Supreme Court of India
Usmanbhai Dawoodbhai Menon & Ors. ... vs State Of Gujarat on 14 March, 1988
Equivalent citations: 1988 AIR 922, 1988 SCR (3) 225
Author: A Sen
Bench: Sen, A.P. (J)

PETITIONER:
USMANBHAI DAWOODBHAI MENON & ORS. ETC.

Vs.

RESPONDENT:
STATE OF GUJARAT

DATE OF JUDGMENT14/03/1988

BENCH:
SEN, A.P. (J)
BENCH:
SEN, A.P. (J)
SHARMA, L.M. (J)

CITATION:
1988 AIR 922 1988 SCR (3) 225
1988 SCC (2) 271 JT 1988 (1) 539
1988 SCALE (1)494
CITATOR INFO :
APL 1990 SC1962 (8)
R 1991 SC 558 (5,7)

ACT:
Terrorist & Disruptive Activities (Prevention) Act, 1987-Whether the High Court has jurisdiction and power to grant bail under s. 439 of Code of Criminal Procedure, 1973 or by recourse to its inherent powers under s. 482 to a person accused of an offence under sections 3 and 4 of the Act-The nature of restraint on power of Designated Courts to grant bail to such a person in view of limitations under s. 20(8) of the Act.

HEADNOTE:
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This Criminal Appeal against the judgment and order of the Gujarat High Court and the connected Special Leave Petitions against the orders of the various Designated Courts in the State constituted under the Terrorist & Disruptive Activities (Prevention) Act, 1987, raised common questions for consideration. It was enough to set out the facts in the appeal. There was an armed clash involving the appellants, as a result whereof the police apprehended the

appellants and produced them before the Designated Court. The appellants moved an application for bail which was rejected by the Designated Court.

The appellants moved the High Court under s. 439 read with s. 482 of the Code. The High Court rejected the bail application on the ground that it had no jurisdiction to entertain such an application under s. 439 of the Code or by recourse to its inherent powers under s. 482. Aggrieved by the decision of the High Court, the appellants appealed to this Court for relief by special leave.

On the view the Court took as to the nature of the function of the Designated Courts in dealing with the bail applications within the constraints of s. 20(8), it was not necessary to deal with the facts of the connected special leave petitions directed against the orders of the different Designated Courts, rejecting the bail applications.

Allowing, the appeal and the special leave petitions partly, the Court,

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HELD: These cases mainly raised two questions of substantial

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importance. The first was as to the jurisdiction and powers of the High Court to grant bail under section 439 of the Code of Criminal Procedure, 1973 or by recourse to its inherent powers under s. 482 to a person held in custody for an offence under ss. 3 and 4 of the Terrorist & Disruptive Activities (Prevention) Act, 1987, and secondly, as to the nature of the restraint placed on the power of the Designated Courts to grant bail to such a person in view of the limitations placed on such power under s. 20(8) of the Act. [246G-H]

The Act being a special Act must prevail in respect of the jurisdiction and power of the High Court to entertain an application for bail under s. 439 of the Code or by recourse to its inherent powers under s. 482. Under the scheme of the Act, there is complete exclusion of the jurisdiction of the High Court in any case involving the arrest of any person for an offence punishable under the Act or any rule made thereunder. There is contrariety between the provisions of the Act and the Code. Under the Code, the High Court is invested with the various functions and duties in relation to any judgment or order passed by a criminal court subordinate to it. The Act creates a new class of offences called terrorist acts and disruptive activities and provides for a special procedure for the trial of such offences. The jurisdiction and power of a Designated Court are derived from the Act and it is the Act that must primarily be looked to in deciding the question before the Court. Where an enactment provides for a special procedure for the trial of certain offences, it is that procedure that must be followed and not the one prescribed by the Code. [239B-C; 240A,D]

No doubt, the legislature has, by the use of the words

'as if it were' in s. 14(3) of the Act, vested a Designated Court with the status of a Court of Session, but the legal fiction contained therein must be restricted to the procedure to be followed for the trial of an offence under the Act i.e. such trial must be in accordance with the procedure prescribed under the Code for the trial before a Court of Session, in so far as applicable. [240D-F]

Though there is no express provision excluding the applicability of s. 439 of the Code similar to the one contained in s. 20(7) of the Act in relation to a case involving the arrest of any person for an offence punishable under the Act or any rule thereunder, yet that result must, by necessary implication, follow. The source of power of a Designated Court to grant bail is not s. 20(8) of the Act, as it only places limitations on such power, but it does not necessarily follow that the power of a Designated Court to grant bail is relatable to s. 439 of the Code. The
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Designated Court is a 'court other than the High Court or the Court of Session' within the meaning of s. 437 of the Code. The exercise of the power to grant bail by a Designated Court is not only subject to the limitations placed by s. 20(9) which in terms provides that the limitations on grant of bail specified in s. 20(8) are in addition to the limitations under the Code or any other law for the time being in force on the grant of bail. It, therefore, follows that the power derived by a Designated Court to grant bail to a person for an offence under the Act is derived from the Code and not s. 20(8) of the Act. The controversy as to the power of the High Court to grant bail under s. 439 of the Code must also turn on the construction of s. 20(8) of the Act. [241B-E]

