SUPREME COURT OF INDIA

State of Maharashtra

Vs.

Kamal Ahmed Mohammed Vakil Ansari

Crl.A.No.445 of 2013

(P. Sathasivam and Jagdish Singh Khehar JJ.)

14.03.2013

JUDGMENT

JAGDISH SINGH KHEHAR, J.

1. On 11.7.2006 there were seven bomb blasts in seven different first class compartments of local trains of Mumbai Suburban Railways. These bomb blasts resulted in the death of 187 persons.
Severe injuries on account of the said bomb blasts were caused to 829 persons. These blasts led to the registration of following seven criminal reports:

i) CR No.77 of 2006 at Mumbai Central Police Station.

ii) CR No.78 of 2006 at Mumbai Central Police Station.

iii) CR No.86 of 2006 at Bandra Railway Police Station

iv) CR No.87 of 2006 at Bandra Railway Police Station

v) CR No.41 of 2006 at Andheri Railway Police Station.

vi) CR No.59 of 2006 at Vasai Road Railway Police Station

vii) CR No.156 of 2006 at Borivli Railway Police Station.

In all these cases investigation was transferred to the Anti Terrorists Squad, Mumbai (hereinafter referred to as "the ATS"), wherein the matter was registered as CR No.5 of 2006.

2. In all 13 accused were arrested in connection with the bomb blasts of 11.7.2006. The accused-respondents herein are the accused in the controversy. Initially the accused-respondents were charged with offences punishable under Sections 302, 307, 326, 427, 436, 20A, 120B, 123 and 124 of the Indian Penal Code, 1860 read with Section 34 of the Indian Penal Code. The accused-respondents were also charged with offences under the Indian Explosives Act, the Prevention of Damage to Public Property Act, the offences under the Indian Railways Act and the offences punishable under the Unlawful Activities (Prevention) Act, 1967. Later, the provisions of Maharashtra Control of Organised Crime Act, 1999 (hereinafter referred to as "the MCOCA") were applied to the case. Thereupon, the accused-respondents were charged under Sections 3(1)(i), 3(2) and 3(4) of the MCOCA. On 30.11.2006 the charge-sheet in CR no.5 of 2006 came to be filed as MCOCA Special Case no.21 of 2006 (hereinafter referred to as Special Case No.21 of 2006) for offences punishable under Sections 302, 307, 324, 325, 326, 327, 427, 436, 120B, 121-A, 122, 123, 124A, 201, 212 Indian Penal Code, 1860, read with Sections 3(1)(i), 3(2), 3(3), 3(4), 3(5), the MCOCA, read with Sections 10, 13, 16, 17, 18, 19, 20, 40 of Unlawful Activities (Prevention) Act, 1967, read with Sections 6, 9B of the Explosives Act, 1884, read with Sections 3, 4, 5, 6 of the Explosive Substances Act, 1908, read with Sections 3, 4 of the Prevention of Damage to Public Property Act, 1984, read with Sections 151, 152, 153, 154 of the Railways Act, 1989, read with Section 12(1)(c) of the Passports Act, 1967.

3. The prosecution case (in Special Case No.21 of 2006) in brief is, that bombs were planted on 11.7.2006 in seven different first class compartments of local trains of Mumbai Suburban Railways by the Students Islamic Movement of India (hereinafter referred to as "the SIMI"). SIMI is a terrorist organization, the accused-respondents are allegedly its members. According to the prosecution, the accused-respondents had conspired to plant bombs at Mumbai's local trains to create panic in furtherance of terrorist activities being carried out by the SIMI in India.

4. Having examined its witnesses, and having placed on the record of Special Case No.21 of 2006, the necessary exhibits, the prosecution closed its evidence on 4.4.2012. Thereafter, witnesses were examined in defence by the accused-respondents. On 19.7.2012, accused Nos.2, 6, 7 and 13 filed an application (at Exhibit 2891) praying for issuance of summons to 79 witnesses named therein. On

24.7.2012, the accused-respondents filed another application (at Exhibit 2914), again for summoning defence witness. The application filed by the accused-respondents, inter alia, included the names of the following witnesses:

(i) Witness at serial No.63 - Chitkala Zutshi, Additional Chief Secretary (Home Department)

(ii) Witness at serial No.64 - Vishwas Nangre Patil, Deputy Commissioner of Police

(iii) Witness at serial No.65 - Milind Bharambe, Deputy Commissioner of Police

(iv) Witness at serial No.66 - Dilip Sawant, Deputy Commissioner of Police.

5. To appreciate the reason for summoning the witnesses at serial nos. 63 to 66, it is necessary to refer to some more facts. As against the accusations contained in Special Case no.21 of 2006, referred to above, in another MCOCA Special Case no.4 of 2009 (hereinafter referred to as 'Special Case No.4 of 2009'), it was alleged by the prosecution, that the accused therein were members of the Indian Mujahideen (hereinafter referred to as "the IM"). The IM is also allegedly a terrorist organization, blameworthy of such activities within the territorial jurisdiction of India.

The investigating agency had been claiming, that all bomb blasts in Mumbai since the year 2005 had been carried out by the IM. During the course of investigation in Special Case no. 4 of 2009, some of the accused therein (Special Case no. 4 of 2009) had confessed that they, as members of the IM had carried out bomb blasts, in Mumbai Suburban trains on 11.7.2006. In fact, 'the accused Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah', in Special Case no.4 of 2009, had made these confessional statements under Section 16 of the MCOCA. The confessional statement of Sadiq Israr Shaikh was recorded by Vishwas Nangre Patil, Deputy Commissioner of Police (witness at serial no.64). Likewise, the statement of Arif Badruddin Sheikh was recorded by Miland Bharambe, Deputy Commissioner of Police (witness at serial No.65). And, the statement of Ansar Ahmad Badshah was recorded by Dilip Sawant, Deputy Commissioner of Police (witness at serial No.66). Chitkala Zutshi, the then Additional Chief Secretary, Home Department (witness at serial No.63) had granted sanction for the prosecution of the aforesaid accused in Special Case

No.4 of 2009 on 21.2.2009, by relying interalia on the confessional statements made by Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah. The accused (respondents herein) desire to produce the witnesses at serial nos. 63 to 66, to establish their own innocence.

6. The Trial Court by its order dated 1.8.2012, declined the prayer made by the accused-respondents for summoning the witnesses at serial Nos.63 to

66. Dissatisfied with the order dated 1.8.2012, the accused-respondents preferred Criminal Appeal No.972 of 2012 before the High Court of Judicature at Bombay (hereinafter referred to as 'the High Court'). The High Court by its order dated 26.11.2012 allowed the appeal preferred by the accused-respondents. The operative part of the aforesaid order dated 26.11.2012, is being extracted hereunder :

"83. As a result of the aforesaid discussion, it is clear that the evidence sought to be adduced by the appellants is relevant and admissible. The appellants cannot be prevented from bringing on record such evidence. The impugned order is contrary to law, and needs to be interfered with.

84. The appeal is allowed. The impugned order is set aside.

85. The appellants shall be entitled to have the witnesses in question summoned, and examine them as witnesses for the defence.

86. Appeal is disposed of accordingly."

7. Aggrieved with the order dated 26.11.2012, passed in Criminal Appeal No.972 of 2012, the State of Maharashtra preferred the instant Special Leave Petition (Crl.) No.9707 of 2012.

8. Leave granted.

9. It is necessary to first define the contours of the controversy, which we are called upon to adjudicate, in the present appeal. The accused- respondents press for summoning the witnesses at serial nos. 63 to 66 as defence witnesses. The object for summoning the aforesaid witnesses is, that the witnesses at serial nos. 64 to 66 had recorded the confessional statements of Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah during the course of investigation in Special Case no. 4 of 2009. Based interalia on the aforesaid confessional statements, the

witness at serial no. 63 had accorded sanction for prosecution of the accused in Special Case no. 4 of 2009. The object of the accused-respondents (of producing these witnesses in defence) is to show, that others are responsible for actions for which the accused-respondents are being blamed. It is relevant to pointedly notice, that the aforesaid confessional statements were not made by persons who are accused in Special Case no. 21 of 2006 (i.e. they are not co-accused with the accused-respondents). The first question for determination therefore would be, whether the confessional statements recorded before the witnesses at serial nos. 64 to 66, by persons who are not accused in Special Case no. 21 of 2006, would be admissible in Special Case no. 21 of 2006. The instant question will have to be examined with reference to the provisions of the Indian Evidence Act, 1872 (hereinafter referred to as, the Evidence Act) and the MCOCA. Alternatively, the question that would need an answer would be, whether the said confessional statements are admissible under Sections 6 and 11 of the Evidence Act not as confessional statements, but as "relevant facts". The answers of the two alternate questions will have to be determined on totally different parameters, and under different statutory provisions. Both the questions are, therefore, being examined by us independently hereinafter.

