IN THE HIGH COURT OF SINDH AT KARACHI

C.P.No.D-3128 of 2011

Lt. Cl. (R) Asif Saeed & another

Versus

The State & others

BEFORE:
Mr. Justice Mushir Alam, CJ
Mr. Justice Mohammad Shafi Siddiqui

Date of Hearing: 06.11.2012

Petitioner:	Through Mr. Abid S. Zuberi Advocate
Respondent No.1	The State through Mr. Abdul Rehman Kolachi, APG.
Respondents No.2 to 43	Through Mr. Muhammad Ilyas Khan Advocate.

J U D G M E N T

Mohammad Shafi Siddiqui, J.- Being aggrieved and dissatisfied with order dated 19.09.2011 passed by the Administrative Judge ATA at High Court of Sindh at Karachi whereby it was held that the case/complaint, as mentioned in the FIR, does not fall within the jurisdiction of Anti-Terrorism Court and directed the I/O to submit the report before the concerned Judicial Magistrate, the petitioners preferred this petition.

2. It is the case of the petitioners that there was a dispute of the petitioner No.2 with KESC Labour Union, which culminated in filing and disposal of a Writ Petition No.1428 of 2011 as under:-

> *"----Therefore, in order to avoid any untoward incident and to strike a balance between the rights of the respective parties we while disposing of this petition along with listed applications direct the respondents No.1 to 5 as under:-*

(a) Ensure free ingress and egress of the employees and management of the petitioner KESC to their offices and installations.

(b) Ensure due protection of the employees and management of the petitioner KESC and its offices and installations.

(c) Ensure free access and due protection to the consumers who approach Customer Care Centre.

(d) In case of any threat to the employees, management or consumers who's access to Customer Care Centre is restricted or threatened to register the case and to proceed strictly in accordance with law.

(e) *In order to maintain public order and to avoid possible confrontation or an incident of the nature as complained by the petitioner on 20.01.2011 and to ensure that miscreants may not by explaining the situation cause losses to the installations or create law and order situation, permanent blockage, if any, of the roads/footpath in front of the offices /installations of the petitioner by the employees represented by respondent No.6, be removed."*

3. It is contended by the learned counsel that despite clear directions, law enforcing agencies failed to restrain KESC Labour Union from continuing with their unlawful action. Thereafter a legal notice was issued on 01.07.2011 which was served on law enforcing agencies which ended up in filing contempt application bearing CMA No.10956 of 2011 in the aforesaid CP. Subsequent to filing of this contempt application a high level meeting was held at the Governor House, Karachi, between KESC management, law enforcement agencies and the representatives of KESC Labour Union and after detailed deliberations an agreement dated 26.07.2011 was signed by all stakeholders whereby amongst others the KESC Labour Union and law enforcing agencies undertook to comply with the orders passed in CP No.D-1428 of 2011 and to abstain from any kind of protest.

4. It is the case of the petitioners that despite this, on 29.08.2011 around mid-day 400 to 500 contingent of KESC Labour Union members and workers illegally and with intention to harm and cause damage to the petitioner No.2 and its employees and their properties attacked the Gizri House, KESC and held the officers and its employees as hostage for over 12 hours. It is contended that these miscreants were armed with batons, stones and automatic weapons under the instigation of KESC Labour Union and even tried to break open the gate of the premises of KESC House which was timely repelled by the security guards of petitioner No.2.

5. It is contended that they surrounded all the gates of the Gizri House KESC. On such a situation KESC management called the law enforcing agencies for the enforcement of order dated 17.06.2011 passed in CP No.D-1428 of 2011 however they failed. Consequently, pursuant to this new wave of violence, the petitioner No.1 who is the security head of KESC reported the incident to PS Defence Karachi and lodged FIR No.330 of 2011 against these miscreants which FIR was lodged under sections 147, 148, 149, 452, 324, 353, 342, 186, 435, 427 and 34 PPC and Section 7 of the ATA. In the same way FIR No.331/2011 under sections 353, 324, 435, 427 and 34 PPC was lodged by police officials with police station Defence.

6. It is contended that it was not before 11.00 p.m. in the mid night that in the cover of heavy firing the KESC employees who were held hostage were released from the Gizri House KESC. The entire incident of the day was widely covered by the print and electronic media. FIR was lodged on 29.08.2011 and on the next date i.e. 30.08.2011 these

miscreants who were arrested in pursuance of the aforesaid FIR were produced before the Administrative Judge ATA at High Court of Sindh at Karachi and remand was obtained. However, on 19.09.2011 the impugned order was passed on account of failure of the I/O to file his report and mis-appreciation of ATA laws. The learned Administrative Judge ATA vide impugned order dated 19.09.2011 was pleased to hold that the case does not fall within the jurisdiction of ATA Court and directed the I/O to submit his report before the concerned Judicial Magistrate.