In view of the explicit bar in s. 19(2), there is exclusion of the jurisdiction of the High Court. It interdicts that no appeal or revision shall lie to any court, including the High Court, against any judgment, sentence or order, not being an inter-locutory order, of a Designated Court. While it is true that Chapter XXXIII of the Code is still preserved, as otherwise the Designated Court would have no power to grant bail, still the source of power is not s. 439 of the Code but s. 437, being a court other than the High Court or the Court of Session. Any other view would lead to an anomalous situation. If it were to be held that the power of a Designated Court to grant bail was relatable to section 439, it would imply that not only the High Court but also the Court of Session would be entitled to grant bail. The power to grant bail under s. 439 is unfettered by any conditions and limitations like s. 437. It would run counter to the express prohibition contained in s. 20(8) of the Act. The Court upheld the view of the High Court that it had no jurisdiction to entertain an application for bail under s. 439 or under s. 482 of the Code. [243G-H; 244A-B,D]

As regards the approach which a Designated Court has to adopt while granting bail in view of the limitations placed on such power under s. 20(8), the sub-section in terms places fetters on the power of a Designated Court on the grant of bail and limitations specified therein are in addition to the limitations under the Code. In view of these more stringent conditions, a Designated Court should carefully examine every case before it for finding out whether the provisions of the Act apply or not. A prayer for bail ought not to be rejected in a mechanical manner. [244E-G]

The Designated Courts had not in these cases carefully considered the facts and circumstances and had rejected the bail applications mechanically. In the criminal appeal, the facts were already set out. In
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the special leave petitions Nos. 2369 and 2469 of 1967, the prosecution had been started at the instance of the management of a textile mill. The other cases had arisen out of communal riots. Normally, such cases have to be dealt with under the ordinary procedure prescribed by the Code, unless offences under ss. 3 and 4 of the Act are made out. The Designated Courts are under a duty to examine the circumstances closely from this angle. That had not been done. It was, therefore desirable to set aside the orders passed by the various Designated Courts and remit the cases for fresh consideration. [246D-F]

The appeal and the special leave petitions partly succeeded. While upholding the judgment and order of the High Court, dismissing the applications for bail under s. 439 of the Code of Criminal Procedure, 1973, the Court granted leave and set aside the impugned orders passed by the various Designated Courts in the State, dismissing the applications for bail, and directed them to consider each particular case on merits as to whether it fell within the purview of s. 3 and/or s. 4 of the Act, and if so, whether the accused in the facts and circumstances of the case were entitled to bail while keeping in view the limitations on their powers under s. 20(8) of the Act. Where the Designated Courts find that the acts alleged in the police report or complaint of facts under s. 14(1) do not fall within the purview of s. 3 and/or s. 4 of the Act, they shall in exercise of the powers under s. 10 of the Act transfer the cases for trial to the ordinary criminal courts. The accused persons, enlarged on bail by this Court, should continue to remain on bail until their applications for bail were dealt with by the Designated Courts with advertence to the observations made above. [246F-H; 247A-B]

In Re the Special Courts Bill, 1978, [1979] 2 S.C.R. 476; Balchand Jain v. State of Madhya Pradesh , [1977] 2 S.C.R. 52; Ishwar Chand v. State of Himachal Pradesh, I.L.R. (1975) H.P. 569 and V.C. Shukla v. State through C.B.I., [1980] Suppl. S.C.C. 92, referred to.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 3 13 of 1987 etc. From the Judgment and order dated 12.6.1987 of the Gujarat High Court in Misc. Appln. No. 680 of 1987 P.S. Poti, G.A. Shah, Shankar Ghosh, M.N. Shroff, Vimal Dave, M.R. Barot, E.C. Agarwala, Vijay Pandit, Ms. P. Bhatt, Shakil Ahmad Syed, N.M. Ghatate, S.V. Deshpande, B.R. Dutta, Mrs. H. Wahi, S.S. Khanduja, S.R. Srivastava, Mrs. R. Gupta, K.K. Gupta, A.S. Bhasma and A.M. Khanwilkar,for the appearing parties.

The Judgment of the Court was delivered by SEN,J. This appeal by special leave petition are directed against the judgment and order of the Gujarat High Court dated May 12, 1987 and the orders passed by various Designated Court in the State constituted under s. 9(1) of the Terrorist & Disruptive activities (prevention) Act, 1987 mainly raise two questions of substantial importance. First of these is as to the jurisdiction and power of the High Court to grant bail under s. 439 of the Code of Criminal Procedure, 1973 or by resource to its inherent powers under s. 482 to a person held in custody accused of an offence under ss. 3 and 4 of the Act, and secondly, as to the nature of the restraint placed on the power of the Designated Courts to grant bail to such person in view of the limitations placed on such power under s. 20(8) of the Act.

By the judgment under appeal, the High Court has held that under the Act there is total exclusion of the jurisdiction of the High Courts and therefore it cannot entertain an application for grant of bail under s. 439 of the Code. In other cases, the persons under detention have applied for grant of special leave under Art. 136 of the Constitution against the orders passed by various Designated Courts in the State refusing to grant bail on the ground that the power of a Designated Court to grant bail is circumscribed by the limitations prescribed by s. 20(8) of the Act i.e. due to the non-fulfilment of the conditions laid down therein.

