

IN THE HIGH COURT OF KARNATAKA AT BENGALURU



DATED THIS THE 29TH DAY OF MARCH, 2022

PRESENT

THE HON'BLE MR. RITU RAJ AWASTHI, CHIEF JUSTICE

AND

THE HON'BLE MR. JUSTICE B. VEERAPPA

AND

THE HON'BLE MR. JUSTICE P. KRISHNA BHAT

CRIMINAL APPEAL NO.755/2021

BETWEEN :

1 . IRFAN PASHA

2 . WASEEM AHMED @ WASIM,

3 . MOHAMMED SAIDQ @ MOHAMMED MAZAR,

4 . MOHAMMED MUJEEB ULLA @ MUJEEB,

...APPELLANTS

(BY SRI. S BALAKRISHNAN, ADVOCATE)

AND :

STATE OF KARNATAKA,
THROUGH NATIONAL INVESTIGATION AGENCY,
BANGALORE,
REP BY SPP,
HIGH COURT OF KARNATAKA,
HIGH COURT BUILDING,
BANGALORE-560 001.

...RESPONDENT

(BY SRI. PRASANNA KUMAR P, STANDING COUNSEL)

THIS CRIMINAL APPEAL IS FILED UNDER SECTION 21 OF NATIONAL INVESTIGATION AGENCY ACT PRAYING TO TRANSFER THE CASE IN SPL.C.NO.181/2017 FROM HONOURABLE XLIX ADDITIONAL CITY CIVIL AND SESSIONS JUDGE AND SPECIAL JUDGE FOR TRIAL OF NIA CASES, (CCH-50) TO ANY OTHER HONOURABLE COURT HAVING JURISDICTION UNDER THE CODE OF CRIMINAL PROCEDURE, TO PROCEED WITH THE TRIAL OTHER THAN THE OFFENCE UNDER UNLAWFUL ACTIVITIES (PREVENTION) ACT.

THIS REFERENCE IS MADE BY THE CHIEF JUSTICE TO DETERMINE THE ISSUE WHETHER AN INTERLOCUTORY APPLICATION FILED AND DISMISSED BY A SPECIAL COURT WOULD GIVE RISE TO FILING OF AN APPEAL UNDER SECTION 21 OF THE NATIONAL INVESTIGATION AGENCY ACT, 2008 OR WHETHER APPEAL LIES UNDER SECTION 21 OF THE NATIONAL INVESTIGATION AGENCY ACT, 2008 AGAINST AN ORDER PASSED ON AN INTERLOCUTORY APPLICATION FILED UNDER SECTION 20 OF THE ACT.

THIS REFERENCE HAVING BEEN HEARD AND RESERVED FOR ORDERS, COMING ON FOR PRONOUNCEMENT OF ORDER ON REFERENCE, THIS DAY, THE **CHIEF JUSTICE** PRONOUNCED THE FOLLOWING:

ORDER ON REFERENCE

This reference arises out of order dated 09.08.2021 made by the Division Bench of this Court raising doubt about the correctness of view taken by coordinate bench in Criminal Appeal No.97/2018, wherein the office objection regarding maintainability of the appeal was over-ruled and the appeal was decided on merits. The order dated 09.08.2021 for ready reference, is reproduced below:

"The registry has raised following objection with regard to maintainability of this appeal:

"How this Crl.A. is maintainable u/s 21 of NIA Act seeking transfer the case in Spl.C.No.181/2017, pending before LI Additional City Civil and Sessions Judge, C/C.LIX Additional City Civil and Sessions Judge, Bengaluru."

2. *Sri.S.Balakrishnan, learned counsel appearing for appellants has relied upon order dated 08.07.2019 passed in Crl.A.No.97/2018 to contend that similar application had been filed in Spl.C.C.No.330/2015 and said application came to be rejected by the Special Court by order dated 08.01.2018, which was challenged in the Crl.A.No.97/2018 and appeal came to be decided on*

merits, by over-ruling said office objection and as such he prays for over ruling the office objections raised in this appeal.