7. Aggrieved with this the petitioners have filed this petition on the grounds that the learned Administrative Judge ATA did not take into consideration the correct facts which are mentioned in the FIR No.330 of 2011 lodged by petitioner No.2. It is further contended by the learned counsel that the decision was based on extraneous and irrelevant consideration and facts. Learned counsel further contended that the Court dealing with criminal cases takes cognizance of offence on the contents of the FIR and on tentative assessment of the material available on record and the defence plea cannot be looked into. It is contended by the learned counsel that the learned Administrative Judge did not appreciate the fact that the definition of word "Terrorism" as provided in Section 6 of the ATA Act is to be given widest possible consideration. He further submitted that bare perusal of the contents of the FIR will depict that the accused and their companions were involved in acts of terrorism not only against the employees of KESC who were held hostage but also against public who lives in that vicinity. He submitted that all the business nearby were shut and the traffic movement on the

said road was affected. He submitted that the police vehicle was torched, skirmishes with law enforcement agencies which lead to their injury, stoning, baton charge and indiscriminate use of fire arms on petitioner No.2's property, its employees and snatching of weapon from the security guards of the petitioner No.2.

8. He submitted that the learned Administrative Judge ATA failed to take into consideration the definition of word "action" as provided under subsection 2 of Section 6 of ATA. It is also contended by the learned counsel that the learned Administrative Judge ATA failed to take into consideration the definition of word "Terrorist" provided in Section 6(7) of the ATA. He submitted that the FIR was lodged at 5:30 p.m. by the Security Head of KESC, petitioner No.2, for the incident which started in the morning and which lasted up to 11:00 p.m., therefore, the subsequent facts could have come to light only upon filing of the report of the I/O which was neither filed by the I/O nor it was considered necessary by the Administrative Judge to have gone through the same before passing the impugned order. It is further urged that the learned Administrative Judge passed the impugned order on the ground that Section 7 of the ATA is only mentioned in one of the FIRs without realizing that during the course of the inquiry and at the time of filing challan the police can further charge an accused under provision of law which are attracted in the case not mentioned in the FIR. Learned counsel in support of his above submissions has relied upon the case of (i) Ahmed Razi Vs. The State reported in 2005 P.Cr.L.J. 1369 (ii) Nazir Ahmed v. Noruddin reported in 2012 SCMR 517.

9. The aforesaid case law were cited in pursuance of the fact that neither motive nor the intent for commission of the offence is relevant for the purpose of conferring jurisdiction on the Anti-Terrorism Court. The said order reported in case of 2012 SCMR 517 also distinguishes the two judgments of the Hon'ble Supreme Court reported in case of Muhabbat Ali v. The State reported in 2007 SCMR 142 and the case of Bashir Ahmed v. Muhammad Sadiq reported in PLD 2009 SC 11.

10. Learned counsel for the petitioner further relied upon the case of Mirza Shaukat Baig v. Shahid Jamil reported in PLD 2005 SC 530. It is contended that in terms of the said judgment the word "Terrorism" means the use or threat of "action" where the "action" falls within the meaning of subsection 2 of Section 6 of the Act and creates a serious risk to the safety of the public or is designed to frighten the general public thereby prevent them from coming out and carrying on their lawful trade and daily business and disrupts civil life shall amount to terrorism as enumerated in Section 6 of the Act.

11. In reply learned counsel for the respondents has relied upon Section 6 of the Anti-Terrorism Act, 1997 and submitted that Section 6(2) cannot be read in isolation and it is to be read along with Section 6(1). He further submitted that a number of statements under section 161 Cr.P.C. were recorded and from none of these statements inference of terrorism could be drawn. Earlier Constitution Petition No.D-1428 of 2011 was filed on 07.05.2011 where no ground of terrorism were alleged. In addition to the above learned counsel also submitted that the State has not filed any appeal impugning the order of the Administrative Judge, Anti-Terrorism Court and the petitioners under the circumstances

can only assist the prosecution under section 493 Cr.P.C. He submitted that under mashirnama six shells of SMG were seized and it is not even remotely considered to be a case under Anti-Terrorism Act, 1997. In support of his arguments learned counsel has relied upon the case of (i) Muhammad Ali v. The State (PLD 2004 Lahore 554), (ii) Shaikh Muhammad Amjad v. The State (2002 P.Cr.L.J. 1317), (iii) Ahmer Razi v. The State (2005 P.Cr.L.J. 1679), (iv) Nooruddin Vs. Nazeer Ahmed & others reported in 2011 P.Cr.L.J. 1370, (v) Mohabbat Ali v. The State (2007 SCMR 146), (vi) Muhammad Sharif v. State (PLJ 2008 Cr. Cases (Lahore) 49), (vii) Tariq Mahmood v. the State (2008 SCMR 1631) and (viii) Qazi Muhammad Irshad v. The State (2001 P.Cr.L.J. 1852.

