

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

WEDNESDAY, THE 26TH DAY OF OCTOBER 2022 / 4TH KARTHIKA, 1944

BAIL APPL. NO. 6688 OF 2022

CRIME NO.725/2022 OF KOVALAM POLICE STATION,

THIRUVANANTHAPURAM

PETITIONER/ACCUSED:

RENOJ R.S

AGED 18 YEARS

R.S. NIVAS,

KEZHOOR, AGRICULTURAL COLLEGE,

KALLIYOOR, THIRUVANANTHAPURAM, PIN - 695522

BY ADVS.

D.SREENATH

RENOY MOHAN

TEENA MARY THOMAS

SIJO PATHAPARAMBIL JOSEPH

RESPONDENTS/STATE/DEFACTO COMPLAINANT:

1 STATE OF KERALA

REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, PIN - 682031

2 XXX

BY SRI.K.A.NOUSHAD, PUBLIC PROSECUTOR

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON
26.09.2022, THE COURT ON 26.10.2022 DELIVERED THE
FOLLOWING:

“C.R.”

BECHU KURIAN THOMAS, J.

B.A. No. 6688 of 2022

Dated this the 26th day of October, 2022

ORDER

By an order dated 02.09.2022, this Court had granted bail to the petitioner under section 439 of the Code of Criminal Procedure, 1973. However, since a legal question regarding conflict between two statutes arose, it was decided to consider the matter in detail. Hence, despite granting bail to the petitioner, the case was heard in detail on subsequent days.

2. The issue to be resolved relates to the manner and forum for filing an application for bail when offences under the provisions of the Protection of Children from Sexual Offences Act, 2012 (for brevity 'the POCSO Act') as well as the provisions of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as 'the SC/ST Act') are both alleged to have been committed in the same crime.

3. The prosecution in the present case alleged that the defacto

complainant/victim, aged just 15 years, was in a relationship with the first accused and on 16.07.2022, petitioner, who is the second accused, slapped the victim and scolded her using filthy language thereby committing offences under the Indian Penal Code, 1860 apart from the POCSO Act. The prosecution also included provisions of the SC/ST Act since it was learnt that the victim was a member of the Scheduled Caste.

4. Petitioner was arrested on 19.07.2022 and was in custody till this Court directed his release. This bail application was filed on 12.08.2022. However, the Registry of this Court raised an objection that in view of the offences alleged under the SC/ST Act, an appeal alone is maintainable under section 14A of the said Act. Thereafter, the matter was placed for consideration of this Court and having regard to the urgency of the issue, especially since the petitioner was under detention, the Registry was directed to number the case. Subsequently, bail was granted to the petitioner, reserving the legal question to be decided later.

5. It is pertinent to mention at this juncture that this Court had, in a recent decision in **Basheer v. Rajani** (2022 (5) KLT 352) held that when an offence under the SC/ST Act is alleged, a bail

application including that for anticipatory bail, can be filed only before the Special Court designated under the said statute. It was also held that the jurisdiction exercised by this Court in the matter of bail is only appellate in nature under section 14A of the SC/ST Act.

6. Sri. Sijo Pathaparambil Joseph, the learned counsel for the petitioner contended that the objection raised by the Registry on the maintainability of this bail application is without any merit and also pointed out that the said objection resulted in the petitioner remaining in detention until 02-09-2022. After referring to various decisions, the learned Counsel submitted that the provisions of POCSO Act enable an accused even to seek anticipatory bail or bail by resorting to the provisions of the Cr. P.C since there is no restriction as in the SC/ST Act. The learned Counsel relied upon the principle that when two conflicting statutes contain non-obstante clauses, the later statute will prevail. The learned counsel also contended that since POCSO Act is the later of the two statutes, jurisdiction of this Court under Section 439 of Cr. P.C. can be invoked.

7. Sri. K.A Noushad, the learned Public Prosecutor, was also heard. The learned Public Prosecutor fairly submitted that the matter requires clarification to avoid confusion and recurrence in future of

similar objections by the Registry.

8. While appreciating the legal issue raised, it is to be borne in mind that if the provisions of the POCSO Act prevail, then the petitioner is entitled to maintain an application for bail under section 439 of Cr.P.C and seek the remedy before the Sessions Court as well as the High Court. However, if the provisions of the SC/ST Act prevail, then an application for bail has to be filed before the Special Court and only an appeal will lie to the High Court under section 14A of the SC/ST Act. There is thus, apparently, a conflict in the application of the provisions of the two statutes in question relating to bail.

