



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
(Criminal Jurisdiction)

Reserved on	11.09.2020
Delivered on	30.09.2020

PRESENT

THE HON'BLE MR.JUSTICE M. SATHYANARAYANAN
AND
THE HON'BLE MR.JUSTICE V.BHARATHIDASAN

Criminal Reference (MD). No.2 of 2020

The Additional Registrar General,
Madurai Bench of Madras High Court,
Madurai.
(Reference Letter in D.No.2060/2020/A1,
dt.07.08.2020 from the District Judge,
Karur.)

: Petitioner

Prayer: Criminal Reference Case filed under Section 395 of the Code of Criminal Procedure, based on the letter of the District Judge, Karur, in D.No.2060/2020/A1, dated 07.08.2020, wherein, he has submitted that the jurisdiction as to the Anticipatory Bail Petition u/s 438 Cr.P.C., involving the offences under the Protection of Children from Sexual Offences Act can be entertained by the regular District and Sessions Court or triable only by the Special Court constituted under Protection of Children from Sexual Offences Act and has submitted for Reference u/s 395 of the Code of Criminal Procedure.

For Petitioner

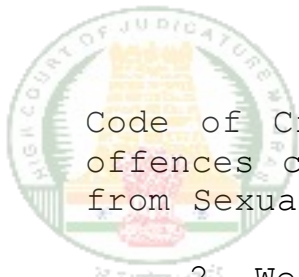
: Mr.N.Mohideen Basha

: Mr.K.K.Ramakrishnan,
Additional Public Prosecutor
to Assist the Court

ORDER

V.BHARATHIDASAN, J.

This matter is placed before this Court to decide a reference sought by the learned District Judge, Karur, under Section 395 of the Code of Criminal Procedure, 1973, with regard to the jurisdiction of the District and Sessions Court in entertaining anticipatory bail applications filed under Section 438 of the



Code of Criminal Procedure, 1973 [In short, '**Cr.P.C.**'], for the offences committed under the provisions of Protection of Children from Sexual Offences Act, 2012 [In short, '**POCSO Act**'].

2. We have had the assistance of Mr.K.K.Ramakrishnan, learned Additional Public Prosecutor and Mr.N.Mohideen Basha, learned counsel appearing for the High Court, in deciding the issue.

3. A petition under Section 438 of Cr.P.C., seeking anticipatory bail for the offences punishable under Sections 5(i) and 6 of the POCSO Act and Sections 9 and 10 of the Child Marriage Act, 2006, has been filed before the Special Court, designated under the POCSO Act at Karur, and the same has been returned by the Special Court stating that, it has no jurisdiction to entertain the application for anticipatory bail. Thereafter, the application has been filed before the Sessions Court, that application has been resisted by the learned Public Prosecutor stating that, the anticipatory bail application is not maintainable before the Sessions Court, only the Special Court has exclusive jurisdiction to entertain the same. In the above circumstances, the learned Sessions Judge referred the anticipatory bail application, to this Court under Section 395 of Cr.P.C., to decide whether the District and Sessions Court has jurisdiction to entertain the anticipatory bail applications for the offences committed under the POCSO Act.

4. In G.O.Ms.No.1087, Home (Courts-II) Department, dated 04.12.2013, the State Government, in consultation with the High Court, designated the Fast Track Mahila Courts as Special Courts under the POCSO Act and Additional Sessions Judges presiding over the Fast Track Mahila Courts are functioning as Special Courts under the POCSO Act.

5. Section 438 of Cr.P.C., deals with grant of bail to person apprehending arrest and the High Court and Sessions Courts are empowered to grant such pre-arrest bail. Now, a doubt has arisen that, after the constitution of Special Courts, whether the Special Court alone has jurisdiction to deal with the application filed under Section 438 of Cr.P.C., and the Sessions Courts are excluded from dealing with such petitions.

6. Before going into the controversy, it is useful to refer to various provisions under the Code of Criminal Procedure as well as the POCSO Act.

7. Section 6 of Cr.P.C., deals with the classes of Criminal Courts, which reads as follows:



"6. Classes of Criminal Courts.- Besides the High Courts and the Courts constituted under any law, other than this Code, there shall be, in every State, the following classes of Criminal Courts, namely:-

- (i) Courts of Session;
(ii) Judicial Magistrates of the first class and, in any metropolitan area, Metropolitan Magistrate;
(iii) Judicial Magistrates of the second class; and
(iv) Executive Magistrates."

8. Section 9 of Cr.P.C., defines the 'Sessions Court', which reads as follows:

"9. Court of Session.- (i) The State Government shall establish a Court of Session for every sessions division.