12. Learned State counsel submitted that the police report was not available when the remand was claimed and the impugned order was passed as such the material that should have been relied upon by the learned Administrative Judge before passing the impugned order was not placed before the Hon'ble Court and as such it is neither a speaking order nor based on material. He submitted that there were nine injuries and the medical certificate was also available with the police

13. We have heard the learned counsel and perused the record. The only controversy that is involved is as to whether the offence made out in the FIR is triable by Anti-Terrorism Court or by a regular Court not governed by special Statute.

14. Before considering any of the arguments of the learned Counsel for the parties, we would first like to examine the relevant provisions whereby cases under Anti Terrorism Act, 1997 may be transferred .

15. The first provision under the said Act whereby the case can be transferred finds appearance in subsection (4) of Section 13 of the Anti-Terrorism Act, 1997,which reads as under:-

> *"**13(4)** Notwithstanding anything contained in subsection (2) and subsection (3), the Federal Government or if so directed by the Government, the Provincial Government shall in addition to the existing [Anti Terrorism Courts) or such other [Anti Terrorism Courts] as may be established in the area, establish one such additional [Anti Terrorism Court] under this Act at the principal seat of the (each High Court) and appoint a Judge of such High Court as a Judge of [Anti Terrorism Court] in consultation with the Chief Justice of the High Court concerned, and where a Judge of High Court is appointed as a Judge for any area under this Act, he shall be the administrative Judge for that area and such administrative Judge, in addition to the powers exercisable under this act, either suo moto or on the application of any party, at any stage of the proceedings whether before or after the framing of charge, for sufficient cause including as mentioned in subsection (1) of section 28, transfer, withdraw or recall any case pending before any other [Anti Terrorism Court] in that area and may either try the case himself or make it over for trial in any other [Anti Terrorism Court] in that area."*

16. The other section which deals with the transfer is subsection (1) of section 28 of the Anti-Terrorism Act, 1997 which reads as under:-

> *"**28. Transfer of cases __(1)** Notwithstanding anything contained in this Act [the Chief Justice of High Court concerned may, if he] considers it expedient so to do in the interest of justice, or where the convenience or safety of the witnesses or the safety of the accused so requires, transfer any case from one [Anti Terrorism Court] to another { Anti Terrorism Court] within or outside the area."*

17. The subsection (4) of Section 13 of the Anti-Terrorism Act, 1997 reveals that the Federal Government or the Provincial Government shall in addition to the existing Anti Terrorism Courts or such other Anti Terrorism Courts as may be established in the area, establish one such additional Anti Terrorism Court under this Act at the principal seat of the each High Court and appoint a Judge of such High Court as a Judge of Anti Terrorism Court in consultation with the Chief Justice of the

High Court concerned and that he shall be the Administrative Judge for that area. The said Administrative Judge under the powers exercisable under this Act either suo moto or on the application of any party before or after framing of charge, for sufficient cause including as mentioned in subsection (1) of Section 28 transfer, withdraw or recall any case pending before any other Anti Terrorism Court in that area and may either try the case himself or make it over for trail in any other Anti Terrorism Court in that area. The said subsection needs no clarification that it deals only with the transfer of case from one Anti Terrorism Court to another Anti Terrorism Court and that such powers may be exercised by the Administrative Judge who may be considered as a Judge of Anti Terrorism Court but then the powers are to be exercised under this Act. The power to transfer the case from one Anti Terrorism Court to another Anti Terrorism Court includes the powers under subsection (1) of Section 28. Another thing which is clarified from this subsection is that as far as the transfer of case from one Anti Terrorism Court to another Anti Terrorism Court is concerned, the stage of the proceedings is not concerned i.e. whether before or after the framing of charge.

18. Section 23 of the Anti-Terrorism Act, 1997 deals with the transfer of the case from Anti Terrorism Court to the Court having jurisdiction under the code that means Sessions Court where the offence is triable. Section 23 of the Anti-Terrorism Act, 1997 read as under:-

> *"**23. Power to transfer cases to regular Courts.—** Where, after taking cognizance of an offence, [an Anti Terrorism Court] is of opinion that the offence is not a scheduled offence, it shall, notwithstanding that it has no jurisdiction to try such offence, transfer the case for trial of such offence to any Court having jurisdiction under the Code, and*

the Court to which the case is transferred may proceed with the trial of the offence as if it had taken cognizance of the offence."