10. Before venturing into the two alternate questions referred to in the foregoing paragraph, it is necessary to delineate a few salient features on which there is no dispute between the rival parties. It is not a matter of dispute, that confessional statements have been made during the course of investigation in Special Case no. 4 of 2009. The aforesaid confessional statements were made before the witnesses at serial nos. 64 to 66. The witnesses at serial nos. 64 to 66 were then holding the rank of Deputy Commissioners of Police (at the time when the confessional statements were recorded). The present appeal is a proceeding, emerging out of Special Case no. 21 of 2006. The accused in Special Case no. 4 of 2009, are different from the accused in Special Case no. 21 of 2006. Importantly, Special Case no. 4 of 2009, is not being jointly tried with Special Case no. 21 of 2006. The accused in Special Case no. 4 of 2009 (who had made the confessional statements under reference), are available. In other words, those who had made the confessional statements (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) before the witnesses at serial nos. 64 to 66, can be summoned to be produced in Special Case no. 21 of 2006, as defence witnesses, at the choice and asking of the accused- respondents (in Special Case no. 21 of 2006), for affirming or denying the correctness of the confessional statements made by them (before the witnesses at serial nos. 64 to 66). According to the learned counsel for the appellant, those who had made the confessional statements (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) before the witnesses at serial

nos. 64 to 66, have since retracted their confessional statements. Insofar as the latter aspect of the matter is concerned, the same is neither acknowledged nor denied at the behest of the accused- respondents.

11. When a question pertaining to the admissibility of evidence before an Indian court arises, it has to be determined with reference to the provisions of the Evidence Act. Alternatively, the question may be determined under a special enactment, which may either make such evidence admissible, or render it inadmissible. The special enactment relied upon in the present controversy is, the MCOCA. Therefore, the questions posed for determination in the present case, will have to be adjudicated on the basis of the provisions of the Evidence Act, and/or the MCOCA.

12. It is relevant in the first instance to describe the expanse/sphere of admissible evidence. The same has been postulated in Section 5 of the Evidence Act. Under Section 5 aforementioned, evidence may be given "of every fact in issue" and of such other facts which are expressly "declared to be relevant", and of no other facts. For the present controversy, the facts in issue are the seven bomb blasts, in seven different first class compartments, of local trains of Mumbai Suburban Railways, on 11.7.2006. Thus far, there is no serious dispute. But then, evidence may also be given of facts which are "declared to be relevant" under the Evidence Act. Under the Evidence Act, Sections 6 to 16 define "relevant facts", in respect whereof evidence can be given. Therefore, Sections 5 to 16 are the provisions under the Evidence Act, which alone have to be relied upon for determining admissibility of evidence.

13. Sections 17 to 31 of the Evidence Act pertain to admissions and confessions. Sections 17 to 31 define admissions/confessions, and also, the admissibility and inadmissibility of admissions/confessions. An analysis of the aforesaid provisions reveals, that an admission or a confession to be relevant must pertain to a "fact in issue" or a "relevant fact". In that sense, Section 5 (and consequently Sections 6 to 16) of the Evidence Act are inescapably intertwined with admissible admissions/confessions. It is, therefore, essential to record here, that admissibility of admissions/confessions, would depend on whether they would fall in the realm of "facts in issue" or "relevant facts". That in turn is to be determined with reference to Sections 5 to 16 of the Evidence Act. The parameters laid down for the admissibility of admissions/confessions are, however, separately provided for under the Evidence Act, and as such, the determination of admissibility of one (admissions/confessions) is clearly distinguishable from the other (facts in issue/relevant facts).

14. We shall now endeavour to delve into the first question, namely, whether the confessional statements recorded by the three accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah, in Special Case no. 4 of 2009), before the witnesses at serial nos. 64 to 66, are admissible as confessions in the trial of Special Case no. 21 of 2006. There seems to be a serious dispute between the rival parties, whether the deposition in respect of these confessional statements, can only be made by producing as witnesses, the person who had made such admission/confession; or in the alternative, deposition thereof can also be made through the persons before whom such confessions were made.

15. Admissions and confessions are exceptions to the "hearsay" rule. The Evidence Act places them in the province of relevance, presumably on the ground, that they being declarations against the interest of the person making them, they are in all probability true. The probative value of an admission or a confession does not depend upon its communication to another. Just like any other piece of evidence, admissions/confessions can be admitted in evidence only for drawing an inference of truth (See Law of Evidence, by M. Monir, fifteenth edition, Universal Law Publishing Co.). There is, therefore, no dispute whatsoever in our mind, that truth of an admission or a confession can not be evidenced, through the person to whom such admission/confession was made. The position, however, may be different if admissibility is sought under Sections 6 to 16 as a "fact in issue" or as a "relevant fact" (which is the second question which we are called upon to deal with). The second question in the present case, we may clarify, would arise only if we answer the first question in the negative. For only then, we will have to determine whether these confessional statements are admissible in evidence, otherwise than, as admissions/confessions.

16. Therefore to the extent, that a confessional statement can be evidenced by the person before whom it is recorded, has been rightfully adjudicated by the High Court, by answering the same in the affirmative. The more important question however is, whether the same would be admissible through the witnesses at serial nos. 63 to 66 in Special Case no. 21 of 2006. Our aforesaid determination, commences from the following paragraph.

17. The scheme of the provisions pertaining to admissions/confessions under the Evidence Act (spelt out in Sections 17 to 31) makes admissions/confessions admissible (even though they are rebuttable) because the author of the statement acknowledges a fact to his own detriment. This is based on the simple logic (noticed above), that no individual would acknowledge his/her liability/culpability

unless true. We shall determine the answer to the first question, by keeping in mind the basis on which, admissibility of admissions/confessions is founded. And also, whether confessions in this case (made to the witnesses at serial nos. 64 to 66) have been expressly rendered inadmissible, by the provisions of the Evidence Act, as is the case set up by the appellant.

18. An examination of the provisions of the Evidence Act would reveal, that only such admissions/confessions are admissible as can be stated to have been made without any coercion, threat or promise. Reference in this regard may be made to Section 24 of the Evidence Act which provides, that a confession made by an accused person is irrelevant in a criminal proceeding, if such confession has been caused by inducement, threat or promise. Section 24 aforesaid, is being reproduced below:-

> "24. Confession by inducement, threat or promise when irrelevant in criminal proceeding –
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> > A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him."
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> Sections 25 and 26 of the Evidence Act exclude, from the realm of admissibility, confessions made before a police officer or while in police custody. There can be no doubt, that the logic contained in the rule enunciated in Sections 25 and 26 is founded on the same basis/truth out of which Section 24 of the Evidence Act emerges. That a confession should be uninfluenced, voluntary and fair. And since it may not be possible to presume, that admissions/confessions are uninfluenced, voluntary and fair, i.e., without coercion, threat or promise, if made to a police officer, or while in police custody, the same are rendered inadmissible. Sections 25 and 26 aforesaid, are being reproduced below:-

> "25. Confession to police officer not to be proved-

No confession made to police officer shall be proved as against a person accused of any offence.

26. Confession by accused while in custody of police not to be proved against him-

No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

Explanation — In this section "Magistrate" does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882 (10 of 1882)."

There is, therefore, a common thread in the scheme of admissibility of admissions/confessions under the Evidence Act, namely, that the admission/confession is admissible only as against the person who had made such admission/confession. Naturally, it would be inappropriate to implicate a person on the basis of a statement made by another. Therefore, the next logical conclusion, that the person who has made the admission/confession (or at whose behest, or on whose behalf it is made), should be a party to the proceeding because that is the only way a confession can be used against him. Reference can be made to some provisions of the Evidence Act which fully support the above conclusions. Section 24 of the Evidence Act leads to such a conclusion. Under Section 24, a confession made "by an accused person", is rendered irrelevant "against the accused person", in the circumstances referred to above. Likewise, Section 25 of the Evidence Act contemplates, that a confession made to a police officer cannot be proved "as against a person accused of any offence". Leading to the inference, that a confession is permissible/admissible only as against the person who has made it, unless the same is rendered inadmissible under some express provision. Under Section 26 of the Evidence Act, a confession made by a person while in custody of the police, cannot "be proved as against such person" (unless it falls within the exception contemplated by the said Section itself). The gamut of the bar contemplated under Sections 25 and 26 of the Evidence Act, is however marginally limited by way of a proviso thereto, recorded in Section 27 of the Evidence Act. Thereunder, a confession has

been made admissible, to the extent of facts "discovered" on the basis of such confession (this aspect, is not relevant for the present case). The scheme of the provisions pertaining to admissions/confessions depicts a one way traffic. Such statements are admissible only as against the author thereof.

19. It is, therefore clear, that an admission/confession can be used only as against the person who has made the same. The admissibility of the confessions made by Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah need to be viewed in terms of the deliberations recorded above. The admissibility of confessions which have been made by the accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah, in Special Case no. 4 of 2009) who are not the accused in Special Case no. 21 of 2006, will lead to the clear conclusion, that they are inadmissible as admissions/confessions under the provisions of the Evidence Act. Had those persons who had made these confessions, been accused in Special Case no. 21 of 2006, certainly the witnesses at serial nos. 64 to 66 could have been produced to substantiate the same (subject to the same being otherwise permissible). Therefore, we have no doubt, that evidence of confessional statements recorded before the witnesses at serial nos. 64 to 66 would be impermissible, within the scheme of admissions/confessions contained in the Evidence Act.

