
(2013) 12 KL CK 0028
In the High Court Of Kerala
Case No : B.A. No's. 8029 of 2013

Mammunhi Thalangadi Mahamood

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 12-12-2013

Acts Referred:

Citation : (2014) CriLJ 2042 : (2014) 1 KHC 22 : (2014) 1 KLJ 192 : (2014) 1 KLT 132

Hon'ble Judges : Thomas P. Joseph, J

Bench : Single Bench

Advocate : Shaijan C. George, M.T. Ajith, S. Rekha Kumari and Sajitha George, for the Appellant; M. Ajay, Spl. Public Prosecutor, S. Sreekumar and S. Rajeev, Amicus Curiae, for the Respondent

Final Decision : Dismissed

Judgement

Thomas P. Joseph, J.—These applications for anticipatory bail under S. 438 of the Code of Criminal Procedure (for short, "the Code") are preferred by the petitioner who apprehends arrest in cases registered by the Chandra police and taken over and re-registered by the National Investigation Agency (for short, "the NIA") for the offences punishable under Ss. 489B and C of the Indian Penal Code (for short, "the Penal Code").

The following questions arise for a decision:

I. Whether, the Special Court constituted under the National Investigation Agency Act, 2008 (for short, "the N.I.A. Act") has jurisdiction to entertain an application for anticipatory bail from a person apprehending arrest in respect of a non bailable offence triable by the Special Court under the said Act?

II. Whether the jurisdiction of the Court of Session and the original criminal jurisdiction of the High Court to entertain such an application is impliedly barred by the provisions of the N.I.A. Act?

Sri. M. Ajay, learned Special Public Prosecutor for the N.I.A. has contended that trial of offences scheduled under the N.I.A. Act and allied offences triable by the Special Court constituted under that Act is governed by the said Act. Learned Special Public Prosecutor submits that under S. 21(1), clarified by sub-s.(4) of the said Act original jurisdiction is vested with the Special Court alone under the N.I.A. Act to entertain an application for "bail" which should include an application for anticipatory bail as well. The power of the High Court is only to entertain an appeal against an order granting or refusing bail which should include an order granting or refusing anticipatory bail as well. That appeal has to be heard by a Bench of two Judges of the High Court. The N.I.A. Act confers only appellate jurisdiction in the High Court to entertain a request for anticipatory bail. The said provision impliedly takes away jurisdiction of the Court of Session and the original criminal jurisdiction of the High Court to entertain an application under S. 438 of the Code. It is argued that under the N.I.A. Act, the Special Court is a court of original criminal jurisdiction having the status of a Court of Session and invested with the powers of the Court of Session in the matter of trial and pre-trial matters though certain powers of the Magistrate also are conferred on the Special Court. All matters relating to offences investigated by the N.I.A. Act and triable by the Special Court so far as it is not inconsistent with the provisions of the Code are to be dealt with by the Special Court and not by the Courts referred to in the Code. Learned counsel has placed reliance on the decisions in *State of Tamil Nadu Vs. V. Krishnaswami Naidu and Another*, *State of Gujarat Vs. Salimbhai Abdulgaffar Shaikh and Others*, *Mohammed Nainar and Others Vs. State of Kerala and Others*, and *Bangaru Laxman Vs. State (through CBI) and Another*,

2. Sri. Shaijan C. George, learned counsel for the petitioner has contended that a Special Court constituted under the N.I.A. Act even if is treated as a Court of original criminal jurisdiction, is neither a Court of the Magistrate nor a Court of Session. The power to grant anticipatory bail conferred by S. 438 of the Code cannot be exercised by any court other than a Court of Session and the High Court. The Special Court under the N.I.A. Act has therefore no power, either expressly or by implication, to entertain an application for anticipatory bail. The Special Court constituted under the N.I.A. Act gets the power to grant (regular) bail not under any provision of the said Act but by virtue of S. 437 of the Code which empowers a Court other than the Court of Session or the High Court to grant bail when a person accused or suspected of the commission of any non bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before such Court not being a Court of Session or the High Court. Hence the expression "bail" used in sub-s. (4) of S. 21 of the N.I.A. Act should mean "regular bail" which alone the Special Court is competent to grant and not anticipatory bail which could be granted only by the Court of Session or the High Court under S. 438 of the Code. Learned counsel has argued that the original criminal jurisdiction of the High Court under S. 438 of the Code to grant anticipatory bail is not expressly or impliedly taken away by

