

Ashish Bansal And Ors Vs State Of Chhattisgarh

Court: Chhattisgarh High Court

Date of Decision: Jan. 6, 2021

Acts Referred: Code Of Criminal Procedure, 1973 " Section 167, 378(3), 439

Scheduled Castes And The Scheduled Tribes (Prevention Of Atrocities) Act, 1989 " Section 14A, 20

Protection Of Children From Sexual Offences Act, 2012 " Section 28(2), 31, 42(A)

Constitution Of India, 1950 " Article 15(3)

Hon'ble Judges: Rajendra Chandra Singh Samant, J

Bench: Single Bench

Advocate: K. Tripti Rao, Jitendra Shrivastava, Hariom Rai, Chandradeep Prasad, Sanjay Agrawal, Mohit Kumar, Devendra Pratap Singh

Judgement

Rajendra Chandra Singh Samant, J

1. State counsel appearing for the respondent has raised a question regarding maintainability of the bail application filed under Section 439 of

Cr.P.C.

2. The offences have been registered against the applicants in all three cases under Protection of Children from Sexual Offences Act, 2012 (in

short 'the Act, 2012') and also under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (in short 'the Act, 1989').

3. As regards the Act, 2012, the provision under Criminal Procedure Code are applicable, therefore, application under Section 439 of the Cr.P.C.

can be filed before High Court, however, different procedure has been provided under Section 14-A of the Act, 1989, which is as follows :-

Section 14-A. Appeals. " (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an appeal shall lie, from

any judgment, sentence or order, not being an interlocutory order, of a Special Court or an Exclusive Special Court, to the High Court both on facts

and on law.

2. Notwithstanding anything contained in sub-section (3) of section 378 of the Code of Criminal Procedure, 1973 (2 of 1974), an appeal shall lie to

the High Court against an order of the Special Court or the Exclusive Special Court granting or refusing bail.

3. Notwithstanding anything contained in any other law for the time being in force, every appeal under this section shall be preferred within a period

of ninety days from the date of the judgment, sentence or order appealed from:

Provided that the High Court may entertain an appeal after the expiry of the said period of ninety days if it is satisfied that the appellant had

sufficient cause for not preferring the appeal within the period of ninety days:

Provided further that no appeal shall be entertained after the expiry of the period of one hundred and eighty days.

Ã, Every appeal preferred under sub-section (1) shall, as far as possible, be disposed of within a period of three months from the date of admission

of the appeal.]

4. The question raised by the State Counsel is this, that provision under Section 14-A of the Act, 1989 has overriding effect according to Section 20

of the same Act, which says that save as otherwise provided in this Act, the provisions of this Act shall have effect notwithstanding anything

inconsistent therewith contained in any other law for the time being in force or any custom or usage or any instrument having effect by virtue of

any such law. Therefore, the application filed under Section 439 of Cr.P.C. for grant of bail to the applicants in the case of commission of offences

under the provisions of the Act, 2012 along with the provisions under the Act, 1989 is not maintainable.

5. Learned counsel appearing on behalf of the applicant in M.Cr.C. No.3053 of 2020, submits that the Act, 2012 and the Act, 1989 both are special

laws. The Act, 1989 caters to the need of class of citizens, who are member of scheduled caste or scheduled tribe. The applicability of the Act,

2012 is more generalized because in this Act, there is no discrimination made of the victim belonging to any class. The offence i.e. committed is

basically penalized under the provisions of the Act, 2012 and it may be by chance that victim in such case, may belong to scheduled caste or

scheduled tribe, then the offence under the Act, 1989 shall also be registered against the accused persons. Therefore, the Act, 2012, which is

subsequent enactment comes into play first and the Act, 1989 follows in suitable cases.

6. It is submitted that although there is provision under Section 20 of the Act, 1989 that Act shall have overriding effect on other laws and

enactments, but the same is meant for the existing enactments. The provision of the Act, 1989 came into force in the year 1989, whereas, the Act,

2012 came into force in the year 2012. Section 42 (A) of the Act, 2012 provides that the provisions of this Act shall be in addition to and not in

derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have

overriding effect on the provisions of any such law to the extent of the inconsistency.