19. The two important things are relevant and distinguishable as far as the other two subsections are concerned i.e. it applies only after taking cognizance of an offence and not before and that this is the only provision that deals with the transfer of the cases pending in any Anti Terrorism Court to a regular Court under the Code of Criminal Procedure. Thus, as we understand the powers that are available to the Administrative Judge or any Judge of Anti Terrorism Court to transfer the case from Anti Terrorism Court to a regular Court under the code is available only under section 23 of the Anti-Terrorism Act, 1997 and no other subsections as mentioned are relevant for that purpose. It is already an admitted position that the learned Administrative Judge passed the orders before the Investigation Officer could submit his report i.e. the learned Administrative Judge appeared to have taken the cognizance before any material could be placed before the learned Administrative Judge and hence even the tentative assessment was not done. Such alleged cognizance before considering the material amounts to pre-conceiving the facts. Cognizance could only be taken when challan/police papers are submitted for consideration which in this case has not been done/filed.

20. As far as merit of the case is concerned, we proceed as under.

21. In order to understand the ambit of the jurisdiction of Anti-Terrorism Court and the offences falling therein it is necessary to understand the meanings of the relevant words as prescribed by Anti-Terrorism Act, 1997.

"6. <u>Terrorism</u>. *(1) In this Act, "terrorism" means the use or threat of action where:--*

(a) The action falls within the meaning of sub-section (2), and
(b) The use or threat is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect or create a sense of fear or insecurity in society; or
(c) The use or threat is made for the purpose of advancing a religious, sectarian or ethnic cause or intimidating and terrorizing the public, social sectors, business community and preparing or attacking the civilians, Government officials, installations, security forces or law enforcement agencies.

(2) <u>An "action"</u> shall fall within the meaning of sub-section (1) if it:-

(a) ..

(d) involves the doing of anything that is likely to cause death or endangers a person's life.

(ee) involves use of explosives by any device including bomb blast;

(i) creates a serious risk to safety of the public or a section of the public, or is designed to frighten the general public and thereby prevent them from coming out and carrying on their lawful trade and daily business, and disrupts civil life.

(j) involves the burning of vehicles or any other serious form of arson.

(n) involves serious violence against a member of the police force, armed forces, civil armed forces or a public servant."

22. Learned counsel for the respondent in support of his arguments has relied upon the case of Muhammad Ali v. The State (PLD 2004 Lahore 554) in terms whereof it is held that:-

"….The fact remains that no witnesses belonging to the complainant party had uttered even a single word about any fear and insecurity created in the society at large on account of the criminal activity of the accused party and Mukhtar Ahmad, DSP (PS-17), the Investigating Officer, had stated before the learned trial Court in black and white that no evidence had been produced before him nor he had himself collected any evidence regarding fear and insecurity spreading in the locality due to the actions of the accused party."

It was further held that:

" Even otherwise, as already held above, the motivation on the part of the accused party in the present case was a retaliation against the complainant party after the murder of Muhammad Sharif deceased

> *and such motivation was based purely upon a personal and private grievance which had no nexus with the objects of the Anti-Terrorism Act, 1997."*

23. The Division Bench of Lahore High Court in the foresaid case relied upon the case of Muharram Ali and others v. Federation of Pakistan reported in PLD 1998 SC 1445 holding that the convicts could not have been convicted by the Anti-Terrorism Court for offence under section 6 read with section 7 of Anti-Terrorism Act, 1997.

24. Learned counsel for the respondents also relied upon the case of Shaikh Muhammad Amjad v. The State (2002 P.Cr.L.J. 1317) in terms whereof the determining factor is, that, whenever the public, a section of public, a community or society becomes aware of the commission of offence either immediately on the commission of offence or at any subsequent time on discovery of the commission of offence, is put to the mental, psychological and physical condition envisaged in section 6(1)(b) of Anti-Terrorism Act, 1997, it should be deemed to be an act of terrorism. It was further held in terms of side line 'H' of the aforesaid judgment that;

> *"..if an offence is committed without any background of any enmity, dispute, provocation or any known and common reason for commission of offence and the nature, manner and method of the commission of offence is such that the public at large individually and collectively feel apprehension that anyone of them can at any time be subjected to similar act of brutality and callousness it takes the public at large and society or a particular group or sect of society into the grip of apprehension, sense of insecurity, fear and intimidation, disturbing the physical and mental peace and tranquility of the people, giving impression that the writ of government has been rendered ineffective, with the result that nobody is safe in pursuing ordinary pursuits of life, then such acts certainly amount to an act of terrorism as defined in section 6(1)(b) of the A.T.A."*

25. Next judgment cited by learned counsel for the respondents is the case of Ahmer Razi v. The State (2005 P.Cr.L.J. 1679). In this case the application for transfer of case from Special Court to the Court of Sessions was dismissed as according to the applicant therein the case was not triable by ATA Judge under Anti-Terrorism Act, 1997. In this case the police recovered some explosive substance from the possession of the accused, the police took the contraband in their custody and registered FIR. In this view of the fact it was held that the offence so committed does not fall within the ambit of Anti-Terrorism Act, 1997 as mere possession of explosive substance is not included in the definition. Learned counsel submitted that apart from six shells of SMGno other explosive substance has been recovered.

