



HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.1797 of 2022

{Arising out of order dated 26-9-2022 passed by the learned Single Judge in
Cr.A.No.1193/2022}

Judgment reserved on: 27-3-2023

Judgment delivered on: 12-4-2023

Dushyant Pandey, S/o Late Shri Ramshankar Pandey, Age about 33
years, R/o Ramannagar Ward No.18, Janjgir, P.S. City Kotwali, Janjgir,
District Janjgir-Champa (C.G.)

(In Jail)
---- Appellant

Versus

State of Chhattisgarh, Through Police Station Janjgir, District Janjgir-
Champa (C.G.)

---- Respondent

For Appellant: Mr. Sumit Singh, Advocate.
For Respondent/State: Mr. Ashish Tiwari, Government Advocate.
For Objector: Mr. Ravindra Sharma, Advocate.

**Hon'ble Shri Sanjay K. Agrawal and
Hon'ble Shri Radhakishan Agrawal, JJ.**

C.A.V. Judgment

Sanjay K. Agrawal, J.

1. Finding question of public importance involved in the criminal appeal, the learned Single Judge by order dated 14-2-2023, in exercise of power conferred under Rule 32(1) of the High Court of Chhattisgarh Rules, 2007, has referred the matter to the Hon'ble Chief Justice and in turn, the Hon'ble Acting Chief Justice by its order, directed the matter to be placed before DB-II and this is how the matter is before us on the following question of law / stated question: -



Question of Law / Stated Question: -

“Firstly, whether if an appeal against an order passed by a Special Court rejecting an application under Section 439 of CrPC, has been decided on merits or otherwise by this Court, the subsequent appeal under any change circumstances is maintainable before this Court?

If yes, whether this Court can entertain an appeal after the period of limitation as provided under the 2nd proviso clause of the Section 14A of the Special Act?”

Facts leading to this reference: -

2. The appellant herein was arrested in connection with Crime No.362/2022 registered at Police Station Janjgir, District Janjgir-Champa for commission of offence under Section 306 of the IPC and also under Section 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short hereinafter referred to as ‘the POA Act’). The appellant while facing trial before the Special Judge (Atrocities), Janjgir moved an application for grant of bail under Section 439 of the CrPC which the learned Special Judge by order dated 21-7-2022 rejected. Feeling aggrieved and dissatisfied with the order rejecting his application for grant of regular bail, he preferred an appeal before this Court under Section 14A(2) of the POA Act which was registered as Cr.A.No.1193/2022 titled as **Dushyant Pandey v. State of Chhattisgarh** and the learned Single Judge by order dated 26-9-2022 has dismissed the said appeal on merits. Thereafter, on 28-10-2022, the Special Judge (Atrocities) framed charges against the appellant for the offences under Section 306 of the IPC & Section 3(2)(v) of the POA Act. Upon framing charges, the appellant herein has preferred this appeal under Section 14A(2)





of the POA Act stating that charges have been framed against him on 28-10-2022 by the Special Judge after dismissal of his criminal appeal preferred under Section 14A(2) of the POA Act on 26-9-2022. Though the instant appeal was admitted for hearing by the learned Single Judge on 30-11-2022, but ultimately, the learned Single Judge finding that in Cr.A.No.1104/2021 (**Neeraj Jagatramka v. State of Chhattisgarh**), decided on 7-2-2022, it has been held that subsequent appeal under Section 14A(2) of the POA Act seeking bail after rejection of first bail application is maintainable, but while deciding the appeal that the question of limitation and the principle of merger has not been brought to the notice of the Court, no finding in that regard has been returned by the Bench deciding Cr.A.No.1104/2021, this reference has been made on the above stated question of law.

Submissions of parties: -

3. Mr. Sumit Singh, learned counsel appearing for the appellant, would submit that on change of circumstances the subsequent appeal would be maintainable like in the present case, charges have been framed after dismissal of appeal by this Court which would amount to change in circumstances and secondly, appeal in terms of Section 14A(2) of the POA Act would be maintainable as there is no bar in entertaining the subsequent appeal against the same order rejecting the bail application though the nomenclature is mentioned as appeal under the POA Act, but in fact it is the concurrent jurisdiction under Section 439 of the CrPC which the Court exercises. He would rely upon the decision of the M.P. High





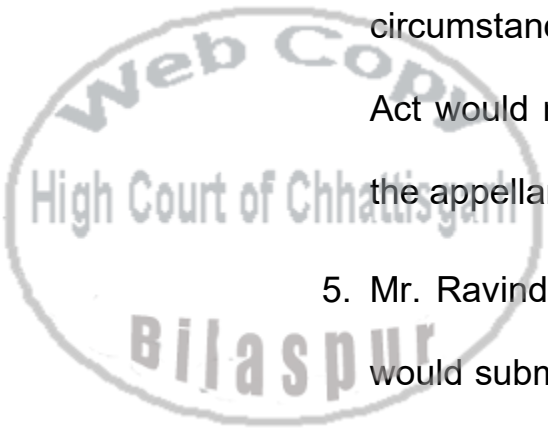
Court in the matter of Ramu @ Ramlal v. State of M.P.¹ and the Full Bench judgment of the Allahabad High Court in the matter of In re: Provision of Section 14A of SC/ST (Prevention of Atrocities) Amendment Act, 2015 (FB)². As such, the appeal as preferred would be maintainable and accordingly, the question be answered in favour of the appellant holding the appeal to be maintainable.

