

IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

Reserved on: 05.07.2022

Pronounced on: 15.07.2022

CRMC No.474/2018

STATE OF J&K THROUGH P/S HAJIN BANDIPORA ...Petitioner(s)

Through: Mr. Usman Gani, GA.

V/s

HILAL AHMAD PARRAY ...Respondent(s)

Through: Mr. Wajid Haseeb, Advocate.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

(JUDGMENT)

1) The petitioner-State has challenged order dated 08.08.2018 passed by Chief Judicial Magistrate, Bandipora, whereby the learned Magistrate has admitted the respondent to bail in FIR No.59/2017 for offences under Section 13, 18 and 19 of ULA(P) Act registered with Police Station, Hajin.

1) The only ground that has been urged by the petitioner while impugning the order of grant of bail to the respondent is that the learned Chief Judicial Magistrate did not have jurisdiction to pass the impugned order because, according to the petitioner, it is only a Special Court designated under National Investigation Agency Act, 2008 (hereinafter referred to as the NIA Act), which has jurisdiction to grant or refuse bail in a Scheduled offence.

2) The petition has been resisted by the respondent/accused. It has been contended by the respondent/accused that at the relevant time no Special Courts were designated in terms of the provisions of NIA Act and that offences under ULA(P) Act were triable by ordinary Sessions Courts and, as such, the Chief Judicial Magistrate was having jurisdiction to entertain and decide the bail application even in cases relating to offences under ULA(P) Act.

3) I have heard learned counsel for the parties and perused the material on record.

4) The question of law that has fallen for consideration in this case is whether a Judicial Magistrate has jurisdiction to entertain and decide a bail application in respect of offences under the provisions of ULA(P) Act when no Special Courts have been designated in terms of Section 22 of the NIA Act. In order to find an answer to this question, we need to take notice of certain provisions contained in the NIA Act.

5) Section 22 of the NIA Act, which vests power with State Government to designate Courts of Session as Special Courts, reads as under:

22. Power of State Government to designate Court of Session as Special Courts.-- (1) *The State Government may designate one or more Courts of Session as] Special Courts for the trial of offences under any or all the enactments specified in the Schedule.*

(2) *The provisions of this Chapter shall apply to the Special Courts designated by the State Government under sub-section (1) and shall have*

effect subject to the following modifications, namely--

- (i) references to "Central Government" in sections 11 and 15 shall be construed as references to State Government;*
- (ii) reference to "Agency" in sub-section (1) of section 13 shall be construed as a reference to the "investigation agency of the State Government";*
- (iii) reference to "Attorney-General for India" in sub-section (3) of section 13 shall be construed as reference to "Advocate-General of the State".*

(3) The jurisdiction conferred by this Act on a Special Court shall, until a Special Court is³[designated] by the State Government under sub-section (1) in the case of any offence punishable under this Act, notwithstanding anything contained in the Code, be exercised by the Court of Session of the division in which such offence has been committed and it shall have all the powers and follow the procedure provided under this Chapter.

(4) On and from the date when the Special Court is³[designated] by the State Government the trial of any offence investigated by the State Government under the provisions of this Act, which would have been required to be held before the Special Court, shall stand transferred to that Court on the date on which it is designated.

6) From a perusal of the aforesaid provision, it is clear that the State Government has power to designate one or more Courts of Session as Special Courts for trial of offences under any or all the enactments specified in the Schedule to NIA Act. Admittedly, as on date of passing of the impugned order, the Government of Jammu and Kashmir had not designated any Special Court in the erstwhile State of Jammu and Kashmir. However, sub-section (3) of Section 22, as quoted above, takes care of a situation where Special Court has not been designated by the State Government. It provides that jurisdiction conferred by NIA

Act shall, until a Special Court is constituted by the State Government, be exercised by the Court of Session of the division in which such offence has been committed. It also provides that such a Court shall have all the powers and follow the procedure provided under Chapter IV of the NIA Act. Thus, for all practical purposes, in the absence of a designated Special Court, the Sessions Court of the area where the offence is committed acquires the status of a Special Court as defined in Section 2(h) of the NIA Act.

7) Having come to the conclusion that in the absence of a designated Special Court at the relevant time, the Sessions Court of the area where the offence was committed, was vested with the powers of a Special Court, let us now proceed to analyze as to what powers and procedure has to be followed by a Special Court in terms of Chapter IV of the NIA Act. In this regard, it would be profitable to notice the provisions contained in Sections 13 and 16 of the NIA Act, which read as under:

13. Jurisdiction of Special Courts. (1) *Notwithstanding anything contained in the Code, every Scheduled Offence investigated by the Agency shall be tried only by the Special Court within whose local jurisdiction it was committed.*

(2) *If, having regard to the exigencies of the situation prevailing in a State if,—*

- (a) *it is not possible to have a fair, impartial or speedy trial; or*
- (b) *it is not feasible to have the trial without occasioning the breach of peace or grave risk to the safety of the accused, the witnesses, the Public Prosecutor or a judge of the Special Court or any of them; or*

(c) *it is not otherwise in the interests of justice,*

the Supreme Court may transfer any case pending before a Special Court to any other Special Court within that State or in any other State and the High Court may transfer any case pending before a Special Court situated in that State to any other Special Court within the State.

