
(2014) 04 CAL CK 0018
In the Calcutta High Court
Case No : SRCR No. 1 of 2013

Teru Majhi and Another

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 03-04-2014

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 2
Companies Act, 1956 — Section 529A
Constitution of India, 1950 — Article 21
Criminal Procedure Code, 1973 (CrPC) — Section 116(7), 167, 193, 194, 209(a)
Forest Act, 1963 — Section 104-D
Limitation Act, 1963 — Section 14(2)
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 18, 3, 32A, 33, 36
Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 — Section 18
Wild Life (Protection) Act, 1972 — Section 50

Citation : (2015) ALLMR(Cri) 207 : (2014) 2 CALLT 450 : (2014) 3 CCR 237 : (2014) 3 CHN 433 : (2015) CriLJ 1017 : (2014) 4 CTC 402 : (2014) 2 RCR(Criminal) 886

Hon'ble Judges : Debabrata Mookerjee, J;Asim Kumar Roy, J;A.K. Banerjee, J

Bench : Full Bench

Advocate : Milon Mukherjee, Ms. Bratati Dutta and Mr. Subhashis Dasgupta, Advocate for the Appellant; Manjit Singh, Learned Public Prosecutor, Mr. Dipankar Mahato, Mr. Ayan Bhattacharjee, Advocates for the State, Mr. L.K. Gupta, Senior Advocate and Mr. Sekhar Bose, Advocate, Amicus Curiae, Advocate for the Respondent

Judgement

A.K. Banerjee, J.—I have read the well-versed lucid judgment of My Lord the Hon"ble Mr. Justice Debangsu Basak. His Lordship not only dealt with each and every aspect that the learned Counsel appearing for the parties as well as the Amicus Curiae highlighted but also dealt with all the precedents relevant on the subject and ultimately answered the query that in my view, is accurate and would deserve no disagreement on any score. At the risk of repetition, may I add a few lines. The precedents cited at the bar already dealt with an identical issue

while considering the provisions of Section 12AC of the Essential Communities Act 1955 as amended by the Essential Commodities (Special Provisions) Act 1981. The said provision is Para-materia with Section 36 of the NDPS Act. The precedent (Pijush Kanti Dey (supra)) would answer the identical query and hold, power u/s 438 could be exercised by the Special Court constituted under the said Act of 1955. Section 37(1) of NDPS Act 1985 was Para material, however, distinction is sought to be raised as Section 37(1) although made a restriction on certain offences under said Act of 1985 outside the scope of release of the accused on bail unless the requirement under sub-section b(i) and b(ii) are complied with. Sub-Section 2 of 37 would make it clear, the limitation on granting bail under sub-section 1 are in addition to the limitations already provided under the Code of Criminal Procedure. Section 36(c) of the said Act of 1985 would provide, "save as otherwise provided in this Act" in Criminal Procedure Code including provisions as to bail and bonds would apply. On a combined reading of Sections 36(c) and 37 it is sought to be suggested, since anticipatory bail was not included the Section 438 would have no application. We fail to reason. If we closely read Section 37 that would provide limitation on grant of bail it did not speak of the power of the Court to grant anticipatory bail. 36(c) would make the Code of Criminal Procedure applicable except the area that would be in conflict with the provisions of the said Act of 1985.

2. My Lord has elaborately dealt with personal liberty guaranteed to the citizens of the country under Article 21 of the constitution. Constitution is our basic structure of all laws, rules and regulations. The Act of 1985 or the Code of 1973 was no exception. The legislature is permitted to enact laws that would put restriction on some rights without disturbing the basic structure of the Constitution. Such restriction in my considered view should be explicit. It could not be applied particularly when it would come in conflict of one's personal liberty guaranteed by the Constitution. Neither in the said Act of 1985 nor any other law for the time in force would put any explicit fetter on the Court to consider the prayer for anticipatory bail u/s 438 that the Code of Criminal Procedure empowered the Court of sessions. The CPC and Code of Criminal Procedure are two epics that would govern the entire civil and criminal field respectively. Unless it is explicitly prohibited, as observed above, any person anticipating criminal proceeding as against him resulting an arrest, is entitled to approach the High Court or the Court of session for an order to the effect, in the event of his arrest he shall be released on bail. However, exercise of such a power by the High Court or the Court of Session is subject to the consideration of certain factors prescribed u/s 438. The query made to us did not suggest, a person anticipating an arrest for an offence under the said Act of 1985 would not be entitled to invoke Section 438 in view of the restriction if any imposed in case of bail u/s 37 or any other provision of the said Act of 1985. It would pre-suppose, the querist would admit the power of the Court of law however, the querist wants to know the fora particularly whether special Court established under the said Act of 1985 would have the same power or not.

3. Under the said Act of 1985 the subject Court to be manned by an Additional District Judge is designated as a judge to try the offence under the said Act of 1985. Hence, the said Court would be considered as a Court of Session for the present purpose. Of course, while excising such power he must have due regard to the provisions of the said Act applicable therefor, including the provision u/s 37. section 37 could not be read to take away the power of the special Court constituted u/s 36 to decide a petition u/s 438. The Public Prosecutor contended, the Court ought to answer the reference keeping in view the provisions of 37(1) (b). I hope, such contention is accordingly dealt with.

4. I am thus in full agreement with His Lordship's considered view on the issue and the ultimate answer that His Lordship has given to the question referred to us.

Ashim Kumar Roy, J.

5. In connection with a case of Anticipatory Bail, relating to an offence punishable under the NDPS Act, pending before the Learned Special Judge, NDPS Act, Bankura, a question arose as to whether the Special Court under the NDPS Act is empowered to entertain any application for Anticipatory Bail or not. Having regard to the same the Learned Judge referred the question to this court, for its decision invoking Section 395 of the Code of Criminal Procedure. The question of law set out in the reference, is, namely:

Is a Special Court u/s 36 of the NDPS Act (deemed Sessions Court) competent to entertain the pre-arrest bail petition u/s 438 CRPC?

6. Brother Debangshu Basak, J. in his judgment opined that a special Court constituted u/s 36 of the NDPS Act, 1985 is competent to entertain a pre-arrest bail petition u/s 438 CRPC. I fully subscribe to such view and concur with his conclusion. At the same time, in the light of our unanimous opinion, in our answer to the reference, it is also required to be clarified that such jurisdiction of the designated Judge to exercise power u/s 438 CRPC relating to offences punishable under the NDPS Act is exclusive and was never vested with the Sessions Judge.

Debangsu Basak, J.

PRELIMINARY

7. Personal liberty was guaranteed under Article 21 of the constitution. Anticipatory bail was one of the tools secured on such personal liberty. The concept of anticipatory bail was that, a person who apprehended arrest in a non-bailable case, would apply for grant of bail. The right of an accused, to apply for anticipatory bail, in a proceeding under the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) was accepted. The question arose, as per the forum, other than the High Court, competent to exercise such power.

8. A petition u/s 438 of the Code Criminal Procedure, 1973 praying for pre-arrest

bail in connection with Patrasayer Police Station Case No. 09/13 dated February 11, 2013 u/s 18 of the NDPS Act, 1985 came up for consideration before the Special Court under the NDPS Act First Court, Bankura in-charge. A point of maintainability of such application was taken. While considering such point of maintainability the learned Judge framed a question of law for reference to this Hon"ble Court.

QUESTION IN THE REFERENCE

9. The question of law framed by the learned Judge was as follows:-

Is Special Court constituted u/s 36 of the NDPS Act (deemed Sessions Court) competent to entertain the pre-arrest bail petition u/s 438 of Criminal Procedure Code?

10. The learned Judge, Special Court under the NDPS Act, 1985 framed the question of reference by his Order dated September 10, 2013. While discussing the necessity to refer the question to this Hon"ble Court the learned Judge considered 2013 CLJ page 3503 (Rakesh Kumar alias Kukka v. State of Himachal Pradesh), Superintendent, Narcotics Central Bureau Vs. R. Paulsamy, , Pijush Kanti Dey Vs. The State, and Baljit Singh Vs. State of Assam and Others, . He noted that Balajit (Supra) cited before him was unreported. He also considered Suresh Dutta Vs. State of Tripura, . The learned Judge explained his views requiring the reference to be made. In his view, Special Court constituted under the NDPS Act, 1985 was a Court of first production and was, therefore, not competent to entertain and hear an application u/s 438 of the Code of Criminal Procedure, 1973. According to him, provisions of Section 12AA(1)(d) of the Essential Commodities Act, 1973 were absent in the NDPS Act, 1985 and, therefore, the ratio of Pijush Kanti Dey (Supra) was not applicable. He noted the divergent views of the Gauhati High Court in the cases of Balajit Singh (Supra) and Suresh Dutta (Supra). He found that, a reference was made to the Larger Bench of the Gauhati High Court for examining the matter. The decision of the Larger Bench of the Gauhati High Court on such reference was not placed before him.