As to the facts. It is enough for our purposes to set out the facts giving rise to Civil Appeal No. 313 of 1987. The prosecution case in brief is as follows. On the morning of March 10, 1987, there was an armed clash between the appellants who are members of a cooperative housing society, and the two sons of the original vendor Babubhai Kansara @ Mohamed Ramzan Alabux and their companions over possession of the disputed plot admeasuring 16,000 square yards resulting in multiple injuries to members of both the groups. The appellants as such members were in possession of the said plot, and as law abiding citizens had instituted Civil Suit No. 108 of 1987 in the Court of the Civil Judge, Junior Division, Narol, applied for and obtained temporary injunction and had gone with the bailiff to have the injunction order served on the opposite party. Their case is that they had entered into an agreement dated August 11, 1979 with the original vendor Babubhai Kansara for the purchase of the disputed plot. The price fixed was Rs. 35 per square yard and Rs. 60,000 were paid as earnest money. They as such members of the society had also paid from time to time by instalments a total amount of Rs.3,50,000 which was equivalent to 30% of the total sale consideration and had been placed in possession of the land by the vendor by a deed acknowledging the receipt of money and mentioning the delivery of possession. After the death of the vendor, his two sons Karam Ali and

Iqbal Ali disowned the transaction and started creating obstructions in the enjoyment of the land by the society, as a result of which on March 9, 1987 the society was constrained to institute the aforesaid suit and obtained a temporary injunction, and also a direction from the learned Civil Judge ordering the Chief Bailiff to execute the injunction order on the two sons of the original vendor. They had also intimated the police about the grant of injunction and sought help to prevent breach of peace but the police took no action despite the endorsement made by the Inspector of Police on their application directing P.S.I., Satellite Station to take appropriate action and prevent any untoward incident. As apprehended, the two sons of the original vendor Karam Ali and Iqbal Ali put up armed resistance and in the scuffle both sides sustained injuries. At the time of the incident, the police arrived at the spot and apprehended the appellants The appellants were straightaway produced before the Designated Court within a period of 24 hours after their arrest without receiving the complaint of facts which constitute offences alleged to have been committed or a police report as required under s. 14(1). The appellants moved an application for bail but the Designated Court by its order dated March 24, 1987 rejected the same holding that there were no reasonable grounds for it to believe that the appellants were not guilty of an offence under s. 3 of the Act apart from various other offences under the Indian Penal Code, 1860.

We are informed that the police have now filed a charge-sheet against the appellants before the Designated Court for having committed offences punishable under ss. 143, 147, 148, 149, 307, 504, 324, 323 and 120B of the Indian Penal Code, s. 27 of the Arms Act and ss. 3 and 4 of the Act. It would thus be seen that the police invoked the Act as against the appellants although they had taken recourse to their legal remedy by filing a suit and obtained a temporary injunction and accompanied the bailiff to execute the order. They were apprehended and as many as eight of them sustained injuries. Assuming there was a scuffle wherein there was a free fight, the appellants being the owners in possession were entitled to act in self- defence. As against the two sons of the original vendor, both of whom are cited as prosecution witnesses, the police have filed a charge-sheet for the self-same offences except for the offences under ss. 3 and 4 of the Act in the Court of the Chief Judicial Magistrate, Narol as a result of which they are liable to be enlarged on bail while the appellants cannot be, due to the constraints on the powers of the Designated Courts to grant bail under S. 20(8) of the Act. The Designated Court having refused to grant bail to the appellants, they moved the High Court by way of an application under s. 439 read with s. 482 of the Code. The High Court by its order dated June 12, 1987 rejected the bail application on the ground that the High Court had no jurisdiction to entertain any such application under s. 439 of the Code ar by recourse to its inherent powers under s. 482. The decision of the High Court proceeds on the ground that the Act being a special Act and the Designated Court constituted by the State Government under s. 9(1) to try the offences under the Act, was not a Court subordinate to the High Court, and further that in view of the provision contained in sub-s. (1) of s. 19 of the Act which provided that an appeal as a matter of right shall lie against any judgment or order of the Designated Court, not being an interlocutory order, to the Supreme Court, and in view of the explicit bar contained in sub-s. (2) thereof which provided that no appeal or revision shall lie before any Court i.e. including the High Court, there was exclusion of jurisdiction of the High Court in regard to the proceedings before a Designated Court. Hence this appeal by special leave.

Facts in the connected special leave petitions which are all directed against the orders passed by different Designated Courts rejecting the applications for bail, are apt to differ from case to case. On the view that we take as to the nature of the function of the Designated Courts in dealing with applications for bail within the constraints of s. 20(8), it is not necessary to deal with the facts of these cases in any detail. Broadly speaking, the cases fall into three distinct categories, namely: (1) Cases of communal riots resulting in offences of murder, arson, looting etc. where there are overt acts on the part of persons of one community against the other. (2) Incidents giving rise to acts of physical violence resulting in communal riots due to instigation. (3) Cases connected with trade-union activities started at the instance of the management, or at the instance of owners of property to settle private disputes on the allegations that there were acts of physical violence.

The statutory provisions bearing on the questions involved may be set out. Sub-s. (1) of s. 3 of the Act which gives a meaning to the expression 'terrorist act' is in the following terms:

> "3. (1) Whoever with intent to overawe the Government as by law established or to strike terror in the people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or fire-arms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature in such a manner as to cause, or as is likely to cause, death of, or injuries to, any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act, commits a terrorist act." Sub-s. (2) thereof reads:
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> "(2) Whoever commits a terrorist act, shall,:
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> (i) if such act has resulted in the death of any person, be punishable with death or imprisonment for life and shall also be liable to fine;
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> (ii) in any other case be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine. "
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> Sub-s. (1) of s. 4 provides for punishment for disruptive activities and reads:
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> "4.(1) Whoever commits or conspires or attempts to commit or abets, advocates, advises, or knowingly facilitates the commission of, any disruptive activity or any act preparatory to a disruptive activity shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine. "

Sub-s. (2) thereof gives a meaning to the expression 'disruptive A activity' and it is as follows:

"(2) For the purposes of sub-section (1), "disruptive activity" means any action taken, whether by act or by speech or through any other media or in any other manner whatsoever,

(i) which questions, disrupts or is intended to disrupt, whether directly or indirectly, the sovereignty and territorial integrity of India; or

(ii) which is intended to bring about or supports any claim, whether directly or indirectly, for the cession of any part of India or the secession of any part of India from the Union.

