

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL MISCELLANEOUS JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Bibhas Ranjan De

C.R.M. (DB) 1249 OF 2022

Abu Samad

VS.

National Investigating Agency

For the petitioner : Mr. Partha Ghosh
Mr. Sagar Saha
Mr. Amal Dutta

For the NIA : Mr. Bhaskar Prasad Banerjee
Mr. Debanish Tandon

Heard on : May 12, 2022

Judgment on : May 12, 2022

DEBANGSU BASAK, J.:-

1. Petitioner prays for bail in connection with RC-No.04/2021/NIA/DLI dated March 2, 2021 under Sections 326/307/120B of the Indian Penal Code and under Sections 3 and 4 of the Explosives Substances Act and under Sections 16/18 and 20 of UA(P) Act, 1967 in NIA Case No.01 of 2021 arising out of Azimganj GR Police Station Case No.05/2021 dated February 17, 2021.
2. The investigations in respect of such police case are now being conducted by the National Investigating Agency (NIA) constituted

under the provisions of the National Investigation Agency Act, 2008.

3. Learned Advocate appearing for the NIA raises the issue of maintainability of the present application for grant of bail and submits that the present petition for bail is not maintainable in view of the provisions of the Act of 2008 particularly Section 21 thereof. He relies upon **(2014) 1 Supreme Court Cases 258 (State of Andhra Pradesh vs. Mohd. Hussain alias Saleem)** as also an order dated June 9, 2021 passed in **CRM 3656 of 2021 (in the matter of: Surojit Mandal)** by a Coordinate Bench in support of his contentions.
4. Learned Advocate appearing for NIA submits that pursuant to the order of the Government of India dated March 1, 2021, NIA took over the investigations. NIA re-registered the case as RC-No.04/2021/NIA/DLI dated March 2, 2021 under Sections 326/307/120B of the Indian Penal Code and Sections 3 and 4 of the Explosives Substances Act, 1908 at NIA, New Delhi Police Station. NIA also invoked Sections 16 and 18 of the Unlawful Activities (Prevention) Act, 1967 with the approval of the learned Court which was granted on March 16, 2021 for the purpose of further investigations. NIA submitted a charge sheet dated August 24, 2021, *inter alia*, under Sections 120B/326/307 of the Indian Penal Code and Sections 3 and 4 of the Explosives Substances Act, 1908 and Sections 16, 18 and 20 of the Unlawful

Activities (Prevention) Act, 1967. Consequently, the provisions of the Act of 2008 stands attracted in view of the case being referred by the Government of India to the NIA and in view of the Schedule to the Act of 2008 read with Section 2(1)(f) of the Act of 2008.

5. Learned Advocate appearing for NIA contends that, in the event of the present application being found to be maintainable on the contentions raised above, then the application is barred by limitation prescribed in the Act of 2008.
6. Learned Advocate appearing for the petitioner submits that the present application for bail is maintainable. He relies upon an order of the Hon'ble Supreme Court dated October 29, 2021 passed in ***Criminal Appeal Nos.1313-1315 of 2021 (The State of Kerala & Ors. vs. Roopesh)*** in support of his contentions.
7. In the facts of the present case, NIA took over the investigations of the police case pursuant to an order of the Central Government dated March 2, 2021. It re-registered the case as RC-No.04/2021/NIA/DLI dated March 2, 2021 under Sections 326/307/120B of the Indian Penal Code and Sections 3 and 4 of the Explosives Substances Act, 1908 at NIA, New Delhi Police Station. It conducted further investigations with the approval of the jurisdictional Court granted on March 16, 2021 for offences under Sections 16 and 18 of UAPA, 1967. It submitted a charge sheet dated August 24, 2021 invoking, *inter alia*, the provisions of Sections 16, 18 and 20 of the UAPA, 1967. Offences under UAPA,

1967 comes within the purview of the Act of 2008 by reason on the Schedule to the Act of 2008.

8. Section 21 of the National Investigation Agency Act, 2008 is as follows:

*“21. **Appeals.**- (1) Notwithstanding anything contained in the Code, an appeal shall lie from any judgment, sentence or order, not being an interlocutory order, of a Special Court to the High Court both on facts and on law.*

(2) Every appeal under sub-section (1) shall be heard by a Bench of two Judges of the High Court and shall, as far as possible, be disposed of within a period of three months from the date of admission of the appeal.