AMICUS CURIAE

11. By an Order dated November 25, 2013 we requested Mr. L.K. Gupta, learned Senior Advocate and Mr. Sekhar Bose, learned Senior Counsel to assist us in the matter as Amicus Curiae.

VIEW OF THE PETITIONER

12. Mr. Milon Mukherjee learned Advocate for the petitioner before the Trial Court submitted that, a petition u/s 438 of the Code of Criminal Procedure, 1973 was maintainable before the Special Court trying offences under the NDPS Act, 1985. He referred to Section 5 of the Code of Criminal Procedure, 1973 which provided that, the provisions of any special Act would apply in addition to the provisions of the Code of Criminal Procedure, 1973 if such Special Act declared it to be so. He

contended that, the Special Court under the NDPS Act, 1985 was constituted under the provisions of Section 36 of the NDPS Act, 1985. A Special Court constituted u/s 36 of the NDPS Act, 1985, according to him, was a Court of Session. According to him, Section 36C of the NDPS Act made the Code of Criminal Procedure, 1973 applicable to proceedings before it, save as otherwise provided in the NDPS Act, 1985. He submitted that, save as otherwise provided in the NDPS Act, 1985 all provisions of the Code of Criminal procedure, 1973 including the provisions as to bails and bonds would apply to the proceedings before a Special Court. The NDPS Act, 1985, according to him, did not take away the provisions as to bails apprehending arrest of the Code of Criminal Procedure, 1973 from the purview of the Special Court constituted under the NDPS Act, 1985. The Special Court had the jurisdiction to entertain and dispose of petition u/s 438 of the Code of Criminal Procedure, 1973.

13. He submitted that Section 12AC of the Essential Commodities Act, 1955 as it stood with the coming into effect of the Essential Commodities (Special Provisions) Act, 1981 was *pari materia* with that of Section 36C of the NDPS Act, 1985. He submitted that, on a reference as to the question whether the Court of Sessions and the Special Court constituted under the Essential Commodities Act, 1955 as amended by the Essential Commodities (Special Provisions) Act, 1981 had concurrent jurisdiction to grant anticipatory bail u/s 438 of the Code of Criminal procedure, 1973 to a person apprehending arrest on an allegation of having committed an offence under the Essential Commodities Act, 1955 or not the Division Bench of this Hon"ble Court in *Pijush Kanti Dey Vs. The State*, held that, the power u/s 438 of the Code of Criminal Procedure, 1973 could be exercised by the Special Court constituted under the Essential Commodities Act, 1955 in respect of offences keeping in view of proviso to Clause 1(d) of Section 12AA of the Essential Commodities Act, 1955.

14. He submitted that, Section 12AA(1)(d) of the Essential Commodities Act, 1955 as amended by the Essential Commodities (Special Provisions) Act, 1981 was *pari materia* with sub-section (1) of section 37 of the NDPS Act, 1985. He relied upon the reasoning of *Pijush Kanti Dey (Supra)* and submitted that, a Special Court under the NDPS Act, 1985 had the authority to consider a petition u/s 438 of the Code of Criminal Procedure, 1973. The parameters on which a petition u/s 438 of the Code of Criminal Procedure, 1973 would be considered by the Special Court under the NDPS Act, 1985 was circumscribed by section 37 of the NDPS Act, 1985. section 37 of the NDPS Act, 1985 could not be read to take away the power of the Special Court constituted u/s 36 of the NDPS Act, 1985 to decide a petition u/s 438 of the Code of Criminal Procedure, 1973.

VIEW OF THE STATE

15. Mr. Manjit Singh, Public Prosecutor, for the State was of the view that, a Special Court under the NDPS Act, 1985 was not authorized to consider a petition u/s 438 of the Code of Criminal Procedure, 1973. In course of his submissions, he traced the history of the NDPS Act, 1985 and various amendments introduced

from time to time to the Act. He submitted that, u/s 36B of the NDPS Act, 1985 the power of the High Court conferred under Chapters XXIX and XXX of the Code of Criminal Procedure, 1973 were preserved. According to him, Section 36C which stipulated that, the Special Court would be deemed to be a Court of Session demonstrated that, the Special Court was not a Court of Session for all purposes and that, such deeming provisions u/s 36C of the NDPS Act, 1985 merely established the non-existence of the fact deemed.

16. He next contended that, a Special Court under the NDPS Act, 1985 was established for the purpose of trial only. Therefore, in his submission, the provisions of the Code of Criminal Procedure, 1973 which were not directly related either to inquiry or trial could not be presumed to be conferred on the Special Court in absence of express mention. Provisions relating to bail and pre-arrest bail were two such instances which were not allied to the general provisions of inquiry or trial. Therefore, both such provisions were required to be incorporated expressly under the NDPS Act, 1985. According to him, Section 36C of the NDPS Act, 1985 incorporated the provisions of bail without mentioning pre-arrest bail. Therefore, in his submission, a Special Court constituted under the NDPS Act, 1985 did not have power u/s 438 of the Code of Criminal Procedure, 1973 to grant pre-arrest bail.

17. He then wanted to approach the issue from a different angle. He relied on Section 9 of the Code of Criminal Procedure, 1973 as amended and applicable to the State of West Bengal. The amended Section 9 of the Code of Criminal Procedure, 1973 as applicable to the State of West Bengal, provided for the establishing of a Court of Session for each Session division. It required every Court of Session to be presided by a Judge appointed by the High Court. It also provided that the High Court could appoint Additional Sessions Judge and Assistant Sessions Judge to exercise the jurisdiction of a Court of Session. u/s 9(3) of the Code of Criminal Procedure, 1973 as applicable to the State of West Bengal, an Additional Sessions Judge exercising jurisdiction in a sub-division (other than the sub-division where the head quarter of the Sessions Judge was situated) would have powers of Sessions Judge in that sub-division, for the purpose of Sections 116(7), 193, 194, 209(a), 409, 439, 449 of the Code of Criminal Procedure, 1973. Therefore, in view of Section 9(3) and the proviso thereto, Section 438 of the Criminal Procedure Code, 1973 could not be read with the provisions of Section 36A and 36C of the NDPS Act, 1985. According to him, in terms of the State amendment to Section 9 of the Code of Criminal Procedure, 1973 under no circumstances, the Additional Sessions Judge could exercise powers of anticipatory bail.

18. He emphasized that, anticipatory bail was an extraordinary privilege which should be granted only in exceptional circumstances. In support of such contention he relied on *Jai Prakash Singh Vs. State of Bihar and Another etc.*, .

19. He went on to submit that, a Judge of the Special Court was required to be appointed by the Government with the concurrence of the Chief Justice of the

High Court. An Additional Sessions Judge was eligible to be appointed as a Sessions Judge. Therefore, According to him, vesting the power of grant of pre-arrest bail with the Special Court constituted under the NDPS Act, 1985, would cause infraction of Section 9(3) proviso of the Code of Criminal Procedure, 1973 as applicable to the State of West Bengal. He read Section 36C of the NDPS Act, 1985 along with the proviso to Section 9(3) of the Code of Criminal Procedure, 1973 as applicable to the State of West Bengal and submitted that, the power of Section 438 of the Code of Criminal Procedure, 1973 was not conferred upon a Special Court.

20. According to the Public Prosecutor, the Special Court was a deemed Court of Sessions. This deeming provision was a legal fiction. While interpreting a legal fiction, according to him, the Court was required to ascertain the purpose of creating the same. According to him, under Sections 36, 36A, 36C of the NDPS Act, 1985 the Special Court was established for trial of offences punishable under such Act. Special Court constituted under the NDPS Act, 1985 derived its powers from the NDPS Act, 1985. It had exclusive jurisdiction to try offences under the NDPS Act, 1985. A judicial proceeding included an enquiry and trial and not an investigation. The provisions of Section 438 of the Code of Criminal Procedure, 1973 were not an integral part of inquiry and trial and, therefore, such power ought not to be deemed to be conferred upon a Special Court without express provision.

21. Special Court constituted under the NDPS Act, 1985 was not a Criminal Court within the meaning of Section 6 of the Code of Criminal Procedure, 1973. He relied on *State of Tamil Nadu Vs. V. Krishnaswami Naidu and Another*, and submitted that the Special Court under the NDPS Act, 1985 was not a class of Court empowered to exercise 438 of the Code of Criminal Procedure, 1973. Deficiency of enactment, therefore, according to him, could not be supplanted by the Court. He relied on *The Commissioner of Sales Tax, U.P., Lucknow Vs. Parson Tools and Plants, Kanpur*, in that regard.

22. On the application of Article 21 of the Constitution of India he relied on *State of M. P. and Another Vs. Ram Krishna Balothia and Another*, to submit that, Section 438 of the Criminal Procedure Code, 1973 was incorporated for the first time much after the Constitution came into force. The power to grant anticipatory bail was conferred only on a Court of Session or the High Court. The Supreme Court in *State of Madhya Pradesh (Supra)* held that, grant of anticipatory bail could not be considered as an essential ingredient of Article 21 of the Constitution. So also its non-application to a certain special category of offences could not be considered as violative of Article 21.