9. The SC/ST Act was enacted on 30.01.1990, while the POCSO Act was enacted on 19.06.2012. Section 20 of the SC/ST Act deals with the overriding effect of the said statute, while section 42A of the POCSO Act, introduced with effect from 03.02.2013, refers to the overriding effect of that statute. Further, section 31 of the POCSO Act provides for the application of Cr.P.C, including the provision for bail. Thus both statutes have provisions which give it an overriding effect. For the purpose of better comprehension, the three provisions mentioned above are extracted.

Section 31 of the POCSO Act is as below:

“Section 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 (2 of 1974) (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”.

Section 42A of the POCSO Act reads as follows:

“Section 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.”

Section 20 of the SC/ST Act reads as below;

“Section 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.”

10. It is evident from the above-extracted sections that both the POCSO Act and the SC/ST Act contain provisions which give that Statute an overriding effect over all other provisions of any other law

to the extent of the inconsistency. It is also evident that under the POCSO Act, the provision for bail as provided under the Cr.P.C is specifically made applicable.

11. The main inconsistency that can be noticed in respect of the POCSO Act and the SC/ST Act is in the nature of jurisdiction to be exercised under the statutes relating to bail. When the POCSO Act does not deny the right of an accused to seek bail or anticipatory bail by recourse to the provisions of the Cr.P.C, and in fact confers that right through section 31, the SC/ST Act specifically excludes the right of an accused to seek anticipatory bail and provides only an appellate remedy to the High Court even in matters of regular bail. Thus, the jurisdiction of the High Court under the SC/ST Act relating to bail is appellate, while under the POCSO Act, when read with Cr.P.C the jurisdiction is concurrent and original.

12. Though the learned counsel for the petitioner vehemently argued in detail about the different classes of persons dealt with by the aforementioned two statutes, and also on the nature of power derived under section 439 Cr.P.C, including the rights of the accused, I am of the view that a detailed analysis of the statutory provisions is not required in view of section 42A of the POCSO Act. A few

decisions of other High Courts of the country also shed light on the question, with which I wholly concur.

13. While considering the issue raised, it is pertinent to notice that despite the SC/ST Act being amended in 2015 and 2018, the overriding effect of POCSO Act, in the event of inconsistency, has not been nullified or interfered with by the Parliament. Thus, it is evident that the legislature intended to give supremacy to the POCSO Act, even over the SC/ST Act, in the event of any inconsistency.

14. When a conflict between two statutes arises, the first task is identifying the special statute. If both are special statutes, the later of the two statutes will prevail. The principles relating to resolution of conflicting statutes are clearly delineated in several decisions, including **Solidaire India Ltd. v. Fairgrowth Financial Services Ltd. and Others** [(2001) 3 SCC 71], **KSL and Industries Limited v. Arihant Threads Limited and Others** [(2008) 9 SCC 763] and **Sharat Babu Digumarti v. Government (NCT of Delhi)** [(2017) 2 SCC 18]. In the last of the above-referred judgment, the Supreme Court referred to the following observation extracted from the judgment in **Solidaire India Ltd.** (supra);

“ Where there are two special statutes which contain non obstante clauses, the later statute must prevail. This is

because at the time of enactment of the later statute, the legislature was aware of the earlier legislation and its non obstante clause. If the legislature still confers the later enactment with a non obstante clause it means that the legislature wanted that enactment to prevail. If the legislature does not want the later enactment to prevail then it could and would provide in the later enactment that the provisions of the earlier enactment continue to apply.”

15. With the aforesaid principle in mind, when we peruse the provisions of section 42A of POCSO Act, it is evident that the said statute clearly indicates that the provisions of the POCSO Act will prevail over all other laws in the event of any inconsistency. Therefore the statutory provision itself is clear in respect to the law that will prevail whenever there is an inconsistency.

16. In this context, the decision of the Allahabad High Court in **Rinku v. State of U.P.** (MANU/UP/2193/2019), the decision of the Bombay High Court in **Suraj S. Paithankar V. State of Maharashtra** MANU/MH/2441/2020 and that of the High Court of Madras **In Re: The Registrar (Judicial) High Court** (MANU/TN/1941/2017) are all relevant. In all these three decisions, it was held that the provisions of the POCSO Act will prevail over the SC/ST Act. I am in agreement with the conclusions in the above judgments.

17. Thus, I hold that whenever an offence under the POCSO

Act is alleged, along with the provisions of the SC/ST Act, the accused is entitled to take recourse to the procedure contemplated under the POCSO Act for bail. Since by virtue of section 31 of the POCSO Act, the provisions of Cr.P.C are made applicable, petitioner is perfectly justified in approaching this Court under section 439 of the Code of Criminal Procedure, 1973.

18. Accordingly, the bail granted to the petitioner on 02.09.2022 is made absolute.

The bail application is allowed as above.

**BECHU KURIAN THOMAS
JUDGE**

vps