

CASE NO.:
Appeal (crl.) 888-891 of 2003

PETITIONER:
State of Gujarat

RESPONDENT:
Salimbhai Abdulgaffar Shaikh & Ors.

DATE OF JUDGMENT: 08/09/2003

BENCH:
S. Rajendra Babu & G. P. Mathur.

JUDGMENT:
JUDGMENT

G.P. Mathur, J.

1. These appeals arise on a certificate granted by the Gujarat High Court under Article 134A read with Article 134(1)(c) of the Constitution in the matter of grant of bail to the respondents.

2. Raising a preliminary objection, Shri Amarendra Sharan, learned Senior Advocate, submitted that an appeal will lie to this Court from any judgment, final order or sentence in a criminal proceeding of a High Court on a certificate being granted in terms of Article 134(1)(c) and 134A of the Constitution; that, an order made in a proceeding arising out of an application for grant of bail is not a judgment, final order or sentence; that, a judgment would mean any decision which terminates a criminal proceeding pending before the Court and excludes an interlocutory order; that, in a criminal proceeding an order on an application for bail is not a final order; that, the order in question is neither a final order nor imposes a sentence; that, therefore, the certificate issued by the High Court should be cancelled and the appeal should be treated as incompetent.

3. There seems to be force in the contentions urged by the learned Senior Advocate on behalf of the respondents but the settled practice of this Court is that if on the face of it this Court is satisfied that the High Court has not properly exercised the discretion under Article 134(1)(c), the matter may either be remitted or this Court may exercise that discretion itself or treat the appeal as one under Article 136 (Nar Singh v. State of U.P., 1955 (1) SCR 238, and Baladin v. State of U.P., AIR 1956 SC 181). Therefore, we do not propose to examine this aspect of the matter any further but treat this appeal as a proceeding arising under Article 136 of the Constitution.

Leave granted.

4. A ghastly incident took place at about 7.45 a.m. on 27.2.2002 when the Sabarmati Express was stopped near Godhra Railway Station and a coach was set on fire resulting in death of 59 persons and serious injuries to 48 others. An FIR was lodged on the basis of which a case was registered as CR No. I-09 of 2002 under Sections 143, 147, 148, 149, 337, 338, 435, 120-B, 34, 153(A), 302, 307 IPC, Sections 141, 151, 152 Indian Railways Act, Sections 3 and 4 of Prevention of Damage to Public Property Act and Section 135(1) of the Bombay Police Act. After investigation, charge sheets were submitted against the accused involved in the case but it was specifically mentioned therein that investigation was still continuing. The respondents who are accused in the case moved separate bail applications which were rejected by the Additional Sessions Judge, Panchmahals at Godhra on different dates between 18th and 30th January, 2003. Thereafter bail applications under Section 439 Cr.P.C. were filed before the High Court. On the basis of the facts revealed as a result of further investigation, the prosecution came to the conclusion that offences under Section 3(2) and (3) and Section 4 of the Prevention of Terrorism Act (for short 'POTA') had also been committed and accordingly took appropriate steps for including the aforesaid offence. A counter-affidavit was filed on behalf of the State on

5.3.2003 before the High Court wherein it was averred that after filing of the charge sheets, further evidence had been collected which revealed commission of offences under Sections 3 and 4 of POTA and applications had already been moved on 19.2.2003 in the Court of Additional Sessions Judge and JMFC (Railway Court) Godhra for adding Sections 3(2) and (3) and Section 4 of POTA to the main charge sheet dated 22.5.2002 as well as the supplementary charge sheets dated 20.9.2002 and 19.12.2002. The accused who were in judicial custody were also informed about the aforesaid development that POTA had been applied against them. It was pleaded in the counter affidavit that the accused-respondents should first approach the Special Court for grant of bail under POTA and they could approach the High Court only after decision of the said matter. It was submitted that in view of the specific provisions of POTA, the learned Single Judge, who was seisin of the matter had no jurisdiction to hear the bail application. The High Court, by a detailed order dated 4.7.2003, allowed all the bail applications and directed that the respondents be released on bail in connection with CR No.I-09 of 2002 registered with Godhra Railway Police Station. Certificate under Article 134A read with Article 134(1)(c) of the Constitution of India was granted by the High Court on the prayer made by the State.

5. Shri Harish Salve and Shri Sushil Kumar, learned senior counsel appearing for the appellant State, have assailed the order of the High Court mainly on two grounds, namely, that the accused having not applied for bail under Section 3(2) and (3) and Section 4 of POTA before the Special Judge, it was not open to the High Court to directly entertain their bail applications and grant them bail in the aforesaid offences and that in view of specific provision contained in Sub-section (2) of Section 34 of POTA only a bench of two judges of the High Court could grant bail in an offence under the said Act. The submission is that as a learned Single Judge of the High Court has granted bail while exercising power under Section 439 read with Section 482 Cr.P.C., the order passed by the High Court is not only illegal but also without jurisdiction.