23. He submitted that, the Courts ought not to proceed on the assumption that the legislators made a mistake in any provision of the NDPS Act, 1985. He relied on *Bharat Aluminium Company and Others Vs. Kaiser Aluminium Technical Service, Inc. and Others etc. etc.,* , *Sri Jeyaram Educational Trust and Others Vs. A.G. Syed Mohideen and Others*, in that regard.

24. The fact that Section 438 of the Code of Criminal Procedure, 1973 came under the Chapter XXXIII with the heading of such Chapter being provisions as to bails and bonds, according to him, could not override the provisions contained in the Chapter. He submitted that, heading of a chapter would not govern the plain meaning of the provisions contained therein. He relied on *Frick India Ltd. Vs. Union of India (UOI) and Others*, in that regard.

25. Next he submitted that, mere mentioning of the provision as to bails and bonds in Section 36C would not introduce all the provisions of Chapter XXXIII of the Code of Criminal Procedure, 1973 to the NDPS Act, 1985. He contrasted Section 36B with 36C of the NDPS Act, 1985 and submitted that, all powers conferred by Chapters XXIX and XXX of the Code of Criminal Procedure, 1973 were preserved in respect of Section 36B. Section 36C of the NDPS Act, 1985 provided that, the provisions of bails and bonds would apply to the proceedings before a Special Court. According to him, had the legislature the intention to vest the power of anticipatory bail to a Special Court the same would be expressly mentioned in Section 36C. This was a contrast on which he laid stress upon.

26. He submitted that, Sections 36A, 36B and 37(2) of the NDPS Act, 1985 were some provisions of legislation by incorporation. He sought to make a distinction between legislation by incorporation, and a mere reference to an earlier Act in the later Act. According to him, a mere reference of any provision of an earlier Act was not legislation by incorporation. In such context, he submitted that, so far as Section 36C related to the powers u/s 438 of the Code of Criminal Procedure, 1973 was concerned, the same was not incorporated by legislation. The provisions u/s 438 of the Criminal Procedure Code, 1973 were not bodily transposed into Section 36C. According to him, had the legislature any intention of vesting the power u/s 438 of the Code of Criminal Procedure, 1973, Chapter XXXIII of the Code of Criminal Procedure, 1973 would be mentioned in Section 36C of the NDPS Act, 1985. He relied on *Bank of Maharashtra Vs. Pandurang Keshav Gorwardkar and Others*, in support of the contention that, the mention of a section was neither legislation by reference nor a legislation by incorporation.

27. On Section 12AA(1)(d) of the Essential Commodities Act, 1955, (as was introduced by way of amendment), he submitted that, there was no relevant provision in the NDPS Act, 1985 which was analogous to Section 12AA(1)(d). Therefore, Section 12AA of the Essential Commodities Act, 1955 as was existing and Sections 36A and 36C of the NDPS Act, 1985 could not be termed as *pari materia*.

28. He went on to submit that, the legislator was deemed to know the existing law on the subject while enacting a law. Therefore, while amending Section 36A of the NDPS Act, 1985 the provisions of Section 12AA(1)(d) of the Essential Commodities Act, 1955 was deemed to be within the contemplation of the legislator. The legislator in its wisdom did not reproduce the same in the NDPS Act, 1985. This, according to him, made the crucial difference. The provisions of Section 36C of the NDPS Act, 1985 according to him, could not be read in a

manner to make any portion of it dead letter or superfluous. He, thereafter, sought to distinguish Pijush Kanti Dey (Supra). He submitted that, the issue before the Division Bench in Pijush Kanti Dey (Supra) was not the same as the reference taken up for consideration here. According to him, as there was no provision analogous to the provisions of Section 12AA(1)(d) of the Essential Commodities Act, 1955 in the NDPS Act, 1985, Pijush Kanti Dey (Supra) would not be applicable to the present reference. Moreover, in Pijush Kanti Dey (Supra) the Division Bench observed that Essential Commodities Act, 1955 was a self-contained Code. However, NDPS Act, 1985 could not be termed to be a self-contained Code. He submitted that invocation of Section 5 of the Code of Criminal Procedure, 1973 by Pijush Kanti Dey (Supra) was misplaced. He relied on Moti Lal Vs. Central Bureau of Investigation and Another, in support of his contention that, when specific provisions of the statute were contrary to the provisions contained in the Code of Criminal Procedure, 1973, the statute would prevail during trial. However, it could not be said that, the operation of the rest of the provisions of the Code of Criminal Procedure, 1973 would not apply to a proceeding before a Special Court constituted under the NDPS Act, 1985. The Court ought to answer the reference keeping in view the in house limitations provided u/s 37(1)(b) of the NDPS Act, 1985.

VIEWS OF THE AMICUS CURIAE

29. Joint submission was made by the Amicus Curiae. They analyzed diverse provisions of the NDPS Act, 1985 to demonstrate the extent NDPS Act, 1985 dispensed with the applications of the provisions of the Code of Criminal Procedure, 1973. Such exercise according to them, were necessary to obtain a view on the opening words of Section 36C particularly "Save as otherwise provided in this Act.....". They identified Sections 32A, 33, 36A, 37, 51, 52A(4) of the NDPS Act, 1985 which gave overriding effect of the provisions of the NDPS Act, 1985 over the Code of Criminal Procedure, 1973. They submitted that, such provisions as enumerated in the preceding sentence made either the provisions of the Code of Criminal Procedure, 1973 in their application to be dispensed with or incorporated into the NDPS Act, 1985 with modifications, which were necessary for the purpose of giving effect to the provisions of the NDPS Act, 1985. They reasoned that, the provisions of the Code of Criminal Procedure, 1973 were not barred from their application in a proceeding under the NDPS Act, 1985. On the contrary they were very much applicable, save to the extent specifically ousted or modified by the provisions of the NDPS Act, 1985 itself.

30. They submitted that a Special Court under the NDPS Act, 1985 was recognized u/s 26(b) of the Code of Criminal Procedure, 1973. Its function, power and authority were recognized in Section 4(2) of the Code of Criminal Procedure, 1973. They relied on Section 5 of the Code of Criminal Procedure, 1973 which provided that nothing in the Code of Criminal Procedure, 1973 would affect such law.

31. They went on to discuss the meaning of "save as otherwise provided in this

Act" used in Section 36C of the NDPS Act, 1985. According to them, the provisions of the Code of Criminal Procedure, 1973 including the provisions as to bails and bonds would apply proceedings under the NDPS Act, 1985. The words "otherwise provided" according to them, would not mean implied bar on the application of the Code of Criminal Procedure, 1973. The words "including provisions" were a legislative certification on the application of the provisions of Chapter XXXIII of the Code of Criminal Procedure, 1973 to proceedings under the NDPS Act, 1985.

32. They next referred to the transitional provisions enumerated in Section 36D of the NDPS Act, 1985. Referring to such transitional provisions they submitted that, a Sessions Court acted as the Court of trial during the transitional period and after the constitution of the Special Court it remained there as a Special Court designated under the NDPS Act, 1985. They sought to support this view of theirs by referring to Section 36B of the NDPS Act, 1985. Orders of the Special Court, they pointed out were appealable to or revisable by the High Court.

33. They wanted us to consider another aspect on this subject. Both the Code of Criminal Procedure, 1973 as well as NDPS Act, 1985 was parliamentary legislation. It was presumed that, while enacting both the legislation, the legislator was aware of the provisions in the general law. Any departure from the provisions of the general law was required to be reflected in the special law. A person choosing to avail Section 438 under the general law had two forai, namely, the Court of Session as well as the High Court. Such choice, according to them could not be taken away by giving a restrictive meaning to Section 36C of the NDPS Act, 1985. In fact, according to them, such choice was not taken away. They next referred to Section 36A(3) of the NDPS Act, 1985 and submitted that, it saved the special power of the High Court regarding bail u/s 439 of the Code of Criminal Procedure, 1973. They submitted that, on a combined and harmonious reading of Section 33A of the NDPS Act, 1985 with Section 36C thereof and Chapter XXXIII of the Code of Criminal Procedure, 1973 it would lead to a conclusion that the Special Court under the NDPS Act, 1985 was entitled to consider a petition u/s 438 of the Code of Criminal Procedure, 1973. The Amicus Curiae dwelt on the subject of legislation by incorporation. They found Section 36C and 51 of the NDPS Act, 1985 to incorporate various provisions of the Code of Criminal Procedure, 1973.

