicker communication, such contingency may seldom arise. A wise and careful counsel will no doubt arm himself in advance with the necessary authority expressed in writing to meet all such contingencies in order that neither his authority nor integrity is ever doubted. This essential precaution will safeguard the personal reputation of the counsel as well as uphold the prestige and dignity of the legal profession.

38. Considering the traditionally recognised role of counsel in the common law system, and the evil sought to be remedied by Parliament by the CPC (Amendment) Act, 1976, namely, attainment of certainty and expeditious disposal of cases by reducing the terms of compromise to writing signed by the parties, and allowing the compromise decree to comprehend even matters falling outside the subject-matter of the suit, but relating to the parties, the legislature cannot, in the absence of express words to such effect, be presumed to have disallowed the parties to enter into a compromise by the counsel in their cause or by their duly authorised agents. Any such presumption would be inconsistent with the legislative object of attaining quick reduction of arrears in court by elimination of uncertainties and enlargement of the scope of compromise.

39. ***To insist upon the party himself personally signing the agreement or compromise would often cause undue delay, loss and inconvenience, especially in the case of non-resident persons. It has always been universally understood that a party can always act by his duly authorised representative****. If a power-of-****attorney holder can enter into an agreement or compromise on behalf of his principal, so can counsel, possessed of the requisite authorisation by vakalatnama, act on behalf of his client****. Not to*

recognise such capacity is not only to cause much inconvenience and loss to the parties personally, but also to delay the progress of proceedings in court. If the legislature had intended to make such a fundamental change, even at the risk of delay, inconvenience and needless expenditure, it would have expressly so stated."

xxx xxx xxx

28. *In* ***Jagtar Singh v. Pargat Singh [(1996) 11 SCC 586****] it was held that the* ***counsel for the appellant has power to make a statement on instructions from the party to withdraw the appeal.*** *In that case, Respondent 1 therein, elder brother of the petitioner filed a suit for declaration against the petitioner and three brothers that the decree dated 4-5-1990 was null and void which was decreed by the Subordinate Judge, Hoshiarpur on 29-9-1993. The petitioner therein filed an appeal in the Court of the Additional District Judge, Hoshiarpur. The counsel made a statement on 15-9-1995 that the petitioner did not intend to proceed with the appeal. On the basis thereof, the appeal was dismissed as withdrawn. The petitioner challenged the order of the appellate court in the revision. The High Court confirmed the same which necessitated the filing of SLP before this Court.*

29. *The learned counsel for the petitioner in* ***Jagtar Singh case [(1996) 11 SCC 586****] contended that the petitioner had not authorised the counsel to withdraw the appeal. It was further contended that the court after admitting the appeal has no power to dismiss the same as withdrawn except to decide the matter on merits considering the legality of the reasoning of the trial court and the conclusions either agreeing or disagreeing with it. Rejecting the said contention, the Court held as under: (Jagtar Singh case [(1996) 11 SCC 586] , SCC p. 587, paras 3-4)*

"3. The learned ***counsel for the petitioner has contended that the petitioner had not authorised the counsel to withdraw the appeal****. The court after*

admitting the appeal has no power to dismiss the same as withdrawn except to decide the matter on merits considering the legality of the reasoning of the trial court and the conclusions either agreeing or disagreeing with it. ***We find no force in the contention****. Order 3 Rule 4 CPC empowers the counsel to continue on record until the proceedings in the suit are duly terminated. The counsel, therefore, has power to make a statement on instructions from the party to withdraw the appeal. The question then is whether the court is required to pass a reasoned order on merits against the decree appealed from the decision of the Court of the Subordinate Judge? Order 23 Rules 1(1) and (4) give power to the party to abandon the claim filed in the suit wholly or in part. By operation of Section 107(2) CPC, it equally applies to the appeal and the appellate court has coextensive power to permit the appellant to give up his appeal against the respondent either as a whole or part of the relief. As a consequence, though the appeal was admitted under Order 41 Rule 9, necessarily the court has the power to dismiss the appeal as withdrawn without going into the merits of the matter and deciding it under Rule 11 thereof.*

4. Accordingly, we hold that the action taken by the counsel is consistent with the power he had under Order 3 Rule 4 CPC. If really the counsel has not acted in the interest of the party or against the instructions of the party, the necessary remedy is elsewhere and the procedure adopted by the court below is consistent with the provisions of CPC. We do not find any illegality in the order passed by the Additional District Judge as confirmed by the High Court in the revision."