20. The issue in hand can also be examined from another perspective, though on the same reasoning. Ordinarily, as already noticed hereinabove, a confessional statement is admissible only as against an accused who has made it. There is only one exception to the aforesaid rule, wherein it is permissible to use a confessional statement, even against person(s) other than the one who had made it. The aforesaid exception has been provided for in Section 30 of the Evidence Act, which is being extracted hereunder:-

> "30. Consideration of proved confession affecting person making it and others jointly under trial for same offence-
>
> When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.
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> Illustrations

(a) A and B are jointly tried for the murder of C. It is proved that A said - B and I murdered C. The Court may consider the effect of this confession as against B.

(b) A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said, A and I murdered C.

This statement may not be taken into consideration by the Court against A, as B is not being jointly tried."

As is evident from a perusal of Section 30 extracted above, a confessional statement can be used even against a co-accused. For such admissibility it is imperative, that the person making the confession besides implicating himself, also implicates others who are being jointly tried with him. In that situation alone, such a confessional statement is relevant even against the others implicated. Insofar as the present controversy is concerned, the substantive provision of Section 30 of the Evidence Act has clearly no applicability because Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah have not implicated any of the accused-respondents herein. The importance of Section 30 of the Evidence Act, insofar as the present controversy is concerned, emerges from illustration (b) thereunder, which substantiates to the hilt one of the conclusions already drawn by us above. Illustration (b) leaves no room for any doubt, that unless the person who has made a confessional statement is an accused in a case, the confessional statement made by him is not relevant. None of the accused in Special Case no. 4 of 2009 is an accused in Special Case no. 21 of 2006. As such, in terms of illustration (b) under Section 30 of the Evidence Act, we are of the view, that the confessional statement made by the accused in Special Case no. 4 of 2009, cannot be proved as a confessional statement, in Special Case no. 21 of 2006. This conclusion has been recorded by us, on the admitted position, that the accused in Special Case no. 4 of 2009 are different from the accused in Special Case no. 21 of 2006. And further because, Special Case no. 4 of 2009 is not being jointly tried with Special Case no. 21 of 2006. Therefore, even though Section 30 is not strictly relevant, insofar as the present controversy is concerned, yet the principle of admissibility, conclusively emerging from illustration (b) under Section 30 of the Evidence Act, persuades us to add the same to the underlying common thread, that finds place in the provisions of the Evidence Act, pertaining to

admissions/confessions. That, an admission/confession is admissible only as against the person who has made it.

21. We have already recorded above, the basis for making a confessional statement admissible. Namely, human conduct per se restrains an individual from accepting any kind of liability or implication. When such liability and/or implication is acknowledged by the individual as against himself, the provisions of the Evidence Act make such confessional statements admissible. Additionally, since a confessional statement is to be used principally as against the person making it, the maker of the confession will have an opportunity to contest the same under Section 31 of the Evidence Act, not only by producing independent evidence therefor, but also, because he will have an opportunity to contest the veracity of the said confessional statement, by effectively cross-examining the witness produced to substantiate the same. Such an opportunity, would also be available to all other co-accused who would be confronted with a confessional statement made by an accused against them (as in Section 30 of the Evidence Act), as they too would have an opportunity to contest the confessional statement made by the accused, in the same manner as the author of the confession. Illustration (b) under Section 30 of the Evidence Act contemplates a situation wherein the author of the confessional statement is not a co-accused. Illustration (b) renders such confessional statements inadmissible. There is, it may be noticed, no room for testing the veracity of the said confessional statement, either at the hands of the person who made it, or by the person against whom it is made. For adopting illustration (b) under Section 30 to the reasoning recorded above, the same be read as under:-

> "...This statement may not be taken into consideration by the court against A (the accused facing trial), as B (the person who made the confession) is not being jointly tried."
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> Illustration (b) makes such a confessional statement inadmissible for the sole reason, that the person who made the confession, is not a co-accused in the case. Again, the underlying principle brought out through illustration (b) under Section 30 of the Evidence Act is, that a confessional statement is relevant only and only, if the author of confessional statement himself is an accused in a case, where the confessional statement is being proved. In the present controversy, the authors of the confessional statements (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) are not amongst the accused in Special Case no. 21 of 2006. The confessional statements made by them, would therefore be inadmissible (as admissions/confessions)

in the present case (Special Case no. 21 of 2006), as the situation in the present case is exactly the same as has been sought to be explained through illustration (b) under Section 30 of the Evidence Act.

22. It is also possible, to determine the admissibility of the statements of the accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) made to the witnesses at serial nos. 64 to 66 independently of the conclusions drawn in the foregoing paragraphs. The instant determination is being recorded by us, again by placing reliance on Sections 25 and 26 of the Evidence Act. As already noticed hereinabove, Section 25 makes a confessional statement made to a police officer inadmissible against "a person accused of any offence". Likewise, a confessional statement made while in the custody of police cannot be proved as against "the person making such confession" under Section 26 of the Evidence Act. It is nobody's case, that the instant confessional statements made by the accused in Special Case no. 4 of 2009 are being proved to substantiate the "discovery" of facts emerging out of such confessional statements. In the aforesaid view of the matter, the exception to Sections 25 and 26 of the Evidence Act contemplated under Section 27 thereof, would also not come into play. Since admittedly the confessional statements, which are sought to be substantiated at the behest of the accused-respondents, were made by the accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) in Special Case no. 4 of 2009, to different "police officers" (all holding the rank of Deputy Commissioners of Police), we are satisfied, that the said confessional statements are inadmissible under Sections 25 and 26 of the Evidence Act.

23. The issue of admissibility of the confessional statements made by Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah before the witnesses at serial nos. 64 to 66, needs to be examined from yet another perspective. Learned counsel for the respondents were successful in persuading the High Court, that a confessional statement made by an accused in one case, could be used in another case as well. In this behalf, the respondents had placed reliance on the decision rendered by this Court in State of Gujarat Vs. Mohammed Atik, AIR 1998 SC 1686. In the aforesaid controversy, the following question, which was framed by the trial Court, had come up for consideration before this Court:- "The question therefore is whether the prosecution be permitted to introduce and prove the confessional statement of an accused, alleged to have been made during the investigation of another offence committed on a different date, during the trial of that accused in another crime."

While answering the question extracted above, this Court first examined whether the confession relied upon, had been recorded in accordance with the provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as, the TADA). Having first determined, that the confessional statement under reference had been validly recorded under the TADA, this Court recorded the following conclusion in answer to the question framed by the trial Court:-

"We have, therefore, absolutely no doubt that a confession, if usable under Section 15 of the TADA, would not become unusable merely because the case is different or the crime is different. If the confession covers that different crime it would be a relevant item of evidence in the case in which that crime is under trial and it would then become admissible in the case."

Based on the conclusion drawn in State of Gujarat Vs. Mohammed Atik (supra), the High Court accepted the prayer made by the respondents, that the confessional statements made by the accused in Special Case no. 4 of 2009, would be admissible in Special Case no. 21 of 2006. The instant legal position is sought to be reiterated before us by the learned counsel representing the accused-respondents.

24. We have given our thoughtful consideration to the conclusions drawn by the High Court on the basis of the decision in State of Gujarat Vs. Mohammed Atik (supra). Before drawing any conclusion one way or the other, it would be relevant to notice, that in accepting the admissibility of the confessional statement in one case as permissible in another case, reliance was placed by this Court on Section 15 of the TADA. Section 15 of the TADA is being extracted hereunder:-

"Section 15 – Certain confessions made to Police Officers to be taken into consideration-

(1) Notwithstanding anything in the Code or in the Indian Evidence Act, 1872, but subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than a Superintendent of police and recorded by such police officer either in writing or on any mechanical device like cassettes, tapes or sound tracks from out of which sounds or images can be reproduced, shall be admissible in the trial of such person or co-accused, abettor or conspirator for an offence under this Act or rules made thereunder:

Provided that co-accused, abettor or conspirator is charged and tried in the same case together with the accused.

(2) The police officer shall, before recording any confession under subsection (1), explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and such police officer shall not record any such confession unless upon questioning the person making it, he has reason to believe that it is being made voluntarily."

There is no room for any doubt, that Section 15 of the TADA expressly makes such confessional statement made by a person admissible not only against the person who has made it, but also as against others implicated therein, subject to the condition, that the person who has made the confession, and the others implicated (the co-accused – abettor or conspirator) are being "...tried in the same case together...". Therefore, it is necessary for us first to specifically highlight, that the admissibility of the aforesaid confessional statements was determined not with reference to the Evidence Act, but under Section 15 of the TADA. What the High Court, as also the respondents before us have overlooked is, that the proviso under sub- Section (1) of Section 15 of the TADA expressly postulates, that a confessional statement made by an accused as against himself, as also a co-accused (abettor or conspirator) is admissible, provided that, the co- accused (abettor or conspirator) is being tried in the same case together with the accused who had made the confession. The proviso under sub- Section (1) of Section 15 of the TADA is founded on the same principle, which we have referred to hereinabove, while analyzing Section 30 of the Evidence Act. The link for determining admissibility is not case specific. A confessional statement may be admissible in any number of cases. Or none at all. To determine admissibility the test is, that the author of the confessional statement must be an accused, in the case (in which the confessional statement is admissible). And in case it is to be used against persons other than the author of the confessional statement, then besides the author, such other persons must all be co-accused in the case. It is therefore apparent, that the confessional statement made by an accused was held to be relevant in State of Gujarat Vs. Mohammed Atik (supra) under Section 15 of the TADA, on the fulfilment of the condition, that the same was recorded in consonance with the provisions of the said Act, as also, the satisfaction of the ingredients contained in the proviso under sub-Section (1) of Section 15

of the TADA, namely, the person who had made the confession, and the others implicated were facing a joint trial. The judgment rendered by this Court in State of Gujarat Vs. Mohammed Atik (supra) has been incorrectly relied upon while applying the conclusions rendered in the same to the controversy in hand, as the confessional statements made by Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah do not implicate the accused-respondents in Special Case no. 21 of 2006, nor are the accused-respondents herein being jointly tried with the persons who had made the confessional statements. Reliance has not been placed by the accused-respondents, on any provision under the MCOCA, to claim admissibility of the witnesses at serial nos. 63 to 66 as defence witnesses. Nor have the learned counsel for the accused-respondents invited our attention to any other special statute applicable hereto, whereunder such a course of action, in the manner claimed by the respondents, would be admissible. We are, therefore, of the view that the High Court erred in relying on the judgment rendered by this Court in State of Gujarat Vs. Mohammed Atik (supra) while determining the controversy in hand.

