

HIGH COURT OF MADHYA PRADESH : JABALPUR

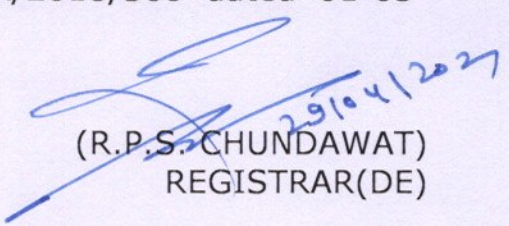
Endt No. Ch-6 /
III-6-5/2010

Jabalpur, dt 29/04/2021

The copy of High Court order dated 22-04-2021 in Criminal Appeal No. 5189/2020 (in the case of Pramod Yadav Vs. State of M.P. & Ors.) passed by Hon'ble Shri Justice Mohammad Rafiq, Chief Justice & Hon'ble Shri Justice Sanjay Dwivedi, Judge High Court of M.P. Jabalpur is forwarded to :-

- (i) The District & Sessions Judge(s)/Special Judge(s)for information and necessary action/compliance.
- (ii) The District & Sessions Judge (Inspection & Vigilance), Jabalpur / Indore / Gwalior;
- (iii) The Director MPSJA Jabalpur for needful,
- (iv) The Member Secretary, SALSA, 54, South Civil Lines, Jabalpur
- (v) The Principal Registrar, Bench at Indore/Gwalior High Court of M.P., Jabalpur.
- (vi) P.S. to Hon'ble the Chief Justice, High Court of Madhya Pradesh Jabalpur for placing the matter before His Lordships,
- (vii) P.S. to Registrar General/ Principal Registrar (Judl) / Principal Registrar (Inspection & Vigilance),/ Principal Registrar (Examination) / Principal Registrar (ILR) High court of Madhya Pradesh Jabalpur,
- (viii) Registrar(J.)/(D.E.)/(A)/ (Vig.)/ (VI.)/ Member Secretary SCMS, High Court of Madhya Pradesh, Jabalpur.
- (ix) Server Room (Computer) for making available in the official website of the High Court under the hyperlink circular/orders etc. in compliance of the orders of Registrar General dated 01-03-2018 & endt No. Reg(IT)/SA/2018/368 dated 01-03-2018.

for information & appropriate action.


(R.P.S. CHUNDAWAT)
REGISTRAR(DE)

**THE HIGH COURT OF JUDICATURE FOR MADHYA
PRADESH AT JABALPUR**

(Division Bench)

Criminal Appeal No.5189/2020

Pramod Yadav

Versus

The State of Madhya Pradesh and others

Present:

Hon'ble Shri Justice Mohammad Rafiq, Chief Justice

Hon'ble Shri Justice Sanjay Dwivedi, Judge

Appearance

Shri Rakesh Kumar Sharma, Senior Advocate appears as amicus curiae.

Shri Arpan Shrivastava, Advocate for the appellant.

Shri Harpreet Singh Ruprah, Advocate for the High Court Advocates' Bar Association.

Shri Pushpendra Yadav, Additional Advocate General for the respondent/State.

Law laid down:

In view of the conflicting views expressed by two Single Benches of this Court in **Mohd. Juned vs. State of M.P.** reported in **2016(1) MPJR 108** and in **Smt. Sunita Gandharva vs. State of M.P. and another in MCRC No.22615/2020**, the matter has been referred to Larger Bench, in this case the Division Bench for answering the following questions:-

“(i) Which court shall conduct the trial of a case, instituted under penal provision of two Special Acts i.e. the Atrocities Act as well as the POCSO Act, either the Special Court constituted under Atrocities Act or the Special Court constituted under the POCSO Act.

(ii) Whether an Appeal against an order of rejection of bail of an accused by the Special Court, in a case instituted for committing offences under the POCSO Act & the Atrocities Act, shall lie under the provisions of Section 14-A of the Atrocities Act or application under Section 438/439 of Code of Criminal Procedure, as the case may be.”

