

(1991) 06 GAU CK 0004

In the Gauhati High Court

Case No : C.R. No. 155 of 1991 and Cri. Revision No. 157 of 1991

Shri Sampatmall Jain

APPELLANT

Vs

The State of Assam

RESPONDENT

Date of Decision : 06-06-1991

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Criminal Procedure Code, 1973 (CrPC) — Section 154(1), 156, 157, 157(1), 159

Penal Code, 1860 (IPC) — Section 143, 336, 338, 343, 353

Terrorist and Disruptive Activities (Prevention) Act, 1987 — Section 10, 11, 12, 13, 14

Citation : (1992) CriLJ 919

Hon'ble Judges : S.N. Phukan, J

Bench : Single Bench

Advocate : S.K. Sen and P.G. Baruah, for the Appellant; M.A. Laskar, A.A.G., C.R. De and B.B. Narzary, Public Prosecutors, for the Respondent

Final Decision : Allowed

Judgement

S.N. Phukan, J.—By this common judgment and order I propose to dispose of two petitions filed u/s 401/482, Cr.P.C. read with Article 227 of the Constitution. The said petitions have been registered as Criminal Revisions Nos. 155 and 157 of 1991.

2. Briefly stated the facts are as follows:--

Facts of Criminal Revision No. 155 of 1991:

This petition has been filed by the accused in connection with Goalpara Police Station Case No. 260 of 1990 (G.R. Case No. 764 of 1990) registered u/s 365/343, IPC read with Sections 3 and 4 of the Terrorists and Disruptive Activities (Prevention) Act, 1987 (for short the Act). It has been alleged that one son of the accused namely Nawartanmall had gone to Southern India on 24-11-90 in connection with his business trip and during his absence, on 30-11-90 State Police personnel went to the house of the petitioner and enquired

about the above son of the petitioner and also made a search of the house, but nothing was recovered. Police did not disclose why the presence of the said son was required. Again on 10-12-90 in the midnight another search was conducted by the State Police and on that date also nothing could be recovered. Police, however, took the younger son of the petitioner Monoj and also his Manager and an employee to the police station. The employee was released on the next day, but other two persons were detained till 13-12-90, and it is stated, without any reason or material. Thereafter, again on 12-1-91 some Army Personnel went to the house of the petitioner and enquired about the said son Nawartanmall, made a thorough search of the house, but nothing was found. However, the Army Personnel asked the petitioner to produce his son on or before 20-1-91 and also gave threat. Petitioner made several attempts to find out as to whether any specific case was registered against his son, but could not get any information. Under the above circumstances, a petition was filed before this court u/s 438, Cr.P.C. read with Section 482 for anticipatory bail which was registered as Criminal Original Application No. 34 of 91 and finally the petition was rejected as the petitioner could not furnish specific case number and other informations. The court directed to collect further information both by the petitioner and the learned Govt. Advocate of the State of Assam. Another petition was filed stating that the information could not be collected. However, on 14-2-91, the Goalpara Police arrested the petitioner Sampatmall in connection with Goalpara case and forwarded him to District Magistrate on 15-2-91. Copy of the forwarding report is at Annexure-"A" to the petition. On enquiry the petitioner came to know that an FIR was filed on 6-11-90 by the Officer-in-charge of Goalpara Police Station before the Chief Judicial Magistrate, Goalpara, which was registered as Case No. 764 of 90 u/s 365/343, IPC. In the FIR it was disclosed, inter alia, that it was reliably learnt that in the evening of 31-10-90 at about 7 p.m. two unidentified young persons went to the Paul Pharmacy, Goalpara and asked the owner Shri Chittaranjan Paul to come out for holding some discussions. Accordingly Shri Paul came out and became untraced. It was suspected that two young persons kidnapped Shri Paul in a white Ambassador Car and he was untraceable and accordingly the said FIR was filed. The case record reveals that one S.I. of Goalpara Police Station on 13-2-91 prayed before the learned Chief Judicial Magistrate to add Sections 3 and 4 of the Act in the above case which was allowed on the same day. The said order has been assailed. The prayer is at Annexure "C" to the petition and the impugned order passed by the learned Chief Judicial Magistrate is at Annexure "D". Hence the present petition praying also for quashing the entire proceeding and also for bail.