the N.I.A. Act. Reliance is placed on the decisions in Balchand Jain Vs. State of Madhya Pradesh, , Shri Gurbaksh Singh Sibbia and Others Vs. State of Punjab, and Usmanbhai Dawoodbhai Memon and Others Vs. State of Gujarat,

3. In view of the importance of the questions raised for a decision, I sought the assistance of Senior Advocate, Sri. S. Sreekumar and Adv. Sri. S. Rajeev. Learned Senior Advocate has pointed out with reference to the various provisions of the Code that the Special Court constituted under the N.I.A. Act is a special category of court separate from the Courts mentioned in S. 6 of the Code. According to the learned Senior Advocate, offences investigated by the N.I.A. under the N.I.A. Act and triable by the Special Court must be dealt with in accordance with the provisions of the N.I.A. Act so far as it is not inconsistent with the provisions of the Code. If the power of the Special Court is to entertain only applications for regular bail and the appeal from an order granting or refusing regular bail is to be heard by a Bench of two Judges of the High Court, it is unlikely that the power to entertain an application for anticipatory bail which is an extra ordinary privilege and wider in scope is conferred on the Court of Session and on the High Court on its original side which is normally to be heard by a Single Judge. According to the learned Senior Advocate, adopting such a view will produce incongruous results. Learned Senior Advocate has brought to my notice the decision of the Full Bench of the Patna High Court (per majority) in In the matter of In re: Shri Ravi Nandan Sahay, Sessions Judge where it is held that the Special Court constituted under the Prevention of Corruption Act, 1988 (for short, "the PC Act") has the power to grant anticipatory bail.

4. Adv. Sri. S. Rajeev, on the other hand argued that even the appellate jurisdiction conferred on the High Court under S. 21(4) of the N.I.A. Act is limited in scope in view of the wordings of the said provision making reference to S. 378 of the Code. It is argued that under S. 438 of the Code, any person apprehending arrest in respect of a non bailable offence is entitled to file an application for anticipatory bail in the Court of Session or the High Court within whose territorial limits he apprehends arrest though the place of crime is elsewhere and if a view is taken that the Court of Session and the High Court on its original criminal jurisdiction has no power to entertain such an application, the said right of the person apprehending arrest under S. 438 of the Code would become redundant. Learned counsel has placed reliance on the decision in T. Madhusoodan Vs. The Superintendent of Police and Another, where, interpreting the word "the" occurring before the expression "Court of Session/High Court" in S. 438 of the Code, this Court held that a person apprehending arrest is entitled to file application for anticipatory bail in the Court of Session/High Court within whose territorial limits he apprehends arrest notwithstanding that the place of occurrence is beyond the local limits of those Courts.

5. Section 6 of the Code deals with the classes of criminal courts and says that besides the High Courts and the Courts constituted under any law, other than the Code, there shall be the category of Courts mentioned therein. S. 6 thus

contemplates constitution of Courts under other laws as well. S. 7 of the Code deals with territorial division of the Courts classified under S. 6 (while it does not mention about Courts constituted under any law other than the Code). S. 9 of the Code states that the State Government shall establish a Court of Session for every session division and states about the manner of appointment of Judges to such Court. The said provision makes it clear that it is within the power of the High Court to appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in a Court of Session meaning thereby that S. 9 contemplates more than one Court of Session in the same Sessions division.