30. *The analysis of the above decisions make it clear that the counsel who was duly authorised by a party to appear by executing the vakalatnama and in terms of Order 3 Rule 4, empowers the counsel to continue on record until the proceedings in the suit are duly terminated. The counsel, therefore, has the power to make a statement on*

instructions from the party to withdraw the appeal. In such a circumstance, the counsel making a statement on instructions either for withdrawal of appeal or for modification of the decree is well within his competence and if really the counsel has not acted in the interest of the party or against the instructions of the party, the necessary remedy is elsewhere."

(Emphasis by us)

234. We may note that the pronouncement ***Bakshi Dev Raj (2)*** has been cited in ***Y. Sleebachen*** with approval. The court has authoritatively ruled that the *vakalatnama* authorises counsel to enter into a binding written settlement on behalf of a party; it authorizes him to withdraw a substantive appeal.

235. In the present case, the statement made by counsels on 19th September, 2016 was a fair statement on the correct position in law and unrelated to the merits of the case.

236. We find that while executing the *vakalatnamas*, the appellants had specifically authorized their counsels to make the statements as necessary on their behalf in the matter.

237. Nothing has been shown to us by the appellants that they have at any point withdrawn the *vakalatnamas* of the counsels. The applicants who made the statements on 19th September, 2016 have not discharged the *vakalatnamas* even on date. The terms thereof bind the applicants.

238. Clearly, Mahender Yadav and Krishan Khokhar had authorized the counsels to withdraw or compromise any disputes that may arise touching or in any manner relating to the case in

question as well as to appoint or instruct any other legal practitioner to exercise the power and authority conferred under the *vakalatnama* to him. The applicants had also unequivocally agreed to ratify and confirm all acts done by the advocate or his substitute, as if the same had been done by him personally. Therefore, the submission that counsels had no authority to make the statement on 19th September, 2016 is again devoid of any merit.

239. Therefore, the statements made on behalf of Mahender Yadav and Krishan Khokhar on the 19th of September 2016 bind them and render the present applications not maintainable.

240. We could have rejected Crl.M.A.No.15239/2016 and Crl.M.A.No.15233/2016 on the short ground alone of the statement made by counsel on behalf of Mahender Yadav and Krishan Khokhar but have permitted hearing to them in these applications as we had to hear the third application and rule as required by law.

X. Can a litigant level ruthless and baseless allegations seeking recusal from hearing by a judge and be permitted to get away without suffering any consequences?

241. The present case is not the first case where averments which have no basis in judicial record are asserted, either before the same court at later stage or before the higher courts. Specific allegations are made against a judge conducting a case to embarrass him and compel him to recuse himself from hearing the case or transfer the case to another Bench. The Supreme Court has repeatedly mandated courts that such attacks should be seriously dealt with.

242. On this aspect, we may usefully extract further observations of the Supreme Court in ***(2009) 8 SCC 106, R.K. Anand v. Registrar, Delhi High Court*** para 264 wherein the court observed the present day trend with regard to the calculated attacks on judges which read thus :

> ***"264.*** *We are constrained to pause here for a moment and to express grave concern over the fact that lately such tendencies and practices are on the increase. We have come across instances where one would simply throw a stone on a Judge (who is quite defenceless in such matters!) and later on cite the gratuitous attack as a ground to ask the Judge to recuse himself from hearing a case in which he would be appearing. Such conduct is bound to cause deep hurt to the Judge concerned but what is of far greater importance is that it defies the very fundamentals of administration of justice.* ***A motivated application for recusal, therefore, needs to be dealt with sternly and should be viewed ordinarily as interference in the due course of justice leading to penal consequences.****"*
>
> (Emphasis supplied)

243. In the same context, reference needs to be made to a judgment of the Supreme Court reported at ***(1995) Supp (1) SCC 384, Jaswant Singh v. Virender Singh*** in paras 32 and 33 of ***Jaswant Singh*** which are topical so far as the present consideration is concerned and therefore, we deem it fit to extract the same hereunder :