26. The other judgment of this Court that was relied upon by learned counsels for both the parties is the case of Nooruddin Vs. Nazeer Ahmed reported in 2011 P.Cr.L.J. 1370. In this case the Division Bench of this Court relied upon 2003 SCMR 1323, PLD 2005 SC 530, PLD 2009 SC 11, 2007 SCMR 142, 2009 SCMR 547. It is a case where three persons were brutally murdered in daylight at a shop situated in a market. The shop was bolted from inside even then the accused persons had climbed on the roof of the shop and broken the roof and viciously murdered three persons. It is also alleged that all the accused persons also made heavy aerial firing to create harassment and terrorism.

27. It appears that the two judgments heavily relied upon by the Division Benches of this Court in the aforesaid judgment are the judgments reported in PLD 2005 SC 530 and the judgment reported in PLD 2009 SC 11. In the earlier judgment the Hon'ble Bench of the

Supreme Court held that Section 6 of the Act is exhaustive and is capable enough to meet all kind of "terrorism" and does not revolve around the word "designed to" as used in Section 6(1)(b) of the Act or mesne-rea but the key word is "action" on the basis whereof it can be adjudged as to whether the alleged offence falls within the scope of section 6 of the Act or otherwise. The word "designed to" can be equated with the word willfully, knowingly and deliberately. Significance and import of the word "action" cannot be minimized and requires interpretation in a broader perspective.

28. On the other hand in the case reported in PLD 2009 SC 11 it was held by the Hon'ble Supreme Court that striking off terror is sine qua non for the application of provisions as contained in Section 6 of the Act which cannot be determined without examining the nature, gravity and heinousness of the alleged offence, contents of FIR, its cumulative effect on the society or group of persons. It was further held that "Terrorism" means the use or threat of "action" where the action falls within the meaning of subsection 2 of Section 6 of the Act and creates a serious risk to the safety of the public and it amounts to terror and such an action squarely falls within the ambit of such section and shall be triable by a Special Court constituted for such purpose.

29. It is urged that in this case it is nowhere claimed that any person other than the persons who are involved in the dispute between the petitioner No.2 and the respondents were either injured or somehow or in some way effected or have come forward to establish that they have been terrorized in terms of Section 6 of the Anti-Terrorism Act, 1997.

30. The other case law that has been relied upon is the case of Muhabbat Ali v. The State reported in 2007 SCMR 142. In this case as well it was held by the Hon'ble Supreme Court that:

> *"8. In order to determine as to whether an offence would fall within the ambit of section 6 of the Act, it would be essential to have a glance over the allegations made in the F.I.R, record of the case and surrounding circumstances. It is also necessary to examine that the ingredients of alleged offence has any nexus with the object of the case as contemplated under sections 6, 7 and 8 thereof. Whether a particular act is an act of terrorism or not, the motivation, object, design or purpose behind the said Act is to be seen. It is also to be seen as to whether the said Act has created a sense of fear and insecurity in the public or any section of the public or community or in any sect.--"*

31. Another case that has been relied upon by respondents No.1 to 4 is the case of Muhammad Sharif v. State (PLJ 2008 Cr. Cases (Lahore) 49). It pertains to the jurisdiction of the Anti-Terrorism Court as to whether the cases not forming schedule offence can be sent to the Court having jurisdiction under the Code.

32. In the case of Tariq Mahmood v. the State (2008 SCMR 1631) as relied upon by learned counsel for the respondents it has been held that the case of the accused who had clean past rested on a lower pedestal than that of terrorists and sectarian criminals who killed innocent persons either to weakened the State or to cause damage to the parties of the rival sect. The terrorists or the sectarian killers did not have any personal grudge or motive against the innocent victims. It was further observed in the case ibid that admittedly a feud existed between the parties over a piece of land prior to the occurrence. It was further held that criminal cases should be tried and decided by the Courts having

plenary jurisdiction until and unless extraordinary circumstances existed justifying the trial of the case by special Courts.

33. The sentences that appears to have been in all the aforesaid judgment seems to be that in order to ascertain whether or not the offence that the accused are charged with falls within the parameters of offences falling under the Anti-Terrorism Act, 1997 is based on the initial complaint i.e. FIR and the material in respect thereof available and the prevailing circumstances.