Explanation For the purposes of this sub-section,-

(a) "cession" includes the admission of any claim of any foreign country to any part of India, and

(b) "secession" includes the assertion of any claim to determine whether a part of India will remain within the Union."

Sec. 19 ousts the jurisdiction of the High Court altogether and reads "19.(1) Notwithstanding anything contained in the Code, an appeal shall lie as a matter of right from any judgment, sentence or order, not being an interlocutory order, of a Designated Court to the Supreme Court both on facts and on law. (2) Except as aforesaid, no appeal or revision shall lie to any court from any judgment, sentence or order including an interlocutory order of a Designated Court."

Sub-s. (8) of s. 20 of the Act which has an important bearing on these cases is in these terms:

"(8) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act or any rule made thereunder shall, if in custody, be released on bail or on his own bond unless

(a) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(b) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail."

Sub-s. (9) thereof provides that the limitations on granting of bail specified in sub-s. (8) are in addition to the limitations under the Code or any other law for the time being in force on granting of

bail.

In support of the appeal and the connected special leave petitions, learned counsel for the appellants and the petitioners, put forth the following submissions, namely: (1) Part III of the Act is 'supplemental' to the Code and the Code still applies except to the extent that it stands modified by the provisions of the Act, and particularly those contained in Part IV. (2) While s. 11(1) creates a special tribunal for trial of offences under s. 3 or s. 4 of the Act viz. the Designated Courts constituted by the Central or the State Government under s. 9(1), the various sub-sections of s. 14 provide that the procedure and powers of such Designated Courts shall be as specified therein. Particular emphasis is laid upon the provision contained in sub-s. (3) thereof which reads:

> " 14(3) . Subject to the other provisions of this Act, a Designated Court shall, for the purpose of trial of any offence, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session so far as may be in accordance with the procedure prescribed in the Code for the trial before a Court of Session . "

(3)The 'source of power' of a Designated Court to grant bail is not s. 20(8) of the Act but s. 439 of the Code and that s. 20(9) only places limitations on such power. This is made explicit by s. 20(9) which provides that the limitations on the granting of bail specified in sub-s. (8) are 'in addition to the limitations under the Code or any other law for the time being in force'. (4) Though the legislature has made an express provision in s. 20(7) of the Act which provides that nothing in s.438 of the Code which deals with the power of the High Court or the Court of Session to grant anticipatory bail, shall apply in relation to a case involving the arrest of any person on an accusation of having committed an offence punishable under the Act or any rule made thereunder, there is no like provision making s. 439 of the Code dealing with the power of the High Court or the Court of Sessions to grant bail. A fortiori, Chapter XXXIII of the Code is still preserved as otherwise the Designated Courts would have no power to grant bail.

As regards the jurisdiction and power of the High Court to grant bail under s. 439 of the Code or by recourse to its inherent powers under s. 482, the contention on behalf of the appellants and the petitioners is that Chapter XXXIII of the Code being applicable, the source of power of a Designated Court to grant bail being s. 439, the necessary concomitant is that the jurisdiction and power of the High Court to entertain an application for bail on its own under s. 439 or by recourse to its inherent powers under s. 482, is applicable. The argument is that it is impermissible for the legislature to set up a new hierarchy of Courts different from the one envisaged by the Constitution and byepass the High Court. Under the Constitution the High Court is the repository of all judicial authority within the State. To take away the power of the High Court would be tantamount to strike at the very foundation of an independent judiciary, free from executive control. It is pointed out that s. 20(4) of the Act makes s. 167 of the Code applicable in relation to a case involving an offence punishable-under the Act, subject to the modifications specified therein. Cl. (a) thereof provides that reference in sub-s. (1) of s. 167 to 'Judicial Magistrate' shall be construed as reference to 'Judicial Magistrate or Executive Magistrate or Special Executive Magistrate', while cl. (b) provides that references in sub-s. (2) of that section to 'fifteen days', 'ninety days' and 'sixty days' wherever they occur, shall be construed as references to 'sixty days', 'one year' and 'one year' respectively. The