> ***"****32. Before parting with this judgment, there is however, one* ***matter which has caused us considerable concern*** *and we wish to advert to it. After the recount had been ordered by the learned Single Judge in the High Court and the Deputy Registrar had carried out the inspection of the*

ballot papers of the specified booths, the appellant filed an application in the High Court under Section 151 CPC seeking stay of the further arguments to enable the appellant to move the Supreme Court. In the said application the appellant referred to certain 'observations' made by the learned Judge during the course of arguments and also referred to the manner in which the two packets containing ballot papers which had been objected to by both the parties and had been kept for scrutiny of the learned Single Judge, were handled by the learned Judge. The appellant went on to say that 'by doing this the Hon'ble Court was pleased to make these ballot papers suspect and doubtful and these cannot be considered for any decision on them regarding their validity or otherwise as these remained in unsealed condition for unascertainable time without the petitioner or his counsel being present there'. The learned Judge by his order dated 13-5-1993 recorded the following proceedings:

> *'Counsel for the petitioner has not appeared and the petitioner himself has made a request that he wants to move the Hon'ble Supreme Court for transfer of the election petition from this Court. In view of this statement, the petition is being adjourned. The petitioner wants to place as application for transfer on record. He may file it in the Registry, if so advised.*
>
> *During the course of arguments yesterday, two sealed envelopes relating to Polling Booths Nos. 28 and 31 had been opened in the presence of the parties and their counsel at the time when the report of the Commissioner who carried out test checking was being considered. These open envelopes had remained in my custody in my almirah under lock and key. Since the case is now being adjourned, these open envelopes be resealed and the same be handed over to the Additional Registrar (Judicial) along with other sealed envelopes.'*

33. Thereafter, the appellant as already noticed, filed a transfer petition in this Court which was dismissed on 30-8-1993. The ***transfer petition like the application (supra) cast aspersions on the learned Judge in the discharge of his judicial functions and had the tendency to scandalise the Court. It was an attempt to browbeat the learned Judge of the High Court and cause interference in the conduct of a fair trial. Not only are the aspersions derogatory, scandalous and uncalled for but they also tend to bring the authority and administration of law into disrespect****. The contents of the application seeking stay as also of the transfer petition,* ***bring the court into disrepute and are an affront to the majesty of law and offend the dignity of the court****. The appellant is an advocate and it is painful that by filing the application and the petition as a party in person, couched in an* ***objectionable language****, he permitted himself the liberty of indulging in an action, which ill behoves him and does little credit to the noble profession to which he belongs. An advocate has no wider protection than a layman when he commits an act which amounts to contempt of court. It is most unbefitting for an advocate to make imputations against the Judge only because he does not get the expected result, which according to him is the fair and reasonable result available to him. Judges cannot be intimidated to seek favourable orders. Only because a lawyer appears as a party in person, he does not get a license thereby to commit contempt of the court by intimidating the Judges or scandalising the courts. He cannot use language, either in the pleadings or during arguments, which is either intemperate or unparliamentary. These safeguards are not for the protection of any Judge individually but are essential for maintaining the dignity and decorum of the courts and for upholding the majesty of law. Judges and courts are not unduly sensitive or touchy to fair and reasonable criticism of their judgments. Fair comments, even if, outspoken, but made*

without any malice or attempting to impair the administration of justice and made in good faith, in proper language, do not attract any punishment for contempt of court. However, when from the criticism a deliberate, motivated and calculated attempt is discernible to bring down the image of judiciary in the estimation of the public or to impair the administration of justice or tend to bring the administration of justice into disrepute the courts must bestir themselves to uphold their dignity and the majesty of law. The appellant, has, undoubtedly committed contempt of the court by the use of the objectionable and intemperate language. *No system of justice can tolerate such unbridled licence on the part of a person, be he a lawyer, to permit himself the liberty of scandalising a court by casting unwarranted, uncalled for and unjustified aspersions on the integrity, ability, impartiality or fairness of a Judge in the discharge of his judicial functions as it* ***amounts to an interference with the due course of administration of justice***."

(emphasis supplied)

244. The above observations were relied upon by the Supreme Court while considering a request for recusal in the judgment reported at ***(2014) 8 SCC 470, Subrata Roy Sahara v. Union of India & Ors.*** :

"137. *The observations recorded in the above judgment in Jaswant Singh case [Jaswant Singh v. Virender Singh, 1995 Supp (1) SCC 384] are fully applicable to the mannerism and demeanour of the petitioner Mr Subrata Roy Sahara and some of the learned Senior Counsel. We would have declined to recuse from the matter, even if the "other side", had been a private party.* ***For, our oath of office requires us to discharge our obligations, without fear or favour. We therefore also commend to all courts, to similarly repulse all baseless and unfounded***

<u>insinuations, unless of course, they should not be hearing a particular matter, for reasons of their direct or indirect involvement</u>. The benchmark, that justice must not only be done but should also appear to be done, has to be preserved at all costs.*"*