4. Mr. Ashish Tiwari, learned State counsel, would submit that since the right of appeal has been conferred to the accused under Section 14A of the POA Act and the application under Section 439 of the CrPC has been rejected, therefore, on the change of circumstances, another appeal in terms of Section 14(2) of the POA Act would not be maintainable and as such, the present appeal of the appellant deserves to be dismissed.

5. Mr. Ravindra Sharma, learned counsel appearing for the objector, would submit that the order rejecting the application for grant of bail under Section 439 of the CrPC was challenged by the appellant in Cr.A.No.1193/2022 and that has been dismissed on merits by order dated 26-9-2022 and thereafter, upon the alleged change of circumstances, second appeal under Section 14A(2) of the POA Act would not be maintainable as it would amount to review of order dated 26-9-2022 as appeal is a creature of statute and there cannot be any right of appeal unless it is expressly provided in any statute and once appellate jurisdiction has been exercised by the appellate court under Section 14A(2) of the POA Act, the court becomes functus officio and cannot entertain appeal upon change in

1 ILR (2018) M.P. 163

2 2018 SCC OnLine Allahabad 2087 : 2018 CrLJ 5010 (FB)





circumstances as power to grant bail has only been conferred in view of Section 14A(2) of the POA Act to the Special Court constituted under the POA Act with effect from 26-1-2016, the date on which Section 14A was brought into the statute book by the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015. Therefore, in light of the decision of the Supreme Court in the matter of **Hari Singh Mann v. Harbhajan Singh Bajwa and others**³, the criminal appeal deserves to be dismissed by answering the stated question in negative.

6. We have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the record with utmost circumspection.

7. Section 439 of the CrPC deals with Special powers of High Court or Court of Session regarding grant of bail. Section 439(1) of the CrPC states as under:-

“439. Special powers of High Court or Court of Session regarding bail.—(1) A High Court or Court of Session may direct—

(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of Section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;

(b) that any condition imposed by a Magistrate when releasing an person on bail be set aside or modified:

Provided that the High Court or the Court of Session shall, before granting bail to a person who is

3 (2001) 1 SCC 169



accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.”

8. By virtue of Section 18 of the POA Act, Section 438 of the CrPC has been made inapplicable to the persons committing the offence under the POA Act. Similarly, by virtue of Section 19 of the POA Act, the provisions of Section 360 of the CrPC and the provisions of the Probation of Offenders Act, 1958 have been made inapplicable to any person above the age of 18 years who is found guilty of having committed an offence under the POA Act.

Statutory scheme of appeals under the POA Act: -

9. The POA Act was promulgated which is an Act to prevent the Commission of offences of atrocities against the members of the Scheduled Castes and the Scheduled Tribes, to provide for Special Courts and Exclusive Special Courts for the trial of such offences and for the relief and rehabilitation of the victims of such offences and for matters connected therewith or incidental thereto, but it had no provision of appeal against the order granting or rejecting bail.
10. The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015 was brought into force with effect from 26-1-2016 by which the extensive amendment was made in the POA Act. Section 14 of the POA Act provides for Special Court and Exclusive Special Court with power and jurisdiction to try the offences under the Act and further, power to directly take cognizance of the offence under the Act was introduced. Section





14A was also introduced with effect from 26-1-2016 which provides for appeals from any judgment, sentence or order, not being an interlocutory order, of a Special Court or an Exclusive Special Court, to the High Court both on facts and on law. Sub-section (2) of Section 14A further provides that an appeal shall lie to the High Court against an order of the Special Court or the Exclusive Special Court granting or refusing bail. For the sake of convenience, Section 14A of the POA Act needs to be noted here which states as under: -

"14A. Appeals.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an appeal shall lie, from any judgment, sentence or order, not being an interlocutory order, of a Special Court or an Exclusive Special Court, to the High Court both on facts and on law.

(2) Notwithstanding anything contained in sub-section (3) of section 378 of the Code of Criminal Procedure, 1973 (2 of 1974), an appeal shall lie to the High Court against an order of the Special Court or the Exclusive Special Court granting or refusing bail.

