

Reserved On: 30.08.2024

Decided On:02.09.2024

HIGH COURT OF UTTARAKHAND AT NAINITAL

First Bail Application No.1382 of 2024

Abdul MalikApplicant

Versus

State of UttarakhandRespondent

Present:-

Mr. Salman Khurshid, Senior Advocate through video conferencing, assisted by Mr. Vikas Kumar Guglani, Advocate for the applicant.

Ms. Manisha Rana Singh, A.G.A. for the State.

JUDGMENT

Per: Hon'ble Ravindra Maithani, J.

Applicant Abdul Malik is in judicial custody in FIR No. 21 of 2024, under Sections 147, 148, 149, 307, 395, 323, 332, 341, 342, 353, 412, 427, 436, 420B IPC, Section 3 and 4 of Prevention of Damage to Public Property Act, 1984, Section 7 of Criminal Law Amendment Act, 1932, Section 3/25, 4/25, 7/25 of the Arms Act, 1959 and section 15/16 of the Unlawful Activities (Prevention) Act, 1976 ("UAPA"), Police Station Banbhoolpura, District Nainital. He has sought his release on bail.

2. Heard learned counsel for the parties and perused the record.

3. As soon as the matter is taken up, learned State counsel raised question with regard to the

maintainability of the bail application. She submits that the applicant seeks bail under the provisions of the UAPA. The bail rejection order has been passed by the Sessions Judge, Haldwani. Therefore, it is argued that instant bail application is not maintainable, instead the applicant ought to have appealed the bail rejection order, in view of Section 21 of the National Investigating Agency Act, 2008 (“the NIA Act”).

4. Instant bail application on merits has not been heard. Arguments have been heard on the question of maintainability of the bail application.

5. Learned Senior Counsel appearing for the applicant submits that instant bail application is maintainable. He referred to Section 13 of the NIA Act to argue that the scheduled offences investigated by National Investigation Agency (“Agency”) can only be tried by the Special Court, as constituted under Section 11 of the NIA Act. Learned Senior Counsel would submit that the appeal under Section 21 of the NIA Act, may be preferred only against judgment and order passed by the Special Court. It is argued that in the instant case, the bail rejection order has not been passed by any Special Court, instead it has been passed by the Sessions Court. Learned Senior Counsel has placed reliance on the

principle of law, as laid down in the case of Bahadur Kora and others Vs. State of Bihar, 2015 SCC OnLine Pat 1775.

6. In the case of Bahadur Kora (*supra*), the Full Bench of Hon'ble Patna High Court has answered the questions relating to the issue and in para 44 observed as follows:-

“44. The second is about Sub-section (3) of Section 22 of the Act. It refers to “any offence punishable under this Act”. Even a microscopic analysis of the Act discloses that the Act does not define any independent offences nor does it provide for punishment thereof. It is felt that the proper expression to be employed, would have been “any offence which is liable to be investigated and tried under this Act”. We, therefore, hold that:

(A) the Judgment in Aasif's case (*supra*), insofar as it held that Investigating Agency of the State Government can investigate and try offences in accordance with the provisions of the N.I.A. Act, in the cases where offences punishable under the Unlawful Activities (Prevention) Act are alleged, and that such cases must be tried by the Courts of Sessions under Sub-section (3) of Section 22 of the N.I.A. Act, cannot be said to have laid the correct law;

(B) the cases even where offences punishable under the provisions of U.A.P. Act are alleged shall be tried by the Courts as provided for under the Cr.P.C. and not in accordance with the special procedure, under the Act unless (i) the investigation of such cases is entrusted by the Central Government to the N.I.A., and (ii) the N.I.A. transfers the same to the Investigating Agency of State Government.

The Appeals shall be treated as Bail Applications, to be heard under Section 439 of Cr.P.C. and the registry shall place the same before the learned Single Judges after requiring the parties to alter the provisions of law;

(C) all the cases in the State of Bihar, which are being tried by the Courts of Sessions, on the basis of the Judgment of this Court in Aasif's case (supra), shall stand transferred to the Courts that otherwise have jurisdiction to try them; and

(D) none of the steps taken in such cases that were pending before the Court of Sessions shall render the investigation or trial, invalid or unlawful.”