3. Facts of Criminal Revision No. 157/91:--

This petition is against the order dated 26-3-91 passed by the learned Chief Judicial Magistrate, Goalpara in G.R. Case No. 209/91 (Goalpara P.S. Case No. 52/91) under Sections 143/336/506/338/448/353/427, IPC. According to petitioner he is a well-to-do person and is a contractor under the Public Works Department, Assam State Electricity Board and Railways. He is also a partner in

respect of the Cinema Hall namely M/s. Kalpana Cinema situated at Goalpara. The estimated value at present for execution of the works as a contractor is more than Rs. 11 lacs. Petitioner has stated that his presence is necessary for execution of the contract works. According to petitioner on 23-3-91 a serious fire broke out in the night in a locality of Goalpara just opposite side of the petitioner's house. Petitioner and other persons of the locality tried to extinguish the fire. The fire fighting staff was immediately contacted over phone but the telephone was not lifted by the officials and nobody came to the place even after an hour. Then the fire was almost extinguished the fire fighting people arrived at the spot. As the fire brigade people did not arrive, at the request of the public the petitioner went to the fire brigade station along with four persons in his own car and found that no attempt was made by the fire fighting men to proceed to the spot. Accordingly, petitioner made a representation by filing a petition, which was drafted by an advocate and the petition was filed in the police station on 23-3-91. On 26-3-91 petitioner came to know that an FIR was lodged against him and 3/4 persons alleging offence under the sections mentioned above and it was lodged by Brojen Sarkar, Station Officer, Fire Station, Goalpara on 24-3-91. In the FIR Section 3/4 of the Act was not added and the FIR also did not disclose any offence under the Act. According to petitioner as the petitioner lodged a complaint against the fire brigade personnel, as a counter-blast, the aforesaid FIR was filed. Petitioner has come to know that on 25-3-91 the Town S.I. of Police, respondent No. 3 made an application before the Court that Section 3/4 of the Act is required to be added and the said application is at Annexure-5 to the petition. It is alleged that the learned Chief Judicial Magistrate without application of mind and without affording any chance to the petitioner, in a most mechanical way passed the impugned order on 25-3-91 allowing the prayer to add the aforesaid Sections 3 and 4 of the Act along with other sections under the IPC. Hence, the present petition for setting aside the said order dated 25-3-91.

4. In connection with this present petition various important points of law have been urged both by Mr. S. K. Sen, Mr. P. G. Baruah, learned counsel for both the petitioners. I have also heard Mr. M. A. Laskar, learned Addl. Advocate General and Mr. C. R. De and Mr. B. B. Narzary, learned Public Prosecutor.

5. In view of the elaborate arguments advanced and as prayed for I propose to deal with all the points raised during the course of the arguments. It may be stated that the main thrust of the contention on behalf of the State is that as the orders were passed under the Act, this Court has no jurisdiction to interfere in view of the law laid down by the apex court in Usmanbhai Dawoodbhai Memon and Others Vs. State of Gujarat, and Niranjana Singh Karam Singh Punjabi and Others Vs. Jitendra Bhimraj Bijja and others, In this connection reference can also be made to a decision of the Division Bench of the Gujarat High Court in Ayubkhan Kalandarkhan Pathan Vs. State of Gujarat and Others, I shall take up the law laid down in the above decisions at the appropriate place. For the present let me consider the scheme of the Act.

6. The Act was enacted to make special provisions for prevention of, and for coping with, terrorist and disruptive activities and for matters connected therewith or incidental thereto. Section 2(d) defines the expression "disruptive activities" to have the meaning assigned to it in Section 4. Section 2(h) defines the expression "terrorist act" to have the meaning assigned to it u/s 3(1) of the Act. Section 3(1) of the Act, inter alia, provides that whoever with intent (i) to overawe the Govt. as by law established or (ii) to strike terror in the people or any section of the people or (iii) to alienate any section of the people or (iv) to adversely affect the harmony amongst different sections of the people, does any act or thing by using any of the lethal weapons mentioned therein in such manner as to cause death of/or injury to any person or persons, commits a terrorist act. Sub-section (2) of Section 3 lays down the penalty for commission of such an act. Section 4(1) describes the penalty for indulging in any disruptive activity. Section 4(2) defines a "disruptive activities" to mean any action taken in whatever manner (i) which questions, disrupts or is intended to disrupt, whether directly or indirectly, the sovereignty and territorial integrity of India; or (ii) which is intended to bring about or supports any claim, whether directly or indirectly, for the cession of any part of India or secession of any part of India from the Union. Section 5 is in respect of possession of certain unauthorised arms etc. in specified area; Section 6 is regarding enhanced penalties. Section 7 enables the Central Govt. to confer powers on any officer of the Central Govt.; Section 8 is regarding forfeiture of property of certain persons.