6. Section 2(1)(h) of the N.I.A. Act defines "Special Court" as meaning a Special Court constituted under S. 11 or under S. 22 of the said Act. S. 11 deals with the power of the Central Government to constitute Special Courts. Sub-s. (1) says that the Central Government shall, by notification in the Official Gazette, for the trial of Scheduled offences, constitute one or more Special Courts for such area or areas, or for such case or class or group of cases, as may be specified in the notification. Sub-s. (3) states that such Special Court shall be presided over by a Judge to be appointed by the Central Government on the recommendation of the Chief Justice of the High Court. Sub-s. (7) says that a person shall not be qualified for appointment as a Judge or an Additional Judge of a Special Court unless he is, immediately before such appointment, a Sessions Judge or an Additional Sessions Judge in any State. S. 22 of the N.I.A. Act confers power on the State Government to constitute Special Court. Sub-s. (1) says that the State Government may constitute one or more Special Courts for the trial of offences under any or all the enactments specified in the Schedule to the N.I.A. Act. Sub-s. (3) says that the jurisdiction conferred by the N.I.A. Act on a Special Court shall, until a Special Court is constituted by the State Government under sub-s. (1) in the case of any offence punishable under the said 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 Chapter IV. Sub-s. (4) says that on and from the date when the Special Court is constituted by the State Government, trial of any offence investigated by the State Government under the provisions of the N.I.A. 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 constituted.

7. Section 13 of the N.I.A. Act deals with the jurisdiction of the Special Courts (constituted under S. 11 or 22 of the said Act). Sub-s. (1) says that 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. S. 14 of the N.I.A. Act relates to the power of the Special Court with respect to other offences. Sub-s. (1) says that when trying any offence, a Special Court may also try any other offence with which the accused may, under the Code be charged, at the same trial if the offence is connected with such other offence.

8. Section 16 of the N.I.A. Act deals with the procedure and powers of the Special Court. Sub-s. (1) says that 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. Sub-s. (2) says that when 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-s. (1) of S. 260 or S. 262 of the Code, try the offence in a summary way in accordance with the procedure prescribed in the Code and that provisions of Ss. 263 to 265 of the Code shall, so far as may be, apply to such trial. Sub-s. (3) says that subject to the other provisions of the N.I.A. 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.

9. Section 21 of the N.I.A. Act deals with appeals. Sub-s. (1) says that 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. Sub-section (2) says that every appeal under sub-s. (1) shall be heard by a Bench of two Judges of the High Court. Sub-section (4) of the N.I.A. Act says that notwithstanding anything contained in sub-s. (3) of S. 378 of the Code, an appeal shall lie to the High Court against an order of the Special Court granting or refusing bail.

10. Though Sri. Shaijan C. George and Sri. S. Rajeev, learned Advocates have addressed argument as to the scope of the appeal under sub-s. (2) in view of sub-s. (4) of S. 21 of the Act making reference to S. 378 of the Code, that argument need not detain this Court further since referring to sub-s. (1) and (4) of S. 21, a Division Bench of this Court in Mohammed Nainar v. State of Kerala (supra) has held that sub-s. (4) is clarificatory in nature and that the appeal from an order granting or refusing bail (in that case, it was regular bail) can be heard only by a Bench consisting of two Judges of the High Court which meant that the High Court has no power on its original criminal jurisdiction to entertain an application for (regular) bail. The Supreme Court considered the said question in Crl. M.P. Nos. 17570 and 17571 of 2013 in SLP (Crl.). Nos. 7375 and 9788 of 2012. In the judgment dated 13.09.2013 the Supreme Court has held, referring to Usmanbhai Dawoodbhai Memon and Ors. v. State of Gujarat as well that the appeal arising from an order granting or refusing bail under S. 21(4) of the N.I.A. Act can be heard only by a Bench of two Judges of the High Court. It was held (in view of the appellate jurisdiction conferred on the High Court) that an application for bail either under S. 439 or under S. 482 of the Code would not lie before the High Court in exercise of its original criminal jurisdiction. Thus, the position is confirmed so far as (for the time being, regular) bail is concerned that neither the Court of Session nor the High Court on its original criminal jurisdiction could entertain an application either under S. 439 or 482 of the Code obviously

because power of the Court of Session and of the High Court on its original criminal jurisdiction to entertain an application for (regular) bail is impliedly taken away by S. 21(4) of the Act.