25. We shall now endeavour to delve into the second question, whether the confessional statements recorded by the three accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah), in Special Case no. 4 of 2009, before the witnesses at serial nos. 64 to 66, are admissible in Special Case no. 21 of 2006, by producing the persons before whom the confessional statements were made (the witnesses at serial nos. 64 to 66) as defence witnesses, under the Evidence Act. On the instant aspect of the matter, the submission of the accused-respondents has been, that the same satisfy the test of being "relevant facts" under Sections 6 and 11 of the Evidence Act. We shall now record our conclusions separately for each of the aforesaid provisions.

26. Are the statements made by the accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) in Special Case no. 4 of 2009, to the witnesses at serial nos. 64 to 66, admissible under Section 6 of the Evidence Act as "relevant facts"? The accused-respondents emphatically claim that they are. The contention of the learned counsel for the appellant is, however, that the evidence of three police officers (all holding the rank of Deputy Commissioners of Police) and the Additional Chief Secretary (Home Department) relating to confessions made by accused in Special Case No.4 of 2009 is hit by the "hearsay rule". In this behalf it is pointed out, that the blasts in question took place on 11.7.2006 while the confessions were recorded in October, 2008. It is therefore pointed out, that the confessional statements were recorded after two years of the occurrence of the fact

in issue. Section 6 of the Evidence Act, according to learned counsel, partially lifts the ban on the "hearsay rule", if the evidence which is sought to be produced, can be said to be so connected to a "fact in issue" as to form a part of it. It is contended, that the "fact in issue", is the bomb blasts that took place in local trains of Mumbai Suburban Railways, on 11.7.2006. The confessional statements recorded after two years cannot be said to be a part of the said "fact in issue", so connected to it, as to form a part of it. The evidence of police officers about the confessions made by the accused in Special Case No.4 of 2009 is not, according to learned counsel, evidence relating to "facts in issue", but pertain to "collateral facts". This evidence of a collateral fact, it is contended, can be brought in as evidence only if it is "a relevant fact" under some provision of the Evidence Act. Such evidence of the police officers, according to learned counsel for the appellant, is not relevant under any provisions of the Evidence Act, certainly not under Section 6 thereof.

27. Such evidence, according to learned counsel, is barred by the "rule of hearsay". According to learned counsel, the ban on hearsay evidence does not extend to the rule of "res gestae". It is however submitted, that the rule of "res gestae" is not attracted in the present case, as there is no live link between the occurrence of bomb blasts on 11.7.2006, and the recording of confessional statements two years thereafter. If the accused persons had made such confessional statements immediately after the occurrence of the bomb blasts, as a natural reaction in immediate proximity of the occurrence, so as to constitute a part of the occurrence itself, there may have been a live link between the blasts and the confessional statements, and such confessional statements, may have been perceived as a part of the same, and therefore, may (in such eventuality) have been admissible under Section 6 of the Evidence Act. The statement of the accused in Special Case no. 4 of 2009, according to learned counsel, cannot for the reasons mentioned above, be treated as part of the same transaction, as the transaction of bomb blasts of 11.7.2006.

28. In order to substantiate his aforesaid contention, learned counsel for the appellant placed reliance on the decision rendered in Venkateshan v. State, 1997 Cr.LJ 3854, wherein Madras High Court held, that in a murder case where the accused who had assaulted the deceased, had made a statement about the assault to the brother of the deceased, within half an hour of the act, the evidence of the brother was held to be "res gestae", and therefore, admissible under Section 6 of the Evidence Act. It was submitted, that only such a fact as is so connected to a "fact in issue", so as to be treated as a part of it, would constitute "res gestae", and would not be excludable by the "rule of hearsay". Relevant observations from the

aforesaid judgment, which were brought to our notice, are being extracted hereunder:

> "17. The above proposition of law has been laid down by the Apex Court and the same followed by other Courts. We have to see whether there is an interval or time lag between the act committed by the accused and the time of statement given to the witnesses and was it a long one so as to give time or opportunity for fabrication. In the instant case the occurrence took place at 11.30 p.m., and the statement made by the appellant to P.W. 1 at 12 mid night i.e. half-an-hour later. In the light of the facts of this case, it cannot be stated that there is a long interval so as to given opportunity for any fabrication. After the occurrence was over, P.W. 2 and P.W. 3 informed to P.W. 1 and immediate4ly on receipt of the information rushed to the house of the appellant where the appellant was found standing near the victim. Therefore, as per illustration (a) to Section 6 of the Evidence Act-
>
> "Whatever was said by the accused to the witness shortly after the occurrence also would form part of the transaction and so it has to be considered to be the relevant facts and circumstances of the case."
>
> 18. Therefore we hold that the statement made by appellant to P.W. 1 immediately after the occurrence without any long time lag would be admissible under Section 6 of the Evidence Act."
>
> Reliance was also placed on decision rendered in Gentela Vijaya Vardhan Rao v. State of A.P., 1996 (6) SCC 241, wherein this Court held, that the principle of law embodied in Section 6 of the Evidence Act, is expressed as "res gestae". The rule of "res gestae", it was held, is an exception to the general rule, that hearsay evidence is not admissible. The rationale of making certain statements or facts admissible under Section 6 of the Evidence Act, it was pointed out, was on account of spontaneity and immediacy of such statement or fact, in relation to the "fact in issue". And thereafter, such facts or statements are treated as a part of the same transaction. In other words, to be relevant under Section 6 of the Evidence Act, such statement must have been made contemporaneously with the fact in issue, or at least immediately thereupon, and in conjunction therewith. If there is an interval between the fact in issue, and the fact sought to be proved, then such statement cannot be described as falling in the "res gestae" concept. Reliance from the aforesaid judgment was placed on the following observations:

"15. The principle or law embodied in Section 6 of the Evidence Act is usually known as the rule of res gestae recognized in English Law. The essence of the doctrine is that fact which, though not in issue, is so connected with the fact in issue as to form part of the same transaction becomes relevant by itself. This rule is, roughly speaking, an exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement or fact admissible under Section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But it is necessary that such fact or statement must be part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or at least immediately thereafter. But if there was an interval, however slight it may be, which was sufficient enough for fabrication then the statement is not part of res gestae. In R. v. Lillyman (1896) 2 Q.B. 167 a statement made by a raped woman after the ravishment was held to be not part of the res gestae on account of some interval of time lapsing between the act of rape and the making of the statement. Privy Council while considering the extent upto which this rule of res gestae can be allowed as an exemption to the inhibition against near say evidence, has observed in Teper v. R. (1952) 2 All E.R. 447, thus :

"The rule that in a criminal trial hearsay evidence is admissible if it forms part of the res gestae is based on the propositions that the human utterance is both a fact and a means of and that human action may be so interwoven with words that the significance of the action cannot be understood without the correlative words and the dissociation of the words from the action would impede the discovery of the truth. It is essential that the words sought to be proved by hearsay should be, if not absolutely contemporaneous with the action or event, at least so clearly associated with it that they are part of the thing being done, and so an item or part of the real evidence and not merely a reported statement."

The correct legal position stated above needs no further elucidation."

29. We have examined the issue of admissibility of the deposition of the witnesses at serial nos. 63 to 66 with reference to the reason for which they are desired to be summoned as defence witnesses. We may first extract Section 6 of the Evidence Act hereunder:

"6. Relevancy of facts forming part of same transaction – Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

Illustrations

(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after is as to from part of the transaction, is a relevant fact.

(b) A is accused of waging war against the Government of India by taking part in an armed insurrection in which property is destroyed, troops are attacked and goals are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, though A may not have been present at all of them.

(c) A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.

(d) The question is whether certain goods ordered from B were delivered to A. the goods were delivered to several intermediate persons successively. Each delivery is a relevant fact."