7. Part III of the Act contains Sections 9 to 19. Section 9 is regarding the powers of the Central Govt./State Govt. for establishment of designated courts, the procedure to be followed and qualification for appointment of officers of such courts and matters connected thereto; Section 10 is regarding place of sitting of such designated courts and Section 11, which is relevant for the purpose, inter alia, provides in Sub-section (1) that notwithstanding anything contained in the Cr.P.C. every offence punishable under any provision of the Act or rules made thereunder shall be triable only by the designated court within whose local jurisdiction it was committed. Subsection (2) empowers the Central Govt. under the conditions laid down by the said section for transfer of any case from one designated court in a State to another designated court within that State or any other State. Other sub-sections are not relevant for our present purpose. Section 12, inter alia, provides that the designated court may also try any other offence with which the accused may be charged at the same trial. Sub-section (2) empowers the designated court to convict persons under the Act and also under any other law. Section 13 provides for appointment of Public Prosecutor for every designated court by the Central Govt. or the State Govt. Section 14 lays down procedure, and powers of designated courts and this provision is relevant for our purpose and is quoted below:

A designated 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.

Sub-section (2) inter alia provides that notwithstanding anything contained in Sub-section (1) of Section 260 or Section 262, Cr.P.C. a designated court may try an offence if it is punishable with imprisonment for a term not exceeding 3 years or with fine or with both in a summary way in accordance with the procedure prescribed in the Cr. P.C. Subsection (3) empowers Designated Court with all the powers of a Court of Session and the Designated Court 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 Cr. P.C. Sub-section (4) and (5) is regarding transfer of cases and trial of cases in absence of the accused. Section 15 empowers a police officer not below rank of Superintendent of Police to record a confessional statement and such confessional statement shall be admissible in trial of the person of an offence under the Act or Rules made thereunder notwithstanding anything contained in Cr. P.C. or in the Evidence Act. This section is a drastic measure and is a departure from the normal criminal jurisprudence of our Country. I do not want to say more in respect of this section except the fact that provisions of this section shall have to be kept in mind while granting remand to police custody under the Act. Section 16 provides for protection of witnesses. According to Section 17 trial by Designated Courts shall have precedence over the trial of any other case against the accused in any other courts. Section 18, inter alia, provides that after taking cognizance of any offence where a Designated Court is of the opinion that the offence is not triable by it, it shall transfer the case for trial to any other court having jurisdiction under Cr. P.C. and the court to which it is transferred may proceed with the trial. Section 19 is the provision for appeal. Sub-section (1) provides that notwithstanding anything contained in the Cr. P.C., 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. According to Sub-section (2) except as laid down in Sub-section (1) no appeal or revision shall lie to any court from any judgment, sentence or order including an interlocutory order of a Designated Court. Sub-section (3) provides for period of limitation, which may be condoned by the Supreme Court.

8. Part IV of the Act contains Miscellaneous provisions. Section 20 of the Act modified some of the sections of the Cr. P.C. Sub-section (1), inter alia, provides that every offence punishable under the Act or any rule made thereunder shall be deemed to be a cognizable offence within the meaning of Clause (c) of Section 2, Cr. P.C. and cognizable case as defined in the said clause be construed accordingly notwithstanding anything contained in the Cr. P.C. or any other law. By Sub-sections (2) to (6) the following modifications were made in the Cr. P.C. viz. (1) Section 21, Cr. P.C. shall apply in a case involving an offence under the Act or any rule subject to the modification that the reference to "the State Govt." shall be construed as a reference to "the Central Govt. or the State Govt."; (2) Section 164, Cr. P.C. shall apply in relation to a case involving an offence punishable under the Act or any rule subject to the modification that in Sub-section (1) "Metropolitan Magistrate or Judicial Magistrate" shall be construed as a reference to "Metropolitan Magistrate, Judicial Magistrate, Executive