(Emphasis by us)

245. After so observing, the court had recorded its conclusions in para 185. We extract hereunder paras 185.1 and 185.8, it being relevant in the present case :

"185. *In view of our findings recorded hereinabove, our conclusions are summarised hereunder:*

xxx

185.1. *We find no merit in the contention advanced on behalf of the petitioner that we should recuse ourselves from the hearing of this case.* ***<u>Calculated psychological offensives and mind games adopted to seek recusal of Judges need to be strongly repulsed. We deprecate such tactics and commend a similar approach to other courts, when they experience such behaviour</u>****.* *(For details, refer to paras 1-14.)*

xxx

185.8. *The law laid down by this Court in Jaswant Singh v. Virender Singh [Jaswant Singh v. Virender Singh, 1995 Supp (1) SCC 384] , has been found to be fully applicable to the facts of this case, particularly the mannerism and demeanour exhibited by the petitioner and some of the learned counsel. Our recusal from the case sought on the ground of bias has been found to be devoid of any merit. Each and every insinuation levelled by the petitioner and his learned Senior Counsel, during the course of hearing, has been considered and rejected on merits. (For details, refer to paras 117-137.)"*

(Underlining by us)

246. In the present case, ruthless and baseless allegations have been made that one of us (*P.S. Teji, J.*) had "*applied his mind to the merits of the case including defence taken by the applicant*"; "*dealt with the merits of the case against the accused persons*"; "*examining the material extensively on merits*"; "*applied judicial mind to the merits of the case*"; "*considered the several of the main planks of the defence*" and "*dealt with the matter at the stage of the trial*" by the applicant Sajjan Kumar in Crl.M.A.No.15236/2016. Assertions of "*facts that had occurred during the trial proceeding*"; "*already given his mind*"; "*shown his anxiety to conduct the trial of the matter*" and "*already formed and expressed an opinion on the facts of the case which are the subject matter of the present appeal*" made by the other applicants Mahender Yadav and Krishan Khokhar have been held to be completely without basis, unjustified and are, in fact, false.

247. It has been noted by us above that it was frankly admitted by learned counsel on record in these applications for Mahender Yadav and Krishan Khokhar that he needed to inspect the record in order to answer our query regarding the record of the trial court. Clearly, these irresponsible, baseless and false allegations have been made in the applications and pressed in court without having ascertained their correctness.

248. In ***R.K. Anand,*** the Supreme Court has commended that such motivated application for recusal deserves to be dealt with sternly and *should be viewed "ordinarily" as interference in the due course of justice leading to* ***penal consequences***.

249. In ***Jaswant Singh,*** it has been observed that petitions casting unwarranted, uncalled for and unjustified aspersions on a ld. judge, on his integrity, ability, impartiality or fairness in discharge of judicial functions, had the tendency to scandalise the court. It was held that the aspersions were an attempt to browbeat the learned judge of the High Court and cause interference in the conduct of a fair trial which brings authority and administration of law into disrespect; brings the court into disrepute; are an affront to the majesty of law and offend the dignity of the court. Such conduct has been held to amount to interference with due course of the administration of justice, thus clearly punishable under the Contempt of Courts Act.

250. The averments in the applications before us regarding court proceedings are false and in fact would justify invocation of criminal contempt of court proceedings against the applicants for making such false averments with the clear intention of preventing a judge from discharging judicial function.

251. We are commanded by the observations of the Supreme Court in ***Subrata Roy Sahara*** extracted above that such baseless and unfounded insinuations should be absolutely repulsed.

252. The attempt to single out a judge and address judges constituting a Bench by name and making personal allegations not supported by record against them are really a frontal attack intended to humiliate the judge concerned in public spaces and browbeat them giving in to illegally and improperly made demands and deserves to be condemned in the highest tone.

253. Arguments before us were peppered with the plea that ld. Senior Counsels were "*embarrassed*" in supporting the applications. In our view, submissions which are supported by facts and the authority of law cannot cause embarrassment in discharge of professional duty. If there is embarrassment in making any submission, the same should not be made at all.

254. We have no manner of doubt that we would have been justified in invoking such contempt proceedings against these applicants for having wilfully made such applications containing baseless and unfounded allegations and deliberately misrepresenting judicial record in a dishonest attempt to prevent hearings in these cases.