Question No.1: **Held-**The trial of a case instituted under the provisions of two special Acts viz. the Scheduled Castes and Scheduled Tribes (Prevention of

Atrocities) Act, 1989 and Protection of Children from Sexual Offences Act, 2012, shall be conducted by the Special Courts constituted under the POCSO Act.

Question No.2:

Held - In a case involving the offences under both the Atrocities Act and POCSO Act, since the trial of the accused involving offences of both the special enactments namely Atrocities Act and POCSO Act shall be conducted by the Special Court constituted under Section 28 of the POCSO Act, the remedy of the accused against the order of rejection of bail under Section 439 of Cr.P.C. by the Court of Special Judge would be by filing the bail applications under Section 439 of Cr.P.C. before the High Court.

Significant paragraph Nos. 13 to 30

Whether approved for reporting- Yes.

Heard on: 05/04/2021

ORDER

(Pronounced on 22/04/2021)

Per: Mohammad Rafiq, C.J.

1. This matter has been referred to the Division Bench in view of difference of opinion expressed by two Single Benches of this Court in **Mohd. Juned vs. State of M.P.** reported in 2016(1) MPJR 108 and in **Smt. Sunita Gandharva vs. State of M.P. and another in MCRC No.22615/2020.**
2. The present matter in which the order of reference has been made, has been filed as a Criminal Appeal under Section 14-A(1) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short “the Atrocities Act”) against the order dated 23.07.2020 passed by Special Judge, Atrocities Act, Seoni in SC ATR No.08/2020. In fact, earlier appeal filed by appellant viz. Criminal Appeal No.10267/2019, was dismissed as

withdrawn vide order dated 10.12.2019 with liberty to him to file afresh appeal after recording of the statement of the prosecutrix.

3. The facts of the case in brief are that the police station Keolari, District Seoni registered Crime No.314/2019 against the accused/appellant for offence punishable under Sections 363, 366, 376(2)(n), 376(3) of IPC, Section 5(L) and 6 of Protection of Children from Sexual Offences Act, 2012 (for short **“the POCSO Act”**) and Section 3(1)(w)(i), 3(2)(va) and 3(2)(v) of Atrocities Act on the allegation that he abducted the minor prosecutrix and took her to Nagpur where he sexually exploited her on the pretext of marriage. During the course of investigation, the accused/appellant was arrested on 22.10.2019. He filed an application under Section 439 Cr.P.C. for grant of bail which was rejected by the Special Judge, Atrocities Act, Seoni vide order dated 23.07.2020. Aggrieved thereby, he filed the earlier appeal viz. CRA No.10267/2019, which was dismissed as withdrawn vide order dated 10.12.2019 with liberty to file afresh after recording of the statement of prosecutrix. Thereafter the trial Court recorded the statement of prosecutrix wherein she did not support the prosecution story and deposed that appellant did not commit rape with her. This paved the way for the accused/appellant to file second appeal on the same subject matter.

4. In the course of argument of appeal before the Single Bench, an objection was raised by the learned Public Prosecutor that since the accused is also being tried for offences punishable under Sections 5 and 6 of the POCSO Act, therefore, he should have filed an application under Section 439 of Cr.P.C. before this Court rather than filing appeal. It was argued that when the

accused is being tried for offences of POCSO Act as well as for offences under the Atrocities Act, such trial should be conducted by the Special Judge notified for trial of the cases registered under POCSO Act, whereas, in the present case, the trial is being conducted by the Special Judge notified for trial of the cases registered under the Atrocities Act. It was therefore argued that the trial against the accused stood vitiated and a direction be issued to transfer this case to the court of Special Judge notified for trial of the cases under the POCSO Act. Reliance was placed on the Single Bench judgment of this Court in **Smt. Sunita Gandharva (supra)**.

5. Learned counsel for the accused/appellant contested the aforesaid objection and submitted that there was nothing objectionable even if the trial of the case involving offences of both POSCO Act as well as Atrocities Act was being conducted by the Special Court notified for trial of the offences under the latter Act. Since the application filed by the accused under Section 439 of Cr.P.C. was dismissed by the Special Judge notified under the Atrocities Act, an appeal against such order would lie to this Court under Section 14 of the Atrocities Act. Reliance in support of this argument was placed on the judgment of Single Bench of this Court in **Mohd. Juned (supra)**.