11. Now the question is whether in the matter of anticipatory bail, the Special Court under the N.I.A. Act has the power or the power of the Court of Session and of the High Court on its original criminal jurisdiction still remain notwithstanding the provisions contained in the N.I.A. Act?

12. In *State of Tamil Nadu v. V. Krishnaswami Naidu and Anr.* the Supreme Court was considering the power of the Special Court constituted under the Criminal Law (Amendment) Act, 1952 (for short, "the Amendment Act") to detain an accused, under S. 167 of the Code. In paragraph 6, referring to the power of the Special Court under S. 8(1) of the Amendment Act, the Supreme Court held that the Special Court under the said Act has power to try the accused persons without committal following the procedure prescribed by the Code. The Supreme Court noticed that while under sub-s. (3) of S. 8 of the Amendment Act a Special Judge is deemed to be a Court of Session for certain purposes, sub-s. (2) empowered the Special Judge to grant tender of pardon. S. 8(A) of the said Act empowered the Special Judge to try cases summarily which are triable by the Magistrate. The Supreme Court referred to the power of the Special Judge under the said Act to authorize detention of the accused under S. 167 of the Code. In paragraph 7, it is held,

The provisions of the Cr.P.C. are not excluded unless they are inconsistent with the Criminal Law (Amendment) Act. Thus read there could be no difficulty in coming to the conclusion that the Cr.P.C. is applicable when there is no conflict with the provisions of Criminal Law (Amendment) Act. If a Special Judge who is empowered to take cognizance without committal is not empowered to exercise powers of remanding an accused person produced before him or release him on bail it will lead to anomalous situation.

Referring to the relevant provisions of the Code and the Amendment Act, the Supreme Court concluded that the Special Court constituted under the said Act has power to authorize detention of the accused under S. 167 of the Code. The principle laid down in the aforesaid decision is that it is within the power of the Special Judge under the Amendment Act to exercise such powers as are required, so far as it is not inconsistent with the provisions of the Code and not specifically denied to it.

13. Section 34(1) and (4) of the Prevention of Terrorism Act, 2002 (for short, "the POTA") contain exactly similar provisions as in S. 21(1) and (4) of the N.I.A. Act. In *State of Gujarat v. Salimghani Abdulgafar Shaikh and Ors.* the Supreme Court considered whether in view of S. 34(1) and (4) of the POTA, the High Court still has the jurisdiction and power to entertain an application for bail in exercise of its original criminal jurisdiction under S. 439 of the Code? Referring to Ss. 34(1) and (4) of the POTA the Supreme Court held that the power of the High

Court under S. 439 of the Code cannot be exercised and that the High Court has no power, on its original criminal jurisdiction to entertain an application for bail under S. 439 of the Code in so far as the power of the High Court is confined to appellate jurisdiction under S. 34(4) of the POTA. In holding so, the Supreme Court referred to the decision in *State of Punjab Vs. Kewal Singh and Another*,

14. *Bangaru Laxman Vs. State (through CBI) and Another*, referred to the power of the Special Court under the P.C. Act to grant pardon. In paragraph 31, the Supreme Court referred to the decision in *Harshad S. Mehta and Others Vs. The State of Maharashtra*, which dealt with the power of the Special Court constituted under the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 and *A.R. Antulay Vs. Ramdas Srinivas Nayak and Another*, In *Harshad S. Mehta v. State of Maharashtra*, it was held that to make the Court (constituted under the (Trial of Offences Relating to Transactions in Securities) Act, 1992) functionally oriented, some powers are conferred by the statute setting it up and that except those powers which are specifically denied, it has to function as a Court of original criminal jurisdiction not being hide bound by the terminological status or description of the Magistrate or Court of Session. It was held in *Harshad S. Mehta v. State of Maharashtra* that under the Code, such Special Court will enjoy all powers which a Court of original criminal jurisdiction enjoys whether of a Magistrate or as a Court of Session save and except the ones which are specifically denied (to the Special Court by the statute).