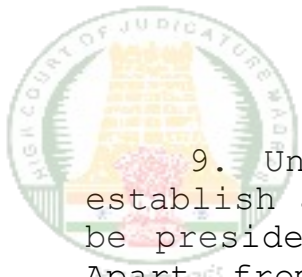
(2) Every Court of Session shall be presided over by a Judge, to be appointed by the High Court.

(3) The High Court may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in a Court of Session.

(4) The Sessions Judge of one sessions division may be appointed by the High Court to be also an Additional Sessions Judge of another division, and in such case he may sit for the disposal of cases at such place or places in the other division as the High Court may direct.

(5) Where the office of the Sessions Judge is vacant, the High Court may make arrangements for the disposal of any urgent application which is, or may be, made or pending before such Court of Session by an Additional or Assistant Sessions Judge, or, if there be no Additional or Assistant Sessions Judge, by a Chief Judicial Magistrate, in the sessions division; and every such Judge or Magistrate shall have jurisdiction to deal with any such application.

(6) The Court of Session shall ordinarily hold its sitting at such place or places as the High Court may, by notification, specify; but, if, in any particular case, the Court of Session is of opinion that it will tend to the general convenience of the parties and witnesses to hold its sittings at any other place in the sessions division, it may, with the consent of the prosecution and the accused, sit at that place for the disposal of the case or the examination of any witness or witnesses therein."



9. Under Section 9 of Cr.P.C., the State Government shall establish a Court of Session for every sessions division and shall be presided over by a Judge, to be appointed by the High Court. Apart from that, the High Court may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in the Court of Session. Thus, the Sessions Judge presides over the Sessions Court, the Additional Sessions Judge and the Assistant Sessions Judge are exercising the jurisdiction in the Court of Session.

10. A cursory reading of the above provisions would make it clear that, the Court of Session is the Court of original jurisdiction to take cognizance of any offence, when the case is committed to the Sessions Court, and the Presiding Sessions Judge takes cognizance of the offence, the Additional Sessions Judge or Assistant Sessions Judge cannot take cognizance of any offence, as they do not have the original jurisdiction and they can only try such cases, as the Sessions Judge of the division may, by a general or special order, make over to them, as provided under Section 194 of Cr.P.C., however, all of them are exercising the jurisdiction in the same sessions division.

11. Now, coming to the provisions under the POCSO Act, Section 2(1) of the Act defines the '**Special Court**', which means that, a Court designated as such under Section 28 of the Act.

12. Section 28 of the POCSO Act deals with the designation of Special Courts, which reads as follows:

"28. Designation of Special Courts.- (1) For the purposes of providing a speedy trial, the State Government shall in consultation with the Chief Justice of the High Court, by notification in the Official Gazette, designate for each district, a Court of Session to be a Special Court to try the offences under the Act:

Provided that if a Court of Session is notified as a children's Court under the Commissions for Protection of Child Rights Act, 2005 (4 of 2006), or a Special Court designated for similar purposes under any other law for the time being in force, then, such Court shall be deemed to be a Special Court under this section.

(2) 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 (2 of 1974), be charged at the same trial.



(3) The Special Court constituted under this Act, notwithstanding anything in the Information Technology Act, 2000 (21 of 2000) shall have jurisdiction to try offences under section 67-B of that Act in so far as it relates to publication or transmission of sexually explicit material depicting children in any Act, or conduct or manner or facilitates abuse of children online."

13. A cursory reading of Section 28(1) of the POCSO Act would go to show that, a Court of Session which already in existence in each district can be designated as a Special Court to try the offences under the POCSO Act. As stated earlier, an Additional Sessions Judge exercising jurisdiction in the Court of Session, could preside over the Special Court.

14. Section 33 of the POCSO Act deals with the procedure and powers of the Special Court, which reads as follows:

"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.

(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.

(9) 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."

15. Under Section 33(1) of the POCSO Act, 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. Under Section 33(9) of the POCSO Act, a Special Court shall 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, for trial before a Court of Session. In such circumstances, the Special Court has to be treated as Court of original jurisdiction and it has all the powers of Court of original criminal jurisdiction, as provided under the Code of Criminal Procedure, except those are specifically excluded under the relevant Act.