effect of the amendment to s. 167 by s. 20(4) is to invest the Executive Magistrates, who are not subject to the control of the High Court, with an unlimited power to grant police remand or remand to judicial custody without the filing of a challan for indefinite duration from time to time upto a period of one year. It is said that the affect of this virtually means detention without trial. The learned counsel accordingly characterised the Act as 'a piece of draconian legislation' which makes serious in-roads into the rights of the citizens to life and liberty guaranteed under Art. 21 of the Constitution without the constitutional safeguards enshrined in Art. 22. However, it was expressly stated before us that the constitutionality of the Act is not under challenge in these cases and that this question is under the consideration of a larger bench of this Court in another case Our attention was particularly drawn to the view expressed by Chandrachud, CJ in delivering the majority opinion in the Presidential reference in Re the Special Courts Bill, 1978 (1979) 2 SCR 476 where the Court upheld the Special Courts Bill mainly because of the provision for appointment of a sitting High Court Judge as a Judge of the Special Court as a sufficient safeguard against Executive interference. The learned Chief Justice in the course of his judgment observed: "It is of the greatest importance that in the name of fair and unpolluted justice, the procedure for appointing a Judge of the Special Court, should inspire the confidence not only of the accused but of the entire community. Administration of justice has a social dimension and the society at large has a stake in impartial and even- handed justice." It is pointed out that the Act though patterned on the lines of the Special Courts Act, 1979 instead leaves it to the discretion of the Central Government or a State Government, as the case may be to appoint a person of their choice, to be a Judge of the Designated Court. It is further pointed out that the State Government has under s. 9(4) of the Act appointed retired District Judges to be Judges of some of the Designated Courts in the State, constituted under s. 9(1). It is apprehended that a retired District Judge would be completely at the mercy of the Executive. Essentially, the submission is that the creation of a Designated Court which is not subject to the control and superintendence of the High Court is detrimental to the constitutional concept of judicial independence. It is apprehended that the entrustment of the power to the Executive Magistrates to grant police remand extending over one year by amendment of sub-s. (1) of s. 167 of the Code was capable of misuse. Our attention was also drawn to the various provisions of the Act which take away the various safeguards provided to an accused as provided in the Code as well as s. 25 of the Evidence Act which, according to the learned counsel, offend against Art. 21 of the Constitution. See: ss. 11(2), 14(2), 14(5), 15(1), 16(1), (2) and (3), and 21(2). It is said that the procedure contemplated by Art. 21 must be right and just and fair, and not arbitrary, fanciful or oppressive. Otherwise, it would not be procedure at all and the requirements of Art. 21 would not be satisfied. We do not think it necessary to go into these aspects for the constitutionality of the Terrorist & Disruptive Activities (Prevention) Acts, 1985 and 1987 and their provisions is not a question before us. We feel that these questions should best be left open to be dealt with by the Constitution Bench At the very outset, Shri Poti, learned counsel appearing for the State Government with his usual fairness, unequivocally accepted that the provisions of the Act do not take away the constitutional remedies available to a citizen to approach the High Court under Art. 226 or Art. 227 or move this Court by a petition under Art. 32 for the grant of an appropriate writ, direction or order. It must necessarily follow that a citizen can always move the High Court under Art. 226 or Art. 227 or this Court under Art. 32 challenging the constitutional validity of the Act or its provisions on the ground that they offend against Arts. 14, 21 and 22 or on the ground that a notification issued by the Central Government or the State Government under s. 9(1) of the Act

constituting a Designated Court for any area or areas or for such case or class or group of cases as specified in the notification, was a fraud on powers and thus constitutionally invalid.

As to the merits, the submissions advanced by learned counsel for the State Government proceeded more or less on these lines. Where an enactment provides for a complete procedure for the trial of certain offences, it is that procedure that must be followed and not the one prescribed by the Code. Under s. 14(1), the Designated Court has exclusive jurisdiction for the trial of such offences and by virtue of s. 12(1), the Designated Court may also try any other offence with which the accused may under the Code, be charged at the same trial if the offence is connected with such other offence. Where there is a special enactment on a specific subject as the Act in question which is a special law, the Act as a special Act must be taken to govern the subject and not the Code in the absence of a provision to the contrary. The legislature by the use of the words 'as if it were' in s. 14(3) endowed a Designated Court with the status of a Court of Session, but the legal fiction must be restricted to procedure alone, that is to say, the procedure for the trial of an offence must be in accordance with the procedure prescribed under the Code for trial before a Court of Session, insofar as applicable. But some meaning must be given to the opening words of s. 14(3) 'Subject to the other provisions of the Act'. Where an enactment provides for a complete procedure for the trial of an offence, it is that procedure that must be followed and not the one prescribed by the Code.

Our attention was drawn to s. 4(1) of the Code which provides that all offences under the Indian Penal Code, 1860 shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions contained therein i.e. in accordance with the procedure prescribed under the Code. Sub-s. (2) thereof however engrafts an exception to the general rule as to the procedure to be followed for the A trial of offences under any other laws, and it reads:

> "4(2). All offences under any other laws shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or other vise dealing with such offences".

In support of the contention that the procedure to be followed is the special procedure laid down by the Act, reliance is placed on s. S of the Code which is in these terms:

> "(5). Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force."

It is submitted that there is no express provision excluding the applicability of s. 439 of the Code similar to the one contained in s. 20(7) of the Act in relation to any case involving the arrest of any person on an accusation of having committed an offence punishable under the Act or any rule made thereunder, but that result must, by necessary implication, follow. According to the learned counsel, the source of power of a Designated Court to grant bail is not s. 439 of the Code but s. 437 which speaks of 'a Court other than a High Court or a Court of Session' and it, insofar as material, reads as

follows:

> "437(1). When bail may be taken in case of non- bailable offence-When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer-in-charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail ... "
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> (Emphasis supplied) Before dealing with the contentions advanced, it is well to remember that the legislation is limited in its scope and effect. The Act is an extreme measure to be resorted to when the police cannot tackle the situation under the ordinary penal law. The intendment is to pro-

vide special machinery to combat the growing menace of terrorism in different parts of the country. Since, however, the Act is a drastic measure, it should not ordinarily be resorted to unless the Government's law enforcing machinery fails.