(3) Notwithstanding anything contained in any other law for the time being in force, every appeal under this section shall be preferred within a period of ninety 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 ninety days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of ninety days:

Provided further that no appeal shall be entertained after the expiry of the period of one hundred and eighty days.

(4) Every appeal preferred under sub-section (1) shall, as far as possible, be disposed of within a period of three months from the date of admission of the appeal."





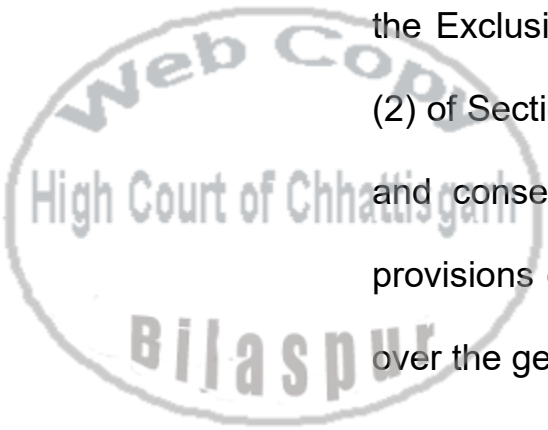
11. Establishment of Special Court and Exclusive Special Court and specification of Special Public Prosecutor and Exclusive Public Prosecutor were also provided in the POA Act (the Amendment Act of 2015) to exclusively try the offences under the POA Act to enable speedy and expeditious disposal of cases.

12. A focused glance of the provisions contained in Section 14A(2) of the POA Act would show that a special provision has been carved out relating to an appeal by providing that notwithstanding anything contained in sub-section (3) of Section 378 of the CrPC, an appeal shall lie to the High Court against an order of the Special Court or the Exclusive Special Court granting or refusing bail. Sub-section (2) of Section 14A of the POA Act starts with a non obstante clause and consequently, in case of any conflict or inconsistency, the provisions contained in sub-section (2) of Section 14A shall prevail over the general provisions relating to grant of bail.

13. Right of appeal envisaged under Section 14A(2) of the POA Act is statutory in nature and right has been exercised in terms of the statute of the POA Act regarding such right of appeal. Appeal is the right of entering a superior court and invoking its aid and interposition to redress the error of court below. The Supreme Court in the matter of **Garikapati Veeraya v. N. Subbiah Choudhry and others**⁴ has held that the right of appeal is not a mere matter of procedure but is a substantive right and it is a vested right to enter the superior court, and observed as under: -

“(23) From the decisions cited above the following principles clearly emerge:

4 AIR 1957 SC 540





(i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

(ii) The right of appeal is not a mere matter of procedure but is a substantive right.

(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.

(iv) The right of appeal is a vested right and such a right to enter the superior Court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

(v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise.”

14. Furthermore, in the matter of **Competition Commission of India v.**

Steel Authority of India Limited and another⁵, their Lordships of

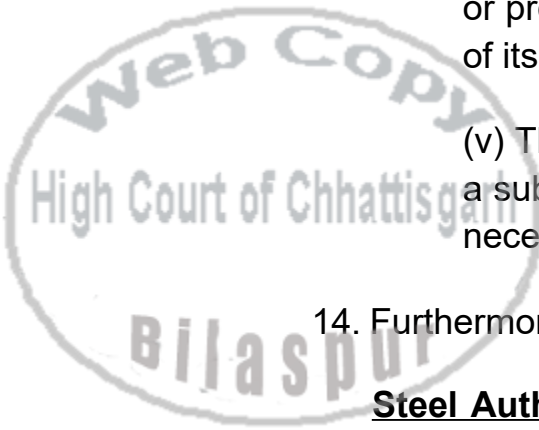
the Supreme Court have held that appeal being a statutory right

and no party having a right to file appeal except in accordance with

the prescribed procedure, and observed in paragraphs 50, 51 and

52 as under: -

“50. The principle of “appeal being a statutory right and no party having a right to file appeal except in accordance with the prescribed procedure” is now well settled. The right of appeal may be lost to a party in face of relevant provisions of law in appropriate cases. It being a creation of a statute, legislature has to decide whether the right to appeal should be unconditional or conditional. Such law does not violate Article 14 of the Constitution. An appeal to be maintainable must have its genesis in the authority of law. Reference may be made





to *M. Ramnarain (P) Ltd. v. State Trading Corpn. of India Ltd.*⁶, and *Gujarat Agro Industries Co. Ltd. v. Municipal Corpn. of the City of Ahmedabad*⁷.

51. Right of appeal is neither a natural nor an inherent right vested in a party. It is a substantive statutory right regulated by the statute creating it. The cases of *Kondiba Dagadu Kadam v. Savitribai Sopan Gujar*⁸ and *Kashmir Singh v. Harnam Singh*⁹ may be referred to on this point. Thus, it is evident that the right to appeal is not a right which can be assumed by logical analysis much less by exercise of inherent jurisdiction. It essentially should be provided by the law in force. In absence of any specific provision creating a right in a party to file an appeal, such right can neither be assumed nor inferred in favour of the party.