15. In *Balchand Jain v. State of Madhya Pradesh*, the Supreme court considered whether R. 184 of the Defence and Internal Security of India Rules, 1971 (for short, "the Rules") provided limit on the power of the High Court under S. 438 of the Code to grant anticipatory bail. Referring to the relevant provisions the Supreme Court held that R. 184 of the Rules and S. 438 of the Code operated in different fields and that though the power to grant of regular bail is controlled by R. 184 of the Rules, such limitation is not prescribed in the matter of exercise of the extraordinary jurisdiction conferred on the High Court under S. 438 of the Code. In *Gurbaksh Singh Sibbia v. The State of Punjab*, the Supreme Court was dealing with the power of the Court of Session/High Court under S. 438 of the Code. It was held that the limitations if any prescribed under S. 439 of the Code are not contained in S. 437 of the Code and that the Court of Session and the High Court have the discretionary jurisdiction to grant anticipatory bail under S. 438 of the Code.

16. In *Usmanbhai Dawoodbhai Memon & Ors. v. State of Gujarat*, the Supreme Court considered whether the High Court has power to grant bail under Ss. 439 and/or 482 of the Code in view of Ss. 19(1) and (2) and S. 20(8) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (for short, "the TADA"). It was held that the said Act being a Special Act must prevail in respect of jurisdiction and power of the High Court to entertain an application for bail under S. 439 of the Code or by recourse to its inherent power under S. 482. Under the scheme of the Act, there is complete exclusion of the jurisdiction of the High Court in any

case involving the arrest of any person on an accusation of having committed an offence punishable under the TADA or any Rule made thereunder. It was further held that the power of the said Court under the TADA to grant bail is by virtue of S. 437 of the Code when the accused is brought before a Court other than the High Court or the Court of Session. It all depends on the scheme of the particular Act as to whether the power of the High Court and the Court of Session to grant bail under S. 438 and 439 exist.

17. Taking a clue from the above observation in *Usmanbhai Dawoodbhai Memon and Ors. v. State of Gujarat* it is argued by Sri. Shaijan C. George and Sri. S. Rajeev that a Special Court constituted under the N.I.A. Act being neither a High Court nor a Court of Session, power to grant (regular) bail as understood in S. 21(4) of the N.I.A. Act came to it not from the provisions of the said Act but under S. 437 of the Code. It is argued that therefore, the expression "bail" in S. 21(4) of the N.I.A. Act should mean "regular bail" which alone the Special Court has the power, under S. 437 of the Code to grant or refuse. As the Special Court is not a High Court or Court of Session, it cannot exercise the power conferred on the High Court or the Court of Session under S. 438 of the Code, it is argued.

18. The argument apparently sounds attractive and requires deeper consideration. The provisions in the POTA and the N.I.A. Act regarding constitution of the Special Courts, its power, provision for appeals, etc. are identical. The provisions of the N.I.A. Act shows that a special court constituted under the said Act is to be presided over by a person who, immediately before his appointment was a Sessions Judge or an Additional Sessions Judge. Though under S. 5(4) of the P.C. Act it is stated that the Special Judge appointed under that Act is deemed to be a Magistrate for certain purposes, I do not find any similar provision in the N.I.A. Act. On the other hand, what S. 16(3) of the N.I.A. Act says is that subject to the provisions of that 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 trial by a Court of Session. I referred to S. 22(3) of the N.I.A. Act which says that jurisdiction conferred by that Act on a Special Court shall, until a Special Court is constituted by the State Government under sub-s. (1) in the case of any offence punishable under the said Act, notwithstanding anything contained in the Code be exercised by the Court of Session of the division in which such offence has been committed.