As a matter of construction, we must accept the contention advanced by learned counsel appearing for the State Government that the Act being a special Act must prevail in respect of the jurisdiction and power of the High Court to entertain an application for bail under s. 439 of the Code or by recourse to its inherent powers under s. 482. Under the scheme of the Act, there is complete exclusion of the jurisdiction of the High Court in any case involving the arrest of any person on an accusation of having committed an offence punishable under the Act or any rule made thereunder. There is contrariety between the provisions of the Act and those contained in the Code. Under the Code, the High Court is invested with various functions and duties in relation to any judgment or order passed by criminal court subordinate to it. Those powers may be briefly enumerated, namely, the jurisdiction and power to hear an appeal under s. 374 against any judgment or sentence passed by the Court of Session, the power to hear an appeal against an order of acquittal by a criminal court including the Court of Session under s. 378, the power to hear a reference as to the validity of. any Act, ordinance or regulation or any provision contained therein made by a criminal court under s. 395, the confirmation of a death sentence on a reference by a Court of Session under ss. 366-371 and s. 392, the power to grant bail under s. 439 subject to certain limitations, the inherent power under s. 482 to make such orders as may be necessary or to prevent abuse of the process of the Court or otherwise to secure the ends of justice. Undoubtedly, the High Court has the jurisdiction and power to pass such orders as the ends of justice require, in relation to proceedings before all criminal courts subordinate to it.

The legislature by enacting the law has treated terrorism as special criminal problem and created a special court called a Designated Court to deal with the special problem and provided for a special procedure for the trial of such offences. A grievance was made before us that the State Government by notification issued under s. 9(1) of the Act has appointed District & Sessions Judges as well as Additional District & Sessions Judges to be Judges of such Designated Courts in the State. The use of ordinary courts does not necessarily imply the use of standard procedures. Just as the legislature can create a special court to deal with a special problem, it can also create new procedures within the

existing system. Parliament in its wisdom has adopted the frame-work of the Code but the Code is not applicable. The Act is a special Act and creates a new class of offences called terrorist acts and disruptive activities as defined in ss. 3(1) and 4(2) and provides for a special procedure for the trial of such offences. Under s. 9(1), the Central Government or a State Government may by notification published in the official Gazette, constitute one or more Designated Courts for the trial of offences under the Act for such area or areas, or for such case or class or group of cases as may be specified in the notification. The jurisdiction and power of a Designated Court is derived from the Act and it is the Act that one must primarily look to in deciding the question before us. Under s. 14(1), a Designated Court has exclusive jurisdiction for the trial of offences under the Act and by virtue of s. 12(1) it may also try any other offence with which the accused may, under the Code, be charged at the same trial if the offence is connected with such other offence. Where an enactment provides for a special procedure for the trial of certain offences, it is that procedure that must be followed and not the one prescribed by the Code.

No doubt, the legislature by the use of the words 'as if it were' in s. 14(3) of the Act vested a Designated Court with the status of a Court of Session. But, as contended for by learned counsel for the State Government, the legal fiction contained therein must be restricted to the procedure to be followed for the trial of an offence under the Act i.e. such trial must be in accordance with the procedure prescribed under the Code for the trial before a Court of Session, insofar as applicable. We must give some meaning to the opening words of s. 14(3) 'Subject to the other provisions of the Act' and adopt a construction in furtherance of the object and purpose of the Act. The manifest intention of the legislature is to take away the jurisdiction and power of the High Court under the Code with respect to offences under the Act. No other construction is possible. The expression 'High Court' is defined in s. 2(1)(e) but there are no functions and duties vested in the High Court. The only mention of the High Court is in s. 20(6) which provides that ss. 366-371 and s. 392 of the Code shall apply in relation to a case involving an offence triable by a Designated Court, subject to the modifications that the references to 'Court of Session' and 'High Court' shall be construed as references to 'Designated Court' and 'Supreme Court' respectively. Sec. 19(1) of the Act provides for a direct appeal, as of right, to the Supreme Court from any judgment or order of the Designated Court, not being an interlocutory order. There is thus a total departure from different classes of Criminal Courts enumerated in s. 6 of the Code and a new hierarchy of Courts is sought to be established by providing for a direct appeal to the Supreme Court from any judgment or order of a Designated Court, not being an interlocutory order, and substituting the Supreme Court for the High Court by s. 20(6) in the matter of confirmation of a death sentence passed by a Designated Court.

Though there is no express provision excluding the applicability of s. 439 of the Code similar to the one contained in s. 20(7) of the Act in relation to a case involving the arrest of any person on an accusation of having committed an offence punishable under the Act or any rule made thereunder, but that result must, by necessary implication, follow. It is true that the source of power of a Designated Court to grant bail is not s. 20(8) of the Act as it only places limitations on such power. This is made explicit by s. 20(9) which enacts that the limitations on granting of bail specified in s. 20(8) are 'in addition to the limitations under the Code or any other law for the time being in force'. But it does not necessarily follow that the power of a Designated Court to grant bail is relatable to s.

439 of the Code. It cannot be. doubted that a Designated Court is 'a Court other than the High Court or the Court of Session' within the meaning of s. 437 of the Code. The exercise of the power to grant bail by a Designated Court is not only subject to the limitations contained therein, but is also subject to the limitations placed by s. 20(8) of the Act.

The controversy as to the power of the High Court to grant bail under s. 439 of the Code must also turn on the construction of s. 20(8) of the Act. It commences with a non-obstante clause and in its operative part by the use of negative language prohibits the enlargement on bail of any person accused of commission of an offence under the Act, if in custody, unless two conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application for such release and the second condition is that where there is such opposition, the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail. If either of these two conditions is not satisfied, the ban operates and the person under detention cannot be released on bail. It is quite obvious that the source of power of a Designated Court to grant bail is not s. 20(8) of the Act but it only places limitations on such powers. This is implicit by s. 20(9) which in terms provides that the limitations on granting of bail specified in sub-s. (8) are in addition to the limitations under the Code or any other law for the time being in force on granting of bail. It there-

fore follows that the power derived by a Designated Court to grant bail to a person accused of an offence under the Act, if in custody, is derived from the Code and not from s. 20(8) of the Act.