255. In fact, in view of the specific mandate of the Supreme Court in para 264 of ***R.K. Anand,*** penal consequences must enure to the applicants for their aforedetailed conduct.

256. These cases underscore the real truth that "*there can be peace only if there is justice*" as stated by Mahatma Gandhi and endorsed by world leaders. Failure to punish for a mass crime as riots in which several perished, creates the most difficult chasm in the world to fill. Such failure not only creates wounds which fester but those which actually and incurably infect society.

257. That riots happened in 1984 in New Delhi, the capital of India in which hundreds perished, is not disputed. That despite passage of 32 years thereafter, cases in the complaints emanating from those riots have not attained finality in adjudication has generated a sense of injustice in the victims as well as those who

feel that they have been unjustly accused of commission of the crimes. Most importantly, it has lent arrogance to the actual perpetrators and created scepticism with judicial process in the society at large. It generates a view that serious crime such as mass violence goes undetected and unpunished. We feel that this may have emboldened several and encouraged other such incidents which have occurred in the country thereafter leaving black marks on our history.

258. It is the effort to bring a closure to these prosecutions (pending as appeals in the Delhi High Court) , that too on fervent and impassioned pleas initiated by an ailing eighty eight year of an old co-convict (Capt. Bhagmal) undergoing rigorous life imprisonment, supported by other life convicts, which has led to our having to hear protracted arguments on the recusal of one of us (*P.S. Teji, J*) thereby expending valuable judicial time thereon, instead of proceeding with the merits of the case. It has further required both of us to devote time and effort to penning separate judgments on the prayer as mandated by judicial pronouncements.

259. We therefore, exercise restraint and desist from invoking our jurisdiction under the Contempt of Courts Act and also in not initiating penal action against the applicants as commended in the above set out judicial precedents, only for the reason these cases brook no further delay. No digression, distraction or diversion by any other proceedings which could result in protraction of the hearings in the main appeals would be in the interests of justice. Though strongly inclined to impose costs for the dilatory tactics

adopted by way of these applications, we refrain from doing only in the larger interests of justice which would be met by expeditious disposal of the cases.

XI. Conclusion

260. In view of the above discussion, we sum up our conclusions as follows :

(i) The order dated 15th February, 2010 disposing the anticipatory bail application was an interim order containing no binding finding.

(ii) The order dated 27th March, 2010 deciding the preliminary objection to territorial jurisdiction of the court by one of the accused persons (other than the applicants) is a view only on the objection taken. There is no expression of opinion on the merits of the case. The applicants did not support the objection.

(iii) On the 27th March, 2010, the case was not even registered on the board of the then District Judge-VI and Additional Sessions Judge (East) who has never dealt with it as a trial judge or so passed any order which could give rise even to a suspicion of bias, let alone reasonable apprehension of bias.

(iv) The applications under consideration manifest the insidious attempt to create a facade of apprehension of bias by pleading a non-existent factual foundation for the purposes of supporting the prayer for recusal. Had there been any apprehension of bias or even suspicion of bias, the applicants would have objected to the very order of committal of the case on 20th of March, 2010 by the

ACMM; the order dated 25th March, 2010 by the District Judge-VII and would have filed applications of objection before the District Judge-VI on 27th March, 2010 itself.

(v) In the six years since 2010 (when the anticipatory bail applications were dealt with and the order passed on 27th March, 2010), a whole trial stands concluded and final judgment stands passed in the case by the trial court. There is no basis at all for nursing apprehension of bias, let alone reasonable or real ground for the same.

(vi) On the 19th of September 2016, other than learned counsel for Sajjan Kumar, counsels appearing for all other private parties in the bunch of connected appeals, including the applicants, had submitted that they have no objection if this Bench continues to hear these appeals. This statement binds the applicants.

(vii) The averments in the application are contrary to court record, especially the references to trial and the imputations to the mind of Bench. These tantamount to a direct interference in the due course of administration of justice and obstruct discharge of judicial function by a judge rendering the applicants liable to be proceeded against under the Contempt of Courts Act.

(viii) The life convicts in the case do not have any apprehension of bias and have not joined the applicants in filing these applications. On the contrary, the life convicts have pressed for hearing the appeals by the Bench as presently constituted illustrating the *malafide* of the applicants and the intention to only delay decision

making. The present applications are the grossest possible abuse of the process of law.

XII. Result

We find no merit in these applications which are hereby dismissed.

GITA MITTAL, J

P.S.TEJI, J

NOVEMBER 04, 2016/aj