3. *Per contra*, Sri.P.Prasanna Kumar, learned Standing Counsel appearing for respondent would submit that in view of express language contained in sub-section (1) of Section 21 this appeal is not maintainable, since as it is filed against an interlocutory order.

4. Having heard the learned Advocates appearing for parties and after perusing the records of Crl.A.No.97/2018, we notice that in the final order which has been passed on 08.07.2019 in the said appeal there is no reference to any discussion with regard to maintainability of the appeal, obviously on account of order passed on 03.06.2019 whereunder the Coordinate Bench had over ruled the office objections by following order:

"Heard learned counsel for the appellant and learned SPP for the respondent.

Office objection over ruled.

Call on 06/06/2019."

5. In order to appreciate the rival contentions raised in this appeal regarding maintainability it would be necessary to note Section 20 and 21(1) of the National Investigation Agency Act, 2008, which has been pressed into service and it reads:

"20. Power to transfer cases to regular courts.-- Where, after taking cognizance of any offence, a Special Court is of the opinion that the offence is not triable by it, it shall, notwithstanding that it has no jurisdiction to try such offence, transfer the case for the trial of such offence to any court having jurisdiction under the Code and the Court to

which the case is transferred may proceed with the trial of the offence as if it had taken cognizance of the offence.

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) xxxxx*
- (3) xxxxx*
- (4) xxxxx*
- (5) xxxxx"*

6. A plain reading of Section 20 would indicate that where the Special Court after taking cognizance of an offence is of the opinion that offence is not triable by it, is empowered to transfer the said case for trial of such offence to any court having jurisdiction under the Criminal Procedure Code and such court may proceed with the trial of the offence as if it had taken the cognizance of the offence. Sub-section (1) of Section 21 would indicate that an appeal shall lie from any judgment, sentence or order, not being an interlocutory order, of a Special Court to this Court both on facts and on law. In other words, where the order which is under challenge is an interlocutory order passed by the jurisdictional Special Court, necessarily the appeal would not be maintainable. In the instant case, an interlocutory application came to be filed by appellant/accused contending inter alia that offence alleged against is not triable by Special Court and it ought to be transferred to regular Special Court. However, said plea was not accepted and as such trial court rejected said contention by order dated 03.06.2019. Said order has been passed by Special Court on an interlocutory application and it is an interlocutory order. Hence, we are of the prima facie view that appeal would not be

maintainable. However, on account of Coordinate Bench in Crl.A.No.97/2018 by order dated 03.06.2019 referred to herein supra having over-ruled the office objection and there being no reasons assigned as to how the appeal would be maintainable against an interlocutory order an authoritative pronouncement on this issue would be required.

7. *Sri.S.Balakrishnan, learned counsel appearing for appellants has made a valiant attempt to contend that order dated 03.06.2019 passed in Crl.A.No.97/2018 is a precedent, which requires to be followed by this Court. It is true that well-recognized definition of precedent is "an adjudged case or a decision of a court, considered as furnishing as an example or authority for an identical or similar case afterwards arising or a similar question of law". Salmond defines a precedent as a judicial verdict which contains in itself a legal authoritative element, which is described as ratio decidendi.*

8. *The Hon'ble Apex Court in KRISHENA KUMAR vs. UNION OF INDIA reported in (1990) 4 SCC 207 defined ratio decidendi thus:*

"20. The ratio decidendi is the underlying principle, namely, the general reasons or the general grounds upon which the decision is based on the test or abstract from the specific peculiarities of the particular case which gives rise to the decision. The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre-existing rule of law, either statutory or Judge-made, and a minor premise consisting of the material facts of the case under immediate consideration."

9. Since we find in Crl.A.No.97/2018 the registry had raised an objection with regard to maintainability of said appeal, as has been raised in the present appeal and the Coordinate Bench without having discussed the provisions of law on the issue namely, Section 21(1) *visa-vis* Section 20 and by an order simplicitor the office objection having been overruled, the judicial discipline demands and commands that law requires to be laid to rest on this issue by a larger bench. Hence, we are of the opinion that following question requires to be adjudicated by a larger bench:

(1) Whether an interlocutory application filed and dismissed by a Special Court would give rise to filing of an appeal under Section 21 of the National Investigation Agency Act, 2008?