6. The learned Single Judge in view of the conflicting views expressed by two Single Benches of this Court, referred the matter to Larger Bench, in this case the Division Bench, on the following questions:-

“(i) Which court shall conduct the trial of a case, instituted under penal provision of two Special Acts i.e. the Atrocities Act as well as the POCSO Act, either the Special Court constituted under

Atrocities Act or the Special Court constituted under the POCSO Act.

(ii) Whether an Appeal against an order of rejection of bail of an accused by the Special Court, in a case instituted for committing offences under the POCSO Act & the Atrocities Act, shall lie under the provisions of Section 14-A of the Atrocities Act or application under Section 438/439 of Code of Criminal Procedure, as the case may be."

7. When the matter was listed before this Court on 11.12.2020, a direction was issued to issue notice to the High Court Bar Association, Jabalpur; High Court Advocates' Bar Association, Jabalpur; High Court Bar Association, Indore; and High Court Bar Association, Gwalior to address the Court on the issue. Shri Rakesh Kumar Sharma, learned Senior Advocate was appointed as *amicus* to assist the Court.

8. We have heard Shri Rakesh Kumar Sharma, learned Senior Advocate appearing as *amicus curiae*, Shri Arpan Shrivastava, learned counsel for the appellant, Shri Harpreet Singh Ruprah, Advocate/Secretary, High Court Advocates' Bar Association, Jabalpur and Shri Pushpendra Yadav, learned Additional Advocate General for the State.

9. Shri Rakesh Kumar Sharma, learned Senior Advocate submitted that there is no conflict between the two judgments passed by the Single Benches of this Court in **Mohd. Juned (supra)** and **Smt. Sunita Gandharva (supra)**. The ratio of both the judgments is that the POCSO Act being the latter Act, its provisions would prevail over those of the Atrocities Act. In both the judgments, the learned Single Judges of this Court have relied on the authoritative enunciations of law by the Supreme Court in **Sarwan Singh and another vs. Kasturi Lal, AIR 1977 SC 265** holding that the latter enactment must prevail over the earlier one. It is argued by the learned Senior

Counsel that both the POCSO Act and Atrocities Act contain non-obstante clauses regarding applicability of various provisions of Cr.P.C. The Special Courts have been constituted under both the enactments for the purpose of taking cognizance, conducting trials etc. However, in Atrocities Act, the application for bail is filed under Section 439 of Cr.P.C. before the Special Court and if the same is refused or allowed then the remedy would be to file an appeal under Section 14-A(2) of the Atrocities Act before this Court. But there is no such appeal provided under the POCSO Act and in such an eventuality, the regular bail application under Section 439 of Cr.P.C. has to be filed. The learned Senior Counsel in support of his arguments has placed reliance on the following judgments:-

- (i) In Re.: Registrar (Judicial) High Court, Madras, 2017 Cri.L.J. 4519
- (ii) State of Andhra Pradesh vs. Mangali Yadagiri, 2016 Cri.L.J. 1415
- (iii) Guddu Kumar Yadav vs. The State of Bihar, Cr. Misc. No.52792 of 2019
- (iv) Rinku vs. State of U.P., Cri. Misc. Bail Application No.33075/2018
- (v) Vikrambhai Amrabhai Malivad vs. State of Gujarat, R/Criminal Misc. Application No.11014/2020.
- (vi) Suraj S. Paithankar v. The State of Maharashtra, Bail. Application No.817/2020.
- (vii) Lokesh Kumar Jangid vs. State of Rajasthan, Criminal Miscellaneous Second Bail Application No.9440/2020.