Magistrate, or Special Executive Magistrate"; (3) Section 167 shall also apply in relation to a case involving an offence punishable under the Act or rule with the modification that (a) reference in Sub-section (2) of the said Section to "15 days", "90 days" and "60 days", wherever they occur, shall be construed as a reference to "60 days", "1 year" and "1 year" respectively; Sub-section (2-A) shall be deemed to have been omitted; (4) Section 268, Cr. P.C. shall accordingly apply to offences under the Act and the rule with the modification that:--(a) Reference in Sub-section (1) to "the State Govt." shall be construed as reference to "the Central Govt. or the State Govt.", (b) to "Order of the State Govt." shall be construed as reference "to Order of the Central Govt. or the State Govt. as the case may be", or (c) reference to "State Govt." in Sub-section (2) thereunder shall be construed as a reference to "Central Govt. or the State Govt., as the case may be".

According to Sub-section (6) of Section 20 of the Act Sections 366 to 371 and Section 392, Cr. P.C. shall apply in relation to case involving an offence triable by a Designated Court subject to the modification that the reference to "Court of Session" "High Court", wherever they occur shall be construed as a reference to "Designated court" and "Supreme Court" respectively.

Sub-section (7) provides that Section 438, Cr. P.C. shall not apply in relation to any case involving the arrest of any person or an acquisition of having committed an offence punishable under the Act or rule made thereunder. Sub-section (8) provides that notwithstanding anything contained in Cr. P.C. no person accused of an offence punishable under the Act or any rule shall, if in custody, be released on bail or on his own bond unless (a) the Public Prosecutor has been given an opportunity to oppose the application for such release, and (b) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty for such offence and that he is not likely to commit such offence while on bail.

9. Sub-section (9) of Section 20 provides that limitation on granting bail as specified in Sub-section (8) are in addition to the limitation under Cr. P.C. or any other law for the time being in force on granting the bail.

Sections 21 to 30 are not relevant for our purpose.

10. Before I refer to the two decisions of the apex court, one decision of this Court and the decision of the Gujarat High Court, I may refer to the relevant provisions of the Cr. P.C. under Chapter XXII under the Heading "Information to the Police and their powers to investigate". Sub-section (1) of Section 154, inter alia, provides that every information relating to the commission of a cognizable offence is given orally to an Officer-in-Charge of a Police Station shall be reduced in writing by him or under his direction and be read over to the informant and every such information shall be signed by the person given it and the substance thereof shall be entered in a book to be kept for such purpose and in such form as the State Govt. may prescribe in this behalf. The said book is known as

General Diary maintained by each police station. Subsection (2) provides that a copy of such information shall be given forthwith free of cost to the informant. It is not necessary to refer to Sub-section (3). I quote below Sub-section (1) of Section 157, Cr. P.C.

Sub-section (1) -- If, for information received or otherwise, an Officer-in-Charge of police station has reason to suspect the commission of an offence which he is empowered u/s 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender.

(Emphasis supplied)

Section 158, inter alia, provides that every such report mentioned in Section 157, if directed by the State Govt. shall be submitted through superior officer of police; Section 159, empowers the Magistrate to direct an investigation or if he thinks at once proceed or depute any Magistrate subordinate to him to hold preliminary enquiry on receiving report u/s 157. In the passing it may be mentioned that Section 160 empowers police officer to require attendance of witnesses for obtaining information, but the proviso to said Sub-section (1) of Section 160 directs that no male person under the age of 15 years or woman shall be required to attend at a place other than the place in which such male person or woman resides. According to apex court this provision has to be strictly complied with by police during investigation. Sub-sections (1) and (2) of Section 167 run as follows:

(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by Section 57, and there are grounds for believing that the accusation or information is well-founded, the Officer-in-Charge of the police station or the police officer making the investigation if he is not below the rank of Sub-Inspector shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as Such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction.

Provided that --

(a) the Magistrate may authorise the detention of the accused person, otherwise than in custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding --

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years.

(ii) sixty days, where the investigation relates to any offence, and, on the expiry of the said period of 90 days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXIII for the purpose of that Chapter;

(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

By the Act 45 of 1978, Sections 164 and 167, Cr. P.C. have been modified as recorded earlier.