34. A careful perusal of the aforesaid judgments tentatively reveals that the question of "motivation" and "design o" are differently dealt with by some of the Hon'ble Benches.

35. Coming to the case in hand, perusal of the FIR shows that a mob of 150 to 200 sacked employees around 11.00 a.m. appeared at the main gate and attempted to enter inside. They entered in the office forcibly from main gate, started throwing on the glasses of the office and made forcible hostage to 250 to 300 people available in the office and throughout remained busy destroying the properties. It was also reported in the FIR that they forcibly snatched the guns from the security guards namely Saleem son of Sharif and on his resistance these mischievous element started firing with intention to kill. It was also reported that said Saleem received one bullet at his neck and he got injured. It was further reported that after the incident was brought to the notice of the police, some more miscreants approximately 200 to 250 arrived and parked vehicles in front of all three gates of KESC House and thus blocked the entrance/exit passage. They continued to throw stones and cudgel and

fire arms with intention to kill causing hindrance in the official duties. In the process one police officer and two officials received injuries from the bullets and stones. It was also reported that the vehicles of the police was damaged as windscreen, side glass and other glasses of master truck No. 8951, windscreen and side glass and other glasses of another master truck No.SP8056 were broken as well as the sunscreen and glasses, side window of Hino Bus No.SP 7882 were also broken. They also managed to torch one truck No.SB-8049 by using explosive substance and resultantly vehicle completely burnt whereafter police in self defence started shelling and aerial firing for the arrest of these miscreants and captured some of them whose names were mentioned in the FIR.

36. With this background as reported in the FIR, we would deal with the relevant section 6 of the Anti-Terrorism Act, 1997. As stated, the "Terrorism" means use or threat of "action" whereas the "action" falls within subsection 2 of Section 6 of the Act and creates a serious risk to safety of the public or a section of the public or is designed to frighten the general public and thereby prevent them from coming out and carrying on their lawful trade and daily business and disrupts civil life. Such actions shall amount to terrorism as enumerated in Section 6 of the Act. As far as the word "action" is concerned it is defined under subsection 2 of Section 6 and the relevant "actions" meaning whereof has been defined for the purpose of this Act 1997 are 6(2)(i)(j)(n) which have already been reproduced above.

37. It is a bit surprising to note that the order impugned herein was passed in consideration of the contents of the FIR only without considering the investigation report that was never before the learned

Administrative Judge. It is an admitted fact that the incident started in the morning at around 11:00 a.m. and continued until 11:00 pm in the night and the FIR was lodged around 5:30 p.m. in the evening which shows that the alleged offence with same venom and gravity was continued even after lodging of the FIR which facts obviously have not been incorporated in the FIR and it must have been found incorporated in the investigation report if at all produced or asked to be produced by the learned Administrative Judge.

38. There is no cavil to this proposition that it (subsequent event) constituted a relevant material for the purpose of reaching a definite conclusion as to whether the offence falls within the domain of Anti-Terrorism Act, 1997. Prima facie the impugned order has been passed without considering the relevant material, therefore, in our tentative view such material should have been before learned Administrative Judge to reach to such definite conclusion.

39. From the leading case laws, as cited by both the counsel appearing for the petitioners as well as for respondents, it appears that in case of Muhabbat Ali v. The State reported in 2007 SCMR 142 and the case of Bashir Ahmed v. Muhammad Sadiq reported in PLD 2009 SC 11 a view was formed whereby the motivation, object, design or purpose behind the said offence was to be seen whereas in terms of the case of Mst. Najmunisa v. Judge Special Court reported in 2003 SCMR 1323 and other case of Mirza Shaukat Baig v. Shahid Jamil reported in PLD 2005 SC 530 the motivation and the other co-words such as "knowing" and "deliberately" were excluded. Thus, the word "design" in terms of the aforesaid judgment reported in PLD 2005 SC 530 was never equated

with the word "knowing, deliberately and willfully". Thus by this interpretation prior planning to cause effect of terrorism is excluded, meaning thereby that any action design in such may which ultimately ended up in causing and effecting such actions are included in the definition of "design to". No matter one may not have the intention of causing such effect, but it is the end result that Courts. Though in this matter by plain reading it appears to be an original dispute between the petitioner No.2 and the Union of KESC however in order to achieve their object the incident of 29.08.2011 appears to have been made in such a way that prima facie created a sense of insecurity to the public at large. The contents of the FIR reveals that initially a mob of 150 to 200 people started the procession and subsequently another group of 200 to 250 people joined the procession. Terrorism in terms of Section 6(1)(b) is defined as its use or threat designed to coerce and intimidate or overawe the government or the public or a section of public or community or sect or create a sense of fear or insecurity in society as prima facie apparent. Section 6(2) provides numerous kinds of actions. Some of the actions relevant for the purpose of this case are as under.