(3) Except as aforesaid, no appeal or revision shall lie to any court from any judgment, sentence or order including an interlocutory order of a Special Court.

(4) Notwithstanding anything contained in sub-section (3) of Section 378 of the Code, an appeal shall lie to the High Court against an order of the Special Court granting or refusing bail.

(5) Every appeal under this section shall be preferred within a period of thirty 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 thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of thirty days:

Provided further that no appeal shall be entertained after the expiry of period of ninety days.”

9. The Hon'ble Supreme Court in the case of **Mohd. Hussain alias Saleem (supra)** considered the various provisions of the Act of 2008 including Section 21 thereof and is of the following view:

“16. The abovereferred Section 21(4) of the NIA Act provides that an appeal lies to the High Court against an order of the Special Court granting or refusing bail. However, sub-section (3) which is a prior sub-section, specifically states that “except as aforesaid”, no appeal or revision shall lie to any court from any judgment, sentence or order including an interlocutory order of a Special Court. Therefore, the phrase “except as aforesaid” takes us to sub-sections (1) and (2). Thus when anybody is aggrieved by any judgment, sentence or order including an interlocutory order of the Special Court, no such appeal or revision shall lie to any court except as provided under sub-sections (1) and (2), meaning thereby only to the High Court. This is the mandate of Section 21(3) of the NIA Act.

17. There is no difficulty in accepting the submission on behalf of the appellant that an order granting or refusing bail is an interlocutory order. The point however to be noted is that as provided under Section 21(4) of the NIA Act, the appeal against such an order lies to the High Court only, and to no other court as laid down in Section 21(3). Thus it is only the interlocutory orders granting or refusing bail which are made appealable, and no other interlocutory orders, which is made clear in Section 21(1), which lays down that an appeal shall lie to the High Court from any judgment, sentence or order, not being an interlocutory order of a Special Court. Thus other interlocutory orders are not appealable at all. This

is because as provided under Section 19 of the Act, the trial is to proceed on day-to-day basis. It is to be conducted expeditiously. Therefore, no appeal is provided against any of the interlocutory orders passed by the Special Court. The only exception to this provision is that orders either granting or refusing bail are made appealable under Section 21(4). This is because those orders are concerning the liberty of the accused, and therefore although other interlocutory orders are not appealable, an appeal is provided against the order granting or refusing the bail. Section 21(4), thus carves out an exception to the exclusion of interlocutory orders, which are not appealable under Section 21(1). The order granting or refusing the bail is therefore very much an order against which an appeal is permitted under Section 21(1) of the Act.

18. Section 21(2) of the NIA Act provides that every such appeal under sub-section (1) shall be heard by a Bench of two Judges of the High Court. This is because of the importance that is given by Parliament to the prosecution concerning the Scheduled Offences. They are serious offences affecting the sovereignty and security of the State amongst other offences, for the investigation of which this special Act has been passed. If Parliament in its wisdom has desired that such appeals shall be heard only by a Bench of two Judges of the High Court, this Court cannot detract from the intention of Parliament. Therefore, the interpretation placed by Mr. Ram Jethmalani on Section 21(1) that all interlocutory orders are excluded from Section 21(1) cannot be accepted. If such an interpretation is accepted it will mean that there will be no appeal

against an order granting or refusing bail. On the other hand, sub-section (4) of Section 21 has made that specific provision, though sub-section (1) otherwise excludes appeals from interlocutory orders. This appeals under sub-section (1) are to be heard by a Bench of two Judges as provided under sub-section (2). This being the position, there is no merit in the submission canvassed on behalf of the applicant that appeals against the orders granting or refusing bail need not be heard by a Bench of two Judges.

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27.1. Firstly, an appeal from an order of the Special Court under the NIA Act, refusing or granting bail shall lie only to a Bench of two Judges of the High Court.”