11. In *Usmanbhai* (supra) two questions were considered viz. the jurisdiction and power of the High Court to grant bail u/s 439 or 482, Cr. P.C. to a person held in custody, accused of an offence under Sections 3 and 4 of the Act, and secondly as to the nature of restraint placed on the power of the Designated court to grant bail within the constraints of Section 20(8) of the Act. The constitutional validity of the Act was not considered and it was left open.

12. While dealing with the above two points vis-a-vis in *Usmanbhai* (supra) in para 13 of the judgment the court held that here there is a special enactment on a specific subject as the Act in question which is a special law, the act as special Act must be taken to govern the subject and not the Cr. P.C. in the absence of a provision to the contrary. According to apex court the Act is a special Act and creates a new class of offences called "terrorist acts & disruptive activities" as defined in Sections 3 and 4 of the Act and provides for a special procedure for trial of such offences. According to the apex court, the legislature by the use of the words "as if it were" in Section 14(3) endowed a Designated Court with the status of a Court of Session, but the legal fiction must be restricted to the procedure alone that is to say, the procedure for trial of an offence must be in accordance with the procedure prescribed under the Cr. P.C. for trial before a Court of Session, insofar as applicable.

13. In para 15 of the Judgment the apex court held as follows:

Before dealing with the contention advanced, it is well to remember that the

legislation is limited in its scope and effect. The Act is an extreme measure to be resorted to when the police cannot tackle the situation under the ordinary penal law. The intendment is to provide special machinery to combat the growing menace of terrorism in different parts of the country. Since, however, the Act is a drastic measure, it should not ordinarily be resorted to unless the Government's law enforcing machinery fails.

14. In paras 16, 17 and 18 of the judgment, the apex court, inter alia, held that by enacting the Act, the legislature has treated terrorism as a special criminal problem and accordingly created a special court viz. the Designated Court to deal with this problem and also provided a special procedure for trial of such offences. There is a total departure for different classes of criminal courts enumerated in Section 6 of Cr. P.C. and a new hierarchy of courts is sought to be established by providing for a direct appeal to the Supreme Court from any judgment or order of a Designated Court, not being an interlocutory order. According to the apex court the jurisdiction and power of a Designated Court is derived from the Act. Apex court further held that under the scheme of the Act there is complete exclusion of the jurisdiction of the High Court in any case involving arrest of any person on an accusation of having committed an offence punishable under the Act or any rule made thereunder, though under the Cr. P.C. the High Court is invested with various functions and duties in relation to any judgment and order passed by ordinary criminal court subordinate to it. From reading para 19 of the judgment it is obvious that their Lordships held that power to grant bail by a Designated Court is derived from Section 437, Cr.P.C. as the said court is a court other than High Court or Court of Session within the meaning of the said section. It was further held that Section 439, Cr. P.C. is not the source of power of the Designated Court to grant bail. Regarding bail it was also laid down that limitations on granting bail specified in Section 20(8) of the Act are in addition to limitations under the Cr. P.C. or any other law for the time being in force. In other words, while granting bail the powers of the Designated Court is restricted not only by the limitations laid down in Section 20(8), but also u/s 437, Cr. P.C. or any other law. In para 22 of the judgment it was held that the High Court had no jurisdiction to entertain an application for bail u/s 439 or 482, Cr. P.C. In para 13 it was specifically laid down that Designated Court shall carefully examine every case coming before it for finding out whether provisions of the Act apply or not. Since before granting bail the court is called upon to satisfy itself that there are reasonable grounds for believing that the accused is innocent of the offence and that he is not likely to commit any offence while on bail, the allegations of fact, the police report along with the statements in the case diary and other available materials should be closely examined and further a prayer for bail ought not to be rejected in the mechanical manner. In para 24, it was held that granting or refusal of a bail application is essentially an interlocutory order as there is no finality attached to it and an application for bail can always be renewed from time to time.