In our considered view, the test to determine admissibility under the rule of "res gestae" is embodied in words "are so connected with a fact in issue as to form a part of the same transaction". It is therefore, that for describing the concept of "res gestae", one would need to examine, whether the fact is such as can be described by use of words/phrases such as, contemporaneously arising out of the occurrence, actions having a live link to the fact, acts perceived as a part of the occurrence, exclamations (of hurt, seeking help, of disbelief, of cautioning, and the like) arising out of the fact, spontaneous reactions to a fact, and the like. It is difficult for us to describe illustration (a) under Section 6 of the Evidence Act, specially in conjunction with the words "are so connected with a fact in issue as to form a part of the same transaction", in a manner differently from the approach characterized above. We are satisfied, that the confessional statements recorded by the accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) in

Special Case no. 4 of 2009 to the witnesses at serial nos. 63 to 66 do not satisfy the ingredients of the rule of "res gestae" incorporated in Section 6 of the Evidence Act. This is so because the statements made by Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah, cannot be said to have contemporaneously arisen along with the bomb blasts of 11.7.2006, which is the "fact in issue". The confessional statements of the accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) in Special Case no. 4 of 2009 cannot be perceived to be part of the said "fact in issue". The statements made by Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah are most certainly not, spontaneous reactions arising out of the bomb blasts of 11.7.2006. The statements under reference are not reactions of the kind referred to above. Our above inferences are fully substantiated, if examined in conjunction with the legislative illustrations incorporated under Section 6 of the Evidence Act.

30. It is not necessary for us to further examine, while dealing with the present controversy, whether a confessional statement of an occurrence could/would fall within the realm/expanse of the rule of "res gestae", in a given exigency. We, therefore, refrain from recording any conclusions thereon, while dealing with the instant controversy, because such an issue does not arise herein.

31. We shall now endeavour to determine, whether the statements made by the accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) in Special Case no. 4 of 2009, to the witnesses at serial nos. 64 to 66 are admissible through the said witnesses (at serial nos. 64 to 66) under Section 11 of the Evidence Act. It is pointed out by learned counsel representing the appellant, that in law there is a clear distinction between the "existence of a fact", and "a statement as to its existence". The evidence of the accused persons in Special Case no.4 of 2009 before the court admitting their guilt would be, according to learned counsel, evidence about "the existence of the fact" i.e., their culpability and/or responsibility for the bomb blasts of 11.7.2006. The evidence of the police officers, it was submitted, is not about the existence of such fact, but is about recording "a statement as to its existence". It is therefore clear, according to learned counsel, that the evidence of the police officers would not be permissible under Section 11 of the Evidence Act, because the evidence of the witnesses at serial nos. 63 to 66 fall in the latter category of "a statement about the existence of a fact". Moreover, it is contended, that it would be clearly hit by the "rule of hearsay".

32. The second contention advanced on behalf of the learned counsel for the petitioner was aimed at determining the relevance of the witnesses at serial nos. 63

to 66, with reference to Section 11 of the Evidence Act. According to the learned counsel for the appellant, Section 11 makes the "existence of facts" relevant and admissible, and not "a statement as to such existence". For this learned counsel for the appellant placed reliance on Munna Lal v. Kameshwari, AIR 1929 Oudh 113. In this case the question was, whether the defendant no.3 was a major when he executed the disputed mortgage deed. The evidence sought to be given comprised of two documents i.e., Exhibit A-10 and A-11. These documents were held to be inadmissible by the trial court. Exhibit A-10 was the certified copy, of a statement made by defendant no.3 in the Revenue Court on 16.2.1925; and Exhibit A-11 was the statement of the mother of defendant no. 3, before the Revenue Court, on the same day. In both the statements the age of defendant no. 3 was stated as 21 years. The High Court held, that these statements could not be admitted, as they were statements of living persons, who had not been examined as witnesses in the case. If they had been examined, their statements might have been admissible, under the Evidence Act (either in corroboration, or in contradiction of the statements so made). Since neither defendant no. 3, nor the mother of defendant no. 3, were examined as witnesses, therefore, the statements were considered as not admissible. The High Court however further held, that both the persons being living persons, their statements recorded earlier (on 16.2.1925) could not have been considered admissible under Section 32(5) of the Evidence Act. The High Court also rejected the contention, that the aforesaid statements were admissible under Section 11 of the Evidence Act. The court held, that if the said statements could also not be admitted under Section 32, then they could also not be admitted under Section 11. Learned counsel for the appellant, placed reliance on the following observations recorded in the judgment:

> "It was contended that two documents which are Exs. A-10 and A-11 are admissible in evidence and should not have been rejected by the learned Additional District Judge as irrelevant and inadmissible in evidence. Ex.A-10 is a certified copy of a statement made by defendant 3, the father of the plaintiff-respondent, in the revenue Court on 16th February 1925. Ex.A-11 is the statement of the mother of defendant 3 also made in the revenue Court on the same date, i.e., 16th February, 1925. In both these statements the age of defendant 3 is stated to have been at the time of the statements 21 years. We do not see how any of these statements can be admitted in evidence since we are of the opinion that they are statements of living persons who have not been examined as witnesses in the case. If they had been examined as such the statements might have been admissible under the Evidence Act either in corroboration of the statement made by them in Court as witnesses or in contradiction of the statements so made. We, however, find that neither

defendant 3 was put into the witness-box, nor was the mother of defendant 3 examined as a witness in the case. It was also admitted that both the persons being living persons their statements could not have been considered to have been admissible under S.32, Cl.(5), Evidence Act. It was, however, contended by the learned counsel for the appellant that these statements were admissible under S.11, Evidence Act. We are of opinion that before a fact can be considered to be relevant under S.11 of the Act it must be shown that it is admissible. It would be absurd to hold that every fact, which even if it be inadmissible and irrelevant, would be admissible under S.11. We are supported in this view by the observations of their Lordships of the Allahabad High Court in Bala Ram v. Mahabir Singh, (1912) 34 All.341. An attempt was made in that case, as has been done in this case, to admit in evidence the deposition made by a person who though deceased, did not fall within the provisions of S.32, Evidence Act, on the ground that the provisions of S.11 of the Act would make such evidence admissible. It was observed by their Lordships that this argument could not be accepted because if a particular deposition could not be admitted under the provisions of S.32, Evidence Act, it could not be held to be admissible under S.11 of the said Act. We are therefore of opinion that the learned Additional District Judge was correct in holding that Exs. A-10 and A-11 which are statements of living persons who have not been examined as witnesses in this case are inadmissible in evidence and cannot be relied upon in proof of the allegations of the defendants appellants that defendant 3 was a major at the time when he executed the deed."

In order to substantiate the same contention, reliance was also placed on the decision rendered by the Allahabad High Court in Mt.Naima Khatun v. Basant Singh, AIR 1934 Allahabad 406. It was submitted, that the High Court had concluded in the aforesaid judgment, that a statement which is not admissible under Section 32 of the Evidence Act, would also not be admissible under Section 11. And further, that Section 11 makes the "existence of fact" admissible, and not "a statement as to its existence". Our attention was invited to the following observations recorded in the judgment relied upon:

"The deed of adoption was executed by the defendant's adoptive mother, Rani Bishen Kuer, and bears her signature in Gurumukhi. The endorsement of the Sub-Registrar says that she was a purdanasin lady and admitted the execution and completion of the document from behind the purdah of a wooden door leaf. In this document she refers to the fact of having adopted

the boy, and that he would be the owner of the entire property of her husband like the begotten son of her husband. She also states that she had performed the adoption ceremonies according to the custom prevailing in her husband's family, and further states at present Basant Singh aforesaid is about one and a half years old. The lady is dead and cannot now be called. The condition required in the opening portion of Section 32, Evidence Act, which alone is relied upon for purposes of admissibility, is therefore fulfilled. The learned advocate for the respondent strongly argues that this document falls within Sub-section 5 of Section 32, and that the statement, inasmuch as it relates to the existence of relationship by blood and adoption, made by a person having a special means of knowledge and at a time when no question in dispute had arisen, was admissible in evidence. There can be no doubt that the rule of English Law is particularly strict, and the admission of hearsay evidence in pedigree cases is confined to the proof of pedigree and does not apply to proof of the facts which constitute a pedigree, such as birth, death and marriage, when they have to be proved for other purposes. In Haines v. Guthrie (1883) 13 Q.B.D. 818 an affidavit filed by the defendant's father stating the date of the defendant's birth in an action to which the plaintiff had not been a party was held inadmissible as evidence of the age of the defendant in support of his defence. In India we have Section 32, Evidence Act, which does not seem to be so strict. It is however clear that if a statement does not fall within Section 32, it could not be admissible under Section 11 of the Act: Bela Ram v. Mahabir Singh (1912) 34 All. 341 and Munna Lal v. Kameshari Dat A.I.R. 1929 Oudh 113. Obviously there is a difference between the existence of a fact and a statement as to its existence. Section 11 makes the existence of facts admissible, and not statements as to such existence, unless of course the fact of making that statement is itself a matter in issue."