10. A Coordinate Bench of this Hon’ble Court also found an application for bail under Section 439 of the Code of Criminal Procedure, 1973 to be not maintainable in the case of **Surojit Mandal (supra)**.
11. The Hon’ble Supreme Court in the case of **Roopesh (supra)** considered **Mohd. Hussain alias Saleem (supra)**. In **Roopesh (supra)** a single Judge of the High Court allowed the revisional applications. **Roopesh (supra)** held that, in view of the provisions of Section 21 of the Act of 2008 a single Judge of the High Court could not hear and dispose of a revisional application invoking the Act of 2008. The revisional applications were remanded to be

decided and disposed of by the Division Bench of the High Court. The factual scenario in the present case is different. **Roopesh (supra)** did not consider an application for grant of bail. We are considering an application for grant of bail after such prayer being rejected by the jurisdictional Court by the order dated February 24, 2022.

12. Section 21 of the Act of 2008 deals with appeals. Sub-section (1) of Section 21 contains a non-obstante Clause. It provides that notwithstanding anything contained in the Code of Criminal Procedure, an appeal shall lie from any judgment, sentence or order, not being an interlocutory order of a Special Court to the High Court both on facts and on law. Sub-section (4) of Section 21 of the Act of 2008 also contains a non-obstante clause. It provides that notwithstanding anything contained in sub-section (3) of Section 378 of the Code of Criminal Procedure, an appeal shall lie to the High Court from an order of Special Court granting or refusing bail.
13. That orders granting or refusing to grant bail are of interlocutory nature is well-established. The Hon'ble Supreme Court in **Mohd. Hussain alias Saleem (supra)** takes note of such position in law in Paragraph 17 thereof. However, Section 21(4) of the Act of 2008 makes an order (which by its nature is an interlocutory order) granting or refusing to grant bail appealable to the High Court. Sub-section (4) of Section 21 is an exception to the first three sub-

sections of Section 21 which prohibits appeal or revision from interlocutory orders. Sub-section (2) of Section 21 requires such appeal to be heard by a Division Bench. Sub-section (3) of Section 21 prohibits any appeal or revision from any judgment, sentence or order unless as provided in the Act of 2008. These three sub-sections of Section 21, therefore, prohibits any appeal or revision from any interlocutory order of the Special Court trying offences under the Act of 2008. This position is also recognised by the Hon'ble Supreme Court in ***Mohd. Hussain alias Saleem (supra)***. The opening non-obstante Clause of sub-section (4) of Section 21 deals with sub-section (3) of Section 378 of the Code of Criminal Procedure. Sub-Section (3) of Section 378 of the Code of Criminal Procedure requires leave of the High Court for an appeal under sub-section (1) or sub-Section (2) of Section 378 to be entertained by the High Court. Section 378 of the Code of Criminal Procedure provides for appeal in case of acquittal.

14. The issue of maintainability of an application under Section 439 of the Code of Criminal procedure before the High Court in respect of proceedings governed by the Act of 2008 was also considered in ***Mohd. Hussain alias Saleem (supra)*** and held as follows:

“21. Usmanbhai was a matter under the Terrorist and Disruptive Activities (Prevention) Act (28 of 1987), shortly known as “TADA”. This Act also had a similar provision in Section 19(1) thereof which reads as follows:

“19. Appeal.- (1) Notwithstanding anything contained in the Code, an appeal shall lie as a matter of right from any judgment, sentence or order, not being an interlocutory order, of a Designated Court to the Supreme Court both on facts and on law.

(2) Except as aforesaid, no appeal or revision shall lie to any court from any judgment, sentence or order including an interlocutory order of a Designated Court.”

It is also material to note that Section 20(8) of TADA had provisions identical to Section 21(4) of MCOC Act. The Gujarat High Court while interpreting the provisions of TADA had held that it did not have the jurisdiction to entertain the application for bail either under Section 439 or under Section 482 of the Code. That view was confirmed by this Court by specifically stating at the end of para 22 of its judgment in Usmanbhai case in following words: (SCC pp.289-90)

“22. ... We must accordingly uphold the view expressed by the High Court that it had no jurisdiction to entertain an application for bail under Section 439 or under Section 482 of the Code.”

22. The view taken by this Court in Usmanbhai was reiterated in State of Punjab v. Kewal Singh. That was also a matter under TADA, and the application for bail by the respondents was rejected by the Designated Court. Thereupon they had moved the High Court under Section 439 CrPC for grant of bail, and a learned Single Judge of the Punjab and Haryana High Court had enlarged them on bail on the ground that the co-

accused had been granted bail. The order in this matter was also passed by a Bench presided over by A.P. Sen, J. This Court set aside the order passed by the High Court and clearly observed in para 2 as follows: (Kewal Singh case, SCC p. 148)

“2. ... We are of the view that the High Court had no jurisdiction to entertain an application for bail under Section 439 of the Code. See Usmanbhai Dawoodbhai Memon v. State of Gujarat.”

