

## IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL MISC.APPLICATION NO. 11014 of 2020

VIKRAMBHAI AMRABHAI MALIVAD

Versus

STATE OF GUJARAT

Appearance:

MR. RAHIL P JAIN(7305) for the Applicant(s) No. 1

MR MITESH AMIN, PUBLIC PROSECUTOR WITH MS SHRUTI PATHAK,  
APP for the Respondent(s) No. 1CORAM: **HONOURABLE MR. JUSTICE A.S. SUPEHIA**

Date : 05/10/2020

**CAV ORDER**

(1) This Court is confronted with the issue of maintainability of the captioned application in the present form i.e. under section 439 of the Code of Criminal Procedure, 1973 (hereinafter referred to as “the Cr.P.C.”) instead of an appeal under section 14-A(2) of the Scheduled Castes and Schedules Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as “the Atrocity Act”). The State has raised the preliminary objection with regard to the maintainability, whereas it is the case of the applicant-accused that the application is precisely filed under the provision of section 439 of the Cr.P.C. as he is arrested in connection with the offences under The Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as “the POCSO Act”).

(2) Pursuant to the offences registered vide C.R No.I-11187006200762 of 2020 for the offences under section 376, 376(d), 201 and 506(2) of Indian Penal Code, 1860 (hereinafter referred to as “the IPC”), under sections 4 and 12 of the POCSO Act and sections 3(1)(r), 3(1)(w)(1), 3(2)(v) of the Atrocity Act, at Lunavada Police Station, Dist. Mahisagar, the applicant was arrested on 22.05.2020. After filing of the charge-sheet, he filed Criminal Misc. Application No.272 of 2020 in

the Court of Additional Sessions Judge & Special PocsO Judge & Special Atrocity Judge, Mahisagar at Lunwada. The same met with the fate of rejection vide order dated 09.07.2020. As a sequel, he has filed the captioned application under section 439 of the Cr.P.C.

- (3) Learned Public Prosecutor Mr.Amin, at the outset has raised an objection with regard to the maintainability of the present application. While referring to the provision of section 14-A(2) of the Atrocity Act, he has urged that the application may be rejected as non-maintainable since the applicant has to file an appeal under the said provision. In support of his submission, he has placed reliance on the judgement dated 28.03.2018 rendered by the Coordinate Bench of this Court in Criminal Misc. Application No.6219 of 2018 (Anilaben w/o Vineshbhai Asari d/o Jivabhai Kharadi vs State of Gujarat).
- (4) In response, the learned advocate Mr.Rahil P Jain appearing for the applicant, has placed reliance on the judgement dated 07.11.2019 of the Single Bench of the Hon'ble High Court of Judicature at Patna passed in Criminal Misc. No.52792 of 2019 in case of Guddu Kumar Yadav vs The State of Bihar, and has submitted that while dealing with the analogous issue, the Hon'ble Patna High Court has held that in case involving offences under both Acts, i.e. the POCSO Act and the Atrocity Act, the same would not be appealable under section 14-A(2) of the Atrocity Act and only the bail application under section 439 of the Cr.P.C. would alone be maintainable. It is submitted by him that the POCSO Act, being a Special Act enacted for the purpose of protection of children, would prevail over the Atrocity Act, hence the bail application under the provision of section 439 of the Cr.P.C. is precisely filed.

- (5) At this stage, learned Public Prosecutor Mr.Amin has drawn the attention of this Court to the date of introduction of section 14-A(2) of the Atrocity Act. He has submitted that section 14-A(2) was inserted vide Amendment Act, 2015, which is subsequent to the POCSO Act, 2012 , and hence the later Act would prevail. It is further asserted by him that the Hon'ble Patna High Court has not dealt with the aforesaid aspect and has ignored the date of subsequent amendment in section 14-A, by which the non-obstante clause was introduced with regard to filing of an appeal before the Hon'ble High Court against any order of rejection or granting of bail passed by the Special Court. Hence, it is urged that in light of the Amendment Act, 2015, in the Atrocity Act, the applicant has to file an appeal under section 14-A(2) of the Atrocity Act instead of section 439 of the Cr.P.C.
- (6) Since there is a conflict with regard to the provisions of the POCSO Act and the Atrocity Act, it would be apposite to incorporate them:

**“The Protection of Children from Sexual Offences Act, 2012**

**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 33 : Procedure and powers of Special Court**

(1) A Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts.