6. In order to examine the contention raised by the learned counsel for the appellant, it is necessary to take note of Section 34 of POTA which reads as under :

"34. (1) Notwithstanding anything contained in the Code, an appeal shall lie from any judgment, sentence or order, not being an interlocutory order, of a Special Court to the High Court both on facts and on law.

(2) Every appeal under sub-section (1) shall be heard by a bench of two Judges of the High Court.

(3) Except as aforesaid, no appeal or revision shall lie to any court from any judgment, sentence or order including an interlocutory order of a Special Court.

(4) Notwithstanding anything contained in sub-section (3) of Section 378 of the Code, an appeal shall lie to the High Court against an order of the Special Court granting or refusing bail.

(5) Every appeal under this section shall be preferred within a period of thirty days from the date of judgment, sentence or order appealed from;

Provided that the High Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of thirty days."

Sub-section (1) of Section 34 of POTA lays down that an appeal shall lie from any judgment, sentence or order not being in interlocutory order of a Special Court to the High Court both on facts and law and in view of Sub-section (2), the appeal has to be heard by a bench of two judges. Normally

an order granting or refusing bail is an interlocutory order and no appeal would lie. However, in view of sub-section (4) of Section 34 an appeal shall lie to the High Court against such an order. Under the scheme of POTA, there is a clear departure in the matter of grant of bail from that of Code of Criminal Procedure. The provisions regarding bail in Code of Criminal Procedure are contained in Sections 436 to 439.. Sub-section (1) of Section 439 confers power upon the Court of Sessions and High Court to grant bail to any person accused of having committed a non-bailable offence. Sub-section (2) of Section 439 deals with cancellation of bail and provides that any person who has been released on bail under Chapter XXXIII may be arrested and committed to custody. There is no provision for appeal under the Code of Criminal Procedure against an order refusing or granting bail.

7. The considerations which normally weigh with the court in granting bail in non-bailable offences have been explained by this Court in State v. Capt. Jagjit Singh AIR 1962 SC 253 and Gurcharan Singh v. State (Delhi. Admn.) AIR 1978 SC 179 and basically they are the nature and seriousness of the offence; the character of the evidence; circumstances which are peculiar to the accused; a reasonable possibility of the presence of the accused not being secured at the trial; reasonable apprehension of witnesses being tampered with; the larger interest of the public or the State and other similar factors which may be relevant in the facts and circumstances of the case. While hearing an application for cancellation of bail under Sub-section (2) of Section 439 of the Code, the Courts generally do not examine the merits of the order granting bail. What is normally relevant to be examined in such a proceeding is whether the accused is trying to tamper with the evidence subsequent to his release on bail or has threatened the witnesses or has committed any other offence while on bail or is trying to adopt dilatory tactics resulting in delay of trial or has absconded or that the offence committed by him has created serious law and order problem. The Court has to see as to whether the accused has misused the privilege of bail granted to him. Only in exceptional cases where the order granting bail is vitiated by any serious infirmity and in the interest of justice it becomes necessary to interfere with the discretion exercised in granting bail that the order would be interfered with on merits.

8. Sub-section (4) of Section 34 of POTA provides for an appeal to the High Court against an order of the Special Court granting or refusing bail. Though the word 'appeal' is used both in Code of Criminal Procedure and Code of Civil Procedure and in many other Statutes but it has not been defined anywhere. Over a period of time, it has acquired a definite connotation and meaning which is as under :-

"A proceeding undertaken to have a decision reconsidered by bringing it to a higher authority, specially the submission of a lower Court's decision to higher Court for review and possible reversal.

An appeal strictly so called is one in which the question is, whether the order of the Court from which the appeal is brought was right on the material which the Court had before it.

An appeal is removal of the cause from an inferior to one of superior jurisdiction for the purposes of obtaining a review or retrial.

An appeal generally speaking is a rehearing by a superior Court on both law and fact."

9. Broadly speaking, therefore, an appeal is a proceeding taken to rectify an erroneous decision of a Court by submitting the question to a higher Court, and in view of express language used in sub-section (1) of Section 34 of POTA the appeal would lie both on facts and on law. Therefore even an order granting bail can be examined on merits by the High Court without any kind of fetters on its powers and it can come to an independent conclusion whether the accused deserves to be released on bail on the merits of the case. The considerations which are generally relevant in the matter of cancellation of bail under sub-section (2) of Section 439 of the Code will not come in the way of the High Court in setting aside an order of the Special Court granting bail. It is therefore evident that the provisions of POTA are in clear contradistinction with that of Code of Criminal Procedure where no appeal is provided against an order granting bail. The appeal can lie only against an order of the Special Court and unless there is an order of the

Special Court refusing bail, the accused will have no right to file an appeal before the High Court praying for grant of bail to them. Existence of an order of the Special Court is, therefore, sine qua non for approaching the High Court.