10. Shri Harpreet Singh Ruprah, learned counsel relying on Section 42A of the POCSO Act submitted that both the Atrocities Act as well as POCSO Act

contain non-obstante clauses. Section 42A of the POCSO Act provides that the provisions of this Act shall be in addition to and not in derogation of, the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency. Relying on Section 20 of the Atrocities Act, it is submitted that save as otherwise provided in this Act, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any custom or usage or any instrument having effect by virtue of any such law. Relying on the judgment of Supreme Court in **Sharat Babu Digumarti vs. Govt. (NCT of Delhi)**, (2017) 2 SCC 18, the learned counsel argued that where there are two special enactments, which contain non-obstante clauses, the latter statute must prevail. Similar view has been taken by the Supreme Court in **Sarwan Singh vs. Kasturi Lal (supra)**, **K.S.L. and Industries Limited vs. Arihant Threads Limited and Others**, (2008) 9 SCC 763, **Guddu Kumar Yadav vs. The State of Bihar in Cr.Misc. No.52792/2019**. Learned counsel has also relied on the judgment of Allahabad High Court in **Rinku vs. State of U.P.** in Criminal Misc. Bail Application No.33075/2018 and of Chhattisgarh High Court in the case of **Ram Swarup Rajwade vs. State of Chhattisgarh** in W.P. (Cr.) No.540/2020.

Mr. Harpreet Singh Ruprah, learned counsel appearing for the High Court Advocates' Bar Association, Jabalpur has also referred to the celebrated book titled '**Principles of Statutory Interpretation**' by Justice G.P. Singh

13th Edition, Page 376 observing that conflict in such cases is resolved on consideration of purpose and policy underlying the enactments and the language used in them. Another test that is applied is that the latter enactment normally prevails over the earlier one. It is argued that the POCSO Act has much wider scope and has a detailed procedure which is evident from the provisions contained in Sections 19 to 27 of the POCSO Act.

11. Shri Pushpendra Yadav, learned Additional Advocate General argued that the Atrocities Act was enacted in 1989 to prevent the commission of offence of atrocities against the member of Scheduled Castes and Scheduled Tribes with a non-obstante clause giving overriding effect on other laws. The POCSO Act was enacted in the year 2012 with an object to provide protection to the children from sexual offences which also contains the non-obstante clause having overriding effect to the other inconsistent laws. The learned Additional Advocate General submits that where there are two special statutes containing non-obstante clauses, the latter statute must prevail. This is because at the time of enactment of the latter statute, the legislature is presumed to be aware about the earlier legislation and its non-obstante clause. If the legislature still confers the latter enactment with a non-obstante clause, it means that the legislature wanted that enactment to prevail. If the legislature would not want the latter enactment to prevail, then it could provide in the latter enactment that the provisions of the earlier enactment continue to apply. In support of his argument, learned Additional Advocate General has placed reliance on **Solidare India Pvt. Ltd. Vs. Fairgrowth Financial Services Ltd, (2001) 3 SCC 71; Maruti Udyog Ltd. Vs. Ram Lal and others, (2005)**

2 SCC 638; KSN and Industries Ltd. Vs. Arihant Threads Ltd. and others, (2008) 9 SCC 763, KSN and Industries Ltd. Vs. Arihant Threads Ltd. and others, (2015) 1 SCC 166.

Learned Additional Advocate General submits that Section 362 under chapter XXVII of Cr.P.C. having title "The Judgement". Section 353 defines judgment passed in Criminal Trial. Section 362 prescribes 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 whereas Section 439 talks about special power of the High Court and Sessions Court for grant of bail. Section 439(1) confers the power to grant the bail on certain conditions and Section 439(2) confers the power to cancel the bail. Therefore, Section 362 cannot restrict the power of the High Court under Section 439(2) to cancel the bail granted. The law in this respect has been correctly laid down by this Court in **Smt. Sunita Gandharva (supra)**.

12. We have given our anxious consideration to the submissions made by the learned counsel for the parties.

13. We have to first of all test the correctness of the argument that there is in fact no conflict between the two judgments of different Single Benches of this Court in **Mohd. Juned (supra)** and in **Smt. Sunita Gandharva (supra)** and, therefore the reference was uncalled for.