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(2) The Special Public Prosecutor, or as the case may be, the counsel appearing for the accused shall, while recording the examination-in-chief, cross-examination or re-examination of the child, communicate the questions to be put to the child to the Special Court which shall in turn put those questions to the child.

(3) The Special Court may, if it considers necessary, permit frequent breaks for the child during the trial.

(4) The Special Court shall create a child-friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in the court.

(5) The Special Court shall ensure that the child is not called repeatedly to testify in the court.

(6) The Special Court shall not permit aggressive questioning or character assassination of the child and ensure that dignity of the child is maintained at all times during the trial.

(7) The Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial:

Provided that for reasons to be recorded in writing, the Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child.

*Explanation.* For the purposes of this sub-section, the identity of the child shall include the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed.

(8) In appropriate cases, the Special Court may, in addition to the punishment, direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child.

(7) Subject to the provisions of this Act, a Special Court shall, for the purpose of the trial of any offence under this Act, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session, and as far as may be, in accordance with the procedure specified in the Code of Criminal Procedure, 1973 (2 of 1974) for trial before a Court of Session.

**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.

**The Scheduled Castes and Schedules Tribes(Prevention of Atrocities)Act, 1989.**

**SECTION 14 : Special Court and Exclusive Special Court (1)**  
For the purpose of providing for speedy trial, the State Government shall, with the concurrence of the Chief Justice of the High Court, by notification in the Official Gazette, establish an Exclusive Special Court for one or more Districts:

Provided that in Districts where less number of cases under this Act is recorded, the State Government shall, with the concurrence of the Chief Justice of the High Court, by notification in the Official Gazette, specify for such Districts, the Court of Session to be a Special Court to try the offences under this Act:

Provided further that the Courts so established or specified shall have power to directly take cognizance of offences under this Act.

(2) It shall be the duty of the State Government to establish adequate number of Courts to ensure that cases under this Act are disposed of within a period of two months, as far as possible.

(3) In every trial in the Special Court or the Exclusive Special Court, the proceedings shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the Special Court or the Exclusive Special Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded in writing:

Provided that when the trial relates to an offence under this Act, the trial shall, as far as possible, be completed within a period of two months from the date of filing of the charge sheet.

**SECTION 14A : 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.

(4) 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.”

- (8) A bare perusal of the aforementioned provisions of both the Acts reveals the establishment of special courts for conducting the trials for the respective offences. The non-obstante clauses are manifested in both the Acts. There cannot be any scintilla of doubt that both the Acts are Special Acts enacted through the wisdom of the Legislature for the benefit of the respective classes. Section 14-A of the Atrocity Act was introduced subsequently vide amendment Act, 2015, i.e after the promulgation of the POCSO Act, 2012. Thus, the issue which needs deliberation is whether the subsequent amendment in the Atrocity Act will have the overriding effect to the former POCSO Act by virtue of

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“principle of later act will prevail”. The issue has been laid to quietus by the decisions of the Apex Court.

- (9) In the case of Sarwan Singh Vs Kasturilal, AIR 1977 SC 265, the Supreme Court has observed thus:

“**20** Speaking generally, the object and purpose of a legislation assume greater relevance if the language of the law is obscure and ambiguous. But, it must be stated that we have referred to the object of the provisions newly introduced into the Delhi Rent Act in 1975 not for seeking light from it for resolving in ambiguity, for there is none, but for a different purpose altogether. 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. A piquant situation, like the one before us, arose in Shri Ram Narain V/s. Simla Banking & Industrial Co. Ltd., 1956 SCR 603 the competing statutes being the Banking Companies Act, 1949 as amended by Act 52 of 1953, and the Displaced Persons (Debts Adjustment) Act, 1951. Section 45A of the Banking Companies Act, which was introduced by the amending Act of 1953, and Section 3 of the Displaced Persons Act 1951 contained such a non obstante clause, providing that certain provisions would have effect "notwithstanding anything inconsistent therewith contained in any other law for the time being in force... .." This Court resolved the conflict by considering the object and purpose of the two laws and giving precedence to the Banking Companies Act by observing: "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." As indicated by us, the special and specific purpose which motivated the enactment of Section 14A and Chapter IIIA of the Delhi Rent Act would be wholly frustrated if the provisions of the Slum Clearance Act requiring permission of the competent authority were to prevail over them. Therefore the newly introduced provisions of the Delhi Rent Act must hold the field and be given full effect despite anything to the contrary contained in the Slum Clearance Act.

21 For resolving such inter se conflicts, one other test may also be applied though the persuasive force of such a test is but one of the factors which combine to give a, fair meaning to the language of the law. That test is that the later enactment must prevail over the earlier one. Section 14A and Chapter IIIA having been enacted with effect from 1.12.1975 are later enactments in reference to Section 19 of the Slum Clearance Act which, in its present form, was placed on the statute book with effect from 28.02.1965 and in reference to Section 39 of the same Act, which came into force in 1956 when the Act itself was passed. The legislature gave overriding effect to Section 14A and Chapter IIIA with the knowledge that Sections 19 and 39 of the Slum Clearance Act contained non obstante clauses of equal efficacy. Therefore the later enactment must prevail over the former. The same test was mentioned with approval by this Court in Shri Ram Narain's case at page 615.”

- (10) Yet in another decision of the Supreme Court in the case of Bank of India vs Ketan Parekh, 2008(8)SCC 148, it is held thus:



“8 In the present case, both the two Acts i.e. the Act of 1992 and the Act of 1993 start with the non- obstante clause. Section 34 of the Act of 1993 starts with non-obstante clause, likewise Sec. 9A of the Act of 1992. But incidentally, in this case Sec. 9-A came subsequently, i.e. it came on 25.1.1994. Therefore, it is a subsequent legislation which will have the over-riding effect over the Act of 1993. But cases might arise where both the enactments have the non-obstante clause then in that case, the proper perspective would be that one has to see the subject and the dominant purpose for which the special enactment was made and in case the dominant purpose is covered by that contingencies, then notwithstanding that the Act might have come at a later point of time still the intention can be ascertained by looking to the objects and reasons. However, so far as the present case is concerned, it is more than clear that Sec. 9-A of the Act of 1992 was amended on 25.1.1994 whereas the Act of 1993 came in 1993. Therefore, the Act of 1992 as amended to include Sec. 9A in 1994 being subsequent legislation will prevail and not the provisions of the Act of 1993.”

- (11) The aforementioned observations of the Supreme Court facilitate two distinct features in case two or more laws having non-obstante clause operate in the same field, i.e. (a) in such conflict in the provisions of law cases have to be decided in reference to the object and purpose of the laws under consideration; and (b) the other test would be that the later enactment must prevail over the earlier one. Applying the said features the Court has to examine the conflict in both the provisions of the Acts. Section 31 of the POCSO Act injects powers in the Special Court (Court of Sessions) to grant bail under the shelter of the provisions of the Code of Criminal Procedure, 1973. Section 42A further strengthens the POCSO Act by providing the overriding effect on any other laws for the time being in force, if the same are