34. The Amicus Curiae found the description by the learned Judge making the reference as the Court of the first production to be not discernible. According to them, the Special Court was not the Court of first production. They referred to Section 36A(1)(b) of the NDPS Act, 1985 and submitted that a Judicial Magistrate was empowered to detain such person in custody for a period not exceeding 15 days in the whole and an Executive Magistrate for a period of 7 days. Therefore, the first production after arrest was not indispensably made before the Special Court constituted under the NDPS Act, 1973. After the expiry of the remand the arrestee was required to be forwarded the Special Court

having jurisdiction in respect of the offence. In any event they submitted that, the first production theory could not have any consideration in the framework of the NDPS Act, 1985.

35. The Amicus Curiae submitted that, in given circumstances Courts may be required to find out the intention of the legislature and "iron out the creases" if required. In support of such contention they relied on All India Reporter State of Tamil Nadu Vs. Kodaikanal Motor Union (P) Ltd., which quoted a passage from 1949 Volume 2 AER Page 155 (Seaford Court Estates v. Asher).

36. They relied heavily on Pijush Kanti Dey (Supra). They submitted that, Section 12AC of the Essential Commodities Act, 1955 as it stood with the Essential Commodities (Special Provisions) Act, 1981 coming into effect and Section 36C of the NDPS Act, 1985 were pari materia. They felt that, the referring Court was not correct in appreciating Pijush Kanti Dey (Supra).

37. The Amicus Curiae wanted us to consider Article 21 of the Constitution of India. They wanted us to read the provisions of Section 438 of the Code of Criminal Procedure, 1973 and Section 36C of the NDPS Act, 1985 in light of the liberties guaranteed to a person under Article 21 of the Constitution of India. To emphasize the importance of Section 438 of the Code of Criminal Procedure, 1973, they relied on 1976 Volume 4 Supreme Court Cases page 572 (Balchand Jain v. State of Madhya Pradesh) and Siddharam Satlingappa Mhetre Vs. State of Maharashtra and Others, . On the importance of the personal liberty guaranteed under Article 21 of the Constitution of India they relied upon Shri Gurbaksh Singh Sibbia and Others Vs. State of Punjab, .

38. To shed light on what "save as otherwise provided in the Act" would mean when used in a statute, they relied on State of Rajasthan and Others Vs. Shri Noor Mohammad, . In similar vein, they submitted that, the Code of Criminal Procedure, 1973 would apply to proceedings under the NDPS Act, 1985 and in support of such proposition they relied upon State of Tamil Nadu Vs. V. Krishnaswami Naidu and Another, which was also reported at State of Tamil Nadu Vs. V. Krishnaswami Naidu and Another, .

39. They referred to the powers of a Special Court established under the Special Courts (Trial of Offences relating to Transactions in Securities) Act, 1992 to submit that, a Special Court constituted under such Act was held to retain the power to grant pardon. In that regard they relied upon Harshad S. Mehta and Others Vs. The State of Maharashtra, .

40. They relied upon All India Reporter Bhinka and Others Vs. Charan Singh, to demonstrate how a heading prefixed to a section ought to be read.

41. On the interpretation of Section 12AA and Section 12AC of the Essential Commodities Act, 1981 as they stood with the coming into effect of the Essential Commodities (Special Provisions) Act, 1981 and Section 438 of the Criminal Procedure Code, 1973 the Amicus Curiae relied on decisions of various High

Courts which were as follows:-

1. S. Murugesappa and Others Vs. State of Karnataka
2. Karamchand and Another Vs. The State of M.P.,
3. Pijush Kanti Dey Vs. The State,
4. Suresh Chand and Others Vs. State of Rajasthan,
5. B. Kuppa Naidu Vs. State of Andhra Pradesh

42. They also placed reliance on five other decisions of various High Courts where, according to them, similar provisions of different statute came up for consideration in the light of Section 438 of the Code of Criminal Procedure, 1973. Such decisions were-

1. 1985 Criminal Law Journal page 146 (State of Punjab v. Piara Singh)
2. In re: Shri Ravi Nandan Sahay, Sessions Judge
3. Fakhruddin Sharafali Ampanwala Vs. State,
4. C. Abdul Hameed Vs. State,
5. State of Bihar Vs. Braj Nandan Raut, .

43. Three authorities of three different High Courts on the interpretation of various Sections of the NDPS Act, 1985 by such High Courts were also relied upon by Amicus Curiae. Such authorities were Ved Prakash Goel Vs. Commissioner, Central Bureau of Narcotics and Another, , Rakesh Kumar alias Kukka Vs. State of H.P., , 2004 3 Cri 433 (Baljit Singh v. State of Assam).

44. In conclusion, the Amicus Curiae submitted that, on their reading of the law and the interpretation of the NDPS Act, 1985 as well as various provisions of the Code of Criminal Procedure, 1973 they were of the view that, be it a Court of Session or a Special Court or a Court of Original Jurisdiction, none of them were denuded of the jurisdiction and authority to receive and consider an application for anticipatory bail. They were of the firm view that, a right to move Court against an apprehended arrest was a right or a remedy emerging from Article 21 of the Constitution of India. Any interpretation to any section of a statute particularly the provisions of the NDPS Act, 1985 were required to be made in the context of personal liberty guaranteed under Article 21 of the Constitution of India. An interpretation of law, which took away a civil right or the right of a person ought not to be resorted to, unless specifically barred or restricted by a special law. There was no such restriction in the NDPS Act, 1985.

45. They were, therefore, of the view that, a Special Court constituted under the NDPS Act, 1985 was entitled to receive and consider an application u/s 438 of the Code of Criminal Procedure, 1973. The disposal of such petition was, according to them, governed by section 37 of the NDPS Act, 1985. They wanted

us to answer the reference by holding that a Special Court constituted under the NDPS Act, 1985 had the jurisdiction to entertain and dispose of a petition for pre-arrest bail u/s 438 of the Code of Criminal procedure, 1973.

OUR VIEW

46. In the factual and legal matrix stated above the question under reference required an answer.

47. The statement of objects and reasons of the NDPS Act, 1985 stated that, with the passage of time and development in the field of illicit drug traffic and drug abuse at national and international level many deficiencies in the existing laws of the country came to the notice of the Government. It noted that, our country was also a party to the International convention on Narcotic Drugs and Psychotropic Substances. Government felt an urgent need to enact a comprehensive legislation on Narcotic Drugs and Psychotropic Substances. NDPS Act 1985 was brought about to address such urgent need. It consolidated and amended the existing laws relating to narcotic drugs, made stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances.

48. The Act came into effect on November 14, 1985. The Act was amended from time to time. The Act was divided into seven chapters with their being a Chapter V and a Chapter VA. NDPS Act, 1985 identified the offences and the penalties under such Act. In order to provide speedy trial of the offences identified under the Act, Section 36 of the NDPS Act, 1985 provided for constitution of Special Court. A Special Court constituted under the NDPS Act, 1985 consisted of a Single Judge appointed by the Government with concurrence of the Chief Justice of the High Court. Sub-section (3) of Section 36 required a Judge of a Special Court to be qualified for appointment as a Sessions Judge or as an Additional Sessions Judge.

49. Section 36A specified that the offences under the NDPS Act, 1985 which were punishable with imprisonment for a term of more than three years would be triable by a Special Court only. While considering Section 36A of the NDPS Act, 1985 the learned Judge making the reference to this Hon'ble Court considered a Special Court constituted under NDPS Act, 1985 to be a Court of first production. In arriving at such view, the learned Judge considered sub-section (3) of Section 36A as well as Section 36A(1)(a)(b) and (c) of the NDPS Act, 1985. The Amicus Curiae were of the view that, a Special Court under the NDPS Act, 1985 was not a Court of first production. They relied on Section 36A(1)(b) which provided that an accused, suspected of committing an offence under the NDPS Act, 1985 would be forwarded by a Magistrate to the Special Court.

50. Section 36A of the NDPS Act, 1985 did not mean that the Special Court was the Court of the first production at all times. Section 36A began with the non-obstante clause "Notwithstanding anything contained in the Code of Criminal Procedure, 1973.....". The non-obstante clause was clear. It required

that, the provisions laid down in section 36A of the NDPS Act, 1985 after the non-obstante clause would prevail over the provisions of the Code of Criminal Procedure, 1973 should any provisions of the Code would be in conflict with the provisions of section 36A. The provisions of section 36A of the NDPS Act, 1985 would override the provisions of the Code of Criminal Procedure, 1973 in the event of conflict between the two.

51. Section 36A(1)(a) made the jurisdiction of the Special Court constituted u/s 36 to try offences under the NDPS Act, 1985, which were punishable with imprisonment for a term of more than 3 years, exclusive.