In Balchand Jain v. State of Madhya Pradesh, [1977] 2 SCR 52 while interpreting a similar provision contained in r. 184 of the Defence and Internal Security of India Rules, 1971, Bhagwati, J. speaking for a three Judge Bench observed:

> "The Rule, on its plain terms, does not confer any power on the Court to release a person accused or convicted of contravention of any Rule or order made under the Rules, on bail. It postulates the existence of power in the Court under the Code of Criminal Procedure and seeks to place a curb on its exercise by providing that a person accused or convicted of contravention of any Rule or order made under the Rules, if in custody, shall not be released on bail unless the aforesaid two conditions are satisfied. It imposed fetters on the exercise of the power of granting bail in certain kinds of cases and removes such fetters on fulfilment of the aforesaid two conditions. When these two conditions are satisfied, the fetters are removed and the power of granting bail possessed by the Court under the Code of Criminal Procedure revives and becomes exercisable. The non-obstante clause at the commencement of the Rule also emphasises that the provision in the Rule is intended to restrict the power of granting bail under the Code of Criminal Procedure and not to confer a new power exercisable only on certain conditions. It is not possible to read Rule 184 as laying down a self-contained code for grant of bail in case of a person accused or convicted of contravention of any Rule or order made under the Rule so that the power to grant bail in such case must be found only in Rule 184 and not in the Code of Criminal Procedure. Rule 184 cannot be construed as displacing altogether the provisions of

> the Code of Criminal Procedure in regard to bail in case of a person accused or convicted of contravention of any Rule or order made under the Rules. These provisions of the Code of Criminal Procedure must be read along with Rule 184 and full effect must be given to them except in so far as they are, by reason of the non-obstante clause overridden by rule 184."

The learned Judge placing emphasis on the words 'if in custody' in r. 184, further observed:

> "It is an application for release of a person in custody that is contemplated by Rule 184 and not an application for grant of 'anticipatory bail' by a person apprehending arrest. Section 438 and Rule 184 thus operate at different stages, one prior to arrest and the other, after arrest and there is no overlapping between two provisions so as to give rise to a conflict between them. And consequently, it must follow as a necessary corollary that Rule 184 does not stand in the way of a Court of Session or a High Court granting 'anticipatory bail' under section 438 to a person apprehending arrest on an accusation of having committed contravention of any Rule or order made under the (Defence and Internal Security of India) Rules, 1971."

Upon that view, the Court in Balchand Jain's case held that r. 184 of the Defence and Internal Security of India Rules, 1971, does not take away the power conferred on a Court of Session or a High Court under s. 438 of the Code to grant anticipatory bail. We have been referred to the decision of R.S. Pathak, CJ speaking for a Division Bench of the Himachal Pradesh High Court in Ishwar Chand v. State of Himachal Pradesh, ILR (1975) HP 569 holding that r. 184 did not affect the jurisdiction and power of the High Court under ss. 438 and 439 of the Code which were independent of the power of the special tribunal to try an offence for contravention of an order made under s. 3 of the Defence & Internal Security of India Act, 1971. Both these decisions are clearly distinguishable. The view expressed in Balchand Jain's case is not applicable at all for more than one reason. There was nothing in the Defence & Internal Security of India Act or the Rules framed thereunder which would exclude the jurisdiction and power of the High Court altogether. On the contrary, s. 12(2) of that Act expressly vested in the High Court the appellate jurisdiction in certain specified cases. In view of the explicit bar in s. 19(2), there is exclusion of the jurisdiction of the High Court. It interdicts that no appeal or revision shall lie to any Court, including the High Court, against any judgment, sentence or order, not being an interlocutory order, of a Designated Court. The Act by s. 16(1) confers the right of appeal both on facts as well as on law to the Supreme Court. Further, while it is true that Chapter XXXIII of the Code is still preserved as otherwise the Designated Courts would have no power to grant bail, still the source of power is not s. 439 of the Code but s. 437 being a Court other than the High Court or the Court of Session. Any other view would lead to an anomalous situation. If it were to be held that the power of a Designated Court to grant bail was relatable to s. 439 it would imply that not only the High Court but also the Court of Session would be entitled to grant bail on such terms as they deem fit. The power to grant bail under s. 439 is unfettered by any conditions and limitations like s. 437. It would run counter to the express prohibition contained in s. 20(8) of the Act which enjoins that notwithstanding anything in the Code, no person accused of an offence punishable under the Act or any rule made thereunder shall, if in custody, be released on bail unless the conditions set forth in clauses (a) and (b) are satisfied.

Lastly, both the decision in Balchand Jain and that in Ishwar Chand turn on the scheme of the Defence & Internal Security of India Act, 1971. They proceed on the well recognised principle that an ouster of jurisdiction of the ordinary Courts is not to be readily inferred except by express provision or by necessary implication. It all depends on the scheme of the particular Act as to whether the power of the High Court and the Court of Session to grant bail under ss. 438 and 439 exists. We must accordingly uphold the view expressed by the High Court that it had no jurisdiction to entertain an application for bail under s. 439 or under s. 482 of the Code.