inconsistent with the provisions of the Act. In contrast section 14(A)2 of the Atrocity Act stipulates of filing an appeal before the High Court against the order of Special Court granting or refusing bail by providing a non-obstante clause excluding the provisions of Cr.P.C. The POCSO Act was promulgated in 2012 after the Atrocity Act was enacted, but the provisions of section 14-A of the Atrocity Act was introduced subsequently in the year 2015. However, the primary feature, as discussed hereinabove which needs to be applied in such clash, would be the deliberation on the object and dominant purpose of the laws for which they are enacted. As the caption/title of the POCSO Act suggests, the same was promulgated by the Government for the protection, welfare and safeguarding the interests of children. It is an all-inclusive law prescribing detail and in-depth judicial mechanism safeguarding the interest of child at every stage of trial. The protection of the interest of child is the supreme and penultimate objective of the Act. Similarly, the Government enacted the Atrocity Act in 1989 to prevent atrocity and violence on the members of the Scheduled Castes and Scheduled Tribes meted out to them by the perpetrators other than the Scheduled Castes and Scheduled Tribes. Thus, both the statutes being special and penal in nature are enacted to achieve the welfare and protection of the respective classes. The Acts also envisage of creating special courts and prescribe the procedure for conducting the trial proceedings. In the present case the victim is a child below 18 years, who belongs to schedule caste. The contentious issue which requires deliberation is whether the social status of the child will eclipse his or her wellbeing or safety. The answer is apparent. The caste of a child cannot override or prejudice the security and wellbeing of a child. Thus, a bare glance on the laudable objects of the POCSO Act will illuminate its supremacy on the Atrocity Act, though both the Acts can be termed as Special Acts. Hence, in case both the Special Acts are

armed with non-obstante clauses, but the one which has the dominant feature of having supremacy in object and purpose of the laws for which it was enacted, the same will prevail over the other Act irrespective of the date of its promulgation. In such circumstances, the principle of “later Act shall prevail” will cease to apply.

- (12) In the present application, the applicant accused had approached the Court of Additional Sessions Judge & Special POCSO Judge & Special Atrocity Judge by filing Criminal Misc. Application No.272 of 2020 under section 439 of the Cr.P.C, which resulted into rejection. The applicant, thereafter has filed the captioned application seeking bail by invoking the provisions of section 439 of the Cr.P.C. The powers of granting bail by the High Court under section 439 of the Cr.P.C. will not get diluted even after the special court has exercised such powers. Once it is established that the POCSO Act will have overriding effect on the Atrocity Act, the provisions of section 31 of the POCSO Act will come into play which speaks of applicability of the provisions of Cr.P.C. The same declares that the Special Court shall be deemed to be a Sessions Court, whereas such deeming fiction is conspicuously absent in section 14 of the Atrocity Act. Section 33 of the POCSO Act mandates the procedure for safeguarding the interest of the child during the trial proceedings. Thus, the 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 Atrocity 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.

- (13) Before parting with the observations, I would like to deal with the case law cited by the respective advocates appearing for the parties. The

judgement of the Coordinate Bench of this Court in case of *Anilaben (supra)* will not apply in light of the given facts, since the issue before the Coordinate Bench only pertained to applicability of section 14-A of the Atrocity Act vis-a-vis section 439 of the Cr.P.C. The Coordinate Bench has held that section 14-A of the Amendment Act, 2015 will have overriding effect on the provision of section 378 of the Cr.P.C. The Coordinate Bench was not *seisin* of any other Special Act having non-obstante clause. With regard to the judgement of the Patna High Court, it appears that while considering the provision of section 14-A of the Atrocity Act, the Court was invited the attention to the date of Amendment Act which was promulgated subsequent in 2015 after the POCSO Act. However, I am in complete agreement with the final opinion expressed by the Patna High Court with regard to the maintainability of an application for bail in terms of section 439 of the Cr.P.C. in a case involving the POCSO Act and the Atrocity Act.

- (14) Registry is directed to register the bail application under the provisions of section 439 of the Cr.P.C. in case the same is filed pertaining to the offences registered under both -- the POCSO Act and the Atrocity Act.

Bhavesh-[pps]

Sd/-  
(A. S. SUPEHIA, J)

**FURTHER ORDER**

Leave to amend to add the complainant as party respondent no.2. The amendment to be carried out forthwith.

Rule returnable on 12.10.2020. Learned APP waives service of notice of rule for and on behalf of the respondent-State. The complainant be served through concerned police station, over and above through Fax message, email and/or any other suitable electronic mode.

NEHA /// ABHISHEK

Sd/-  
(A. S. SUPEHIA, J)