52. Section 36A(1)(b) allowed a Magistrate to forward an accused suspected of committing an offence under the NDPS Act, 1985 to a Special Court. Section 36A(1)(b) of the NDPS Act, 1985 stated that where a person accused of or suspected of a commission of an offence under the NDPS Act, 1985, was forwarded to a Magistrate under sub-section (2) or sub-section (2A) of Section 167 of the Code of Criminal Procedure, 1973 such Magistrate could authorize the detention of such person in such custody as he thought fit for a period not exceeding 15 days in the whole where such Magistrate was a Judicial Magistrate and 7 days in the whole where the Magistrate was an Executive Magistrate. Section 36A(1)(b) in its proviso provided that, cases which were triable by the Special Court where such Magistrate considered that a person forwarded to him or at the time before the expiry of a period authorized by him that the detention of such person was unnecessary, he could forward such person to the Special Court having jurisdiction. Section 36A(1)(b), therefore, contemplated a situation where the Special Court was not a Court of first production.

53. Section 36A(1)(c) of the NDPS Act, 1985 stipulated that, the Special Court would exercise, in relation to the person forwarded to it u/s 36A(1)(b), the same power which a Magistrate having jurisdiction to try a case may exercise u/s 167 of the Code of Criminal Procedure, 1973 in relation to the accused person in such case forwarded to him under that section.

54. Section 36A(1)(d) allowed the Special Court, upon perusal of police report of the facts constituting an offence under the NDPS Act, 1985 or upon complaint made by any officer of the Central Government or a State Government authorized in his behalf, take cognizance of offence without the accused being committed to it for a trial.

55. Sub-section (2) of Section 36A allowed the Special Court to try an offence other than an offence under the NDPS Act, 1985 with which the accused may, under the Code of Criminal Procedure, 1973 be charged at the same trial. The special powers of the High Court regarding bail u/s 438 of the Code of Criminal Procedure was retained u/s 36A(3) of the NDPS Act, 1985.

56. Section 36A(4) of the NDPS Act, 1985 increased the number of days occurring in sub-section (2) of Section 167 of the Code of Criminal Procedure, 1973 from 90 days to 180 days. It also provided that, if was not possible to

complete the investigation within the period of 180 days the Special Court was empowered to extend such period up to 1 year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reason for detention of the accused beyond the said period of 180 days.

57. The Special Courts were empowered by Section 36A(5) to try offences punishable under the NDPS Act, 1985 with imprisonment of a term not more than three years summarily. The whole scheme appeared to be in tune with the declared objective of the Government of providing speedy trial of the offences under the NDPS Act, 1985. Such intention of the Government was declared both in the statement of objects and reasons of the NDPS Act, 1985 as well as Section 36 of the NDPS Act, 1985 itself.

58. Our understanding of Section 36A of the NDPS Act, 1985 led us to conclude that, a Special Court constituted under the NDPS Act, 1985 was not always a Court of first production. That, however, would not answer the question referred. It would at the same time go to some length at addressing the question framed.

59. Section 36B related to appeal and revision. It provided that a High Court may exercise, so far as may be applicable, all powers conferred by Chapter XXIX and XXX of the Code of Criminal Procedure, 1973, on a High Court as if a Special Court within the local limits of the jurisdiction of the High Court were a Court of Session trying cases within the local limits of the jurisdiction of the High Court.

60. What was of utmost importance to the question under reference was Section 36C of the NDPS Act, 1985. It provided for the application of the Code of Criminal Procedure, 1973 to proceedings before a Special Court. It opened with the words "save as otherwise provided in this Act". These opening words were commented upon by all the parties appearing before us.

DISCUSSION OF CITED AUTHORITIES

61. We considered the various authorities cited before us by the respective parties. The authorities cited by the Public Prosecutor, were taken up first.

62. In *Jai Prakash Singh Vs. State of Bihar and Another etc.*, , the Supreme Court was concerned with an appeal directed against grant of anticipatory bail. Their Lordships considered, the provisions of Section 438 of the Code of Criminal Procedure, 1973, and noted the previous decisions relating to anticipatory bail. Their Lordships were of the view that anticipatory bail would be granted only in exceptional circumstances, where the Court was prima facie of the view that the applicant was falsely implicated in the crime and that the accused would not misuse his liberty. It was not suggested by the Public Prosecutor that, an accused under the NDPS Act, 1985 did not have recourse to Section 438 of the Code of Criminal Procedure, 1973.

63. What was suggested was that the Special Court did not have jurisdiction to exercise such power.

64. *I State of Tamil Nadu Vs. V. Krishnaswami Naidu and Another*, , the Supreme Court was concerned with the question whether the Special Judge under the Criminal Law (Amendment) Act, 1952 could exercise powers conferred upon a Magistrate u/s 167 of the Code of Criminal Procedure, 1973 to authorize detention of the accused in the custody of the police. Their Lordships were of the view that, the Special Judge in the Criminal Law (Amendment) Act, 1952, was for some purposes deemed to be a Sessions Judge and for some other purposes deemed to be a Magistrate with some powers exercised by the Magistrate conferred upon him. It was also held that the Criminal Law (Amendment) Act was an amending Act so far as Code of Criminal Procedure, 1973 and the Indian Penal Code were concerned. The provisions of the Code of Criminal Procedure, 1973 would be in force unless there were certain provisions in the Criminal Law (Amendment) Act, 1952 which were inconsistent with the provisions of the Code of Criminal Procedure, 1973. Their Lordships answered the question by holding that a Special Judge would be a Magistrate empowered to try a case u/s 167 of the Criminal Procedure Code, 1973. The Special Judge would proceed to exercise the power that was conferred upon a Magistrate having jurisdiction to try the cases. We are afraid that, this authority could not be read to mean that a Special Court constituted under the NDPS Act, 1985 was not empowered to exercise Section 438.

65. In *The Commissioner of Sales Tax, U.P., Lucknow Vs. Parson Tools and Plants, Kanpur*, the Supreme Court was concerned with the question whether Section 14(2) of the Limitation Act, 1963 in terms, or in principle, would be invoked for including the time spent in prosecuting an application under Rule (6) of the U.P. Sales Tax Rules for setting aside the order of dismissal of appeal in default, under the U.P. Sales Tax Act, 1948 from computation of the period of limitation for filing a revision under that Act. In such context, Their Lordships were of the view that where the legislature clearly declared its intent in the scheme and language of a statute, it was the duty of the Court to give full effect to the same without scanning its wisdom or policy, and without engrafting, adding or implying anything which was not congenial to or consistent with such expressed intent of the lawgiver; were so if the statute was a taxing statute. Their Lordships went on to hold, that the object, the scheme and language of the Sales Tax Act did not permit the invocation of Section 14(2) of the Limitation Act, either in terms, or in principle, for excluding the time spent in prosecuting proceedings for setting aside the dismissal of appeals in default, from computation of the period of limitation prescribed for filing a revision under the Sales Tax Act. The question in the present reference, in our view, did not require us to engraft, add or imply anything which was not congenial to or consistent with the expressed intent of the law giver.

66. In *State of M. P. and Another Vs. Ram Krishna Balothia and Another*, the constitutional validity of certain provisions of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 came up for consideration. Their Lordships were of the view that Section 438 of the Court of Criminal

Procedure, 1973, did not apply to any case involving arrest of any person accused of having committed any of the offences specified u/s 3 of such Act. Section 18 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 expressly provided for the exclusion of Section 438 of the Court of Criminal Procedure, 1973 in relation to any case involving the arrest of any person on an accusation of having committed an offence under the said Act of 1989. In the reference under consideration, the NDPS Act, 1985 did not contain a similar section as that of Section 18 of the Act of 1989.

67. The Constitution Bench in *Bharat Aluminium Company and Others Vs. Kaiser Aluminium Technical Service, Inc. and Others etc. etc.*, was concerned with the interpretation of Clause (2) of Section 2 of the Arbitration and Conciliation Act, 1996. Diverse authorities were noted in such judgment. One of the issue which came up for consideration before the Constitution Bench was the doctrine of ironing out the creases when it came to interpreting a section of a statute. In the present reference the provisions of the NDPS Act, 1985 were amply clear. We were not required to apply any of such doctrine for the purpose of interpreting Section 36C of the NDPS Act, 1985.

68. In *Sri Jeyaram Educational Trust and Others Vs. A.G. Syed Mohideen and Others*, , their Lordships were of the view that, when the language of the statute was clear and unambiguous, and when there was no need to apply the tools of interpretation, there was no need to interpret the words in any other manner. Interpretation of Section 92 of the Code of Criminal Procedure, 1973 came up for consideration before their Lordships. We proposed to follow this rule of interpretation. We were, therefore, required to find out whether the words used in Section 36C clear and unambiguous. Once such finding was established, we were not required to apply any other tool of interpretation.

69. In *Frick India Ltd. Vs. Union of India (UOI) and Others*, their Lordships were of the view that the headings prefixed to sections or entries could not control the plain words of the provision; they could not also be referred to for the purpose of construing the provision when the words used in the provision were clear and unambiguous; nor could they be used for cutting down the plain meaning of the words in the provision. Only, in the case of ambiguity or doubt the heading or subheading may be referred to as an aid in construing the provision but even in such a case it could not be used for cutting down the wide application of the clear words used in the provision.