16. In this regard, the Hon'ble Supreme Court in **A.R.Antulay v. R.S.Nayak [AIR 1984 Supreme Court 718]**, while dealing with the powers of the Special Court, has held as follows:

27..... The net outcome of this position is that a new court of original jurisdiction was set up and whenever a question arose as to what are its powers in respect of specific questions brought before it as court of original criminal jurisdiction, it had to refer to the Code of Criminal Procedure undaunted by any designation claptrap. When taking cognizance, a Court of special Judge enjoyed the powers under Sec. 190. When trying cases, it is obligatory to follow the procedure for trial of warrant cases by a Magistrate though as and by way of status it was equated with a



Court of Session. The entire argument inviting us to specifically decide whether a court of a special Judge for a certain purpose is a Court of Magistrate or a Court of Session revolves round a mistaken belief that a special Judge has to be one or the other, and must fit in the slot of a Magistrate or a Court of Session. Such an approach would strangle the functioning of the court and must be eschewed. Shorn of all embellishment, the court of a special Judge is a court of original criminal jurisdiction. As a court of original criminal jurisdiction in order to make it functionally oriented some powers were conferred by the statute setting up the court. Except those specifically conferred and specifically denied, it has to function as a court of original criminal jurisdiction not being hide bound by the terminological status description of Magistrate or a Court of Session. Under the Code it will enjoy all powers which a court of original criminal jurisdiction enjoys save and except the ones specifically denied.

28. Sec 9 of the 1952 Act would equally be helpful in this behalf. Once court of a special Judge is a court of original criminal jurisdiction, it became necessary to provide whether it is subordinate to the High Court, whether appeal and revision against its judgments and orders would lie to the High Court and whether the High Court would have general superintendence over a Court of special Judge as it has over all criminal courts as enumerated in Sec. 6 of the Code of Criminal Procedure. The court of a special Judge, once created by an independent statute, has been brought as a court of original criminal jurisdiction under the High Court because Sec. 9 confers on the High Court all the powers conferred by Chapters XXXI and XXXIII of the Code of Criminal Procedure, 1898 on a High Court as if the court of special Judge were a court of Session trying cases without a jury within the local limits of the jurisdiction of the High Court. Therefore, there is no gainsaying the fact that a new criminal court with a name, designation and qualification of the officer eligible to preside over it with powers specified and the particular procedure which it must follow has been set up under the 1952 Act. The court has to be treated as a court of original criminal jurisdiction and shall have all the powers as any court of



original criminal jurisdiction has under the Code of Criminal Procedure, except those specifically excluded."

17. That Apart, Section 31 of the POCSO Act deals with the application of Code of Criminal Procedure, 1973, to proceedings before a Special Court, which is extracted below:

"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."

18. The above provision makes it very clear that the provisions of the Code of Criminal Procedure including the provisions as to bail and bonds shall apply to the proceedings before a Special Court and for the purpose 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 31 of the POCSO Act, expressly made the provisions as to bail and bonds applicable to the proceedings before the Special Court.

19. Chapter XXXIII of Cr.P.C., deals with the bail and bonds. The Chapter begins with Section 436 of Cr.P.C., and ends with Section 450 of Cr.P.C. As the entire Chapter XXXIII of Cr.P.C., which deals with bail and bonds, are applicable to the proceedings before the Special Court, there cannot be any doubt that Section 438 of Cr.P.C., which deals with anticipatory bail, is also applicable to a Special Court. However, Section 31 of the POCSO Act opens with, "Save as otherwise provided in this Act". A careful reading of POCSO Act would go to show that, there is no provision under the POCSO Act specifically excluding Section 438 of Cr.P.C., before the Special Court. Hence, Section 31 of the POCSO Act is clear and unambiguous that the provisions of Section 438 of Cr.P.C., are very much applicable to the Special Court.

20. In a similar issue arises under the Narcotic Drugs and Psychotropic Substances Act, 1985, relating to a *pari materia* provision of Section 31 of the POCSO Act, in that Act, a Full Bench of the Calcutta High Court in **Teru Majhi v. State of West Bengal [2014(4) CTC 402]**, after surveying various judgments on



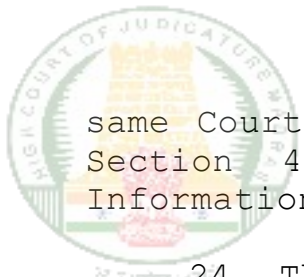
this aspect, has held that the Special Court is empowered to exercise a power under Section 438 of Cr.P.C. The relevant observation reads thus:

"100.....On consideration of the various provisions of the NDPS Act, 1985 it could be safely said that the NDPS Act, 1985 was a self-contained Code. It conferred special jurisdiction and powers to the Special Court constituted under the NDPS Act, 1985 with regard to trial of offences committed under such Act. The NDPS Act, 1985 required trial of offences under such Act punishable with imprisonment for three years and above to be tried by Special Court constituted under such Act. The provisions of the Code of Criminal Procedure, 1973 save and except those provisions which were expressly excluded were applicable to a proceeding before the NDPS Act, 1985. The powers of Section 438 of the Code of Criminal Procedure, 1973 to be unavailable to a Special Court constituted under the NDPS Act, 1985 was required to be taken away expressly by the NDPS Act, 1985 itself. Such was not the position. Section 36-C of the NDPS Act, 1985 empowered the Special Court constituted under the NDPS Act, 1985 to exercise powers under Section 438 of the Code of Criminal Procedure, 1973. These provisions of the Code of Criminal Procedure, 1973 were not taken away expressly or otherwise by the NDPS Act, 1985."