52. A statute is stated to be the edict of legislature. It expresses the will of legislature and the function of the court is to interpret the document according to the intent of those who made it. It is a settled rule of construction of statute that the provisions should be interpreted by applying plain rule of construction. The courts normally would not imply anything which is inconsistent with the words expressly used by the statute. In other words, the court would keep in mind that its function is *jus dicere*, not *jus dare*. The right of appeal being creation of the statute and being a statutory right does not invite unnecessarily liberal or strict construction. The best norm would be to give literal construction keeping the legislative intent in mind.”

15. Similarly, Section 14A(2) of the POA Act begins with non obstante clause “notwithstanding anything contained in sub-section (3) of section 378”. It would be appropriate to notice the meaning and purport of “non obstante clause”.

16. A *non obstante* clause is generally incorporated in a statute to give overriding effect to a particular section or the statute as a whole.

6 (1983) 3 SCC 75

7 (1999) 4 SCC 468

8 (1999) 3 SCC 722

9 (2008) 12 SCC 796





The meaning of '*non obstante* clause' has been explained in the

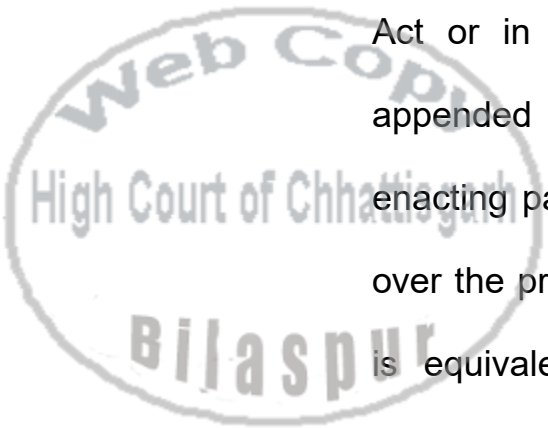
Advanced Law Lexicon by **P. Ramnath Aiyar** as follows: -

“Non obstante clause. A clause in a statute which overrides all provisions of the statute. It is usually worded : 'Notwithstanding anything in ...' Need not always have effect of cutting down clear terms of enactment. Enacting part when clear can Control non-obstante clause.

A clause used in public and private instruments intended to preclude, in advance, any interpretation contrary to certain declared objects or purposes.”

17. A clause beginning with 'notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force', is sometimes appended to a section in the beginning, with a view to give the enacting part of the section in case of conflict an overriding effect over the provision or Act mentioned in the *non obstante* clause. It is equivalent to saying that in spite of the provision or Act mentioned in the *non obstante* clause, the enactment following it will have its full operation or that the provisions embraced in the *non obstante* clause will not be an impediment for the operation of the enactment. Thus a *non obstante* clause may be used as a legislative device to modify the ambit of the provision or law mentioned in the *non obstante* clause or to override it in specified circumstances. (See page 364 of **Principles of Statutory Interpretation** by **Justice G.P. Singh**, 12th Edition 2010.)

18. The nature and object of *non obstante* clause came to be considered by their Lordships of the Supreme Court in the matter of





Union of India and another v. G.M. Kokil and others¹⁰ in which it has been held that a *non obstante* clause is a legislative device employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment to avoid the operation and effect of all contrary provisions.

19. Similarly, in the matter of **State of Bihar and others v. Bihar M.S.E.S.K.K. Mahasangh and others**¹¹, the effect of *non obstante* clause has been explained by their Lordships of the Supreme Court in paragraph 47 of the report as under: -

“47. Normally the use of phrase by the Legislature in a statutory provision like 'notwithstanding anything to the contrary contained in this Act' is equivalent to saying that the Act shall be no impediment to the measure (See Law Lexicon words 'notwithstanding anything in this Act to the contrary). Use of such expression is another way of saying that the provision in which the non obstante clause occurs usually would prevail over other provisions in the Act. Thus, non obstante clauses are not always to be regarded as repealing clauses nor as clauses which expressly or completely supersede any other provision of the law, but merely as clauses which remove all obstructions which might arise out of the provisions of any other law in the way of the operation of the principle enacting provision to which the non obstante clause is attached. (See Bipathumma and others vs. Mariam Bibi; (1966(1) Mysore Law Journal page 162 and at page 165.”

20. Thus, it is quite vivid that a *non obstante* clause is a legislative device which is employed by the competent Legislature to give overriding effect in case of any conflict or inconsistency over the provisions of the same Act or other Acts. The purpose of *non*

10 AIR 1984 SC 1022

11 AIR 2005 SC 1605





obstante clause is to provide the way for full operation of enacting provision without any impediment of obstruction of any provisions of the same Act or any other Act. The main object is to provide full operation of the Act.