70. In *Bank of Maharashtra Vs. Pandurang Keshav Gorwardkar and Others*, , the Supreme Court in the context of the provisions of the Recovery of Debts Due to Banks and Financial institutions Act, 1993 and the Companies Act, 1956 found that, the Debts Recovery Tribunal was only required to follow the provisions of the Companies Act, 1956 so far as it related to the distribution of sale proceeds and not embark upon an adjudication as to the quantum. In the reference in question, Section 36C of the NDPS Act, 1985 made all the provisions of the Code of Criminal Procedure, 1973 applicable, save those as was provided by the Act of

1973. Moreover, the Companies Act, 1956 provided the modality of adjudicating the workers claim in a Company (in liquidation). Another forum, namely, the Debts Recovery Tribunal was, therefore, not required to visit such question when Section 529A of the Companies Act, 1956 was mentioned in the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

71. In *Moti Lal Vs. Central Bureau of Investigation and Another*, the question was whether Central Bureau of Investigation was authorized to investigate an offence which was punishable under the Wild Life (Protection) Act, 1972 as it was contended that the said Act of 1972 was a self-contained Code. Their Lordships found the Wild Life (Protection) Act, 1972 not to be a self-contained Code. It was held that a police officer was empowered to investigate offences under the Wild Life (Protection) Act, 1972. For trial of offences under the Wild Life (Protection) Act, 1972, the Code of Criminal Procedure, 1973 was required to be followed and that there was no other specific provisions on the contrary. The said procedure prescribed u/s 50 of the said Act was limited to take cognizance of the offences as well as powers given to other officers for inspection, arrest such and seizure as well as of regarding statement. Their Lordships held that the specific provisions in the Wild Life (Protection) Act, 1972, which were contrary to the provisions contained in the Code of Criminal Procedure, 1973 would prevail during trial in view of the provisions of Section 4(2) of the Code of Criminal Procedure, 1973. In such context, their Lordships found that it could not be said that operation of rest of the provisions of the Code of Criminal Procedure, 1973 was excluded.

72. We, also, considered the authorities cited by the Amicus Curiae.

73. In *State of Tamil Nadu Vs. Kodaikanal Motor Union (P) Ltd.*, , their Lordships were laying down parameters with regard to interpretation of statute. Their Lordships were of the view that, the Courts must always seek to find out the intention of the legislature. Though the Courts must find out the intention of the statute from the language used, but language more often than not was an imperfect instrument of expression of human thought, cautioned their Lordships. Their Lordships were of the view that a Court should not make a mockery of legislation. To make sense out of an unhappily worded provision, where the purpose was apparent to the judicial eye some violence to language was permissible. Their Lordships noted Lord Denning's view expressed in 1949 2 AER 155 (*Seaford Court Estates v. Asher*). The intention of the legislator in the NDPS Act, 1985 was clear. Section 438 was available to an accused under the NDPS Act, 1985.

74. In *Balchand Jain Vs. State of Madhya Pradesh*, , the Supreme Court considered the question whether an order of anticipatory bail could be competently made by a Court of sessions or a High Court u/s 438 of the Code of Criminal Procedure, 1973. Again the Supreme Court looked at anticipatory bail in the light of Articles 19, 21, 22 of the Constitution of India in *Siddharam Satlingappa Mhetre (Supra)*. Few factors and parameters to be taken into

consideration while dealing with anticipatory bail were laid down. Their Lordships reiterated the six principles regarding anticipatory bail laid down in *Shri Gurbaksh Singh Sibbia and Others Vs. State of Punjab*, . *Gurubaksh Singh Sibbia (Supra)* laid down few principles with regard to anticipatory bail. It provided that, Section 438 of the Code of Criminal Procedure, 1973 was to be interpreted in the light of Article 21 of the Constitution of India. It also laid down that conditions mentioned in Section 437 could not be read into Section 438 of the Code of Criminal Procedure, 1973. Their Lordships were of the view that, although the power to grant anticipatory bail could be described as of an "extraordinary" character, and that would not justify the conclusion that power must be exercised in exceptional cases only. Power u/s 438 was discretionary and was required to be exercised in the light of the circumstances of each case. The question in the reference was whether the Special Court could exercise powers u/s 438 while these three authorities on laid down the parameters for grant of anticipatory bail. The availability of section 438 to an accused under the NDPS Act, 1985 was not in dispute. The question was of the forum entitled to exercise it on an application by the accused.

75. *State of Rajasthan v. Noor Mohammad (Supra)* dealt with provisions of the Motor Vehicles Act, 1939. The expression "save as otherwise provided by or under the Act" occurring at Section 44(3) of the Motor Vehicles Act, 1939 was considered by their Lordships. Their Lordships were of the view that such expression occurring in Section 44(3) should be construed in a harmonious manner with sub-clause (b) of Section 44(3) of the Motor Vehicles Act, 1939. In our reading Section 438 was amply clear.

76. In *Harshad S. Mehta & Ors. (Supra)* the Supreme Court was of the view that the Special Court established under the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 was empowered to grant pardon to an accused. The Special Court under such Act of 1992 enjoyed all the powers of a Court of Original Jurisdiction and it held dual capacity and powers both of Magistrates and Court of Session depending upon the stage of the case. The Act of 1992 incorporated the provisions of the Code of Criminal Procedure, 1973. The question in the reference was not of power to grant pardon but the power to exercise Section 438 of the Code of Criminal Procedure, 1973 by the Special Court.

77. In *Bhinka and Others Vs. Charan Singh*, it was held that the headings prefixed to sections or set of sections in some modern statutes were regarded as preambles to such sections. They could not, however, control the plain words of the statutes but they could explain ambiguous words. If there was any doubt in the interpretation of the section the heading certainly helped the Court to resolve the doubt. Section 36C was sufficiently clear and unambiguous.

78. In *State of Punjab V. Piara Singh (Supra)* the Punjab and Haryana High Courts were considering the power of grant of bail by the Special Court constituted under the Terrorist Affected Areas (Special Courts) Act, 1984.

Reviewing the provisions of the Terrorist Affected Areas (Special Courts) Act, 1984 the Punjab and Haryana High Courts found that the Special Court constituted under the Act of 1984 was at a higher pedestal. Cases involving scheduled offences or apparently scheduled offences under the Act of 1984, were required to be brought to the Special court. It was held that, Special Court alone had the jurisdiction to opine whether the offence which it had taken cognizance of, was or was not a scheduled offence. Such an exercise could not be undertaken before any Court other than the Special Court for a scheduled offence or an apparently scheduled offence. Cases could not be thus brought before the Sessions Court for him to exercise the choice in that regard.

79. In *Sri Ravi Nandan Sahay (Supra)* the majority view of the Full bench of the Patna High Court was that the Special Judge under the Prevention of Corruption Act, 1988 was entitled to exercise all the powers of a Sessions Judge was provided under the Code of Criminal Procedure, 1973 in relation to proceedings under the Act of 1988 so far they were not inconsistent with the provisions of the Act of 1988. It was held that the Special Judge under the Prevention of Corruption Act, 1988 had exclusive power to entertain an application for anticipatory bail or regular bail made by an accused alleged of having committed any offence under the Prevention of Corruption Act, 1988.

80. In *Fakhruddin Sharafali Ampanwala (Supra)* the Andhra Pradesh High Court considered the question, could an application for anticipatory bail as contemplated u/s 438 of the Code of Criminal Procedure, 1973 be moved before the Sessions Judge instead of the Court of Special Judge for economic offences. It was held by the Andhra Pradesh High Court that Special Court of economic offences being a Court having jurisdiction alone was empowered to take cognizance of the offence which were referable to the special enactments in the annexure to the notification under such the Special Court was created. It also went on to hold that, Chapter XXXIII of the Code of Criminal Procedure, 1973 including the provisions for granting anticipatory bail was available to such Special Court.

81. In *C. Abdul Hameed v. State of Karnataka (Supra)* an application u/s 438 of the Code of Criminal procedure, 1973 for grant of anticipatory bail for an offence punishable under the Karnataka Forest Act, 1963 came up for consideration. The question framed by the Karnataka High Court was whether there was a bar u/s 104-D of the Karnataka Forest Act for grant of bail u/s 437 or 439 of the Code of Criminal Procedure, 1973 and whether Courts can grant bail u/s 438 of the Code of Criminal procedure, 1973. Provisions of the NDPS Act, 1985 were considered. While considering the NDPS Act, 1985 it was opined that there was no provision in the NDPS Act, 1985, making Section 438 of the Code of Criminal procedure, 1973 inapplicable to cases under the NDPS Act, 1985. Similarly, It was that, there was no provision in Section 104-D of the Karnataka Forest Act, 1963 making Section 438 of the Code of Criminal Procedure, 1973 inapplicable to cases arising under the said Act. There was no prohibition or bar for entertaining

a petition for anticipatory bail filed u/s 438 of the Code of Criminal Procedure, 1973 when an accusation was made against an accused under any provisions of the Karnataka Forest Act, 1963.