10. Shri Amarendra Sharan, learned senior counsel for the respondents has submitted that the power of the High Court to grant bail under Section 439 Cr.P.C. has not been taken away by POTA and consequently the learned Single Judge had the jurisdiction to grant bail to the respondents in exercise of the power conferred by the aforesaid provision. Learned counsel has laid great emphasis upon Section 49 of POTA, especially Sub-section (5) thereof and has submitted that in view of the language used in this section, the power conferred upon the Court of Sessions and the High Court under Section 439 will remain intact. It has been urged that if the intention of the legislature was to make the provisions of Section 439 of the Code inapplicable in relation to offences under POTA, it would have made a provision similar to Sub-section (5) of Section 49 which expressly excludes the applicability of Section 438 Cr.P.C. We are unable to accept the contention raised by the learned counsel for the respondents. It is well settled principle that the intention of the legislature must be found by reading the Statute as a whole. Every clause of Statute should be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent enactment of the whole Statute. It is also the duty of the Court to find out the true intention of the legislature and to ascertain the purpose of Statute and give full meaning to the same. The different provisions in the Statute should not be interpreted in abstract but should be construed keeping in mind the whole enactment and the dominant purpose that it may express. Section 49 cannot be read in isolation, but must be read keeping in mind the scope of Section 34 whereunder an accused can obtain bail from the High Court by preferring an appeal against the order of the Special Court refusing bail. In view of this specific provision, it will not be proper to interpret Section 49 in the manner suggested by learned counsel for the respondents. In *A.R. Antulay v. Ramdas Srinivas Nayak & Anr.* 1984 (2) SCC 500, the scope of special Act making provision for creation of a Special Court for dealing with offences thereunder and the application of Code of Criminal Procedure in such circumstances has been considered and it has been held that the procedure in Cr.P.C. gets modified by reason of a special provision in a special enactment.

11. Section 20 of TADA contained an identical provision which expressly excluded the applicability of Section 438 of the Code but said nothing about Section 439 and a similar argument that the power of the High Court to grant bail under the aforesaid provision consequently remained intact was repelled in *Usmanbhai Dawoodbhai Menon v. State of Gujarat* 1988 (2) SCC 271. Having regard to the scheme of TADA it was held that there was complete exclusion of the jurisdiction of the High Court to entertain a bail application under Section 439 of the Code. This view was reiterated in *State of Punjab v. Kewal Singh* 1990 (Supp) SCC 147.

12. That apart if the argument of learned counsel for the respondents is accepted, it would mean that a person whose bail under POTA has been rejected by the Special Court will have two remedies and he can avail any one of them at his sweet will. He may move a bail application before the High Court under Section 439 Cr.P.C. in the original or concurrent jurisdiction which may be heard by a Single Judge or may prefer an appeal under Sub-section (4) of Section 34 of POTA which would be heard by a bench of two judges. To interpret a statutory provision in such a manner that a Court can exercise both appellate and original jurisdiction in respect of the same matter will lead to an incongruous situation. The contention is therefore fallacious.

13. In the present case, the respondents did not chose to apply for bail before the Special Court for offences under POTA and consequently there was no order of refusal of bail for offences under the said Act. The learned Single Judge exercising powers under Section 439 read with Section 482 Cr.P.C. granted them bail. The order of the High Court is clearly without jurisdiction as under the scheme of the Act the accused can only file an appeal against an order of refusal of bail passed by the Special Court before

a Division Bench of the High Court and, therefore, the order under challenge cannot be sustained and has to be set aside. Even on merits the order of the High Court is far from satisfactory. Though it is a very long order running into 87 paragraphs but the factual aspects of the case have been considered only in one paragraph and that too in a very general way.

14. The High Court has also invoked powers under Section 482 Cr.P.C. while granting bail to the respondents. Section 482 Cr.P.C. saves the inherent power of the High Court. The High Court possesses the inherent powers to be exercised *ex debito justitiae* to do the real and substantial justice for the administration of which alone Courts exist. The power has to be exercised to prevent abuse of the process of the Court or to otherwise secure the ends of justice. But this power cannot be resorted to if there is a specific provision in the Code for the redress of the grievance of the aggrieved party. (See *Madhu Limaye v. State of Maharashtra* AIR 1978 SC 47). There being a specific provision for grant of bail, the High Court clearly erred in taking recourse to Section 482 Cr.P.C. while enlarging the respondents on bail.

15. In the result, the appeals are allowed and the order passed by the High Court granting bail to the respondents is set aside. Since the respondents have not approached the Special Court for grant of bail to them for offences under POTA, they should first invoke the jurisdiction of the said Court which shall dispose of the matter expeditiously without being influenced by any observation made by the High Court and any party feeling aggrieved thereby will have a right to prefer an appeal before the High Court in accordance with Section 34 of POTA.