7. Placing reliance on the judgment of Supreme Court in Sarwan Singh & Anr. Vs. Kasturi Lal, reported in AIR 1977 SC 26,5 in KSL & Industries

Ltd. Vs. M/s. Arihant Threads Ltd. & Ors, reported in (2008) 9 SCC 76 3 and in case of State of A.P. Vs. Mangali Yadagiri, reported in 2016

Cr.L.J. 1415, it is submitted that the Court has to see the object and purpose of the two enactments and the legislation which is later in point of time

to decide the provision in which of the enactments shall prevail.

8. It is further submitted that in case where person is accused of commission of offence under the Act, 2012 and also of offence under the Act,

1989, the Special Court under the Act, 2012 shall alone have jurisdiction to exercise all the powers including the power to remand the accused

under Section 167 of Cr.P.C.

9. Reliance has also been placed on the judgment of Division Bench of Madras High Court in case of Registrar (Judicial) Vs. Krishnaswami

Naidu & Anr., reported in 2017 Cr.L.J. 4515, judgment of Allahabad High Court in Rinku Vs. State of U.P., passed in Criminal Miscellaneous

Petition no. 33075 of 2018, decided on 11.02.2019, judgment of Patna High Court in Guddu Kumar Yadav Vs. The State of Bihar, in Criminal

Miscellaneous No. 52792 of 2019 decided on 07.11.2019. Judgment of Bombay High Court in Suraj S. Paithankar Vs. The State of Maharashtra, in

Bail Application No. 817 of 2020, decided on 3rd of July, 2020, judgment of Gujarat High Court in Vikrambhai, Amrabhai Malivad Vs., State of

Gujarat, in R/Criminal Misc. Application No.11014 of 2020, decided on 05.10.2020 and, in the, judgment, of, High Court, of,

Madhya Pradesh Bench at Gwalior in Smt. Sunita Gandharva Vs. State of M.P., in Misc. Criminal Case No. 22615 of 2020 decided on 08.10.2020.

10. It is submitted that there are non-obstante clause in both the enactments, therefore, it is for the Court to determine according to the object of the

Act. In the cases cited herein above, the High Courts have held that the object of the Act, 2012 shall prevail, hence, for this reason, the bail

application filed under Section 439 of Cr.P.C. is maintainable, therefore, the objection raised by the State be overruled.

11. Counsels for the applicants in M.Cr.C. No.4799 of 2020 and M.Cr.C. No. 8217 of 2020 adopt the arguments as advanced by the learned

counsel for the applicant in M.Cr.C. No.3053 of 2020 and submit that Section 28 (2) of the Act, 2012 says that while trying an offence under this

Act, a Special Court shall also try an offence [other than the offence referred to in sub-section (1)], with which the accused may, under the Code

of Criminal procedure, 1973 be charged at the same trial. Section 31 of the Act, 2012 also provides that provisions of the Code of Criminal

procedure, 1973 shall have application in the trial of cases under the Act, 2012. The counsel has also relied on the judgment of this Court in case of

Ram Swarup Rajwade Vs. State of C.G. in Writ Petition (Cr.) No. 540 of 2020 decided on 10.12.2020, in which it has been held that Special Court

under the Act, 2012 shall have jurisdiction to try the cases, in which the offences are registered under the Act, 2012 as well as under the Act, 1989

and same principle will apply in the present case also, therefore, it is prayed that the objection raised by the State counsel be overruled.

* State counsel opposes the submissions made by the learned counsel for the applicants. It is submitted that the provisions under Section 14-A of

the Act, 1989 is very much specific, therefore, in case any rejection order is passed by the Special Court constituted under the provisions of the

Act, 1989, then only an appeal shall lie. Special Court have been constituted under the Act, 1989 for trying the offences registered under the Act,

1989, therefore, in such situation, there is no circumstance to hold that Special Court under the Act, 2012 can exclude the jurisdiction of Special

Court constituted under the Act, 1989. Hence, the objection raised is on legal ground, therefore, the application under Section 439 of Cr.P.C. is not

maintainable.

* I have heard the learned counsel for the parties and perused the documents placed on record.

* The Hon'ble Supreme Court in case of Sarvan Singh (supra), has observed as under :-

“.....When two or more laws operate in the same field and each contains a non-obstante clause stating that its provisions will override

those of any other law, stimulating and incisive problems of interpretation arise. Since statutory interpretation has no conventional protocol, cases of

such conflict have to be decided in reference to the object and purpose of the laws under consideration.....”

“.....It is, therefore, desirable to determine the overriding effect of one or the other of the relevant provisions in these two Acts, in a given

case, on much broader considerations of the purpose and policy underlying the two Acts and the clear intendment conveyed by the language of the

relevant provisions therein....”