That takes us to the approach which a Designated Court has to adopt while granting bail in view of the limitations placed on such power under s. 20(8). The sub-section in terms places fetters on the power of a Designated Court on granting of bail and the limitations specified therein are in addition to the limitations under the Code. Under s. 20(8), no person accused of an offence punishable under the Act or any rule made thereunder shall, if in custody be released on bail or on his own bond unless the two conditions specified in cls. (a) and (b) are satisfied. In view of these more stringent conditions a Designated Court should carefully examine every case coming before it for finding out whether the provisions of the Act apply or not. Since before granting bail the Court is called upon to satisfy itself that there are reasonable grounds for believing that the accused is innocent of the offence and that he is not likely to commit any offence while on bail, the allegations of fact, the police report along with the statements in the case diary and other available materials should be closely examined. A prayer for bail ought not to be rejected in a mechanical manner.

At the conclusion of the hearing on the legal aspect, Shri Poti, learned counsel appearing for the State Governrment contended, on instructions, that an order passed by a Designated Court for grant or refusal of bail is not an 'interlocutory order' within the meaning of s. 19(1) of the Act and therefore an appeal lies. We have considerable doubt and difficulty about the correctness of the proposition. The expression 'interlocutory order' has been used in s. 19(1) in contradistinction to what is known as final order and denotes an order of purely interim or temporary nature. The essential test to distinguish one from the other has been discussed and formulated in several decisions of the Judicial Committee of the Privy Council, Federal Court and this Court. One of the tests generally accepted by the English Courts and the Federal Court is to see if the order is decided in one way, it may terminate the proceedings but if decided in another way, then the proceedings would continue. In V. C. Shukla v. State through C.B.I., [1980] Suppl. SCC 92, Fazal Ali, J. in delivering the majority judgment reviewed the entire case law on the subject and deduced therefrom the following two principles, namely, (i) that a final order has to be interpreted in contra- distinction to an interlocutory order; and (ii) that the test for determining the finality of an order is whether the judgment or order finally disposed of the rights of the parties. It was observed that these principles apply to civil as well as to criminal cases. In criminal proceedings, the word 'judgment' is intended to indicate the final order in trial terminating in the conviction or acquittal of the accused. Applying these tests, it was held that an order framing a charge against an accused was not a final order but an interlocutory order within the meaning of s. 11(1) of the Special Courts Act, 1979 and therefore not appealable. It cannot be doubted that the grant or refusal of a bail application is essentially an interlocutory order. There is no finality to such an order for an application for bail can always be renewed from time to time. It is however contended that the refusal of bail by a Designated Court due to the non-fulfilment of the conditions laid down in s. 20(8) cannot be treated to be a final

order for it affects the life or liberty of a citizen guaranteed under Art. 21. While it is true that a person arraigned on a charge of having committed an offence punishable under the Act faces a prospect of prolonged incarceration in view of the provision contained in s. 20(8) which places limitations on the power of a Designated Court to grant bail, but that by itself is not decisive of the question as to whether an order of this nature is not an interlocutory order. The Court must interpret the words 'not being an interlocutory order' used in s. 19(1) in their natural sense in furtherance of the object and purpose of the Act to exclude any interference with the proceedings before a Designated Court at an intermediate stage. There is no finality attached to an order of a Designated Court grant-

ing or refusing bail. Such an application for bail can always be renewed from time to time. That being so, the contention advanced on behalf of the State Government that the impugned orders passed by the Designated Courts refusing to grant bail were not interlocutory orders and therefore appealable under s. 19(1) of the Act, cannot be accepted.

Surprisingly enough, a few days after the hearing had concluded and the judgment reserved, the State Government adopted a different stand in another case and contended that an order refusing to grant bail due to non-fulfilment of the conditions laid down in s. 20(8) of the Act was an interlocutory order. We really fail to appreciate such inconsistent stands being taken by the same government on a question of principle.

In view of the stand adopted by the State Government in these cases, we with the assistance of the learned counsel for the parties went through the facts of each case. We regret to find that the Designated Courts have not carefully considered the facts and circumstances and have rejected the applications for bail mechanically. As already mentioned, the cases fall into three broad categories. The facts in Criminal Appeal No. 313 of 1987 have been set out earlier. In Special Leave Petitions Nos. 2369 and 2469 of 1987 the prosecution has been started at the instance of the management of a textile mill in Ahmedabad. The other category of cases have arisen out of communal riots. Normally such cases have to be dealt with under the ordinary procedure prescribed by the Code, unless offences under ss. 3 and 4 of the Act are made out. The Designated Courts were under a duty to examine the circumstances closely from this angle. That has not been done. It is, therefore, desirable to set aside the orders passed by the various Designated Courts and remit the cases for fresh consideration.

Accordingly, the appeal and the special leave petitions partly succeed and are allowed. While upholding the judgment and order of the High Court dismissing the applications for bail under s. 439 of the Code of Criminal Procedure, 1973 we grant leave and set aside the impugned orders passed by the various Designated Courts in the State dismissing the applications for bail and direct them to consider each particular case on merits as to whether it falls within the purview of ss. 3 and/or 4 of the Terrorist & Disruptive Activities (Prevention) Act, 1987; and if so, whether the accused in the facts and circumstances of the case were entitled to bail while keeping in view the limitations on their powers under s. 20(8) of the Act. Where the Designated Courts find that the acts alleged in the police report or complaint of facts A under s. 14(1) do not fall within the purview of ss. 3 and/ or 4 of the Act, they shall in exercise of the powers under s. 10 of the Act transfer the cases

for trial to the ordinary criminal courts. The accused persons who have been enlarged on bail by this Court shall continue to remain on bail until their applications for bail are dealt with by the Designated Courts with advertence to the observations made above.

S.L. Appeal & Petitions partly allowed.