OR

(2) Whether appeal lies under Section 21 of the National Investigation Agency Act, 2008 against an order passed on an interlocutory application filed under Section 20 of the Act?

Registry is directed to place the file before Hon'ble Chief Justice for constituting a larger bench.

Await orders of Full Bench."

Thereafter, vide order dated 08.02.2022, the Hon'ble Chief Justice constituted a larger bench, accordingly, the matter has been placed before this Bench.

FACTUAL BACKDROP:

2. The appellants herein who are accused Nos.1 to 4 in Special Case No.181/2017 before the Special Court, Bangalore, are charge sheeted for the offences punishable under Sections 302, 201 r/w Section 34 of IPC, Sections 3 and 27 of the Arms Act and Sections 15, 16, 17, 18 and 20 of Unlawful Activities (Prevention) Act, 1967. They filed an application under Section 20 of the National Investigation Agency Act, 2008 ('the Act' for short) seeking transfer of the case to a regular Sessions Court on the ground that charge sheet filed is defective, insofar as, offences under Unlawful Activities (Prevention) Act, 1967 are concerned and therefore, the Special Court has no jurisdiction to try the same. The application was rejected vide order dated 22.02.2021, against which the instant Criminal Appeal No. 755/2021 has been filed.

3. We have heard learned counsel for the appellants - Sri.S.Balakrishnan and learned Standing Counsel for National Investigation Agency - Sri.P.Prasanna Kumar.

SUBMISSION OF APPELLANT:

4. Learned counsel for the appellants submitted before us that order impugned in the appeal is not an interlocutory order within the meaning of sub-section (1) of Section 21 of the Act and, therefore, an appeal to this Court is maintainable. He submitted that if the application filed by the accused before the learned Special Court seeking transfer of the same to the regular Sessions Court were to be allowed, proceedings before the learned Special Court would have concluded and it was not open for the prosecution to proceed against the appellants for the offences punishable under Sections 15, 16, 17 and 20 of Unlawful Activities (Prevention) Act, 1967. He also submitted that sanction secured by the prosecution for filing charge sheet against the appellants for the offences under Unlawful Activities (Prevention) Act, 1967, was from an incompetent authority and therefore, it was without jurisdiction and ineffective. It was his submission that application filed before the Special Court should have been allowed.

5. In support of the said contention, Sri.S.Balakrishnan, learned counsel for the appellants has placed

reliance on the following decisions, i.e., *PRAGYASINGH CHADRAPALSINGH THAKUR vs. STATE OF MAHARASHTRA THROUGH ADDITIONAL CHIEF SECRETARY, HOME DEPARTMENT*¹; *THE STATE OF MAHARASHTRA vs. MIRZA HIMAYAT BAIG*²; *SERIOUS FRAUD INVESTIGATION OFFICE & ORS. vs. RAHUL MODI & ORS*³; *UNION OF INDIA & ORS. vs. A.K. PANDEY*⁴; *LAKSHMANASAMI GOUNDER vs. C.I.T., SELVAMANI & OTHERS*⁵; *UNION OF INDIA (UOI) VS. T. NATHAMUNI*⁶; *R.A.H. SIGURAN vs. SHANKARE GOWDA & ORS.*⁷; *L.R. NAGU @ NAGENDRAMURTHY vs. STATE OF KARNATAKA*⁸; *NIRANJAN SINGH KARAM SINGH PUNJABI & ORS. vs. STATE OF MAHARASHTRA*⁹; *STATE OF MAHARASHTRA vs. MURLI RAMACHANDRA PURUSWAMI AND OTHERS*¹⁰; *GIRISH KUMAR SUNEJA vs. CBI*¹¹; *ASHRAF KHAN ALIAS BABU MUNNE KHAN PATHAN & ANOTHER vs. STATE OF GUJARAT - TADA*¹²; *RAMBHAI NATHABAI GADHVI AND OTHERS vs. STATE OF*