7. Referring to the provisions of Section 22 Sub-section (3) of the NIA Act, it is argued that the powers of the Special Court are exercised by the Sessions Court, but bail rejection order has not been passed by the Special Court, as such. It is also submitted that an order passed under Section 22 Sub-section (3) of the NIA Act, is not appealable under Section 21 of the NIA Act, as per the scheme of the NIA Act.

8. Learned State counsel would submit that until Special Court is constituted under Section 22 Sub-section (3) of the NIA Act, the Court of Session may exercise such powers as conferred on Special Court and the procedure given under the Chapter shall eventually be followed. Therefore, it is argued that the order passed by the court empowered under Section 22 Sub-section (3) is appealable under Section 21 of the NIA Act.

9. Learned State counsel would argue that a purposive interpretation of the statute should be done so as to advance the cause of justice. In support of her contention, learned counsel referred to the principles of law, as laid down in the case of State of Andhra Pradesh, Through Inspector General, National Investigation Agency Vs. Mohd. Hussain Alias Saleem, (2014) 1 SCC 258 and Jaffar Sathiq Vs. State, 2021 SCC OnLine Mad 2593.

10. In the case of Mohd. Hussain (*supra*), the Hon'ble Supreme Court, while reading the intention of Parliament held that "the interlocutory order may not be excluded from the purview of Section 21 (1) of the NIA Act". In para 18 of the judgment, the Hon'ble Supreme Court observed as hereunder:-

"18. Section 21(2) of the NIA Act provides that every such appeal under sub-section (1) shall be heard by a Bench of two Judges of the High Court. This is because of the importance that is given by Parliament to the prosecution concerning the Scheduled Offences. They are serious offences affecting the sovereignty and security of the State amongst other offences, for the investigation of which this special Act has been passed. If Parliament in its wisdom has desired that such appeals shall be heard only by a Bench of two Judges of the High Court, this

Court cannot detract from the intention of Parliament. Therefore, the interpretation placed by Mr Ram Jethmalani on Section 21(1) that all interlocutory orders are excluded from Section 21(1) cannot be accepted. If such an interpretation is accepted it will mean that there will be no appeal against an order granting or refusing bail. On the other hand, sub-section (4) of Section 21 has made that specific provision, though sub-section (1) otherwise excludes appeals from interlocutory orders. These appeals under sub-section (1) are to be heard by a Bench of two Judges as provided under sub-section (2). This being the position, there is no merit in the submission canvassed on behalf of the applicant that appeals against the orders granting or refusing bail need not be heard by a Bench of two Judges.”

11. In the case of Jaffar Sathiq (*supra*), a reference was made to the Larger Bench as follows:-

- i. whether an application against the order passed by the District and Sessions Judge in a matter concerning UAP Act shall be numbered as a bail application or an appeal? And
- ii. whether, it has to be posted before the Single Judge or a two Judges Bench of this Court?

12. The Full Bench of Hon'ble Madras High Court answered the reference as follows:-

“21. Be that as it may, the decision of the Supreme Court in **Bikramjit Singh** (*supra*) holds the field today. We must, therefore, yield to the wise counsel of St. Augustine who said “*Roma Locutaest, causa finitaest* (When Rome has spoken, the case is closed) Consequently, the question (s) referred are answered thus:

“An order passed by a Court of Session dismissing a bail application in a case involving offence(s) under the Unlawful Activities (Prevention) Act, 1967, must be challenged only by way of an appeal under Section 21 of the National Investigation Agency Act, 2008. Consequently, such an appeal would lie only before a Division Bench *vide* Section 21 (2) of the National Investigation Agency Act, 2008. The decision of the Division Bench of this Court in A. Raja Mohammed (*supra*) and that of a learned single Judge in Abdulla (*supra*) to the contrary, will stand overruled.”

The reference is, accordingly, answered on the aforesaid terms.”