19. A reading of various provisions of the N.I.A. Act shows that the Special Court constituted under the said Act is a Court of original criminal jurisdiction presided over by a person who immediately before his appointment as the Special Court was a Sessions Judge or an Additional Sessions Judge and vested with the power of the Court of Session in the matter of trial of offences investigated by the N.I.A. The Special Court has the status of a Court of Session though in view of S. 16(2) of the N.I.A. Act, the Special Court is also empowered to try certain offences summarily which power, otherwise, is exercisable only by a magistrate.

If the Special Court were having the status of a Court of Magistrate, it was not necessary for the Parliament to make a special provision under S. 16(1) of the N.I.A. Act that the Special Court can take cognizance of any offence without the accused being committed (meaning thereby that but for the said provision, committal was necessary).

20. There is also no warrant for the conclusion that the jurisdiction of the Special Court under the N.I.A. Act to exercise the powers of the Court of Session is confined to trial of the offence. For, as aforesaid the Special Court is given the power to take cognizance of any offence upon receiving a complaint or on a police report. S. 21(4) of the N.I.A. Act contemplates power of the Special Court to grant or refuse "bail". Grant or refusal of bail could be during the stage of investigation, inquiry or trial. It need not be confined to "trial" alone which stage begins only with framing of charge. It follows that even with respect to pre-trial matters, the Special Court is invested with the power. The Special Court under the N.I.A. Act is a Court of original criminal jurisdiction having the status of a Court of Session and it can exercise all the powers conferred on a Court of Magistrate and Court of Session save and except those powers if any, specifically denied to it and not being hide bound by the terminological status or description of the Magistrate or Court of Session. It is necessary to hold so to make the Special Court functionally oriented. I must also notice the special provisions provided in the N.I.A. Act for protection of witnesses, precedence for trial by the Special Court, place of sitting, transfer of cases and the like which all indicate that the Parliament wanted matters relating to offences triable by the Special Court to be dealt with by the N.I.A. Act. There is no provision in the N.I.A. Act which expressly or even impliedly denies to the Special Court the jurisdiction to entertain an application for anticipatory bail. On the other hand, S. 21(1) of the N.I.A. Act refer to the power of the Special Court to pass "any judgment, sentence or order" while S. 21(4) refers to an "order" granting or refusing "bail". The expression "any order" used in S. 21(1) should therefore mean an order granting or refusing bail as well. That, so far as it is not excluded expressly or even impliedly should mean an order granting or refusing "anticipatory bail" as well. As held in *State of Tamil Nadu v. V. Krishnaswami Naidu and Anr.* and *State of Gujarat v. Salimbhai Abdulgafar Shaikh and Ors.* (supra) and the decisions referred therein, to make the special court under the N.I.A. Act functionally oriented and to deal with the offences which are triable only by the Special Court, the Special Court should have all the powers under the Code save and except those powers which are specifically denied to it.

21. Sri. Shaijan C. George and Sri. S. Rajeev have raised an argument that the power of the Special Court under the N.I.A. Act to grant bail is not conferred by S. 439 of the Code or by any provision of the N.I.A. Act but under S. 437 of the Code. In *Usmanbhai Dawoodbhai Memon & Ors. v. State of Gujarat* (supra) it is held that the power of the Special Court under the TADA to grant regular bail is by virtue of the provisions of S. 437 of the Code. It is relevant to note that S. 20(7) of the TADA expressly excludes application of S. 438 of the Code which

impliedly means that but for the said provision the Special Court under the TADA could exercise that power. There is no such exclusion in the N.I.A. Act which means that the Special Court constituted under that Act could grant anticipatory bail. Further, there is no provision in the TADA similar to S. 21(4) of the N.I.A. Act conferring only appellate jurisdiction on the High Court over an order granting or refusing "bail". Still further, the Supreme Court observed in *Usmanbhai Dawoodbhai Memon and Ors. v. State of Gujarat* that it depends on the particular scheme of the Act as to whether the power of the High Court and the Court of Session to grant bail under S. 438 or 439 of the Code exists.