15. In KSL & Industries Ltd. (supra), the Supreme Court has made reference to the judgment passed in Sarwan Singh's case and observed in

paragraph -66, which is as follows :-

“66. From the above discussion, in my judgment, the law is fairly well settled. A provision beginning with non-obstante clause ("notwithstanding

anything inconsistent contained therein in any other law for the time being in force") must be enforced and implemented by giving effect to the

provisions of the Act and by limiting the provisions of other laws. But, it cannot be gainsaid that sometimes one may come across two or more

enactments containing similar non-obstante clause operating in the same or similar direction. Obviously, in such cases, the Court must attempt to

find out the intention of the Legislature by examining the nature of controversy, object of the Act, proceedings initiated, relief sought and several

other relevant considerations. From the case-law referred to above, it is clear that Courts have applied several workable tests. They, inter alia,

include to keep in view whether the Act is 'general' or 'special', whether the Act is a subsequent legislation, whether there is reference to the

former law and the non-obstante clause therein. The above tests are merely illustrative and by no means they should be considered as exhaustive.

It is for the Court when it is called upon to resolve such conflict by harmoniously interpreting the provision of both the competing statutes and by

giving effect to one over the other.

16. The High Court of Andhra Pradesh has in case of the State of A.P. Vs. Mangali Yadagiri (supra) in paragraph 19 has observed, which is

as under :-

19. A perusal of both the enactments would show that POSCO Act is a self contained legislature which was introduced with a view to protect

the children from the offences of sexual assault, harassment pornography and other allied offences. It was introduced with number of safeguards to

the children at every stage of the proceedings by incorporating a child friendly procedure. The legislature introduced the non-obstante clause in

Section 42-A of the POSCO Act with effect from 20.06.2012 giving an overriding effect to the provisions of the POSCO Act, though the

legislature was aware about the existence of non-obstante clause in Section 20 of the SC/ST Act.

3 High Court of Allahabad in case of Rinku (supra) has referred to the judgment of Madras High Court in Registrar (Judicial) (supra) and made an

observation in para 61 & 62, which is as under :-

61. On an added note, it may be mentioned that an appeal by its essential characteristic, is a creature of statute. It postulates a Court or

Authority of first instance, and another of appellate jurisdiction empowered by law to hear appeals from the Court or Authority of the first instance.

It also postulates specific orders, from which the statute provides appeals. It is not that every order of a Court or Authority of first instance, would

be appealable to the Appellate Court or the Authority, because by law some orders are made appealable. This being the essential characteristic of

an appeal, it is almost impossible to hold that an order of the Special Court under the POCSO Act determining a bail plea, would be appealable

under Section 14A(2) of the SC/ST Act. That could alone have happened in case, there were a provision under either of the two statutes, creating

a legal fiction that the Special Court, POCSO Act, while determining a bail plea in a case where one of the offences charged was under the SC/ST

Act, would be deemed to be a Special Court under the said Act, for the limited purpose of deciding the bail plea.

62. In view of what has been said above, the question as set out in Paragraph 7 (supra), are answered thus :-

Question No.(i) stands answered in the affirmative in terms that where in a case, offences both under the POCSO Act and SC/ST Act are

charged arising out of the same crime, that under the Code may be tried at the same trial, the Special Court, POCSO Act, would have jurisdiction

to determine the bail plea of an accused to the exclusion of the Special Court, SC/ST Act;

Question No.(ii) stands answered in the negative in terms that where an order declining bail to an accused is passed by the Special Court, POCSO

Act, in a crime involving offences, both under the POCSO Act and the SC/ST Act, that order would not be final, and appealable under Section

14A(2) of the SC/ST Act; an application under Section 439 of the Code would alone be maintainable before the High Court.

18. In case of Guddu Kumar (supra), the High Court of Patna has similarly held in para 30, which is as under :-

“30. In view of the forgoing discussions and observations, in the opinion of this Court, where an order granting or refusing bail to an accused

being passed by the Special Court constituted under POCSO Act, in connection with a case involving offences under both the Acts i.e. POCSO

Act and SC/ST Act, the same would not be appealable under Section 14-A (2) of the SC/ST Act. In such circumstances the application for bail in

terms of Section 439 of the Cr.P.C. would alone be maintainable before the High Court.