(3) The Supreme Court or the High Court, as the case may be, may act under this section either on the application of the Central Government or a party interested and any such application shall be made by motion, which shall, except when the applicant is the Attorney-General for India, be supported by an affidavit or affirmation.

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16. Procedure and powers of Special Courts.— (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 that constitute such offence or upon a police report of such facts.*

(2) *Where an offence triable by a Special Court is punishable with imprisonment for a term not exceeding three years or with fine or with both, the Special Court may, notwithstanding anything contained in sub-section (1) of Section 260 or Section 262 of the Code, try the offence in a summary way in accordance with the procedure prescribed in the Code and the provisions of Sections 263 to 265 of the Code shall, so far as may be, apply to such trial:*

Provided that when, in the course of a summary trial under this sub-section, it appears to the Special Court that the nature of the case is such that it is not desirable to try it in a summary way, the Special Court shall recall any witnesses who may have been examined and proceed to re-hear the case in the manner provided by the provisions of the Code for the trial of such offence and the said provisions shall apply to, and in relation to, a Special Court as they apply to and in relation to a Magistrate:

Provided further that in the case of any conviction in a summary trial under this section, it shall be lawful for a Special Court to pass a sentence of imprisonment for a term not exceeding one year and with fine which may extend to five lakh rupees.

(3) *Subject to the other provisions of this Act, a Special Court shall, for the purpose of trial of any offence, have all the powers of a Court of Session and shall try such offence*

as if it were a Court of Session so far as may be in accordance with the procedure prescribed in the Code for the trial before a Court of Session.

(4) Subject to the other provisions of this Act, every case transferred to a Special Court under sub-section (2) of section 13 shall be dealt with as if such case had been transferred under section 406 of the Code to such Special Court.

(5) Notwithstanding anything contained in the Code, but subject to the provisions of section 299 of the Code, a Special Court may, if it thinks fit and for reasons to be recorded by it, proceed with the trial in the absence of the accused or his pleader and record the evidence of any witness, subject to the right of the accused to recall the witness for cross-examination..

8) From a perusal of the Section 13, quoted above, it becomes clear that a Scheduled offence investigated by National Investigation Agency is to be tried only by a Special Court within whose local jurisdiction it was committed and Section 16 provides that a Special Court is empowered to take cognizance of an offence without the accused being committed to it for trial.

9) Clause (ii) of sub-section (2) of Section 22 of the NIA Act, as quoted hereinbefore, clearly provides that reference to “Agency” in sub-section (1) of Section 13 shall be construed as a reference to the “Investigating Agency of the State Government”, which means that every Scheduled offence investigated even by investigating agency of the State Government is to be tried only by a Special Court within whose jurisdiction it was committed. As already stated, in the absence of designation of a Special Court, the powers of a Special Court are to be exercised by the Sessions Court having jurisdiction. Thus, a Sessions Court exercising powers of a Special Court is vested with the

jurisdiction and has to follow the procedure as provided under Chapter IV of the NIA Act.

10) We also need to take note of the relevant provisions of the ULA(P) Act so as to understand the scheme of the two legislations i.e. NIA Act and ULA(P) Act. Section 2(1)(d) of the ULA(P) Act defines the “Court” to mean a criminal court having jurisdiction, under the Code, to try offences under the said Act and includes a Special Court constituted under Section 11 or under Section 21 of the NIA Act. So, the expression “Court” appearing in any provision of the ULA(P) Act, after the coming into force of NIA Act, means the Special Court constituted under the NIA Act.

11) It would also be apt to notice the provisions contained in Section 43-D of the UA(P) Act, which reads as under:

43-D. Modified application of certain provisions of the Code.*(1) Notwithstanding anything contained in the Code or any other law, every offence punishable under this Act shall be deemed to be a cognizable offence within the meaning of clause (c) of section 2 of the Code, and “cognizable case” as defined in that clause shall be construed accordingly*

(2) Section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that in sub-section (2),-

(a) the references to “fifteen days”, “ninety days” and “sixty days”, wherever they occur, shall be construed as references to “thirty days”, “ninety days” and “ninety days” respectively; and

(b) after the proviso, the following provisos shall be inserted, namely:—

Provided further that if it is not possible to complete the investigation within the said period of ninety days, the Court may if it is satisfied with the report of the Public Prosecutor indicating the

progress of the investigation and the specific reasons for the detention of the accused beyond the said period of ninety days, extend the said period up to one hundred and eighty days:

Provided also that if the police officer making the investigation under this Act, requests, for the purposes of investigation, for police custody from judicial custody of any person in judicial custody, he shall file an affidavit stating the reasons for doing so and shall also explain the delay, if any, for requesting such police custody.