14. **Mohd. Juned (supra)** is an earlier judgment, having been rendered on 04.10.2014. The aforesaid judgment was passed in Criminal Revision No.645/2013 filed under Section 397 read with Section 401 of Cr.P.C. whereby Sessions Judge, Ratlam in Sessions Trial No.13/2013 by his order

dated 15.05.2013 relegated the trial of a case registered for offences under Sections 363, 366, 342, 506-B & 376-D of IPC and also under Section 5(g), 6 and 12 of the POSCO Act and Section 3(1)(xi) of Atrocities Act to the Court of Special Judge notified under Atrocities Act. The argument before the High Court was that since cognizance has been taken by Special Judge notified under the POCSO Act, which has been illegally transferred by the Sessions Judge, Ratlam to the Special Judge notified under the Atrocities Act, this shall prejudice the accused. It was therefore prayed that the order passed by the Sessions Judge may be set aside and the trial of the case may be entrusted to Special Judge notified under the POCSO Act. The learned Single Judge has relied on the judgments of Supreme Court in **Sarwan Singh (supra)**, **Jain Ink Mfg. & Co. v. LIC of India and another**, AIR 1981 SC 670, **Sanwarmal Kejriwal vs. Vishwa Co-operative Housing Society Ltd. and others**, AIR 1990 SC 1563, **Ashoka Marketing Ltd. v. Punjab National Bank**, AIR 1991 SC 855, **A.P. State Financial Corporation v. Official Liquidator**, AIR 2000 SC 2642, **Allahabad Bank v. Canara Bank and another**, (2000) 4 SCC 406, **Maruti Udyog Ltd. v. Ramlal & others**, (2005) 2 SCC 638 and in **Jay Engineering Works v. Industry Facilitation Council and another**, AIR 2006 SC 3252, in all of which the Supreme Court has laid down the guidelines for resolving the conflict of two non-obstante clauses contained in two different statutes and held that when two or more laws operate in same field and each contained a non obstante clause indicating that the provisions have been given overriding effect over any other law, the cases shall be decided with reference to the object and purpose of the law under

consideration by applying the test that the latter enactment must prevail over the earlier one.

15. Another argument that was examined by the learned Single Judge in **Mohd. Juned (supra)** was that challan in cases involving POCSO Act has to be filed before the Special Court notified under that Act whereas for offences under the Atrocities Act the trial of the case has to be made over to the Special Court after committal by the Chief Judicial Magistrate. It was noted that in that particular case the challan was filed before the Sessions Court, therefore, it would affect the right of the applicant. Referring to Section 193 of Cr.P.C., it was observed that except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by the Magistrate under the Code. Since in that case the offences of POCSO Act, Atrocities Act and IPC were involved but the challan was filed before the Court of Session, therefore, the challan filed before the Court of Session cannot be said to be prejudicial to the interest of the applicant, held the Court. Relying on the judgment of Supreme Court in **Rattiram & others vs. State of M.P., (2012) 4 SCC 516**, the learned Single Judge noted that the Supreme Court in that case reversed the judgment of this Court and held that mere filing of challan before the Session Court would not amount to illegality and the trial would not vitiate for non-observance of Section 193 of the Code. It was held that until and unless the prejudice is shown and established by the accused, mere filing of the challan before the Court of Sessions, does not amount to illegality. In those facts, it was

observed by this Court in **Mohd. Juned (supra)** that considering the provisions of Atrocities Act, POCSO Act as well as Cr.P.C., it is apparent that the offence registered under the POCSO Act shall be tried by the Court notified under Section 25 of the Commissions for Protection of Child Rights Act, 2005, which shall be deemed to be the “Children’s Court” as per the proviso to Section 28 of the POCSO Act. Simultaneously, if the offence registered under the provisions of the Atrocities Act, then such offences shall be tried by the Special Court notified to try the said offence by Session Judge posted in the said Court from the date of assuming the offence. If the offences of IPC are also involved with respect to the offences of the respective special enactments, then those offences shall also be tried by the said Special Court notified under the respective enactments. It was further held that in a same crime number if the offences have been registered under the provisions of Atrocities Act and POCSO Act, then such offences shall be tried by a Court of Session notified under the Atrocities Act with the aid of Section 9 of Cr.P.C. and as per the language of the notifications. In such circumstances, trial of the offences involved under both the Acts is not required to be split up. But at the same time, the learned Single Judge further made it clear that in case of any inconsistency, the POCSO Act being latter enactment shall prevail over the provisions of the Atrocities Act. However, mere filing of challan before the Sessions Court would not vitiate the trial *ipso facto* in view of the judgment of the Apex Court in the case of **Rattiram (supra)**.