21. In view of the foregoing discussions, it is clear that the Special Court designated under the POCSO Act is empowered to deal with the application filed under Section 438 of Cr.P.C., and the Sessions Court is excluded from entertaining the application filed under Section 438 of Cr.P.C.

22. The next issue raised by the Referring Judge is as to whether the Special Court is empowered to deal with the anticipatory bail application relating to the offences under the POCSO Act, even before registering a First Information Report, or lodging a complaint before the Court concerned, on an apprehension of arrest.

23. As already held, the Special Court is exclusively empowered to deal with the offences under the POCSO Act and thereby, the normal Criminal Courts constituted under Section 6 of Cr.P.C., are excluded from dealing with the offences under the POCSO Act. When the Special Court exercising the exclusive jurisdiction to deal with the offences under the POCSO Act, the



same Court also has the power to deal with the application under Section 438 of Cr.P.C., even before registering the First Information Report.

24. The object of the POCSO Act is to provide protection to the children from offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and well being of the child at every stage of the judicial process, incorporating child-friendly procedures for reporting, recording of evidence, investigation and trial of offences, by constituting a Special Court for speedy trial of the offences against children. The Act also empowers the Special Court to remand the accused at pre-cognizance stage, grant bail, etc. In such circumstances, the regular Sessions Court cannot deal with the application under Section 438 of Cr.P.C., in respect of any offence under the POCSO Act at any point of time.

25. In a similar circumstance, when dealing with grant of pardon under Section 306 of Cr.P.C., by the Special Courts, the Hon'ble Supreme Court in **Harshad S.Mehta v. State of Maharashtra [2001(8) Supreme Court Cases 257]**, has held that even at the pre-cognizance stage, only the Special Court has the power, the relevant portion of which, reads as follows:

"46. It is not possible to accept that the legislature could ever intend to create such an anomalous position where a Magistrate will have power to grant pardon at pre-cognizance stage but after cognizance the Special Court will not have that power. It makes no sense. It is not possible to attribute such an absurdity to the legislature. It does not flow from the provisions of the Act. For this purpose we are assuming that at pre-cognizance stage, all aspects are required to be dealt with by normal courts although as dealt with later, in our view, at that stage too power vests in the Special Court."

26. In view of the above, we are of the considered view that even before registering an FIR, the Special Court alone has the power to deal with the application under Section 438 of Cr.P.C., in relation to the offence under the POCSO Act.

27. Thus, we answer the reference as follows:

"(i) The Special Court designated under Section 28 of the POCSO Act alone is empowered to exercise power under Section 438 of Cr.P.C., in view of Section 31 of the POCSO Act, and the Sessions Court cannot entertain any application seeking pre-arrest bail in respect of



offences under the POCSO Act.

(ii) Even in cases where pre-arrest bail is sought before registering the First Information Report, only the Special Court designated under the POCSO Act can entertain the application and the regular Sessions Court cannot exercise its power under Section 438 of Cr.P.C."

28. In view of the above findings, the anticipatory bail application is remitted back to the concerned Special Court designated under the POCSO Act, to deal with the application on merits.

29. Before parting with this reference, we record our appreciation for valuable assistance rendered by Mr.K.K.Ramakrishnan, learned Additional Public Prosecutor, who argued the case with erudition and also record our appreciation to Mr.N.Mohideen Basha, learned counsel appearing for the High Court.

Sd/-

Assistant Registrar(CS-III)

// True Copy //

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Sub Assistant Registrar(CS)

Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

SML

To

1.The Additional Registrar General,
Madurai Bench of Madras High Court,
Madurai.

2.The District Judge,
Karur.

3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



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3. The Section Officer,
"F" Section,
Madras High Court, High Court Buildings,
Chennai 600 104.
4. The Section Officer, "F" Section,
Madurai Bench of Madras High Court, Madurai.

Order made in
Criminal Reference (MD)No.2 of 2020
Delivered on: 30.09.2020

AVS (CO)
TR(07.10.2020) 12P 8C