(3) Section 268 of the Code shall apply in relation to a case involving an offence punishable under this Act subject to the modification that—

(a) the reference in sub-section (1) thereof—

(i) to “the State Government” shall be construed as a reference to “the Central Government or the State Government.”;

(ii) to “order of the State Government” shall be construed as a reference to “order of the Central Government or the State Government, as the case may be”; and

(b) the reference in sub-section (2) thereof, to “the State Government” shall be construed as a reference to “the Central Government or the State Government, as the case may be”.

(4) Nothing in section 438 of the Code shall apply in relation to any case involving the arrest of any person accused of having committed an offence punishable under this Act.

(5) Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release:

Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true.

(6) The restrictions on granting of bail specified in sub-section (5) is in addition to the restrictions under the Code or any other law for the time being in force on granting of bail.

(7) Notwithstanding anything contained in sub-sections (5) and (6), no bail shall be granted to a person accused of an offence punishable under this Act, if he is not an Indian citizen and has entered the country unauthorisedly or illegally except in very exceptional circumstances and for reasons to be recorded in writing.

12) The aforesaid provision provides for modified application of certain provisions of the Code of Criminal Procedure and it makes clear that extension in period of completion of investigation can be granted only by a Special Court. It also provides that in cases where a person is accused of offence punishable under Chapters IV and VI of ULA(P) Act, he shall not be released on bail if the Court, on perusal of the Case Diary or the report made under Section 173 of the Code, is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true.

13) The expression "Court" used in Section 43-D of ULA(P) Act at various places, when read with the definition of "Court" as contained in Section 2(1)(d) of the said Act, means only a Special Court constituted under the NIA Act. Thus, it is only the Special Court which, in terms of the scheme of the provisions of the ULA(P) Act and the NIA Act, is empowered to entertain and consider the bail application relating to Scheduled offences. The fact that a Special Court has not only jurisdiction to try the scheduled offences but it has also jurisdiction to take cognizance of the offences, shows that the intention of the

legislature was to confer powers of grant/refusal of extension of remand and grant/refusal of bail upon Special Court only and not upon Courts of ordinary of Magistrates.

14) The Supreme Court in the case of **Bikramjit Singh vs. State of Punjab, (2020) 10 SCC 616**, has, while noticing various provisions contained in NIA Act and ULA(P) Act, observed that the scheme of the NIA Act is that offences under the enactments contained in the Schedule to the Act are to be tried exclusively by Special Courts set up under that said Act. The observations of the Supreme Court in the aforesaid case, which are relevant to the context, are reproduced as under:

"23.....hereafter, what is important to note is that notwithstanding anything contained in the Code, the jurisdiction conferred on a Special Court shall, until a Special Court is designated by the State Government, be exercised only by the Court of Sessions of the Division in which such offence has been committed vide sub-section (3) of Section 22; and by sub-section (4) of Section 22, on and from the date on which the Special Court is designated by the State Government, the trial of any offence investigated by the State Government under the provisions of the NIA Act shall stand transferred to that Court on and from the date on which it is designated.

24. Section 13(1) of the NIA Act, which again begins with a non-obstante clause which is notwithstanding anything contained in the Code, read with Section 22(2)(ii), states that every scheduled offence that is investigated by the investigation agency of the State Government is to be tried exclusively by the Special Court within whose local jurisdiction it was committed.

25. When these provisions are read along with Section 2(1)(d) and the provisos in 43-D(2) of the UAPA, the Scheme of the two Acts, which are to be read together, becomes crystal clear. Under the first proviso