22. Section 21(4) of the N.I.A. Act does not differentiate between a regular bail and anticipatory bail. The provision only uses the expression "bail". If the argument of the learned Advocates, Sri. Shaijan C. George and S. Rajeev were to be accepted, it would mean that so far as grant of regular bail to a person in custody is concerned, neither the Court of Session nor the High Court on its original criminal jurisdiction has the power, the power conferred on the High Court is only appellate jurisdiction arising from an order granting or refusing regular bail and that too, to be exercised by a Bench of two Judges but, when it comes to the grant or refusal of anticipatory bail which is an extra ordinary jurisdiction either the Court of Session or the High Court on its original criminal jurisdiction (normally to be exercised by a Single Judge) can exercise that power. If that view is adopted, the result will be incongruity in the provisions and jurisdiction of the High Court. I am inclined to think that such an incongruity is not contemplated by the Parliament while enacting S. 21(4) of the N.I.A. Act.

23. In taking that view I am guided, not by the literal approach to the provisions but by a purposive approach. Sir. Rupert Cross in "Statutory Interpretation" (1976 Edition, page 43) has pointed out that if the Judge considers that application of the words in their ordinary sense would produce absurd results which cannot reasonably be supposed to have been the intention of the Legislature, he may apply them in its secondary meaning which they are capable of being he has limited power to add, alter or ignore statutory words in order to prevent a provision from being unintelligible, absurd or totally unreasonable, unworkable. The Trend of English decisions also is in favour of adopting purposive approach in the matter of interpretation of statute rather than a literal approach.

In *Artemiou v. Procopiou* ((1961) 1 QB 878) it is held:

An intention to produce an unreasonable result is not to be imputed to a statute if there is some other construction available

In *Nothman v. Burnet London Borough Council* ((1978) 1 WLR 220), Lord Denning has referred to the House of Lords' shift to purposive interpretation from literal interpretation in the following words:

The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the "purposive approach" In all

cases now the interpretation of statute we adopt such a construction as will promote the general legislative purpose underlying the provision. It is no longer necessary for the Judges to wring their hands and say: "there is nothing we can do about it". Whenever the strict interpretation of statute gives rise to an absurd or unjust situation, the Judges can and should use their good sense to remedy it.... by reading in, if necessary... so as to do what legislature would have done, had they had the situation in mind.

24. The Supreme Court also has leaned in favour of purposive interpretation (See *Authorised Officer, Thanjavur and Another Vs. S. Naganatha Ayyar and Others*, The Supreme Court held that hardship to some persons should not change the construction (I say so bearing in mind the argument Sri. Shaijan C. George and Sri. S. Rajeev have raised referring to the decision in *Madhusoodan v. Supdt. of Police* (supra)).

25. The question can be approached from a different angle as well. In S. 21(4) of the N.I.A. Act the expression used is "bail" without saying whether it is regular bail or anticipatory bail. Ss. 437 to 439 of the Code state that a person accused of or suspected of the commission of offences of the type referred therein may be "released on bail". The only difference between Ss. 437, 439 and S. 438 is that an order of anticipatory bail under S. 438 insulates a person arrested from custody while an order of bail under Ss. 437 or 439 enables him to be released from custody. P. Ramanadha Aiyer, in the *Advanced Law Lexicon*, 3rd Edition defines "bail" as under:

Bail means to set liberty a person arrested or imprisoned, on security being taken for his appearance on a day and a place certain, which security is called bail. A security such as cash or a bond; especially, security required by a Court for the release of a prisoner who must appear at a future time.

Anticipatory bail is explained as meaning, "an order of anticipatory bail constituting an insurance against police custody following upon arrest for some offence or offences in respect of which the order is issued".