82. In *State of Bihar v. Braj Nandan Raut* (Supra) the Patna High Court held that a Sessions Judge had no jurisdiction to entertain bail application of an accused person relating to an offence committed under the Prevention of Corruption Act, 1988.

83. Keeping the principles enunciated by the authorities cited above we considered the reference.

84. Section 36C of the NDPS Act, 1985 provided that the provisions of the Code of Criminal Procedure, 1973 including the provisions as to bails and bonds would apply to the proceedings before a Special Court save otherwise provided in the NDPS Act, 1985. For the purpose of the provisions of the Code of Criminal Procedure, 1973 which were made applicable u/s 36C the Special Court was deemed to be a Court of Session and the person conducting a prosecution before a Special Court was deemed to be a Public Prosecutor.

85. The entirety of Section 36C and its interpretation were viewed from various angles by the appearing parties. The views of the petitioners and the Amicus Curiae were the same on the interpretation of Section 36C and such interpretation varied from the one propounded on behalf of the State by the Public Prosecutor.

86. In the view of the petitioner and the Amicus Curiae, Section 36C of the NDPS Act, 1985, made such of the provisions of the Code of Criminal Procedure, 1973 applicable to proceedings before a Special Court which were not expressly taken away by the NDPS Act, 1985 itself. They read the opening words "save as otherwise provided in this Act" in such context. NDPS Act, 1985 according to them, did not take away the provisions of anticipatory bail from the purview of a Special Court. On the contrary, according to them, Section 36C expressly made the provisions as to bail and bond applicable to a proceeding before a Special Court. The provisions as to bails and bonds of the Code of Criminal Procedure, 1973 was found in Chapter XXXIII thereof. Chapter XXXIII of the Code of Criminal Procedure, 1973 began with Section 436 and ended with Section 450. Section 438 which was under Chapter XXXIII of the Code of Criminal Procedure, 1973 provided for grant of bail to persons apprehending arrest. Since the entirety of Chapter XXXIII was applicable to a Special Court by virtue Section 36C there was no reason to arrive at the finding that the Special Court was denuded the power of Section 438.

87. On the other hand, the Public Prosecutor contended that the mentioning of the words "provisions as to bails and bonds" in Section 36C would not introduce all the provisions of Chapter XXXIII of the Code of Criminal Procedure, 1973 to the NDPS Act, 1985. The Public Prosecutor, read Section 36B of the NDPS Act, 1985 and contrasted the words used in 36B with that of Section 36C of the NDPS

Act, 1985. According to the Public Prosecutor, the legislator deliberately used different words in the two Sections to make a distinction on the powers conferred. There was distinction in the choices of words used in the two sections. This distinction had a meaning. In Section 36B all powers conferred by Chapter XXIX and XXX of the Code were preserved. Section 36C of the NDPS Act, 1985 did not mention Chapter XXXIII as contrastingly done in Section 36B were the specific chapters of the Code of Criminal Procedure, 1973 were mentioned. The Public Prosecutor read the two sections to mean that the entirety of powers of Chapter XXXIII of the Code of Criminal Procedure, 1973 was not granted to a Special Court constituted u/s 36C of the NDPS Act, 1985. Since the legislator did not intend the Special Court to exercise powers u/s 438 the entirety of the powers of Chapter XXXIII of the Code of Criminal Procedure, 1973 was not granted under the NDPS Act, 1985. Therefore, the Public Prosecutor contended that, a Special Court constituted u/s 36 of the NDPS Act, 1985 did not have power of Section 438 of the Code of Criminal Procedure, 1973 to entertain a petition u/s 438.

88. The concern expressed by the Amicus Curiae was that, personal liberty guaranteed under Article 21 of the Constitution of India ought not to be curtailed while reading Section 36C of the NDPS Act, 1985. In other words, they wanted the Court to arrive at an interpretation which expanded, if not, at least maintained the personal liberty guaranteed under Article 21 of the Constitution of India in construing Section 36C of the NDPS Act, 1985. On the other end of the spectrum was the anxiety of the Public Prosecutor who wanted the Court to take note of the fact that Section 438 of the Code of Criminal Procedure, 1973 was introduced much later to the Constitution coming into force. On this aspect the Public Prosecutor relied on *State of Madhya Pradesh v. Ram Kishana Balothia & Anr.* (Supra). *State of Madhya Pradesh v. Ram Kishana Balothia & Anr.* (Supra) related to Schedule Caste and schedule Tribes (Prevention of Atrocities) Act, 1989 which in Section 18 expressly provided for exclusion of Section 438 of the Code. This kind of express exclusion was absent in the NDPS Act, 1985. (Supra) the Supreme Court was concerned with

89. The Amicus Curiae referred to *Balchand Jain* (Supra) and *Siddharam Satlingappa Mhetre* (Supra) on this issue. In *Balchand Jain* (Supra) the Supreme Court was concerned as to whether an order of anticipatory bail could be competently made by a Court of Session or a High Court u/s 438 of the Code of Criminal Procedure, 1973 in case of offences falling under Rule 184 of the Defence and Internal Security of India Rules, 1971 framed under the Defence and Internal Security of India Act, 1971. Their Lordships were of the view that, Section 438 of the Code of Criminal Procedure, 1973 could stand side by side with Rule 184. It was held that, they operated in different situations. In *Siddharam Satlingappa Mhetre* (Supra) the Supreme Court considered the parameters of grant and refusal of bail in every criminal offence. On the aspect of anticipatory bail their Lordships were of the view that a large number of under trials were languishing in jail in the country since Section 438 of the Code of

Criminal Procedure, 1973 was not allowed its full play. Their Lordships explained the decision of the Constitution Bench in Sibbia case by stating that Section 438 of the Code of Criminal Procedure was not extraordinary in the sense that, it should be invoked only in exceptional or rare cases. Their Lordships found that some Courts of smaller strength erroneously observed that Section 438 of the Criminal Procedure Code, 1973 should be invoked only in exceptional or rare cases. There was unanimity at the bar as to availability of Section 438 of the Code of Criminal Procedure, 1973 to an accused under the NDPS Act, 1985. The arena of controversy was the forum entitled to exercise such powers. The petitioner and the Amicus Curiae suggested that the Special Court were vested with such powers under the scheme of the NDPS Act, 1985 while the Public Prosecutor wanted the Sessions Court to exercise such powers.

90. Much revolved around the interpretation of Section 36C of the NDPS Act, 1985. Sri Jeyaram Educational Trust (supra) required us to find out whether the words used in Section 36C of the NDPS Act, 1985 were clear and unambiguous or not. Section 36C of the NDPS Act, 1985 was as follows:-

36C. Application of Code to proceedings before a Special Court.-Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) (including the provisions as to bail and bonds) shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting a prosecution before a Special Court, shall be deemed to be a Public Prosecutor.

91. For the purpose of argument let us keep aside the words "Save as otherwise provided in this Act....." used in Section 36C for a moment. The moment those words were absent from Section 36C it allowed the entirety of the Code of Criminal Procedure, 1973 to apply to a proceeding under the NDPS Act, 1985. These provisions of the Code of Criminal Procedure, 1973 obviously entailed within its fold Section 438. In absence of the words "Save as otherwise provided in this Act....." a Special Court then had the jurisdiction to exercise powers u/s 438 of the Code of Criminal Procedure, 1973. For a better understanding, after deleting the words "Save as otherwise provided in this Act" from Section 36C it read as follows:-

36C. Application of Code to proceedings before a Special Court.-.....the provisions of the Code of Criminal procedure, 1973 (2 of 1974) (including the provisions as to bail and bonds) shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting a prosecution before a Special Court, shall be deemed to be a Public Prosecutor.

92. If Section 36C was aforesaid, there was no debate that powers u/s 438 of the Code of Criminal Procedure, 1973 was available to a Special Court. We were not

permitted to either delete considered or add the words from the statute. We were to consider the section as it stood in the statute book. The section opened with the words "Save as otherwise provided in this Act.....".

93. Now came the question of interpreting "Save as otherwise provided in this Act....." used in Section 36C. On a plain reading the words "Save as otherwise provided in this Act....." used in Section 36C would mean that the NDPS Act, 1985 was required to provide specific exclusions of the Code of Criminal Procedure, 1973 expressly, for a provision of the Code of Criminal Procedure, 1973 to be inapplicable, in a proceeding under the NDPS Act, 1985. The provisions of the Code of Criminal Procedure, 1973 were not barred from their application to a proceeding under the NDPS Act, 1985. Sections 32A, 33, 36A, 37, 51, 52A(4) of the NDPS Act, 1985 made either the provisions of the Code of Criminal Procedure, 1973 inapplicable or incorporated into the NDPS Act, 1985 with modifications. "Save as otherwise provided in this Act...." was required to be read in such perspective. Those words did not take away the jurisdiction of the Special Court constituted under the NDPS Act, 1985 to exercise powers of Section 438 of the Code. Those words clarified that save and except as provided in the NDPS Act, 1985 all other provisions of the Code of Criminal Procedure, 1973 would apply to a proceedings under NDPS Act, 1985.