19. The High Court of Bombay in case of Suraj S. Paithankar (supra) has also held that the application under Section 439 of Cr.P.C. will be

maintainable in case where the offence under the Act, 2012 and the Act, 1989 both are registered against any accused person and it has been

similarly held in case of Smt. Sunita Gandharva (supra) by the Single Bench of High Court of M.P. Bench Gwalior.

20. The object of the Act, 1989 is as follows:-

“An Act to prevent the Commission of offences of atrocities against the members of the Scheduled Castes and the Scheduled Tribes, to provide

for [Special Courts and Exclusive Special Courts] for the trial of such offences and for the relief and rehabilitation of the victims of such offences

and for matters connected therewith or incidental thereto.

21 The object of the Act, 2012 is as follows:-

“An Act to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special

Courts for trial of such offences and for matters connected therewith or incidental thereto.

WHEREAS clause (3) of article 15 of the Constitution, inter alia, empowers the State to make special provisions for children;

AND WHEREAS, the Government of India has acceded on the 11th December, 1992 to the Convention on the Rights of the Child, adopted by the

General Assembly of the United Nations, which has prescribed a set of standards to be followed by all State parties in securing the best interests of

the child;

AND WHEREAS it is necessary for the proper development of the child that his or her right to privacy and confidentiality be protected and

respected by every person by all means and through all stages of a judicial process involving the child; AND WHEREAS it is imperative that the

law operates in a manner that the best interest and well being of the child are regarded as being of paramount importance at every stage, to ensure

the healthy physical, emotional, intellectual and social development of the child;

AND WHEREAS the State parties to the Convention on the Rights of the Child are required to undertake all appropriate national, bilateral and

multilateral measures to prevent—

1 the inducement or coercion of a child to engage in any unlawful sexual activity;

2 the exploitative use of children in prostitution or other unlawful sexual practices;

3 the exploitative use of children in pornographic performances and materials;

AND WHEREAS sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively addressed.

22. It has been observed in the case of State of A.P. Vs. Mangali Yadagiri (supra) that there is a direct conflict between the two non-obstante

clauses contained in enactments of the Act, 1989 & the Act, 2012 that is Section 20 of the Act, 1989 and Section 42-A of the Act, 2012. From

perusal of the ends and objects of the Act, 1989, it is manifest that it was passed with respect to commission of offence by member of Scheduled

Castes and Scheduled Tribes not by the persons other than the Scheduled Castes and Scheduled Tribes. The Act, 1989 is silent to granting

protection to the children and to the weaker section of the society, therefore, the situation under the Act, 2012, is totally different.

23. It can be observed that on comparing the aims and objects of both the Acts, it would be seen that the victims of the Act, 2012 stand as a larger

class compared to the victims of the Act, 1989. The victims under the Act, 2012 include the victims under the Act, 1989. Hence, it can be said that

the object and purpose of the Act, 2012 has wider application and wider impact. Thus, the harmonious interpretation of the purpose of both the acts,

shows that the Act, 2012 is also bolstering the cause of the Act, 1989.

24. In the matter of Registrar (Judicial) Vs. Krishnaswami Naidu & Anr. (supra), the Division Bench of the Madras High Court has held in para

51, which is as under:-

“51. A comparison of the statement and objects and reasons of both the Acts would manifestly make it clear that in both the Acts, speedy trial

is sought to be achieved. If, in the same transaction, an offence is committed by a non scheduled caste / non-scheduled tribe man against a child

belonging to a scheduled caste / scheduled tribe as provided in the POCSO Act, the said act of the accused would also be an offence under SC &

ST Act. Though the object of both the Acts is to provide speedy trial, the POCSO Act seems to be a more comprehensive Act and it safeguards

the interests of the child victim under the POCSO Act and the same Act shall take care of the children who belong to the scheduled castes and

scheduled tribes also. Further, sub-section (2) of Section 28 of the POCSO Act states that while trying an offence under the POCSO Act, a

Special Court under the Act shall also try an offence other than the offence referred to in sub-section (1) with which the accused may under the

Code of Criminal Procedure, 1973, be charged at the same trial. But, there is no analogous provision in the SC & ST Act. Though the Legislature

thought of amending the SC & ST Act by Amendment Act 1 of 2016, it has not chosen to introduce a new provision in the SC & ST Act like, sub-

section (2) of Section 28 of the POCSO Act. This would also indicate that the intention of the Legislature itself is to give overriding effect only to

the POCSO Act. Applying the test of chronology also, the POCSO Act should receive overriding effect over the SC & ST Act. Therefore, for all

these reasons we hold that if the act of the accused is an offence both under the provisions of POCSO Act as well as SC & ST Act, the Special

Court under the POCSO Act shall deal with the case by exercising all the powers conferred on the said Court including the power to remand, to

take cognizance of offences and to try the offender.”