Learned counsel for the appellant also placed reliance on A.PL.S.V.L. Sevugan Chettiar v. Raja Srimathu Muthu Vijaya Raghunath, AIR 1940 Madras 273, wherein it has been held, that Section 11 must be read subject to the other provisions of the Act, and that, a statement not satisfying the conditions laid down in Section 32 cannot be admitted under Section 11, merely on the ground, that if admitted it may probabilise or improbabilise a fact in issue or a relevant fact. Reference was made to the following observations noted therein:

"11. We may here refer to one other set of documents relied on by the defendants which if admissible, will be very strong evidence in support of

the defendants' case. Exs. 1, 1-a, 4, 5 and 6 are a group of documents relating to plots adjacent to the pond marked Neeranikuttai, just to the west of the point marked J-l in Ex. L. The bearing of these documents on the present controversy is that in all of them the property dealt with is described as situate in Iluppakkudi. If they are admissible, they will cearly show that Iluppakkudi limits extended even further south of the line fixed by the appellate survey officer. The learned Subordinate Judge has rejected these documents as irrelevant. Mr. Eajah Ayyar has strongly contested this view of the lower Court. He maintained that they must be held to be admissible under Sections 11 and 13, Evidence Act. The decisions referred to in para. 613 of Taylor on Evidence would support the view that they may be admissible even under Clause 4 of Section 32, Evidence Act, as statements relating to a matter of public or general interest, namely village boundaries. But in view of the observations of their Lordships of the Judicial Committee in Subramanya Somayajulu v. Sethayya (1923) 10 A.I.R. Mad. 1 as to the scope of this clause, we do not feel ourselves at liberty to follow the English cases. Mr. Rajah Aiyar contended that the documents may fall under Clause 3 of Section 32. We are unable to accede to this contention. As regards Section 11, it seems to us that Section 11 must be read subject to the other provisions of the Act and that a statement not satisfying the conditions laid down in Section 32 cannot be admitted merely on the ground that, if admitted, it may probabilize or improbabilize a fact in issue or a relevant fact."

Our attention was also drawn to the decision rendered by the Bombay High Court in R.D. Sethna v. Mirza Mahomed Shrazi (No.4), (1907) 9 Bombay Law Reporter 1047, wherein it was held as under:

"….. There is a test, a simple and a sufficient test, which reasonably applied yields consistent and intelligible results. Section 32 imposes restrictions upon the admissibility of statements made by persons who cannot be brought before the Court to give their own evidence. The object of those restrictions and the reason for them are plain. The basic: principle of legal evidence being that the Court must always have the best, it follows that where persons can be, they must be brought before the Court to tell what they know at first hand. Their veracity can then be best tested by the art of cross-examination. Where however witnesses cannot be brought before the Court, their previous statements are at best indirect evidence of a kind that a Court would not, except under necessity, receive at all. The conditions which when compelled by necessity to take this evidence or none, are imposed upon its admissibility

plainly aim at affording some guarantee of its truth. As there is to be no chance of testing the man by cross-examination his statement will not be admitted unless it has been made under conditions which, looking to the ordinary course of human affairs, raise pretty strong presumptions that it was a true statement. Thus the whole scope and object of Section 32 centre upon securing the highest degree of truth possible in the circumstances for the statement. And it follows that where the person tendering such a statement is indifferent as to its truth or falsehood there is nothing to bring that section into play. Briefly the test whether the statement of a person who is dead or who cannot be found is relevant under Section 11 and admissible under that section, (presuming of course that it is in other respects within the intention of the section) although it would not be admissible under Section 32 is this. It is admissible under Section 11 when it is altogether immaterial whether what the dead man said was true or false, but highly material that he did say it. In these circumstances no amount of cross- examination could alter the fact, if it be a fact that he did say the thing and if nothing more is needed to bring the tiling said in under Section 11, then the case is outside Section 32. ….."

Likewise, while referring to the decision in Nihar Bera v. Kadar Bux Mohammed, AIR 1923 Calcutta 290, it was submitted, that recitals (statements made in a document) would not become a part of evidence, unless the person(s) making the recital(s) is/are brought before the Court when such a person is alive. In the present case also, it was submitted, that the accused in Special Case no.4 of 2009 who had made the confessional statements, are living persons, and unless they are examined, there is no question of accepting their confessional statement. In this behalf, learned counsel relied upon the following conclusions recorded in the aforesaid judgment:

"In the second place, it has been urged against the judgment of the Subordinate Judge that he placed reliance upon recitals in a deed of release executed by Nanu (the son of Kanu and brother of the two plaintiffs) in favour of the defendant. No doubt the fact that Nanu executed a deed of release constitutes a transaction which is relevant for the purpose of investigation of the question in controversy. But the recitals in the document do not become a part of the evidence. They are assertions by a person who is alive and who might have been brought before the Court if either of the parties to the suit had so desired. This distinction is frequently overlooked and when a document has been admitted in evidence as evidence of a

transaction the parties are often apt to refer to the recitals therein as relevant evidence."

33. Before dwelling on the issue in hand, it is necessary to extract herein Section 11 of the Evidence Act. The same is accordingly reproduced hereunder:-

"11. When facts not otherwise relevant become relevant - Facts not otherwise relevant, are relevant-

(1) if they are inconsistent with any fact in issue or relevant fact;

(2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

Illustrations

(a) The question is, whether A committed a crime at Calcutta on a certain day.

The fact that, on that day, A was at Lahore is relevant.

The fact that, near the time when the crime was committed, A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.

(b) The question is, whether A committed a crime.

The circumstances are such that the crime must have been committed either by A, B, C or D. Every fact which shows that the crime could have been committed by no one else and that it was not committed by either B, C or D is relevant."

A perusal of Section 11 aforesaid reveals, that facts inconsistent with "facts in issue" are included in the realm of relevance. Likewise, facts which make the existence or non-existence of a "fact in issue" highly probable or improbable, have also been included in the realm of relevance. Insofar as the present controversy is concerned, it is the contention of the learned counsel for the accused-respondents, that the confessional statements made by the

accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) in Special Case no. 4 of 2009, to the witnesses at serial nos. 64 to 66, would positively bring the said confessional statements within the realm of relevance, since the said confessions would be clearly inconsistent with the culpability of the accused in Special Case no. 21 of 2006. It was submitted at the behest of the accused-respondents, that even if there was some degree of variance in assuming the aforesaid inference, the confessional statements made by the accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) in Special Case no. 4 of 2009 would go a long way, to make the existence of culpability of the accused-respondents in Special Case no. 21 of 2006 highly improbable. Thus viewed, it was strongly canvassed at the hands of the learned counsel representing the accused-respondents, that the High Court was fully justified in allowing the accused-respondents to substantiate the confessional statements made by the accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) in Special Case no. 4 of 2009 through the witnesses at serial nos. 63 to 66.

34. We have given our thoughtful consideration to the plea raised at the hands of the accused-respondents under Section 11 of the Evidence Act. There can certainly be no doubt about the relevance of the confessional statements made by the accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) in Special Case no. 4 of 2009, as they would clearly demonstrate the inconsistency of the case set up by the prosecution against the accused-respondents in Special Case no. 21 of 2006. In such an eventuality, there would also be no doubt, that the prosecution case would be rendered highly improbable. The only serious concern however, to our mind, is whether the said evidence is admissible, as is the case set up by the accused-respondents, through the witnesses at serial nos. 63 to 66. Insofar as the instant aspect of the matter is concerned, reference may be made to Section 60 of the Evidence Act, which is being extracted hereunder:-

> "60. Oral Evidence must be direct - Oral evidence must, in all cases, whatever, be direct; that is to say;
>
> If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;
>
> If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

If it refers to an opinion or to the grounds in which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds:

Provided that the opinion of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatise if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable:

Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection."

A perusal of Section 60 aforementioned leaves no room for any doubt, that oral evidence in respect of a fact, must be of a primary nature. It would be evidence of a primary nature, if it satisfies the state of facts described as "direct" in Section 60 extracted above. Illustrative instances of direct/primary evidence, are expressed in Section 60 itself. When it pertains to a fact which can be seen, it must be the statement of the person who has himself seen it; if when it refers to a fact which can be perceived, it must be the statement of the person who has perceived it; and when it pertains to an opinion (or the basis on which that opinion has been arrived at), it must be the statement of the person who has himself arrived at such opinion. Stated differently, oral evidence cannot be hearsay, for that would be indirect/secondary evidence of the fact in issue (or the relevant fact).

35. In order to determine the truthfulness of the confessional statements which are sought to be relied upon by the accused-respondents, it is inevitable in terms of the mandate of Section 60 of the Evidence Act, that the accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) in Special Case no. 4 of 2009, who had made the said confessional statements, must themselves depose before a Court for effective reliance, consequent upon the relevance thereof having been affirmed by us under Section 11 of the Evidence Act. We affirm the fine distinction made by the learned counsel for the accused-respondents in pointing out that the confessional statements made by Sadiq Israr Shaikh, Arif Badruddin

Shaikh and Ansar Ahmad Badshah, would only constitute "a statement as to the existence of such fact". That would not be direct/primary evidence. The same would clearly fall in the mischief of the "hearsay rule". In order to be relevant under Section 11 of the Evidence Act, such statement ought to be "a statement about the existence of a fact", and not "a statement as to its existence". In our considered view, therefore, whilst it is permissible to the accused-respondents to rely on the confessional statements made by Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah, it is open to them to do so only through the persons who had made the confessional statements. By following the mandate contained in Section 60 of the Evidence Act, it is not open to the accused-respondents, in view of the expressed bar contained in Section 60 of the Evidence Act, to prove the confessional statements through the witnesses at serial nos. 63 to 66. In the aforesaid view of the matter, it is not possible for us to accept the plea advanced at the hands of the learned counsel for the accused-respondents, that they should be permitted to prove the confessional statements through the witnesses at serial nos. 63 to 66.