16. **Smt. Sunita Gandharva (supra)** is again a very considered and detailed judgment. It however, appears that the judgment of this Court in

Mohd. Juned (supra) was neither cited nor considered by the learned Single Judge while deciding **Smt. Sunita Gandharva (supra)** but a critical analysis of the aforesaid judgment does not show any conflicting view having been taken by the learned Single Judge in the case of **Smt. Sunita Gandharva**. Para 17 of the judgment of **Smt. Sunita Gandharva** shows that unlike in **Mohd. Juned** where a solitary question was whether the trial was vitiated for the reason of being transferred to the Court of Special Judge notified under the Atrocities Act, even though it also involves offences under the POCSO Act, much larger issues were involved therein, which would be evident from para 17 of the judgment in **Smt. Sunita Gandharva (supra)**, which is reproduced hereunder:

“17. Instant case is by way of an application for cancellation of bail at the instance of complainant and the main objection to the said application is maintainability itself. Beside that question of interplay of Atrocities Act and POCSO Act and extent of bail conditions as per Section 437(3) Cr.P.C. are involved. Therefore, according to this Court Five Questions are involved in this case, viz.:-

- (i) Whether, High Court can entertain an application under Section 439(2) of Cr.P.C. for cancelation of bail granted in exercise of powers conferred under Section 14-A(2) of Atrocities Act?;
- (ii) Whether, the Court granting bail in an appeal under Section 14-A(2) of Atrocities Act can be recalled/cancelled as the order granting bail does not attain finality?;
- (iii) Whether, in an offence where the provisions of Atrocities Act and POCSO Act are involved, the procedural law of POCSO Act will apply or the provisions of Atrocities Act?;
- (iv) Whether, in a composite offence involving of provisions of POCSO Act and Atrocities Act, an order refusing bail under Section 439 Cr.P.C. will be appealable as per Section 14-A(2) of Atrocities Act or an application under Section 439 Cr.P.C. simpliciter will lie before the High Court?; and

- (v) What is the scope and extent of bail conditions as referred in Section 437(3) of Cr.P.C.?"

What is relevant for the purpose of answering the reference in the present case can be found in paragraphs 40 to 47 of the judgment in **Smt.**

Sunita Gandharva (supra), which are reproduced hereunder:-

"40. Conflict of jurisdiction between two Special Acts operating in the same field, both carrying non-obstante clause is always perplexing for the Courts to decide. Therefore, Aims and Objects and the Purpose of the enactments that operate in the same field are one of the first and foremost principles to be applied for application of statutes. On this touchstone, looking to the legislative intent, statement of objects and reasons, different other provisions contained in the respective enactments and the language of provisions providing overriding effect indicate that POCSO Act would get precedence over Atrocities Act.

41. Perusal of provisions of Section 42-A of the POCSO Act reveals that it permits the Special Courts established under the said Act, to implement the provisions of other enactments also, insofar as they are not inconsistent with provisions of POCSO Act and in case of any inconsistency, the provisions of POCSO Act are given overriding effect over the provisions of such other enactments to the extent of inconsistency. It needs to be kept in mind that said provision (Section 42-A of POCSO Act) has been inserted in the POCSO Act w.e.f. 3/2/2013 by amendment and Atrocities Act underwent amendment in year 2018 but still Section 20 does not carry any such analogous provision that may enable the Special Court under the said Act to extend safeguards and provide benefit, that are being contemplated under the provisions of the POCSO Act. Provisions of POCSO Act are in addition and not in derogation of the provisions of any law including Atrocities Act. Therefore, POCSO Act is all encompassing in nature, whereas, Section 20 of Atrocities Act limits the interplay of other statutes.