in Section 43-D(2)(b), the 90 day period indicated by the first proviso to Section 167(2) of the Code can be extended up to a maximum period of 180 days if “the Court” is satisfied with the report of the public prosecutor indicating progress of investigation and specific reasons for detention of the accused beyond the period of 90 days. “The Court”, when read with the extended definition contained in Section 2(1)(d) of the UAPA, now speaks of the Special Court constituted under Section 22 of the NIA Act. What becomes clear, therefore, from a reading of these provisions is that for all offences under the UAPA, the Special Court alone has exclusive jurisdiction to try such offences. This becomes even clearer on a reading of Section 16 of the NIA Act which makes it clear that the Special Court may take cognizance of an offence without the accused being committed to it for trial upon receipt of a complaint of facts or upon a police report of such facts. What is equally clear from a reading of Section 16(2) of the NIA Act is that even though offences may be punishable with imprisonment for a term not exceeding 3 years, the Special Court alone is to try such offence – albeit in a summary way if it thinks it fit to do so. On a conspectus of the abovementioned provisions, Section 13 read with Section 22(2)(ii) of the NIA Act, in particular, the argument of the learned counsel appearing on behalf of the State of Punjab based on Section 10 of the said Act has no legs to stand on since the Special Court has exclusive jurisdiction over every Scheduled Offence investigated by the investigating agency of the State.

26. Before the NIA Act was enacted, offences under the UAPA were of two kinds – those with a maximum imprisonment of over 7 years, and those with a maximum imprisonment of 7 years and under. Under the Code as applicable to offences against other laws, offences having a maximum sentence of 7 years and under are triable by the Magistrate’s Courts, whereas offences having a maximum sentence of above 7 years are triable by Courts of Sessions. This Scheme has been completely done away with by the 2008 Act as all scheduled offences i.e. all offences under the UAPA, whether investigated by the National Investigation Agency or by the investigating agencies of the State Government, are to be tried exclusively by Special Courts set up under that Act. In the absence of any designated Court by notification issued by either the Central Government or the State Government, the fall back is upon the Court of Sessions alone. Thus,

under the aforesaid Scheme what becomes clear is that so far as all offences under the UAPA are concerned, the Magistrate's jurisdiction to extend time under the first proviso in Section 43-D(2)(b) is non-existent, "the Court" being either a Sessions Court, in the absence of a notification specifying a Special Court, or the Special Court itself. The impugned judgment in arriving at the contrary conclusion is incorrect as it has missed Section 22(2) read with Section 13 of the NIA Act. Also, the impugned judgement has missed Section 16(1) of the NIA Act which states that a Special Court may take cognizance of any offence without the accused being committed to it for trial inter alia upon a police report of such facts."

15) From the foregoing analysis of the law on the subject, it is clear that it is only the Special Court or in the absence of a Special Court, a Sessions Court exercising powers of a Special Court, which can entertain and grant/refuse bail to a person accused of an offence under the provisions of ULA(P) Act, which finds mention in the Schedule to NIA Act. Bail in a particular offence can be granted/refused only by a court which has jurisdiction to take cognizance or try such offence. A Judicial Magistrate has neither the jurisdiction to take cognizance of offences under ULA(P) Act nor he is vested with jurisdiction to try such offences. It is only a Special Court or in its absence a Sessions Court exercising powers of Special Court which is vested with such power. Thus, a Judicial Magistrate cannot grant or refuse bail in an offence under ULA(P) Act.

16) In the instant case, the learned Chief Judicial Magistrate has, without noticing the aforesaid provisions of the two legislations, relied upon the provisions contained in sections 6 and 7 of the NIA Act and observed that because National Investigation Agency has not taken up

the investigation of the case and the same has been conducted by the State Police, as such, he has jurisdiction to entertain the bail application. The approach adopted by the learned Magistrate is palpably wrong and contrary to law, inasmuch as he has ignored the provisions contained in Section 22(2)(ii) of the NIA Act, which clearly provides that reference to “Agency” in sub-section (1) of Section 13 shall be construed as a reference to the “investigation agency of the State Government”.

17) There is yet another aspect of the matter which has been totally ignored by the learned Magistrate while granting bail to the respondent. Admittedly, the respondent has been booked not only for offences under Section 13 of the ULA(P) Act but he has also been booked for offences under Section 18 and 19, which fall under Chapter IV of the said Act. As already noted, if the Court finds that there are reasonable grounds for believing that accusation against a person, who has been booked for offences punishable under Chapter IV and VI of the said Act, is prima facie true, he cannot be released on bail. The learned Magistrate has not discussed at all as to what are the allegations against the respondent and what is the material in support thereof. He has not discussed as to on what basis he has come to the conclusion that the allegations against the respondent do not appear to be true. Without undertaking such an exercise, the grant of bail by the learned Magistrate to the respondent becomes unsustainable in the eyes of law.

18) For the foregoing reasons, the petition is allowed and the impugned order passed by the learned Chief Judicial Magistrate, Bandipora, is set aside. The respondent is directed to surrender before the Special Court where he is stated to be facing trial and apply for fresh bail.

(SANJAY DHAR)
JUDGE

Srinagar
15.07.2022
"Bhat Altaf, PS"

Whether the order is speaking: Yes/No
Whether the order is reportable: Yes/No