¹ LAWS (BOM) 2013 10 97

² Criminal Appeal No.755/2013 - High Court of Bombay

³ Criminal Appeal Nos.538-539/2019 - Supreme Court of India

⁴ Civil Appeal No.6181/2002 - Supreme Court of India

⁵ (1992) 1 SCC 911

⁶ Criminal Appeal Nos.2512-2513/2014 - Supreme Court of India

⁷ Criminal Appeal Nos.1439/2017 - Supreme Court of India

⁸ Criminal Appeal No.559/2017

⁹ (1990) 4 SCC 76

¹⁰ 2003(4) MhLJ 91

¹¹ (2017) 14 SCC 809

¹² (2012) 11 SCC 606

*GUJARAT – TADA*¹³; *SADIK SHARIF vs. STATE OF KARNATAKA – UAP ACT*¹⁴ *AND SUBHASHREE DAS ALIAS MILI PANDA AND OTHERS vs. STATE OF ORISSA – UAP ACT*¹⁵.

6. He, therefore, submitted that appeal is maintainable and office objections is required to be over-ruled by answering that impugned order is not an interlocutory order.

SUBMISSION OF RESPONDENT:

7. Sri.P.Prasanna Kumar, learned Special Public Prosecutor, per contra, contended that impugned order is an interlocutory order and therefore, an appeal against the same to this Court is specifically barred under sub-section (1) of Section 21 of the Act. He submitted that even if the contention of the accused appellants before the learned Special Court were to be accepted, the proceedings would not have concluded. According to the learned Special Public Prosecutor the only feasible test to determine whether appeal against the impugned order is maintainable before the High Court is to ascertain whether by

¹³ 1997 (7) SCC 744

¹⁴ CrI.R.P.No.98/2009 dated 06.11.2009

¹⁵ 2011 (2) OLR 1000

upholding the grounds raised by appellants, proceedings against appellants would have been terminated. Learned counsel submitted that contention that the sanction order was defective is wholly unsustainable. He further submitted that even if the said contention was accepted, proceedings as against the appellants would not have culminated in their discharge and they would have had to face the trial and therefore, impugned order is in the nature of an interlocutory order.

8. In support of his contention, he placed reliance on the following judgments, i.e., *MADHU LIMAYE vs. STATE OF MAHARASHTRA*¹⁶; *VC SHUKLA vs. CBI*¹⁷; *KK PATEL vs. STATE OF GUJARAT*¹⁸; *STATE OF AP vs. MOHD. HUSSAIN*¹⁹; *GIRISH KUMAR SUNEJA vs. CBI*²⁰; *ASIAN RESURFACING ROAD AGENCY PVT. LTD. vs. CBI*²¹; *ASIM SHARIFF vs. NIA*²² AND *SYED ISMAIL AFAQ vs. STATE OF KARNATAKA*²³.

¹⁶ (1977) 4 SCC 551

¹⁷ (1980) SCC (CrI) 695

¹⁸ (2000) 6 SCC 195

¹⁹ (2014) 1 SCC 258

²⁰ (2017) 14 SCC 809

²¹ (2018) 16 SCC 299

²² Criminal Appeal No.222/2018 (Kar HC-DB) – 08.03.2018

²³ Criminal Appeal No.97/2018 (Kar HC-DB) – 06.07.2019

RELEVANT PROVISIONS:

9. The matter of appeals from any judgment, sentence or order from the Special Court is regulated under Section 21 of the Act. Sections 20 and 21 of the Act are relevant which reads as follows:

"20. Power to transfer cases to regular courts. -

Where, after taking cognizance of any offence, a Special Court is of the opinion that the offence is not triable by it, it shall, notwithstanding that it has no jurisdiction to try such offence, transfer the case for the trial of

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."