21. As such, the scheme of Section 14A(2) of the POA Act would show that the accused person has the right of appeal under Section 14A(2) against the order rejecting his application for grant of regular bail before this Court notwithstanding the provision contained in Section 378(3) of the CrPC and admittedly, in the instant case, right of appeal under Section 14A(2) of the POA Act has been exercised by the appellant herein and his appeal has been dismissed on merits. Upon change of circumstances, second appeal has been said to be preferred under Section 14A(2) of the POA Act which would amount to filing of application for grant of bail under Section 439 of the CrPC and the core issue is about the maintainability of the said appeal.

22. In the matter of **State of Gujarat v. Salimbhai Abdulgaffar Shaikh and others**¹² in which Section 34(4) of the Prevention of Terrorism Act, 2002 (for short, 'the POTA') provides for an appeal before the High Court against an order of the Special Court granting or refusing bail, their Lordships of the Supreme Court considered the specific provision of appeal under Section 34(4) and held that in view of the specific provision under the POTA providing appeal against the order of the Special Court granting or refusing bail, the power under Section 439 of the CrPC cannot be exercised.



Section 34 of the POTA is a pari materia provision to Section 14A of the POA Act which states as under: -

"34. (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.

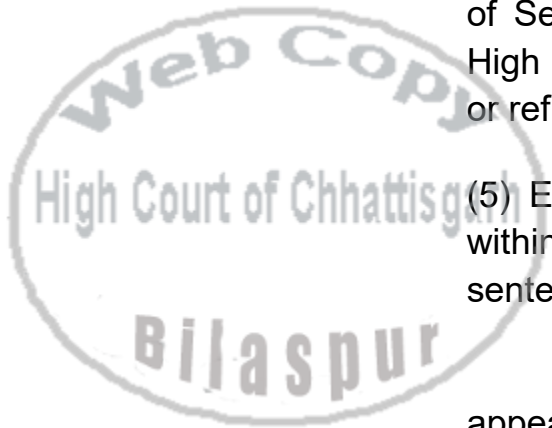
(3) Except as aforesaid, no appeal or revision shall lie to any court from any judgment, sentence or order including an interlocutory order of a Special Court.

(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 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."

Their Lordships considered Section 34(4) of the POTA which provides for an appeal in the High Court against an order of the Special Court granting or refusing bail and held that an appeal is a proceeding taken to rectify an erroneous decision of a court by submitting the question to a higher court, and in view of the express language used in sub-section (1) of Section 34 of the POTA the appeal would lie both on facts and on law. Their Lordships further held that the appeal can lie only against an order of the Special Court and unless there is an order of the Special Court refusing

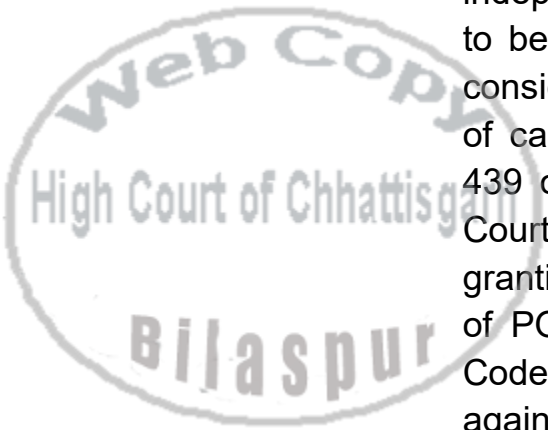




bail, the accused will have no right to file an appeal before the High Court praying for grant of bail to them. Their Lordships also held that existence of an order of the Special Court is, therefore, a *sine qua non* for approaching the High Court. It has been observed in paragraph 11 of the report as under: -

“11. Broadly speaking, therefore, an appeal is a proceeding taken to rectify an erroneous decision of a court by submitting the question to a higher court, and in view of the express language used in sub-section (1) of Section 34 of POTA the appeal would lie both on facts and on law. Therefore even an order granting bail can be examined on merits by the High Court without any kind of fetters on its powers and it can come to an independent conclusion whether the accused deserves to be released on bail on the merits of the case. The considerations which are generally relevant in the matter of cancellation of bail under sub-section (2) of Section 439 of the Code will not come in the way of the High Court in setting aside an order of the Special Court granting bail. It is, therefore, evident that the provisions of POTA are in clear contradistinction with that of the Code of Criminal Procedure where no appeal is provided against an order granting bail. The appeal can lie only against an order of the Special Court and unless there is an order of the Special Court refusing bail, the accused will have no right to file an appeal before the High Court praying for grant of bail to them. Existence of an order of the Special Court is, therefore, a *sine qua non* for approaching the High Court.”