13. In the case of Bahadur Kora (*supra*), the reference was answered by the Full Bench of Hon'ble Patna High Court on 27.03.2015. Thereafter, in the case of Bikramjit Singh Vs. State of Punjab, (2020) 10 SCC 616, the Hon'ble Supreme Court discussed the role of courts under the NIA Act and in para 26 of the judgment observed as hereunder:-

“26. Before the NIA Act was enacted, offences under the UAPA were of two kinds — those with a maximum imprisonment of over 7 years, and those with a maximum imprisonment of 7 years and under. Under the Code as applicable to offences against other laws, offences having a maximum sentence of 7 years and under are triable by the Magistrate's courts, whereas offences having a maximum sentence of above 7 years are triable by Courts of Sessions. **This scheme has been completely done away with by the NIA Act, 2008 as all Scheduled Offences i.e. all offences under the UAPA, whether investigated by the National Investigation Agency or by the investigating agencies of the State Government, are to be tried exclusively by Special Courts set up under that Act. In the absence of any designated court by notification issued by either the Central Government or the State Government, the fallback is upon the Court of Session alone.** Thus, under the aforesaid scheme what becomes clear is that so far as all offences under the UAPA are concerned, the Magistrate's jurisdiction to extend time under the first proviso in Section 43-D(2)(b) is non-existent, “the Court” being either a Sessions Court, in the absence of a notification specifying a Special Court, or the Special Court itself. The impugned judgment in arriving at the contrary conclusion is incorrect as it has missed Section 22(2) read with Section 13 of the NIA Act. Also, the impugned judgment has missed Section 16(1) of the NIA Act which states that a Special Court may take cognizance of any offence without the accused being committed to it for trial, inter alia, upon a police report of such facts.”

(emphasis supplied)

14. In the case of Jaffar Sathiq (*supra*), the Full Bench of Hon'ble Madras High Court has taken note of the judgment in the case of Bahadur Kora (*supra*) as

well as the principles of law, as laid down by the Hon'ble Supreme Court in the case of Bikramjit Singh (*supra*).

15. In the case of Gulshan Kumar Singh Vs. State of Jharkhand, ABA 19142 of 2024, the Jharkhand High Court on 21.08.2024 has held that **“the literal interpretation of the word “Special Court” will not serve the purpose. Section 22(3) provides for the power and jurisdiction of Special Court to be exercised by the Session Court of the Division in absence of any Special Court, whereas Section 21 provides for filing of appeal before the Division Bench of the High Court against any judgement, sentence or order passed by a Special Court. If the word “Special Court” is given literal meaning, then appeal against only those judgments and orders which are passed by the Special Courts shall lie before the Division Bench of the High Court and challenge to the judgments and orders passed by Session Courts even in the matter of Scheduled Offences will lie before the regular Bench of the High Court. Thus, the intention of the legislature in promulgating the law that the appeal should lie before to the Division Bench of the High Court in the matter of scheduled offences, will get frustrated. Looking to the gravity and seriousness of the offences under the Schedule of the Act, 2008, the**

legislature has made specific provision under section 21 of the said Act for filing of appeal before the Division Bench of the High Court to expedite the hearing of such cases. Thus, the word “Special Court” as mentioned in section 21 of the Act, 2008 has to be given purposive construction so that the purpose of the provision as intended by the legislature may be achieved. The intention of the legislature while putting the said section must have been that a Session Court dealing with any scheduled offence under the Act, 2008 even in absence of issuance of any notification either by the Central Government or by the State Government under Section 11 & 22 respectively, has to be considered as a Special Court for the purpose of Section 21 of the Act, 2008 and in such case an appeal against the judgment, sentence or order including an order refusing anticipatory bail by the Session Court, will lie before the Division Bench of the High Court.”

16 A fact has been brought to the notice of the Court that an order rejecting default bail in the similar matter by the Court of Session was challenged in Criminal Appeal No. 291 of 2024, Mujjamil and others Vs. State of Uttarakhand and another before this Court

which was heard and decided by the Division Bench of this Court on 28.08.2024.

17. The words “Special Court” has been defined under Section 2 (1) (h) of the NIA Act, which reads as follows:-

2. Definitions.- (1).....

(a)

.....

(h) “Special Court” means a Court of Session designated as Special Court under section 11 or, as the case may be, under section 22;”

18. Special Courts are constituted under Section 11 and 22 of the NIA Act. It is admitted that in the State of Uttarakhand, a Special Court has been constituted under Section 11 of the NIA Act for the trial of scheduled offences investigated by the National Investigation Agency.

19. Special Courts may also be constituted under Section 22 of the Act, which reads as follows:-

“22. Power of State Government to constitute Special Courts.—(1) The State Government may constitute one or more Special Courts for the trial of offences under any or all the enactments specified in the Schedule.