10. In Cri.A.No.97/2018 (SRI. SYED ISMAIL AFAQ vs. THE STATE OF KARNATAKA) while overruling the office objections, this Court had on 03.06.2019 passed the following order:

"03/06/2019:

Heard learned counsel for the appellant and learned SPP for the respondent.

Office objections over-ruled.

Call on 06/06/2019.

Sd/-

Sd/-"

11. It is apparent from the above that the Hon'ble Division Bench did not give any reason for over-ruling office objections.

LEGAL POSITION:

12. Hon'ble Supreme Court had on several occasions observed that in view of the stringency of sentence on conviction under the Act and also the exacting nature of provisions on bail, the intention of legislation is clear that trial should be accomplished at a faster pace. Therefore, the Act has drastically reduced the avenues for the parties to approach the High Court by way of an appeal. A reading of Section 21 of the Act makes it absolutely clear. Section 21 of the Act in terms speaks about no right of appeal being made available against an interlocutory order. Hon'ble Supreme Court had an occasion to consider the highly restricted scope of preferring an appeal from the orders passed by the Special Court constituted under the Act at various stages before the final judgment is passed in the proceedings before the said Court. In *STATE OF ANDHRA PRADESH vs.*

MOHD. HUSSAIN²⁴ case, the Hon'ble Supreme Court has observed as follows:

"16. The above referred Section 21(4) of the NIA Act provides that an appeal lies to the High Court against an order of the Special Court granting or refusing bail. However sub-section (3) which is a prior sub-section, specifically states that "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. Therefore, the phrase "except as aforesaid" takes us to sub-sections (1) and (2). Thus when anybody is aggrieved by any judgment, sentence or order including an interlocutory order of the Special Court, no such appeal or revision shall lie to any court except as provided under sub-sections (1) and (2), meaning thereby only to the High Court. This is the mandate of Section 21(3) of the NIA Act.

17. There is no difficulty in accepting the submission on behalf of the appellant that an order granting or refusing bail is an interlocutory order. The point however to be noted is that as provided under Section 21(4) of the NIA Act, the appeal against such an order lies to the High Court only, and to no other court as laid down in Section 21(3). Thus it is only the interlocutory orders granting or refusing bail which are made appealable, and no other interlocutory orders, which is made clear in Section 21(1), which lays down that an appeal shall lie to the High Court from any judgment, sentence or order, not being an interlocutory order of a Special

²⁴ (2014) 14 SCC 258

Court. Thus other interlocutory orders are not appealable at all. This is because as provided under Section 19 of the Act, the trial is to proceed on day-to-day basis. It is to be conducted expeditiously. Therefore, no appeal is provided against any of the interlocutory orders passed by the Special Court. The only exception to this provision is that orders either granting or refusing bail are made appealable under Section 21(4). This is because those orders are concerning the liberty of the accused, and therefore although other interlocutory orders are not appealable, an appeal is provided against the order granting or refusing the bail. Section 21(4), thus carves out an exception to the exclusion of interlocutory orders, which are not appealable under Section 21(1). The order granting or refusing the bail is therefore very much an order against which an appeal is permitted under Section 21(1) of the Act.”

(Emphasis supplied)

13. From the above, it is absolutely clear that the only interlocutory order passed by the Special Court against which an appeal is maintainable to the High Court is the order granting or refusing to grant bail.

14. The above decision of Hon'ble Supreme Court directly deals with the provision under consideration namely, Section 21 of the Act. However, in view of vehement submissions made by the learned counsel for the appellants, it is