In Black's Law Dictionary, 9th Edition, the expression "bail" is given the meaning, A security such as cash or a bond; especially security required by a court for the release of a prisoner who must appear in court at a future time.

The expression "bail" only means the security given by the person accused or suspected of the commission of offence for his release from custody or to insulate him from custody. The expression "bail" used in S. 21(4) of the N.I.A. Act could therefore be regular bail as well as anticipatory bail. Such a view is required to be adopted to avoid, as aforesaid unintelligible, absurd or unreasonable results.

26. I must also advert to the argument the learned counsel have raised as to the power of the Court of Session and the High Court within the territorial limit of which the person accused or suspected of commission of non bailable offence

apprehends arrest. If the construction I have adopted is accepted, it would mean that no Court other than the Special Court constituted under the N.I.A. Act could exercise original jurisdiction to grant anticipatory bail. It follows that the Court of Session or the High Court within whose territorial limits the person accused or suspected of a non bailable offence referred to in the N.I.A. Act and triable by the Special Court under the said Act could not entertain an application for anticipatory bail.

27. It is not as if a person accused or suspected of commission of a non bailable offence has the absolute right to get an order of anticipatory bail. He has a statutory right to apply, but the power to grant it is purely discretionary conferred under S. 438 of the Code by the Amendment Act of 1973. There are statutes (for inst; The Scheduled Caste/Scheduled Tribe (Prevention of Atrocities) Act, 1989, the Unlawful Activities (Prevention) Act, 1967, TADA, POTA etc.) where Ss. 438 of the Code is totally made inapplicable to the offences triable by the Special Courts under the said statutes. AIR 1995 1198 (SC) considered constitutional vires of S. 18 of the Scheduled Caste/Scheduled Tribe (Prevention of Atrocities) Act, 1989 excluding application of S. 438 of the Code. It was argued that S. 18 of the said Act was violative of Art. 21 of the Constitution of India. The Supreme Court held, referring to the decision in Kartar Singh Vs. State of Punjab, (which dealt with a similar provision in S. 20(7) of the TADA) that a person accused of an offence has only a statutory right to apply for anticipatory bail introduced in the Code of 1973 in view of the 41st Report of the Law Commission of India which recommended that it could be a useful advantage (to provide for anticipatory bail) though, such power is to be exercised in very exceptional circumstances. The Supreme Court pointed out that in the State of Uttar Pradesh, by S. 9 of the Code of Criminal procedure (UP Amendment) Act, 1976, S. 438 of the Code has been totally omitted with effect from 28.11.1975 while the States of West Bengal and Orissa have prescribed additional limitations for the exercise of power under S. 438 of the Code. Thus even the State Legislature has the power to exclude even wholly, certain class of offences from the purview of S. 438 of the Code. Hence it was within the power of the Parliament to confer on the Special Court constituted under the N.I.A. Act alone the original jurisdiction to entertain an application for anticipatory bail and take away jurisdiction of all other Courts (including the High Court on its original criminal jurisdiction) to exercise that power.

28. The above discussion leads to the conclusion that only the Special Court has the original jurisdiction to entertain an application for anticipatory bail with respect to offences investigated by the N.I.A. Act and triable by the Special Court under the N.I.A. Act. The power of the Court of Session and of the High Court on its original criminal jurisdiction to entertain an application for anticipatory bail under S. 438 of the Code in respect of offences investigated by the N.I.A. and triable by the Special Court under the N.I.A. Act is impliedly taken away by S. 21(4) of the said Act. The power of the High Court in the matter is only appellate jurisdiction as provided under S. 21(4) of the said Act. In the light of my above

view, these applications are not maintainable in this Court. The applications are dismissed.

I place on record my deep appreciation for the excellent assistance rendered to me by the Sr. Adv. S. Sreekumar, Advocates M/s. M. Ajay, Shaijan C. George and S. Rajeev in answering the above said questions.