36. It is necessary in connection with the conclusion drawn by us hereinabove, to deal with the submission advanced at the hands of the learned counsel for the accused-respondents, even on the touchstone of Section 32 of the Evidence Act. Section 32 aforesaid is being extracted hereunder:-

> "32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant – Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:-
>
> (1) when it relates to cause of death - When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.
>
> Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

(2) or is made in course of business - When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce written or signed by him; or of the date of a letter or other document usually dated, written or signed by him.

(3) or against interest of maker - When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true it would expose him or would have exposed him to criminal prosecution or to a suit for damages.

(4) or gives opinion as to public right or custom, or matters of general interest - When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen.

(5) or relates to existence of relationship - When the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

(6) or is made in will or deed relating to family affairs - When the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait, or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.

(7) or in document relating to transaction mentioned in section 13, Clause (a). - When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in Section 13, Clause (a).

(8) or is made by several persons and expresses feelings relevant to matter in question - When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

Illustrations

(a) The question is, whether A was murdered by B ; or A dies of injuries received in a transaction in the course of which she was ravished. The question is, whether she was ravished by B; or

The question is, whether A was killed by B under such circumstances that a suit would lie against B by A's widow.

Statements made by A as to the cause of his or her death, referring respectively to the murder, the rape, and the actionable wrong under consideration, are relevant facts.

(b) The question is as to the date of A's birth.

An entry in the diary of a deceased surgeon, regularly kept in the course of business, stating that, on a given day he attended A's mother and delivered her of a son, is a relevant fact.

(c) The question is, whether A was in Calcutta on a given day.

A statement in the diary of a deceased solicitor, regularly kept in the course of business, that, on a given day, the solicitor attended A at a place mentioned, in Calcutta , for the purpose of conferring with him upon specified business, is a relevant fact.

(d) The question is, whether a ship sailed from Bombay harbour on a given day.

A letter written by a deceased member of a merchant's firm, by which she was chartered, to their correspondents in London to whom the cargo was consigned, stating that the ship sailed on a given day from Bombay harbour, is a relevant fact.

(e) The question is, whether rent was paid to A for certain land.

A letter from A's deceased agent to A, saying that he had received the rent on A's account and held it at A's orders, is a relevant fact.

(f) The question is, whether A and B were legally married.

The statement of a deceased clergyman that he married them under such circumstances that the celebration would be a crime, is relevant.

(g) The question is, whether A, a person who cannot be found, wrote a letter on a certain day. The fact that a letter written by him is dated on that day, is relevant.

(h) The question is, what was the cause of the wreck of a ship.

A protest made by the Captain, whose attendance cannot be procured, is a relevant fact.

(i) The question is, whether a given road is a public way.

A statement by A, a deceased headman of the village, that the road was public, is a relevant fact.

(j) The question is, what was the price of grain on a certain day in a particular market. A statement of the price, made by a deceased banya in the ordinary course of his business is a relevant fact.

(k) The question is, whether A, who is dead, was the father of B.

A statement by A that B was his son, is a relevant fact.

(l) The question is, what was the date of the birth of A.

A letter from A's deceased father to a friend, announcing the birth of A on a given day, is a relevant fact.

(m) The question is, whether, and when, A and B were married.

An entry in a memorandum-book by C, the deceased father of B, of his daughter's marriage with A on a given date, is a relevant fact.

(n) A sues B for a libel expressed in a painted caricature exposed in a shop window. The question is as to the similarity of the caricature and its libellous character. The remarks of a crowd of spectators on these points may be proved."

According to the learned counsel for the accused-respondents, Section 32 expressly legitimises hearsay evidence pertaining to the cause of a person's death, or the circumstances of the transaction which resulted in a person's death. Whilst the aforesaid submission is correct, it is not possible for us to accept the same as extendable, to the present case.

37. A perusal of Section 32 reveals, that it is permissible, while leading evidence relating to the cause of a person's death or relating to the circumstances which resulted in his death, to produce in evidence statements, written or verbal, made by a person who has since died, or by the persons who cannot be found, or by those who have become incapable of giving evidence, or by those whose attendance cannot be procured without an amount of delay. It is clear, that secondary evidence is permissible when the issue relates to the cause of a person's death, or the circumstances of a transaction which resulted in his death. But such permissibility, would extend only to the exigencies expressly enumerated in Section 32 of the Evidence Act. The situations wherein secondary evidence is permissible under Section 32 of the Evidence Act include statements made by persons who have since died, or statements made by persons who cannot be found, or statements made by persons who have become incapable of giving evidence, or statements made by persons who cannot be procured without an amount of delay or expense. Neither of these exigencies exists insofar as the present controversy is concerned. The authors of the confessional statements (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) in Special Case no. 4 of 2009, are very much available and their presence can be procured by the accused-respondents to be presented as defence witnesses on their behalf. In the aforesaid view of the matter, it is not possible for us to accept, that the accused-respondents can place reliance on Section 32 of the Evidence Act, in order to lead evidence in respect of the confessional statements (made by Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah), by recording evidence to the statements of the witnesses at serial nos. 63 to 66.

38. It is also essential to notice herein, that in order to render Section 32 of the Evidence Act, admissible for recording the statements of witnesses at serial nos. 63 to 66, in lieu of the confessional statements made by Sadiq Israr Shaikh, Arif

Badruddin Shaikh and Ansar Ahmad Badshah, learned counsel for the accused-respondents had placed emphatic reliance on Article 20 of the Constitution of India. Article 20 aforementioned is reproduced hereunder:-

> "20. Protection in respect of conviction for offences –
>
> (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.
>
> (2) No person shall be prosecuted and punished for the same offence more than once.
>
> (3) No person accused of any offence shall be compelled to be a witness against himself."
>
> Relying on sub-Article (3) of Article 20, it was the contention of the learned counsel for the accused-respondents, that since no accused can be compelled to be a witness against himself, it would not be open to the accused-respondents to summon Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah, and thereby compel them to be witnesses against themselves. In that sense, it was submitted, that the authors of the confessional statements must be deemed to be persons incapable of giving evidence and/or persons whose attendance cannot be procured for deposition, during the trial of Special Case no. 21 of 2006.

39. The plea advanced at the hands of the learned counsel for the accused-respondents, as has been noticed in the foregoing paragraph, is clearly not available to the accused-respondents in view of the protection afforded to a witness who would find himself in such a peculiar situation under Section 132 of the Evidence Act. Section 132 of the Evidence Act is being extracted hereunder:-

> "132. Witness not excused from answering on ground that answer will criminate - A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind:

Proviso

Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer."

Without stating anything further, we are satisfied to record, that Section 132 of the Evidence Act clearly negates the basis of the submission, adopted by the learned counsel for the accused-respondents, for being permitted to lead secondary evidence to substantiate the confessional statements made by Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah. Accordingly, we hereby reiterate the conclusion drawn by us hereinabove, namely, that the confessional statements made by the accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) in Special Case no. 4 of 2009 cannot be proved in evidence, through the statements of the witnesses at serial nos. 63 to 66. Needless to mention, that the authors of the confessional statements (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) may be produced as defence witnesses by the accused-respondents, for their statements would fall in the realm of relevance under Section 11 of the Evidence Act. And in case Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah appear as defence witnesses in Special Case no. 21 of 2006, the protection available to a witness under Section 132 extracted above, would also extend to them, if they are compelled to answer questions posed to them, while appearing as defence witnesses in Special Case no. 21 of 2006.

40. It is also necessary to examine the issue in hand with reference to the provisions of the MCOCA. The controversy pertaining to the relevance of the statement of witnesses at serial nos. 63 to 66, has to be understood with reference to Section 18 of the MCOCA. We shall now record our determination on the scope and effect of Section 18 of the MCOCA. Section 18 aforementioned is being extracted hereunder:

"Section 18 - Certain confessions made to police officer to be taken into consideration—

(1) Notwithstanding anything in the Code or in the Indian Evidence Act, 1872 (I of 1872), but subject to the provisions of this section, a confession

made by a person before a police officer not below the rank of the Superintendent of Police and recorded by such police officer either in writing or on any mechanical devices like cassettes, tapes or sound tracks from which sounds or images can be reproduced, shall be admissible in the trial of such person or co- accused, abettor or conspirator:

Provided that, the co-accused, abettor or conspirator is charged and tried in the same case together with the accused.

(2) The confession shall be recorded in a free atmosphere in the same language in which the person is examined and as narrated by him.

(3) The police officer shall, before recording any confession under sub-section (1), explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and such police officer shall not record any such confession unless upon questioning the person making it, he is satisfied that it is being made voluntarily. The concerned police officer shall, after recording such voluntary confession, certify in writing below the confession about his personal satisfaction of the voluntary character of such confession, putting the date and time of the same.

(4) Every confession recorded under sub-section (1) shall be sent forthwith to the Chief Metropolitan Magistrate or the Chief Judicial Magistrate having jurisdiction over the area in which such confession has been recorded and such Magistrate shall forward the recorded confession so received to the Special court which may take cognizance of the offence.

(5) The person whom a confession had been recorded under sub-section (1) shall also be produced before the Chief Metropolitan Magistrate or the Chief Judicial Magistrate to whom the confession is required to be sent under sub-section (4) alongwith the original statement of confession, written or recorded on mechanical device without unreasonable delay.