25. In the matter of Vikrambhai Amrabhai Malivad (supra), the Single Bench of Gujrat High Court, after referring to the various case laws, has

observed that on comparative analysis of provisions of both the Acts, leads to sole conclusion, that the legislature in its wisdom has conferred

precedence on the POCSO Act above the Atrocities Act. Hence, the only remedy available for the applicant will be of filing an application under

Section 439 of the Cr.P.C. before the High Court against the order of bail rejection passed by Sessions Judge/ Special Judge.

26. Section 20 of the Act, 1989 provides as follows:-

“20. Act to override other laws.” “Save as otherwise provided in this Act, the provisions of this Act shall have effect notwithstanding anything

inconsistent therewith contained in any other law for the time being in force or any custom or usage or any instrument having effect by virtue of

any such law.

27. Section 42-A of the Act, 2012 provides as follows:-

“42A. Act not in derogation of any other law.-The provisions of this Act shall be in addition to and not in derogation of the provisions of any

other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of

any such law to the extent of the inconsistency.

28. Section 31 of the Act, 2012 provides as follows:-

“31. Application of Code of Criminal Procedure, 1973 to proceedings before a Special Court.- Save as otherwise provided in this Act, the

provisions of the Code of Criminal Procedure, 1973 (including the provisions as to bail and bonds) shall apply to the proceedings before a Special

Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Sessions and the person conducting a

prosecution before a Special Court, shall be deemed to be a Public Prosecutor.”

29. The question before this Court is as to which of the provision under both the acts, shall prevail when the accused is charged with commission of

offence under the Act, 2012 and also for commission of offence under the Act, 1989. The interpretation has to be made as to which of the non-

obstante clause shall prevail.

30. After discussing various pronouncement of the Supreme Court and respective High Courts, the conclusion can be safely drawn that firstly, the

POCSO Act enactment, which has come later in the year 2012 and secondly, the object and purpose of enactment of 2012, has wider perspective

compared to the enactment of the Act, 1989, which is limited to give protection only to members of SC/ST and child victims, are the subject of

concern in the POCSO Act, therefore, object of the POCSO Act is found to be much broader than the Atrocities Act.

31. Section 20 of the Act, 1989, which came into force with enactment in the year 1989 mentions of overriding effect on the other laws that were

in force on the date of such enactment. The provision does not make mention of the overriding effect of the law under the Atrocities Act on any

future enactment. Whereas, Section 42-A of the Act, 2012 mentions that in case of any inconsistency with the provision under any other law, the

provision of the Act, 2012 shall have overriding effect to the extent of the inconsistency.

32. The Act, 2012 provides under Section 31 that the provision of Cr.P.C., 1973 shall apply to the proceedings before Special Court and for the

purposes of the said provisions, the Special Court shall be deemed to be a Court of Sessions and the person conducting a prosecution before a

Special Court, shall be deemed to be a Public Prosecutor. This act provides for complete applicability of the Cr.P.C., 1973. Whereas, Section 14A

of the Act, 1989 provides for different procedure to be adopted in case of bail rejection order passed by the Special Court. Thus, the provision

under Section 14A of the Act, 1989 is inconsistent with the provision of Section 31 of the Act, 2012. By virtue of the provision under Section 42-A

of the Act, 2012, it can be clearly said that the provision of the Act, 2012, shall prevail over the provision of appeal in the Act, 1989, as the same is

inconsistent with the provisions under the Act, 2012.

33. This view taken by this Court finds full support from judgment of High Court of Andhra Pradesh in State of A.P. Vs. Mangali Yadagiri (supra),

judgment of Allahabad High Court in Rinku (supra), judgment of Division Bench of Madras High Court in Registrar (Judicial) (supra), judgment of

Patna High Court in Guddu Kumar (supra), judgment of Bombay High Court in Suraj S. Paithankar (supra) and judgment of Madhya Pradesh High

Court in Smt. Sunita Gandharva (supra). Therefore, the question of maintainability of the present bail applications is decided accordingly by holding

that all the bail applications filed by the applicants under Section 439 of the Cr.P.C. are maintainable.