40. Section 6(2)(d) the action was designed in such a way that it is likely to cause death or endanger a person's life. Section 6(2)(ee), define use of explosive substance. Section 6(2)(i) pertains as to an action leading to a serious risk to safety of the public or a section of in the way it has been designed to frighten the general public. Section 6(2)(j) and (n) is also attracted/involved as the action pertains to burning of vehicles and violence against police force and public servants etc. The contents of the FIR establish the prima facie attraction of the aforesaid actions.

41. In terms of the judgment of Nazir Ahmed v. Noruddin reported in 2012 SCMR 517 the Hon'ble Bench distinguishes the two judgments relied upon by learned counsel for the respondents i.e. Muhabbat Ali v. The State reported in 2007 SCMR 142 and the case of Bashir Ahmed v. Muhammad Sadiq reported in PLD 2009 SC 11. In terms of the judgment reported in Nazir Ahmed v. Noruddin reported in 2012 SCMR 517 the learned Bench categorically observed that "…..Neither the motive nor the intent for commission off offence is relevant for the purposes of conferring jurisdiction on the Anti-Terrorism Court. It is the act which is designed to create sense of insecurity and or to destabilize the public at large, which attract the provisions of section 6 of the AT Act, which in the case in hand was designed to create sense of insecurity amongst the co-villagers."

42. Thus, while deciding these critical questions the opinion formed by the learned Administrative Judge is pre-conceived. Reaching to the conclusion that the offence is triable by regular Court is thus premature. The decision for submitting challan before the normal Court could not have been taken only on consideration of the aforesaid facts as observed by the Hon'ble Supreme Court in the case of Mst. Najmunisa v. Judge Special Court reported in 2003 SCMR 1323 and Mirza Shaukat Baig v. Shahid Jamil reported in PLD 2005 SC 530. It is the combined effect of the word, "action" and "terrorism", definitions of which is reproduced above, which is to be given cumulative effect while reading down the contents of the FIR, police record and the provisions of Section 6 of the Act ibid.

43. In case of Bashir Ahmed v. Muhammad Sadiq reported in PLD 2009 SC 11 the Bench agreed with this observation that it is to be seen whether the said act has created sense of fear and insecurity in the public or any section of public or community or in any sect. However, the only distinguishing feature in Bashir Ahmed's case ibid is that action is to be coupled with motive without which such actions cannot be termed as terrorism and in terms of the aforesaid judgment it is to be determined from the yardstick and scale of motive and object and not from its result or after effect. The perusal of the judgment of Mirza Shaukat Baig v. Shahid Jamil reported in PLD 2005 SC 530 reveals that the Bench of the Hon'ble Supreme Court held that the motive and object is not material but what material was its effect. The relevant observation is reproduced as under:-

> *"29. After having gone through the entire law as enunciated by this Court in different cases the judicial consensus seems to be that striking of terror is sine qua non for the application of the provisions as contained in section 6 of the Act which cannot be determined without examining the nature, gravity and heinousness of the alleged offence, contents of FIR, its cumulative effects on the society or a group of persons and the evidence which has come on record. In so far as the factum of intention is concerned that cannot be evaluated without examining the entire evidence which aspect of the matter squarely falls within the jurisdictional domain of the Court constituted under the Act and such questions cannot be decided by invocation of Constitutional jurisdiction without scrutinizing all the circumstances in a broader prospect by keeping in view the ground realities in mind. There could be no second opinion that where the action of an accused results in striking terror or creating fear, panic, sensation, helplessness and sense of insecurity among the people in a particular vicinity it amounts to terror and such an action squarely falls within the ambit of section 6 of the Act and shall be triable by a Special Court constituted for such purpose. What was the real intention of the offender could only be adjudged on the basis of evidence which cannot be determined by invocation of Constitutional jurisdiction and learned Special Judge who is usually a Senior Sessions Judge can take care of the matter which can be transferred by him if it does not fall within his jurisdictional domain. There is no denying the fact that it was never the intention of legislature that every offender irrespective of the nature*

of the offence and its overall impact on the society or a section of society must be tried by the Anti-Terrorist Court but the question as to whether such trial shall be conducted or not initially falls within the jurisdictional domain of Anti-Terrorist Court which cannot be interfered with in the absence of sufficient lawful justification which appears to be lacking in these cases. It is, however, obligatory for such Courts to watch carefully the nature of accusation and examine the entire record with diligent application of mind to determine as to whether the provisions as contained in the Act would prima facie be attracted or otherwise? Where such Courts are of the view after taking cognizance of the offence that the alleged offence does not fall prima facie under the provisions of the Act it must transfer the same to regular Court without loss of time."