(2) The provisions of this Chapter shall apply to the Special Courts constituted by the State

Government under sub-section (1) and shall have effect subject to the following modifications, namely—

- (i) references to “Central Government” in sections 11 and 15 shall be construed as references to State Government;
- (ii) reference to “Agency” in sub-section (1) of section 13 shall be construed as a reference to the “investigation agency of the State Government”;
- (iii) reference to “Attorney-General for India” in sub-section (3) of section 13 shall be construed as reference to “Advocate-General of the State”.

(3) The jurisdiction conferred by this Act on a Special Court shall, until a Special Court is constituted by the State Government under sub-section (1) in the case of any offence punishable under this Act, notwithstanding anything contained in the Code, be exercised by the Court of Session of the division in which such offence has been committed and it shall have all the powers and follow the procedure provided under this Chapter.

(4) On and from the date when the Special Court is constituted by the State Government the trial of any offence investigated by the State Government under the provisions of this Act, which would have been required to be held before the Special Court, shall stand transferred to that Court on the date on which it is constituted.”

20. Under Section 21 of the NIA Act, provisions for appeals have been made. It reads as follows:-

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

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

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

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

(5) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment, sentence or order appealed from:

Provided that the High Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of thirty days:

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

21. The connection between Section 22 Sub-section (3) and Section 21 of the NIA Act is to be seen.

22. Scheduled offences under the NIA Act may be investigated by the Agency. The State Government may also order investigation of such cases. Sections 6 and 10 of the NIA Act are relevant on this aspect.

23. Chapter IV of the NIA Act deals with Special Courts.

24. Under Section 11 of the NIA Act, Special Courts may be constituted by the Central Government, which as stated, has already been established in the State of Uttarakhand by the Ministry of Home Affairs for the trial of scheduled offences investigated by the National Investigation Agency.

25. In the instant matter, investigation is being done by the State Police, not by the Agency. Cognizance in such cases may be taken by the Sessions Court without the case having been committed to it. Section 16 of the NIA Act, makes provisions in this respect. There are other provisions with regard to the powers of the Special Court with respect of other offences (Section 14), Protection of witnesses (Section 17) and Trial by Special Court to have precedence (Section 19) and others.

26. Section 22 of the NIA Act, provides for designation of one or more Courts of Session as Special Courts for trial of the scheduled offences.

27. Section 22 Sub-section (3) empowers the Court of Session to exercise all the powers of the Special Court and follow the procedure provided under this Chapter until Special Court is so designated.

28. Two things are clear from a bare reading of the Section 22 Sub-section (3) of the NIA Act. The Court of Session of the division shall exercise all the power of Special Court and follow the procedure provided under this Chapter, which means all the powers of Special Court shall be exercised by such Court of Session.

29. Interpreting this part of Section 22 Sub-section (3) of the NIA Act, in the case of Jaffar Sathiq (*supra*), the Full Bench of Hon'ble Madras High Court has held that an order passed by a Court of Session dismissing a bail application under Section 22 Sub-section (3) shall be appealable under Section 21 of the NIA Act.

30. In the case of Mohd. Hussain (*supra*), the Hon'ble Supreme Court took note of the kind of offences affecting sovereignty and security in the State and held that from the purview of Section 21 Sub-section (1) of the NIA Act, interlocutory orders are not excluded.

31. The Court of Session exercising jurisdiction of the Special Court under Section 22 Sub-section (3) of the NIA Act, can exercise all the powers that have been conferred on the Special Court under Chapter IV of the NIA Act. Trial in such matters relates to serious offences and as held in the case of Mohd. Hussain (*supra*), such offences may affect the sovereignty and security of the State also.

Under Section 21 of the NIA Act, the appeals are filed against the orders of the Special Court. In view of the powers that have been conferred on the Court of Session for exercising the jurisdiction of the Special Court, this Court is of the view that the orders passed by the Court of Session under Section 22(3) shall also be appealable under Section 21 of the NIA Act.

32. In the instant matter, bail application of the applicant has been rejected by the Additional Sessions Judge, Haldwani on 10.05.2024. This Court is of the view that the present bail application is not maintainable before this Court. Instead an appeal would lie under Section 21 of the NIA Act before the Division Bench of this Court. Therefore, instant bail application is not maintainable. Accordingly, the bail application deserves to be dismissed as not maintainable.

33. The bail application is dismissed accordingly.

(Ravindra Maithani, J)
02.09.2024