23. Their Lordships of the Supreme Court further considered the question / argument of learned counsel for the respondents (therein), whether a person whose bail under POTA has been rejected by the Special Court will have two remedies and he can avail any one of them at his sweet will by moving a bail application before the High Court under Section 439 of the CrPC in the original or concurrent jurisdiction or may prefer an appeal under sub-





section (4) of Section 34 of POTA, and their Lordships have negated the argument by holding as under: -

“14. That apart, if the argument of learned counsel for the respondents is accepted, it would mean that a person whose bail under POTA has been rejected by the Special Court will have two remedies and he can avail any one of them at his sweet will. He may move a bail application before the High Court under Section 439 CrPC in the original or concurrent jurisdiction which may be heard by a Single Judge or may prefer an appeal under sub-section (4) of Section 34 of POTA which would be heard by a bench of two judges. To interpret a statutory provision in such a manner that a Court can exercise both appellate and original jurisdiction in respect of the same matter will lead to an incongruous situation. The contention is therefore fallacious.

15. In the present case, the respondents did not choose to apply for bail before the Special Court for offences under POTA and consequently, there was no order or refusal of bail for offences under the said Act. The learned Single Judge exercising powers under Section 439 read with Section 482 CrPC granted them bail. The order of the High Court is clearly without jurisdiction as under the scheme of the Act the accused can only file an appeal against an order of refusal of bail passed by the Special Court before a Division Bench of the High Court and, therefore, the order under challenge cannot be sustained and has to be set aside. Even on merits, the order of the High Court is far from satisfactory. Though it is a very long order running into 87 paragraphs but the factual aspects of the case have been considered only in one paragraph and that too in a very general way.”

24. Similarly, in the matter of **State of Andhra Pradesh Through Inspector General, National Investigation Agency v. Mohd. Hussain alias Saleem**¹³, their Lordships of the Supreme Court have considered the pari materia provision contained in Section 21(4) of the National Investigation Agency Act, 2008 to



Section 14A of the POA Act, which also provides that 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. Section 21(4) of the National Investigation Agency Act, 2008 states as under: -

“21. Appeals.—(1) to (3) xxx xxx xxx

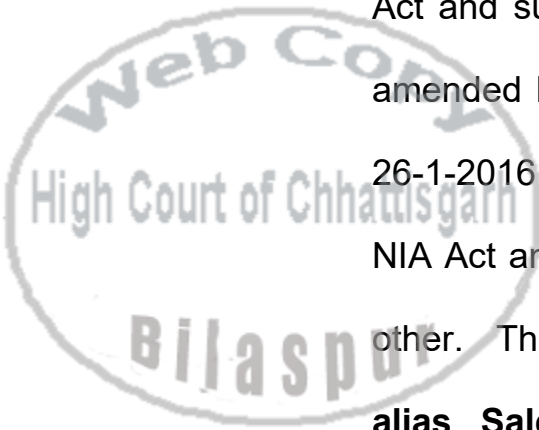
(4) Notwithstanding anything contained in sub-section (3) of Section 378 of the Code, an appeal shall lie to the High Court against an order of the Special Court granting or refusing bail.”

25. A careful perusal of sub-sections (1) & (4) of Section 21 of the NIA Act and sub-sections (1) & (2) of Section 14A of the POA Act as amended by Act 1 of 2016 which came into force with effect from 26-1-2016 would show that both the provisions (Section 21 of the NIA Act and Section 14A of the POA Act) are pari materia to each other. Their Lordships of the Supreme Court in **Mohd. Hussain alias Saleem’s** case (supra) have discussed the provisions contained in Section 21 of the NIA Act and held that the application for bail in light of Section 21(4) will have to be made before the Special Court by observing as under in paragraph 27: -

“27. The order passed by this Court on 2-8-2013 in *State of A.P. v. Mohd. Hussain*¹⁴ is therefore clarified as follows:

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

27.2. And, secondly as far as Prayer (b) of the petition for clarification is concerned, it is made clear that inasmuch as the applicant is being prosecuted for the offences under the MCOC Act, 1999, as well as the

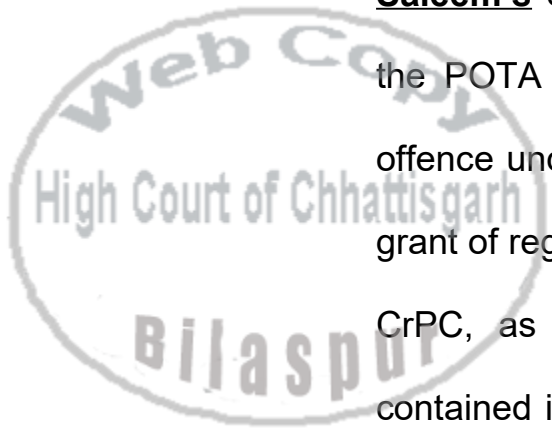




Unlawful Activities (Prevention) Act, 1967, such offences are triable only by the Special Court, and therefore application for bail in such matters will have to be made before the Special Court under the NIA Act, 2008, and shall not lie before the High Court either under Section 439 or under Section 482 of the Code. The application for bail filed by the applicant in the present case is not maintainable before the High Court.