15. In *Niranjan Singh* (supra) the Court reiterated the principle regarding the

application of the Act laid down in Usmanbhai (supra) and the ratio was explained as follows (at page 1875 of Cri LJ 1990):

To put it differently the ratio of the provision is that the Act need not be resorted to if the nature of the activities of the accused can be checked and controlled under the ordinary law of the land. It is only in those cases where the law enforcing machinery finds the ordinary law to be inadequate or not sufficiently effective for tackling the menace of terrorist and disruptive activities the resort should be had to the drastic provisions of the Act. While invoking a criminal statute such as the Act, the prosecution is duty bound to show from the record of the case and the documents collected in the course of investigation that facts emerging therefrom prima facie constitute an offence within the letter of the law. When a statute provides special or enhanced punishments as compared to the punishments prescribed for similar offences under the ordinary penal laws of the country, a higher responsibility and duty is cast on the Judge to make sure there exists a prima facie evidence for supporting the charge levelled by the prosecution. Therefore, when a law visits a person with serious penal consequences extra care must be taken to ensure that those whom the legislature did not intend to be covered by the express language of the statute are not roped in by stretching the language of the law....

16. In Ayubkhan Kalandarkhan Pathan Vs. State of Gujarat and Others, following the ratio laid down by the apex court in Usmanbhai (supra) a Division Bench of the Gujarat High Court held that the High Court under Article 226 of the Constitution can look into whether provisions of the Act is applicable or not to a particular case. The same view was reiterated by Division Bench of this Court in Girish Chandra Kakati y. Union of India in Civil Rule (H. C.) No. 7 of 1991 disposed of on 18-3-91.

17. Keeping in view, the scheme of this Act, provisions of Cr. P.C. including the provisions as amended by the Act and the ratio laid down by the apex court, Gujarat High Court and this court, let me now deal with the procedure to be followed both by the investigating agency and the courts and as well as the law.

18. As stated by the apex court, a separate hierarchy has been set up by the legislature for prevention of and for coping with terrorist and disruptive activities which are a serious threat to our democracy. The court set up for trial of such offences is called the Designated Court constituted under the Act and this Court can impose not only the punishment of imprisonment for life, but also death. In other words, Designated Court shall have all the powers of a Sessions Court. A Sessions Court has no jurisdiction to take cognizance of an sessions triable offence, but Section 14 of the Act empowers the Designated Court to take cognizance of any offence, under the Act the accused being committed to it for trial, upon receiving a complaint of facts which constitute the offence or upon a police report of such facts. This Designated Court has also got power to try some offences in a summary way. An appeal from any judgment, sentence or order, not being an interlocutory order of a Designated Court shall lie to the Supreme

Court both on facts and on law. Thus, this is a major departure from the normal procedure adopted in our criminal trial.

19. Section 154, Cr. P.C. provides for the procedure for First Information Report and Section 157, Cr. P.C. clearly lays down that the First Information Report shall forthwith be sent by the police officer to the Magistrate empowered to take cognizance of such offence upon a police report. Thus, it is obligatory on the part of the police official to send First Information Report to the Magistrate having power to take cognizance of the offence. As under the Act, only Designated Court can take cognizance, the First Information Report shall have to be sent to the said court and not to any other court. Reading Section 159 with Section 157, the intention of the legislature is clear as on receiving such First Information Report, the Court may direct an investigation or if it thinks fit at once proceed or depute any Magistrate subordinate to it to proceed to hold a preliminary enquiry or otherwise dispose of the case in the manner provided in the section. It is true that the power of police to investigate any cognizable offence is uncontrolled by the Magistrate. But when the court finds that police is not investigating any such case, the Magistrate can exercise powers u/s 159, Cr. P.C. That apart, sending the First Information Report forthwith to the Magistrate having power to take cognizance is a protection to the accused so that subsequently the report cannot be tampered with or changed. Situated thus, I hold that in a case under the Act the First Information Report shall have to be sent to the Designated Court and not to any other court. This is the requirement of the law.

20. It has been stated on behalf of the prosecution that though earlier all the learned Sessions Judge were empowered as Designated Court within their respective jurisdiction, but now the Designated Courts are at Guwahati and these courts exercise powers for the entire State. According to learned Counsel for the prosecution if the First Information Reports, in respect of all cases under the Act have to be sent forthwith to the Designated Courts at Guwahati, it may create administrative problems for the State. This in my opinion cannot be a ground to nullify the provisions of the Act and the Cr. P.C., more particularly, when the country is committed to bring justice nearer to the people. I do not want to express any further opinion on this point, more particularly regarding inconvenience caused to the accused persons as I understand that the notification of the Govt. constituting the courts at Guwahati under the Act for the entire State of Assam is under challenge before this Court.