94. When the legislator referred to the specific chapters of the Code in Section 36B while not referring the chapter number in Section 36C disclosed an intention of the legislator not to vest the Special Court powers u/s 438, contended the Public Prosecutor. Section 36B dealt with appeal and revision. The High Court was identified the appeal and the revisional Court with all powers conferred by Chapter XXIX and XXX of the Code of Criminal Procedure, 1973. Section 36C laid down that the Code of Criminal Procedure, 1973 would apply to a proceeding before a Special Court save as otherwise provided in the NDPS Act, 1985. Entirety of the Code, save as otherwise provided in the NDPS Act, 1985 was applicable. The words "..... (including the provisions as to bail and bonds)....." merely clarified that all the provisions of the Code as to bail and bonds would apply to a proceeding before a Special Court. Were the contention of the Public Prosecutor to be adopted, the NDPS Act, 1985 was required to specify all the Code in chapter and verse for it to be made applicable. That interpretation would, we are afraid, lead us to an absurd situation.

95. Section 12AC as introduced by way of amendment to the Essential Commodities Act, 1955 was considered in Pijush Kanti Dey (Supra). It was considered by the Court making the reference. Pijush Kanti Dey (Supra) was rendered on reference. The question before Pijush Kanti Dey (Supra) was whether the Court of Session and the Special Court constituted under the Essential Commodities Act, 1955 have concurrent jurisdiction to grant anticipatory bail u/s 438 of the Code of Criminal Procedure, 1973 to a person apprehending arrest on an accusation of having committed an offence under such Act. The Division Bench in Pijush Kanti Dey (Supra) noted that, Section 438

of the Code of Criminal Procedure, 1973, was contained under Chapter XXXIII. It read Chapter XXXIII to mean that, the legislature intended to bring bail in anticipation of arrest within the category of bail and not treat it as something different from bail. The Division Bench relied upon All India Reporter 1980 Supreme Court page 1632 (Gurubaksh Singh v. State of Punjab) to return a finding that, anticipatory bail would fall within the category of bail, and to be more precise the term bail included anticipatory bail. Section 12AC of the Essential Commodities Act, 1955 was quoted in Pijush Kanti Dey (Supra). Section 12AC of such Act, was as follows:-

12AC. Application of Code to proceedings before a Special Court. Save as otherwise provided in this Act, the provisions of the Code (including the provisions as to bail and bonds) shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting a prosecution before a Special Court, shall be deemed to be a Public Prosecutor.

96. When Section 12AC of the Essential Commodities Act, 1955 and Section 36C of the NDPS Act, 1985 were compared the only conclusion possible was that, the two sections were *pari materia*. Considering Section 12AC of the Essential Commodities Act, 1955 the Division Bench in Pijush Kanti Dey (Supra) was of the view that, by virtue of the deeming provision contained in Section 12AC of the Essential Commodities Act, 1955 the Special Court constituted under the Essential Commodities Act, 1955 was required to be regarded as a Court of Session in relation to a proceeding before it and that, the provision of Chapter XXXIII of the Code of Criminal Procedure, 1973 as to bail and bonds would apply to such proceedings. In such perspective, the Division Bench in Pijush Kanti Dey (Supra) returned a finding that, a Special Court under the Essential Commodities Act, 1955 was fully competent to grant anticipatory bail u/s 438 of the Code of Criminal Procedure, 1973 to a person accused of or suspected of committing any offence under the Essential Commodities Act, 1955. Moreover, the Division Bench in Pijush Kanti Dey (Supra) found that, the Essential Commodities Act, 1955 was a special enactment and a self-contained Code, conferring special jurisdiction and powers to the Special Court. It held that, the powers conferred upon the Court of Session to grant anticipatory bail u/s 438 of the Code of Criminal Procedure, 1973, did not extend to a case where a person apprehending arrest of an accusation of having committed an offence under the Essential Commodities Act, 1955.

97. The Karnataka High Court in S. Murugeshappa & Ors. (Supra) and Madhya Pradesh High Court in Karamchand & Ors. (Supra) were of the view that the Special Court under the Essential Commodities Act, 1955 as well as the High Courts were entitled to exercise powers u/s 438 of the Code of Criminal Procedure, 1973. The Rajasthan High Court in Suresh Chand & Ors. (Supra) was of the view that a High Court could grant anticipatory bail for an offence committed under the Essential Commodities Act, 1955. A Single Judge of the

Andhra Pradesh High Court in *B. Kuppa Naidu (Supra)* was of the view that the Sessions Court and the High Court were not fettered by the provisions indicated u/s 12AA of the Essential Commodities Act, 1955 from exercising powers u/s 438 of the Code of Criminal Procedure, 1973. This view of the Andhra Pradesh High Court was different to that expressed by our Court in *Pijush Kanti Dey (Supra)*. In *Pijush Kanti Dey (Supra)* our Court was of the view that it was for the Special Court constituted under the Essential Commodities Act, 1955 and not the Sessions Court to exercise powers u/s 438 of the Code of Criminal Procedure for offence relating to the Essential Commodities Act, 1955.

98. A different issue was raised before the Gauhati High Court. The issue before the Gauhati High Court in 2004 3 Cri 433 (*Baljit Singh v. State of Assam*) was whether an application for grant of bail u/s 438 of the Code of Criminal Procedure, 1973 before the High Court was maintainable for offences under the NDPS Act, 1985 in the face of Section 36A(3) thereof. The Gauhati High Court considered the cases cited before it including two judgments of Single Judges of the Gauhati High Court having different views, namely, *Suresh Dutta Vs. State of Tripura*, and *Baljit Singh Vs. State of Assam and Others*, . It arrived at a finding that, Section 36C made the provisions of the Code of Criminal Procedure, 1973 including those relating bail and bonds applicable to the proceedings before the Special Court subject to the provisions of the NDPS Act, 1985. It found that, the Special Court for much purpose was deemed to be a Court of Session. The Division Bench of the Gauhati High Court held that, an application for pre-arrest bail u/s 438 of the Code of Criminal Procedure, 1973 was maintainable in law before a High Court in respect of offences alleged to be committed under the NDPS Act, 1985. Both the Delhi High Court and Himachal Pradesh High Court in *Ved Prakash Goel (Supra)* and *Rakesh Kumar alias Kukka (Supra)*, respectively, were concerned with applications u/s 438 of the Code of Criminal Procedure, 1973 made before them. Those two authorities would, therefore, not shed much light on the question referred.

99. There was unanimity at the bar as to the availability of Section 438 of the Code of Criminal procedure, 1973 to an accused under the NDPS Act, 1985.

100. The same logic as that of *Pijush Kanti Dey (Supra)* would apply in the case of the NDPS Act, 1985. NDPS Act, 1985 was a special enactment. It was an enactment which consolidated and amended the law relating to the narcotic drugs and psychotropic substances in India. It provided for speedy trial. It provided for the control and regulation of operations relating to narcotic drugs and psychotropic substances. The NDPS Act, 1985 provided for the forfeiture of property derived from, or used in, illicit traffic in narcotic drugs and psychotropic substances. The NDPS Act, 1985 made provisions to be in tune with the International Convention on Narcotic Drugs and Psychotropic Substances that India were party to. On consideration of the various provisions of the NDPS Act, 1985 it could be safely said that the NDPS Act, 1985 was a self-contained Code. It conferred special jurisdiction and powers to the Special Court constituted

under the NDPS Act, 1985 with regard to trial of offences committed under such Act. The NDPS Act, 1985 required trial of offences under such Act punishable with imprisonment for three years and above to be tried by Special Court constituted under Such Act. The provisions of the Code of Criminal Procedure, 1973 save and except those provisions which were expressly excluded were applicable to a proceeding before the NDPS Act, 1985. The powers of Section 438 of the Code of Criminal Procedure, 1973 to be unavailable to a Special Court constituted under the NDPS Act, 1985 was required to be taken away expressly by the NDPS Act, 1985 itself. Such was not the position. Section 36C of the NDPS Act, 1985 empowered the Special Court constituted under the NDPS Act, 1985 to exercise powers u/s 438 of the Code of Criminal Procedure, 1973. These provisions of the Code of Criminal Procedure, 1973 were not taken away expressly or otherwise by the NDPS Act, 1985.

Answer

We would, therefore, answer the reference by stating that a Special Court constituted u/s 36 of the NDPS Act, 1985 was competent to entertain a pre-arrest bail petition u/s 438 of the Code of Criminal Procedure, 1973.