27.3. Thus, where the NIA Act applies, the original application for bail shall lie only before the Special Court, and appeal against the orders therein shall lie only to a Bench of two Judges of the High Court.”

26. In light of the decisions of the Supreme Court in **Salimbhai Abdulgaffar Shaikh's** case (supra) and **Mohd. Hussain alias Saleem's** case (supra), which deal with pari materia provisions in the POA and the NIA Act, it is quite clear that accused of an offence under the POA Act cannot directly move an application for grant of regular bail before this Court by invoking Section 439 of the CrPC, as the general provisions with regard to grant of bail contained in Section 439 stand impliedly excluded by the statutory scheme contained in Section 14A of the POA Act as amended with effect from 26-1-2016 and the remedy of the accused person is to first invoke the jurisdiction of the Special Court under Section 439 of the CrPC for grant of bail (if any) and if such application is rejected / granted by the Special Court, then only he has to avail the remedy to file appeal under Section 14A(2) of the POA Act, as the right to appeal has been expressly provided under Section 14A(2) of the POA Act as amended by Act 1 of 2016 which came into force with effect from 26-1-2016 i.e. the Amendment Act of 2015. Once the appeal under Section 14A(2) of the POA Act is dismissed on merits, the accused has no right to prefer second



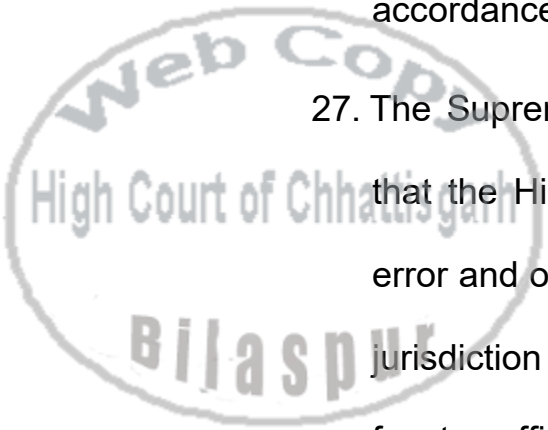


appeal under Section 14A of the POA Act even on change of circumstances, if any, as it would amount to entertaining the application under Section 439 of the CrPC which this Court does not have and its jurisdiction has been impliedly excluded by the statutory scheme enacted under Section 14A of the POA Act and further, for one more reason that since this Court exercised the appellate jurisdiction under Section 14A and entertainment of another appeal on change of circumstance would amount to review its earlier judgment, but, no review is entertainable in view of the provisions contained in Section 362 of the CrPC except in accordance with the provisions of the CrPC.

27. The Supreme Court in **Hari Singh Mann** (supra) has clearly held that the High Court except to correct a clerical or an arithmetical error and once a matter is finally disposed of in original or appellate jurisdiction in the absence of a specific statutory provision becomes functus officio in respect of that matter, and observed as under: -

“10. Section 362 of the Code mandates that no court, when it has signed its judgment or final order disposing of a case shall alter or review the same except to correct a clerical or arithmetical error. The section is based on an acknowledged principle of law that once a matter is finally disposed of by a court, the said court in the absence of a specific statutory provision becomes functus officio and disentitled to entertain a fresh prayer for the same relief unless the former order of final disposal is set aside by a court of competent jurisdiction in a manner prescribed by law. The court becomes functus officio the moment the official order disposing of a case is signed. Such an order cannot be altered except to the extent of correcting a clerical or arithmetical error. ...”

28. The Supreme Court in the matter of **State of Orissa v. Ram**





Chander Agarwala¹⁵ relying upon its earlier decision in the matter of **Supdt. and Remembrancer of Legal Affairs, W.B. v. Mohan Singh**¹⁶ has held that a judgment of the High Court on appeal or revision cannot be reviewed or revised except in accordance with the provisions of the Criminal Procedure Code. The provisions of Section 561-A of the Code cannot be invoked for exercise of a power which is specifically prohibited by the Code.

29. In **Neeraj Jagatramka** (supra), the learned Single Judge while holding the second appeal under Section 14(2) of the POA Act maintainable, held as under: -

“13. From the aforementioned rulings of Hon’ble Supreme Court, it is clear that the law does not prevent second consideration of an application of bail on rejection of first one, earlier rejection is not conclusive. When applying similar analogy for considering bail applications under the Act of 1989 and also keeping in mind Article 21 of the Constitution of India which provides for ‘no person shall be deprived of his life and personal liberty except by due process of law’, the law of bail is also an integral part of Article 21 of Constitution of India, hence the default pointed out is not sustainable.