42. Beside that, statement of objects and reasons of POCSO Act and Atrocities Act are to be seen, wherein, although both the statutes are dedicated to serve the interest of a special class of citizens but the legislative priority or preference appears to be in favour of the child because, if, Chapters V, VI, VIII and IX of POCSO Act and its different provisions are seen in tandem then it reveals that legislature intended to give delicate and protected treatment to the victim under the POCSO Act and special care of children as victims of crime have been designed to go through the process of investigation and trial of the accused. It applies irrespective of social or economic background of a child, therefore, welfare of children transcending all barriers of caste and creed and because of its all pervasive nature, POCSO Act is having overriding effect over the Atrocities Act.

43. It is to be remembered that POCSO Act has much wider scope so far as victims are concerned because POCSO Act is an act to protect Children from sexual offences, sexual harassment and pornography and provide for establishment of special Court for trial of such offences and for matters connected therewith or incidental thereto, therefore, ambit and scope of POCSO Act appears to be much wider than the Atrocities Act. Even otherwise, Child being considered the father of man is a biological evolution/phenomenon; whereas, Caste has a social/customary connotation.

44. One more facet of the controversy deserves attention is Section 28 (2) of the POCSO Act by which Special Court under the POCSO Act has been bestowed with the authority to try an accused for an offence other than the offence referred to in subsection (1) of Section 28. Meaning thereby that Special Court, POCSO Act can try for offence under other enactments also with which the accused may under the Cr.P.C. be charged; whereas, no such analogous provision for such inclusion exists in Atrocities Act, therefore, on this Count also, legislative intent and rule of harmonious construction weigh in favour of POCSO Act.

45. Section 31 of the POCSO Act can also be profitably referred in this regard:-

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

Perusal of above provision, makes it clear that provisions of the Code of Criminal Procedure have been made applicable to all the proceedings before the Special Court including bail and bonds and in later part of the same provision deeming fiction has been created whereby a Special Court for the purpose of all its proceedings shall be deemed to be a Court of Sessions. Therefore, Section 439 of Cr.P.C. is impliedly included by such provision and therefore, against the order of Special Court (POCSO Act), application under Section 439 of Cr.P.C. for bail shall be maintainable instead of appeal under Section 14-A (2) of the Atrocities Act.

46. Another principle for guidance in relation to non-obstante clause in two legislations would be the settled principle that both statutes have to be harmoniously construed as far as possible. Taking the cue from such principle, if both the Acts are taken into consideration where Special Protection, Remedies and Speedy Trial have been contemplated, it appears that POCSO Act is

designed to a wider range of victims than the Atrocities Act. Since the procedure has been specifically provided, children of whatever background including the background from Scheduled Castes or Scheduled Tribes, process of investigation and trial of the accused meanders through different specifically enacted provisions while taking into consideration the delicate mind of a child victim, his probable subjugation to secondary victimization and procedural safeguards appear to be extensively incorporated in the POCSO Act, but not in Atrocities Act.

47. In fact, a Special Court under the Atrocities Act does not have the kind of infrastructure, procedure, staff and training as contemplated in different provisions of the POCSO Act, specially Section 33 to 38 of the POCSO Act, therefore, on this count also, harmonious construction and reconciliation between the two enactments would be achieved when POCSO Act given precedence over the Atrocities Act in case a Child suffers and when he belongs to a Scheduled Caste or Scheduled Tribe Community.”

17. The learned Single Judge in **Sunita Gandharva** (supra) has relied on all those judgments which have been cited by Shri Rakesh Kumar Sharma and Shri Harpreet Singh Ruprah and thereafter recorded his conclusion in para 56 which is reproduced hereunder:-

“56. Conclusively, regarding questions No. (iii) and (iv), it can safely be concluded that when an accused is being tried by Atrocities Act as well as POCSO Act simultaneously, then Special Court under POCSO Act shall have the jurisdiction and if any bail application of accused is allowed or rejected under Section 439 of Cr.P.C. by that Special Court then appeal shall not lie under Section 14-A (2) of Atrocities Act. Only an application under Section 439 of Cr.P.C. for bail shall lie.”