21. What is now duty of a Designated Court on receiving the First Information Report? I have already quoted in paras 13 and 15 of this judgment, the law laid down by the apex court in both the cases viz. Usmanbhai (supra) and Niranjana Singh (supra) regarding the principle of application of the Act to types of cases. The gist of this law is that the Act being a drastic measure should not be ordinarily resorted to, unless the Govt.'s law enforcing machinery fails. Although the jurisdiction of the High Court in respect of the judgment and order etc. passed by a Designated Court has been taken away, but the constitutional

powers of this Court under Articles 226 and 227 of the Constitution are always available as has been laid down by the apex court and the Gujarat High Court, as well as this court. Accordingly, this Court is duty bound to direct all the courts and Tribunals within the jurisdiction of this Court to implement the law laid down by the apex court. Therefore, I hold that on receiving the First Information Report, the first duty of the Designated Court is to apply its mind to the said report and other materials made available and shall take a decision keeping in view, the above ratio laid down by the apex court and other court whether prosecution should be allowed to rope in a person under the Act and in so doing, the Designated Court is duty bound to record its satisfaction or otherwise as to whether the offence disclosed in the First Information Report could be dealt with under the normal law of the land and whether "the Govt."s law enforcing machinery has failed". It is needless to say that before passing the order, Designated Court may hear the Public Prosecutor and the persons accused of the offence. If the Designated Court is of opinion that no prima facie case has been made out under the Act, the Designated Court may transfer the case to any other court having jurisdiction under Cr. P.C. This has to be done promptly as the sword of Damocles need not be kept hanging unnecessarily) without any point or purpose.

22. As a corollary of the above proposition in the above para, a question may arise, in fact it has arisen in the cases in hand whether subsequently provisions of the Act can be allowed to be added during investigation and if so by which court. Admittedly, when normal investigation by police is proceeding the competent court is kept informed and subsequent addition of any Section of the Act by the investigating agency cannot be allowed to be done by ordinary criminal court as the power of such court under the Act is confined only to remand of an accused person. Such an order allowing the investigating agency can be passed only by the Designated Court and not by any other criminal court. In allowing the investigating agency to add any provisions of the Act it is duty of the Designated Court to examine very carefully all the materials produced before the court and a speaking order has to be passed keeping in view ratio of the apex court, as stated above regarding the application of the provisions of the Act. Such order shall not be passed mechanically and it shall be a speaking order with reasons. In the cases in hand, along with the prayer for adding the provisions of the Act, no material were disclosed and that apart, the orders were passed by a Magistrate in a most mechanical way without any reason. Not only these orders are without jurisdiction, these orders are also liable to be struck down for want of reasoned order, which is the basic a judicial order.

23. Next question for consideration is the power of the remand u/s 167, Cr. P.C. By amending the above section by Section 20 of the Act, the Executive Magistrate and Special Executive Magistrate have also been empowered to exercise these powers though under normal procedure this power can be exercised only by Judicial Magistrate. Under Sub-section (1) of the said Section 167, if the investigation cannot be completed within 24 hours and there are

grounds for believing that the accusation or information is well-founded, the Officer-in-Charge of the police station or the police officer making the investigation shall forthwith transmit a copy of the entries in the case diary.

24. Such power of remand should not be exercised by the Magistrate mechanically and without application of mind. It has come to the knowledge of this court that only on the forwarding report with a prayer for remand such orders are passed, which is against the spirit of criminal jurisprudence. Before passing such remand order, the court, like the Designated Court as mentioned above shall have to first to find out whether on the material placed before the court viz. copies of the entry in the case diary, prosecution has been able to show a prima facie case under the Act against the person. In doing so, the court shall have to take note of the law laid down by the apex court which has been quoted in paragraphs 13 and 15 of this judgment. In other words, the court has to examine whether the case can be tackled under the ordinary law of the land and whether the Govt.'s law enforcing machinery has failed. If after examination, the court decides against the prosecution it has to send the record along with the accused person to the Designated Court for passing the appropriate orders in accordance with law laid down. As stated earlier, if an investigation is proceeding under normal law the Magistrate cannot allow the investigating agency to add the provisions of the Act and such an order can only be passed by the Designated Court. In view of the new concept introduced in the Act viz. power of police officers to record confession, the court normally should not allow police remand beyond 24 hours after arrest.