14. For the foregoing reasons, I am of the view that subsequent appeal under Section 14(2) of CrPC seeking bail after rejection of first bail application is maintainable.”

30. It has rightly been said by the learned Single Judge that Court is not barred from entertaining repeat bail application for second consideration at later stage on change in circumstance. But there is distinction between application under Section 439 of the CrPC and appeal under Section 14A(2) of the POA Act. An application is a request to the judicial officer. The word “application” is

15 (1979) 2 SCC 305

16 (1975) 3 SCC 706





synonymous with the term “petition” which means a written statement of material facts, requesting the court to grant the relief or remedy based on those facts (see **P. Philip v. The Director of Enforcement, New Delhi and another**¹⁷) and in this case, it is request to the Special Judge to grant bail under Section 439 of the CrPC, whereas appeal is the right of entering a superior court and invoking its aid and interposition to redress the error of court below, and in this case, it is an appeal to this Court under Section 14A(2) of the POA Act and as such, application under Section 439 of the CrPC would lie before the Special Court, whereas appeal against that order will lie before this Court under Section 14A(2) of the POA Act against the order rejecting his application under Section 439 of the CrPC, as the jurisdiction to hear application under Section 439 of the CrPC now exclusively lies to the Special Court with effect from 26-1-2016 and appeal to this Court and upon of change of circumstance, repeat bail application (if any) would lie under Section 439 of the CrPC before the Special Court, but certainly no appeal would directly lie before this Court on change of circumstance and the principle governing grant of repeat bail application under Section 439 of the CrPC would not apply for filing appeal under Section 14A(2) of the POA Act. As such, the decision in **Neeraj Jagatramka** (supra) by the learned Single Judge cannot be said to be laying down good law and therefore the same is hereby overruled.

31. Thus, we are of the considered opinion that once the appeal under Section 14A(2) of the POA Act is dismissed by this Court on merits,



the subsequent appeal under any change of circumstances would not be maintainable for two reasons firstly, that by the statutory scheme of appeal enacted under Section 14A, the jurisdiction of this Court under Section 439 of the CrPC stands impliedly excluded as the power to grant bail under Section 439 of the CrPC has now only been vested to the Special Court constituted under Section 14 of the POA Act and this Court is only empowered to hear appeal under Section 14A(2) of the POA Act against refusal or grant of bail by the Special Court under the POA Act and secondly, that entertaining the subsequent appeal under change of circumstances directly would amount to review of its earlier order which is expressly provided by Section 362 of the CrPC, as the Court has also become functus officio in respect of that matter. Accordingly, we hereby answer the reference as under: -

1. Once an appeal under Section 14A of the POA Act against the order passed by the Special Court rejecting the application under Section 439 of the CrPC is decided on merits or otherwise by this Court, subsequent appeal under change of circumstances would not be directly maintainable under Section 14A of the POA Act before this Court even on change of circumstances and remedy to the accused, if any, is to file an application before the Special Court for grant of bail.
2. Since the answer to the first stated question is in negative, it would not be expedient to answer the second stated question.





32. Since the present appeal is not maintainable in light of the aforesaid answer, it would be unnecessary to refer this criminal appeal before the learned Single Judge. Therefore, the present criminal appeal is dismissed as not maintainable.

Sd/-
(Sanjay K. Agrawal)
Judge

Sd/-
(Radhakishan Agrawal)
Judge

Soma





Head Note

Once an appeal under Section 14A of the POA Act against the order passed by the Special Court rejecting the application under Section 439 of the CrPC is decided on merits or otherwise by this Court, subsequent appeal under change of circumstances would not be directly maintainable under Section 14A of the POA Act before this Court even on change of circumstances and remedy to the accused, if any, is to file an application before the Special Court for grant of bail.

शीर्ष टिप्पणी

जब विशेष न्यायालय द्वारा द.प्र.सं. की धारा 439 के अन्तर्गत आवेदन को खारिज करने वाले आदेश के विरुद्ध अत्याचार निवारण अधिनियम की धारा 14क के अन्तर्गत किसी अपील को इस न्यायालय द्वारा गुणों के आधार पर या अन्यथा एक बार निर्णीत कर दिया गया हो तो परिस्थितियों में बदलाव के अन्तर्गत की गई पश्चातवर्ती अपील परिस्थितियों के बदले जाने के बावजूद इस न्यायालय के समक्ष अत्याचार निवारण अधिनियम की धारा 14क के अन्तर्गत सीधे तौर पर पोषणीय नहीं होगी तथा अभियुक्त हेतु उपाय, यदि हो तो, यह है कि वह विशेष न्यायालय के समक्ष जमानत हेतु एक आवेदन दायर करे।