44. In the cases relied upon by learned counsel for respondent we may note with significance that in almost all cases the previous enmity and personal vendetta was sine qua non whereas by looking at the contents of the FIR it is manifestly clear that despite alleged enmity and dispute between the petitioner No.2 and the respondents the occasion and incident was designed to create a sense of insecurity to destabilize the public at large. (Examining the case of the respondents on the touchstone of the principles laid down above it cannot be tentatively presumed that the offence does not fall within the scheduled offence as provided under A.T. Act).

45. There is also no cavil to the proposition that it was not in the mind of the law makers that every offence which may have created the "impact" as prescribed in the Anti-Terrorism Act, 1997 and its overall effect must be tried by an Anti-Terrorism Court but the question as to whether till such question is determined on the touchstone of the principle laid down above, such trial shall initially fall within the jurisdictional domain of Anti-Terrorism Court which cannot be interfered with in the absence of sufficient lawful justification. Now the

question here would be whether that sufficient lawful justification which could have caused its transfer from Special Court to the normal jurisdiction were available or not. The simple answer to the aforesaid question is "No". The reason being that the investigation report was not available. It has been held in support of the above observation by the Hon'ble Supreme Court in the case reported in PLD 2005 SC 530 that, "… It is the obligatory for the courts to watch carefully the nature of accusation and examine the entire record with diligent application of mind to determine as to whether the provisions, as contained in the Act would, prima facie, be attracted or otherwise? Where such courts are of the view, after taking cognizance of the offence, that the alleged offence does not fall, prima facie, under the provisions of the Act it must transfer the same to the regular Court without loss of time". In this matter the time to take cognizance never reached before the learned Administrative Judge.

46. In order to see the application of Anti-Terrorism Act, 1997 and for declaring an offence to be schedule offence and in line with the Anti-Terrorism Act, 1997 it is to be seen that the offence mentioned had any nexus with the very object of the said Act for which it had been enacted and that offence itself was covered by provisions of Section 6 and 7 of the Act.

47. The assembly of hundreds of people around itself prima facie shows that it was designed in a manner to use it as a threat to coerce and intimidate or overawe the government or the public or a section of public or community or sect or create a sense of fear or insecurity in the society. It now matters little that the motive and object is material as far

as the instant case is concerned. Had it been intention of the legislature and the law-makers that the motive and object has a significant role to play in determining the jurisdiction then there was no reason or occasion for the legislature to provide details of numerous actions in Section 6(2) of the Anti-Terrorism Act, 1997. The law-makers could have ended up the act by simply saying that the object, mens rea and the motive shall determine the jurisdiction and not the effect of offence and the offence itself. Thus, by providing the definition of action, the application of motive, object and mens rea is somehow overshadowed by the definitions of action. The cases are decided on the basis of law and its interpretation and hence a Judge should not be wiser than law itself. No doubt motive, mens rea and object do play a vital role in the normal offences under the Code but since it is a special law enacted to curb and prevent the terrorism, sectarian violence, the effect of the special law is to be given precedence. We will not involve in the debate as to whether the motive and object to create a sense of fear is there or not as simply the assembly of hundreds of people around and vicinity and their actions as demonstrated in the FIR could hardly allow us to go in this debate as it is apparently clear. We will also not go into the debate as to whether the contents of the FIR are true or not as it is to be seen in the trial whether the allegations leveled against the accused are correct or not as it is certainly the prerogative of learned trial Court/Judge to have come to conclusion after recording of evidence whether or not the case is made out under Anti-Terrorism Act, 1997 and as prescribed by the Hon'ble Supreme Court in the case of Mirza Shaukat Baig and others reported in PLD 2005 SC 530 that after taking cognizance of the

offence, the learned trial Court (Special Court) could form a view as to whether it falls within the jurisdiction as the law makers have intended to whereafter it can be transferred to regular Court (if law permits) and there should be no haste in reaching to a situation of sending it to regular Court which apparently seems to be pre-matured in this case.

48. In view of the facts and circumstances, mentioned above, and after examining the case on the above principles we cannot subscribe to the view formed by learned counsel for the respondents that the case is triable by the Sessions Court only for the reason that it was a case of previous enmity and that it was not designed for such offence and that the motivation was not there as in our view it is in fact the effect and impact which is the relevant feature in determining the issue involved under the special law ibid. We, therefore, allow this petition and direct the Investing Officer to submit the challan before the Anti-Terrorism Court for proceeding onward in accordance with law. In case, the case has already been challaned the trial Court is directed to transfer the case to the Anti-Terrorism Court for further proceedings in accordance with law.

Dated: **Judge**

Chief Justice