(6) The Chief Metropolitan Magistrate or the Chief Judicial Magistrate shall scrupulously record the statement, if any, made by the accused so produced and get his signature and in case of any complaint of torture, the person shall be directed to be produced for medical examination before a Medical Officer not lower in rank than of an Assistant Civil Surgeon."

Section 18 of the MCOCA through a non-obstante clause, overrides the mandate contained in Sections 25 and 26 of the Evidence Act, by rendering a confession as admissible, even if it is made to a police officer (not below the rank of Deputy Commissioner of Police). Therefore, even though Sections 25 and 26 of the Evidence Act render inadmissible confessional statements made to a police officer, or while in police custody, Section 18 of the MCOCA overrides the said provisions and bestows admissibility to such confessional statements, as would fall within the purview of Section 18 of the MCOCA. It is however relevant to mention, that Section 18 of the MCOCA makes such confessional statements admissible, only for "the trial of such person, or co-accused, abettor or conspirator". Since Section 18 of the MCOCA is an exception to the rule laid down in Sections 25 and 26 of the Evidence Act, the same will have to be interpreted strictly, and for the limited purpose contemplated thereunder. The admissibility of a confessional statement would clearly be taken as overriding Sections 25 and 26 of the Evidence Act for purposes of admissibility, but must mandatorily be limited to the accused-confessor himself, and to a co-accused (abettor or conspirator). It is not the contention of the learned counsel for the accused-respondents that the persons who had made the confession (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) before witnesses at serial nos. 64 to 66 are the accused themselves along with the co-accused (abettor or conspirator) in Special Case no.21 of 2006. It is therefore apparent, that the ingredients which render a confessional statement admissible under Section 18 of the MCOCA are not satisfied in the facts of the present case. For that matter Section 18 of the MCOCA, has to be viewed in the same manner, as we have recorded our analysis of Section 15 of the TADA herein above. In the aforesaid view of the matter, it is imperative for us to conclude, that Section 18 of the MCOCA cannot constitute the basis of relevance of the confessional statements made by the accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) in Special Case no. 4 of 2009, to the case in hand. It is therefore not possible for us to accept the admissibility of the witnesses at serial nos. 63 to 66 in so far as Special Case no. 21 of 2006 is concerned.

41. One of the considerations which weighed heavily with the High Court in setting aside the order of the MCOCA Special Court dated 1.8.2012, whereby the request of the accused-respondents to summon witnesses at serial nos. 63 to 66 as defence witnesses was declined, stands highlighted by the High Court in paragraph 29 (of the impugned order dated 26.11.2012). Relevant part of paragraph 29 aforementioned is being reproduced hereunder:

"29. The absurdity of such reasoning does not end here. If that the concerned Dy. Commissioners of Police would not be in a position to state 'whether the facts stated in such confessions were true' is a proper ground to disallow their evidence, how can their evidence be given in MCOC Special Case No.4 of 2009? How can they, in that case would be in a position to state so? This problem will come in all the confessions, as the truth of the facts stated in the confession will be known to the confessor, and not to the person to whom it is made. Such person only gives evidence of the fact that a confession was made, and it is the court that decides whether the fact of confession having been made is true and also whether the facts stated in the confession are true. Confessions are treated as circumstantial evidence of the truth of the facts stated therein and it is the court that decides whether the facts stated in the confession should be believed or not in a given case. It is a matter of evaluation of evidence to be done by the Court after it is tendered. There is therefore, no substance in such contentions, which have, rightly been given up by the respondent-State, before this Court…."

In our deliberations in the preceding few paragraphs, we have brought out the scope of applicability of Section 18 of the MCOCA. It needs to be reiterated that Section 18 of the MCOCA is an exception to Sections 25 and 26 of the Evidence Act, only in a trial against an accused (or against a co-accused - abettor or conspirator) who has made the confession. The said exemption has not been extended to other trials in which the person who had made the confession is not an accused. Since the vires of Section 18 of the MCOCA is not subject matter of challenge before us, it is imperative for us to interpret the effect of Section 18 of the MCOCA as it is.

42. Another submission advanced at the hands of the learned counsel for the accused-respondents which deserves notice was based on Sections 35 and 80 of the Evidence Act. Sections 35 and 80 aforementioned are being extracted hereunder:-

"35. Relevancy of entry in public record or an electronic record made in performance of duty – An entry in any public or other official book, register or record or an electronic record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record or an electronic record is kept, is itself a relevant fact."

80. Presumption as to documents produced as record of evidence -

Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence, or to be statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume - that the document is genuine; that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken."

43. While endeavouring to determine the viability of the production of the witnesses at serial nos. 63 to 66 as defence witnesses, it is important to understand why the aforesaid witnesses are sought to be examined as defence witnesses. The instant aspect of the matter has been dealt with by the MCOCA Special Court in paragraph 5 (of its order dated 1.8.2012) wherein the submission of the counsel representing the accused-respondents was projected as under:

"In the confession, there is a reference to the blasts in Mumbai after 2005. He gave example stating that in a case where it is alleged that 'A' has committed the blast and he is praying for documents of accused 'B' in some other trial to prove his innocence. 'B' has admitted his guilt in the other case and has also admitted that he has committed the b last in the case of 'A'. 'A' is innocent and he has not committed the blast. In these circumstances can 'A' be hanged? He submits that the confessions are the court documents and the accused want to rely on them."

Likewise, the High Court (in the impugned order dated 26.11.2012) had noticed the averments made at the behest of the appellants before it (the accused-respondents herein) in paragraph 30 as under: "Again, there exists a difference between the truth of the facts contained in a confession, and the fact that a confession exists. The fact that someone else has confessed about having committed the crime with which the appellants are charged is relevant in itself. In fact, it is difficult to understand as to how the court is supposed to decide whether the confession is truthful or not before the evidence of such confession is given. It is interesting to note that though some arguments were advanced by the learned Advocate General to the effect that 'the fact that someone else has confessed about the same crime

for which the appellants are being charged, is by itself not relevant at all unless the truth of such confession is sought to be proved,' that was not the stand of the learned Special Public Prosecutor before the Trial Court. In fact, the impugned order itself records that the objection of the Special Public Prosecutor was that if the confessions of the accused in the MCOC Special Case No.4 of 2009 is brought on record of the case against the appellants, it would be inconsistent with the guilt of the accused (paragraph no.6 of the order). It was the specific contention of the Special Public Prosecutor before the Trial Court that the appellants wanted to bring the said confession on record in the present case, because such confessions would be inconsistent with the guilt of the appellants."

It clearly emerges from the submissions advanced at the behest of the accused-respondents, that the confessions made by the accused in Special Case no.4 of 2009 are sought to be adopted for establishing the fact, that it was not the accused-respondents herein who are responsible for the seven bomb blasts in seven different first class compartments of local trains of Mumbai Suburban Railways on 11.7.2006, but it was the accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) in Special Case no. 4 of 2009 who had already confessed to the same. It is therefore apparent, that the objective of the accused-respondents is not to rely on the factum of a confessional statement having been recorded. The objective is to achieve exculpation of blameworthiness on the basis of the truth of the confessional statements made before witnesses at serial nos. 63 to 66. It needs to be kept in mind that the witnesses sought to be produced in their defence by the accused-respondents (the witnesses at serial nos. 64 to 66), cannot vouchsafe the truth or falsity of the confessional statements made by Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah. It is indeed the persons who had made such confessions who can do so. Since it is the truthfulness of the confessional statements made before the witnesses at serial nos. 63 to 66 which is the real purpose sought to be achieved, we are of the view that only those who had made the confessional statements (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) can vouchsafe for the same. This can only be done under the provisions of the Evidence Act. For that the accused-respondents, can only pin their hopes on the persons who had made the confessional statements. There is certainly no escape from the above course in view of the mandate of Section 60 of the Evidence Act. The effect of Section 60 aforesaid, has been highlighted and discussed above. This would also constitute one of the reasons for accepting the contention advanced before us on behalf of State of Maharashtra. In the

> background of the object sought to be achieved having been clarified by us, it is apparent, that Sections 35 and 80 would be of no avail to the accused-respondents in the facts and circumstances of this case, since we have already concluded hereinabove, that the witnesses at serial nos. 63 to 66 cannot be summoned, as their evidence before the trial Court would not fall within the realm of admissibility with reference to "facts in issue" or "relevant facts".

44. From different angles and perspectives based on the provisions of the Evidence Act and MCOCA examined on the basis of submissions advanced by the learned counsel representing the rival parties, it is inevitable for us to conclude, that the accused-respondents cannot be permitted to summon the witnesses at serial nos. 63 to 66 as defence witnesses, for the specific objective sought to be achieved by them.

45. For the reasons recorded hereinabove, we are satisfied, that the impugned order dated 26.11.2012 passed by the High Court deserves to be set aside. The same is accordingly hereby set aside. It is held, that it is not open to the accused-respondents to produce the witnesses at serial nos. 63 to 66 in order to substantiate the confessional statements made by Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah (the accused in Special Case no. 4 of 2009), who are not accused/co-accused in Special Case no. 21 of 2006 (out of the proceedings whereof, the instant appeal has arisen).

46. Appeal stands allowed.