25. According to Section 19 of the Act, as stated above, the appellate court against the judgment, sentence or order of the Designated Court is the Supreme Court. In *Usmanbhai* (supra) the apex court has also laid down that High Court has no power to grant bail either u/s 439 or 482, Cr.P.C., but the power of this court to invoke Article 226 or 227 was not rejected by the apex court. As stated above, both the Gujarat High Court and this court have held that writ petition under Article 226/227 is maintainable. Thus, it would appear that though this court has no power to grant bail under Cr.P.C., reading Section 19 of the Act and the law laid down by the apex court I hold that powers of this court u/s 482, Cr.P.C. against the order of the Magistrate u/s 167, Cr.P.C. has not been taken away. In other words, if the High Court finds legal flaw in a remand order, necessary orders or direction except granting of bail can be passed by the High Court by exercising powers u/s 482, Cr.P.C. This is in addition to the powers of the High Court under Articles 226 and 227.

26. It is a settled law that by exercising power of superintendence under Article 227 of the Constitution, the High Court can keep the subordinate courts and Tribunals within the bound of its authority. *Cwaryam Singh v. Amarnath*, AIR 1954 SC 215. In addition to what has been laid down by the Division Bench of this court I may add that if this Court finds that the Designated Court or Magistrate by exercising powers under Cr.P.C. is not acting in accordance with

law, suitable direction can be given by this court.

27. In Ayubkhan (supra), the Gujarat High Court and in Girish Chandra Kakati (supra) a Division Bench of this court has held, as stated in paragraph 16 of this judgment, that High Court under Article 226 of the Constitution can look into whether provisions of the Act is applicable or not in a particular case.

28. Coming to the cases in hand I find that in Criminal Revision No. 157 of 1991, by the impugned order dated 5-3-91, passed in G.R. Case No. 209/91, learned Chief Judicial Magistrate, Goalpara passed in the following orders:--

In this case the investigating officer by a memo prayed for adding Sections 3/4 of T.A.D.A. Act in this case. The prayer is allowed. On the basis of the prayer, the said section may be added.

The above order cannot stand as the Chief Judicial Magistrate has no power to pass such an order as held earlier. Apart from this, the order is not a speaking order and there is no application of mind by the court. On perusal of the FIR and the allegation made, it is clear that there is absolutely no material for adding the above Section 3/4 of the Act. The allegation of the petitioner before this court that subsequent prayer for adding Section 3/4 of the Act was made only to harass the petitioner as he lodged a complaint against the officer-in-charge of Fire Brigade for not coming to the place of fire in time has some basis.

29. In Criminal Revision No. 155 of 1991, the impugned order runs as follows:

The investigating officer by report has prayed that Section 3/4 of T. A.D. A. (P) Act should be added in the instant case. Prayer allowed.

This order is also not tenable in law for the same reason which has stated in connection with the earlier Criminal Revision.

30. In the result, both the petitions are allowed and the impugned orders are set aside.

In respect of Anup Kumar Barua, who has been shown as an accused in Goalpara P.S. Case No. 52/91 (G.R. Case No. 209/91 pending before the Chief Judicial Magistrate, Goalpara), this court on 12-4-91 passed an order in his petition viz. Criminal Revision No. 157 of 1991 that he shall not be arrested by any authority in connection with the above case. This order had to be passed as an interim measure. I, therefore, confirm the above order, but it needs slight modification and accordingly, I direct that if Anup Kumar Barua is arrested in connection with the above case, he shall be immediately released on furnishing a P. R. bond of Rs. 2,000/-.

Similarly, it is directed that if accused-petitioner Sampatlal Jain, in connection with Criminal Revision No. 155 of 1991 if still is in custody, he shall be released on furnishing of bail bond of Rs. 3,000/- with one surety of like amount to the satisfaction of the learned Chief Judicial Magistrate, Goalpara. The case in connection with which he has been alleged to have been arrested is Goalpara P.S.

Case No. 206 of 1990 (G.R. Case No. 764 of 1990 pending before the learned Chief Judicial Magistrate, Goalpara).

In view of the above both the petitions are allowed.