now necessary to advert to the decisions cited by him in some detail. Firstly, learned counsel for the appellants placed reliance on 2 decisions namely, *NIRANJAN SINGH KARAM SINGH PUNJABI, ADVOCATE vs. JITENDRA BHIMRAJ BIJJAYA AND OTHERS*²⁵ rendered by the Hon'ble Supreme Court and *STATE OF MAHARASHTRA vs. MURLI RAMACHANDRA PURUSWAMI*²⁶ rendered by Bombay High Court. Those cases arose out of charge sheet filed by the concerned police, among others, under Terrorist and Disruptive Activities (Prevention) Act, 1987 (for short 'TADA Act'). The provision that had fallen for consideration was Section 18 of the TADA Act, which provided for transfer of the case from the Special Court under TADA Act to a regular Sessions Court, if Special Court was of the opinion that there was no case made out to frame charges for offences under the TADA Act. It is undoubtedly a provision worded similarly like Section 21 of the Act and therefore, it is a cognate provision. Since the decision in *MD. HUSSAIN's* case we have placed reliance on is directly arising from a case registered under the provisions of the Act, we are of the view that it is not necessary

²⁵ (1990) 4 SCC 76

²⁶ (2003 (4) Mh.L.J. 91

to consider the decision in *NIRANJAN SINGH's* case. In any case, careful perusal of the said decision does not indicate Hon'ble Supreme Court taking any view in derogation of what has been held by the Supreme Court *MD. HUSSAIN's* case (supra). Therefore, the above said decision does not render any assistance to the case of the appellants. Insofar as *STATE OF MAHARASHTRA vs. MURLI RAMACHANDRA PURUSWAMI* is concerned, same is rendered by the Division Bench of the Bombay High Court. Said case is also arising under TADA Act and since *MD. HUSSAIN's* judgment is rendered by the Hon'ble Supreme Court the above case is also of no assistance to the case of appellants.

15. The next decision relied upon by the learned counsel for the appellants is *GIRISH KUMAR SUNEJA vs. CBI*²⁷ rendered by a Bench consisting of three Judges of the Hon'ble Supreme Court. The case before the Hon'ble Supreme Court arose under the Prevention of Corruption Act, 1988, and what was essentially considered in great detail was the nature of "inter-mediate orders" and "quasi final orders". Again since the said decision

²⁷ (2017) 14 scc 809

was rendered in a case arising under the Prevention of Corruption Act, 1988, *MD. HUSSAIN*'s case being directly on the point the above decision also does not render any assistance to the case of the appellants.

16. Learned counsel for the appellants placed reliance on *PRAGYASINGH CHANDRAPALSINGH THAKUR vs. STATE OF MAHARASHTRA THROUGH ADDITIONAL CHIEF SECRETARY, HOME DEPARTMENT*²⁸, which is decided by a Bench of Hon'ble Bombay High Court and even though decided in a case arising from National Investigation Agency Act, in view of clear exposition of law in *MD. HUSSAIN*'s case, we are not inclined to go into a detailed discussion of the above decision. The rest of the decisions cited by the learned counsel for the appellants are not on Section 21 of the Act.

17. In view of the law laid down by the Hon'ble Apex Court in the case of *STATE OF ANDHRA PRADESH vs. MOHD. HUSSAIN* supra, we are of the considered view that no appeal shall lie to the High Court under Section 21 of the Act against

²⁸ LAWS(BOM) 2013 10 97

the interlocutory order except in the case of grant of bail or refusal to grant bail.

18. In the present case, the order impugned in the appeal is an interlocutory order rejecting the transfer application and as such, the appeal preferred by the appellants is not maintainable.

19. The reference is answered as follows:

- i. An interlocutory application rejected by the Special Court vide order dated 22.02.2021 would not give rise to filing of an appeal under Section 21 of the National Investigation Agency Act, 2008.
- ii. No appeal shall lie under Section 21 of the National Investigation Agency Act, 2008 against an order passed under Section 20 of the Act.
- iii. An appeal under Section 21 of the National Investigation Agency Act, 2008 shall be maintainable before the division bench of the High Court only against an interlocutory order granting or refusing to

grant bail passed by the Special Court under National Investigation Agency Act, 2008.

20. In view of the above, Criminal Appeal No.755/2021 preferred by the appellants stands dismissed being not maintainable.

**Sd/-
CHIEF JUSTICE**

**Sd/-
JUDGE**

**Sd/-
JUDGE**

DR/SJ