Thereafter, the Court observed in para 3: (Kewal Singh case, SCC p. 148)

“3. We however wish to make it clear that the respondents may move the Designated Court for grant of bail afresh. The Designated Court shall deal with such application for bail, if filed, in the light of the principles laid down by this Court in Usmanbhai Dawoodbhai Case.”

23. It is material to note that the view taken in Usmanbhai was further confirmed by this Court in State of Gujarat v. Salimbhai Abdulgaffar Shaikh, to which our attention was drawn by Mr Luthra, the learned Additional Solicitor General appearing for NIA. This time the Court was concerned with similar provisions of the Prevention of Terrorism Act, 2002 (“POTA”, for short). Section 34 of POTA is entirely identical to Section 21 of the NIA Act except that it did not contain the second proviso to sub-section (5) of Section 21 of the NIA Act (which has been quoted above), and which proviso has no relevance in the present case. It was specifically contended in that matter by the learned counsel for the respondent that the power of the High

Court to grant bail under Section 439 CrPC had not been taken away by POTA.

24. *In para 13 of the judgment this Court confirmed the view taken in Usmanbhai in the following words: (Salimbhai Abdulgaffar Shaikh case, .. SCC P.58)*

“13. Section 20 of TADA contained an identical provision which expressly excluded the applicability of Section 438 of the Code but said nothing about Section 439 and a similar argument that the power of the High Court to grant bail under the aforesaid provision consequently remained intact was repelled in Usmanbhai Dawoodbhai Menon v. State of Gujarat. Having regard to the scheme of TADA, it was held that there was complete exclusion of the jurisdiction of the High Court to entertain a bail application under Section 439 of the Code. This view was reiterated in State of Punjab v. Kewal Singh.”

25. *In this judgment in State of Gujarat v. Salimbhai Abdulgaffar Shaikh, the Court specifically rejected the plea based on Section 439 of the Code by holding that the High Court under the special statute could not be said to have both appellate and original jurisdiction in respect of the same matter. The Court observed in para 14 thereof as follows: (Salimbhai Abdulgaffar Shaikh case, SCC pp. 58-59)*

“14. That apart, if the argument of the learned counsel for the respondents is accepted, it would mean that a person whose bail under POTA has been rejected by the Special Court will have two remedies and he can avail any one of them at his sweet will. He may move a bail application

before the High Court under Section 439 CrPC in the original or concurrent jurisdiction which may be heard by a Single Judge or may prefer an appeal under sub-section (4) of Section 34 of POTA which would be heard by a Bench of two Judges. To interpret a statutory provision in such a manner that a court can exercise both appellate and original jurisdiction in respect of the same matter will lead to an incongruous situation. The contention is therefore fallacious.”

15. Section 21 of the Act of 2008 designates a Division Bench of the High Court to be the appellate authority in respect of an order granting or refusing to grant bail in respect of the Act of 2008. It cannot, therefore, exercise both original jurisdictional while hearing an application for bail under Section 439 of the Code of Criminal Procedure invoking the Act of 2008 and at the same time exercise jurisdiction as the appellate authority under Section 21 of the Act of 2008 against an order granting or refusing to grant bail by the Special Court.
16. In the present case, an application for grant of bail was moved before the jurisdictional Court which was rejected by the order dated February 24, 2022. Therefore, the order is an appealable order in terms of Section 21 of the Act of 2008. The present application is one under Section 439 of the Code of Criminal Procedure and not under Section 21 of the Act of 2008. An application under Section 439 of the Code of Criminal Procedure

invoking the Act of 2008 is not maintainable. Consequently the present application is not maintainable.

17. The other issue raised on behalf of the NIA that even if an appeal was preferred, the same was barred by the laws of limitation prescribed under the Act of 2008 is kept open.
18. **C.R.M. (DB) 1249 of 2022** is dismissed.

(Debangsu Basak,J.)

19. I Agree.

(Bibhas Ranjan De, J.)