18. The view taken by the learned Single Judge in **Smt. Sunita Gandharva** (supra) finds support from the judgment of the Supreme Court in **Sharat Babu Digumarti** (supra) which can be seen from para 36 and 37 of the report, reproduced hereunder:-

“36. In *Solidaire India Ltd. v. Fairgrowth Financial Services Ltd.* [*Solidaire India Ltd. v. Fairgrowth Financial Services Ltd.*, (2001) 3 SCC 71, this Court while dealing with two special statutes, namely, Section 13 of the Special Court (Trial of Offences

Relating to Transactions in Securities) Act, 1992 and Section 32 of the Sick Industrial Companies (Special Provisions) Act, 1985, observed as follows: (SCC p. 74, para 10):-

“10.Where there are two special statutes which contain non obstante clauses, the later statute must prevail. This is because at the time of enactment of the later statute, the legislature was aware of the earlier legislation and its non obstante clause. If the legislature still confers the later enactment with a non obstante clause it means that the legislature wanted that enactment to prevail. If the legislature does not want the later enactment to prevail then it could and would provide in the later enactment that the provisions of the earlier enactment continue to apply’. [Ed.: As observed in *Bhoruka Steel Ltd. v. Fairgrowth Financial Services Ltd.*, 1996 SCC OnLine Bom 717]”

37. The aforesaid passage clearly shows that if legislative intent is discernible that a latter enactment shall prevail, the same is to be interpreted in accord with the said intention. We have already referred to the scheme of the IT Act and how obscenity pertaining to electronic record falls under the scheme of the Act. We have also referred to Sections 79 and 81 of the IT Act. Once the special provisions having the overriding effect do cover a criminal act and the offender, he gets out of the net of the IPC and in this case, Section 292. It is apt to note here that electronic forms of transmission are covered by the IT Act, which is a special law. It is settled position in law that a special law shall prevail over the general and prior laws. When the Act in various provisions deals with obscenity in electronic form, it covers the offence under Section 292 IPC.”

19. The Supreme Court in **Sarwan Singh (supra)** has also taken the same approach that in the case of conflict between two non-obstante clauses in two different enactments, the latter will prevail. Para 20 of the report containing relevant discussion is reproduced herein below:-

“20. Speaking generally, the object and purpose of a legislation assume greater relevance if the language of the law is obscure and ambiguous. But, it must be stated that we have referred to the object of the provisions newly introduced into the Delhi Rent Act in 1975 nor for seeking light from it for resolving an ambiguity, for there is none, but for a different purpose altogether. When two or more laws operate in the same field and each contains a non-obstante clause stating that its provisions will over-ride those of any other law, stimulating and incisive problems of interpretation arise. Since statutory interpretation has no conventional protocol, cases of such conflict have to be decided in reference to the object

and purpose of the laws under consideration. A piquant situation, like the one before us, arose in *Shri Ram Narain v. Simla Banking & Industrial Co. Ltd.* [AIR 1956 SC 614 : 1956 SCR 603] the competing statutes being the Banking Companies Act, 1949 as amended by Act 52 of 1953, and the Displaced Persons (Debts Adjustment) Act, 1951. Section 45A of the Banking Companies Act, which was introduced by the amending Act of 1953, and Section 3 of the Displaced Persons Act 1951 contained each a non-obstante clause, providing that certain provisions would have effect "notwithstanding anything inconsistent therewith contained in any other law for the time being in force" This Court resolved the conflict by considering the object and purpose of the two laws and giving precedence to the Banking Companies Act by observing:

"It is, therefore, desirable to determine the overriding effect of one or the other of the relevant provisions in these two Acts, in a given case, on much broader considerations of the purpose and policy underlying the two Acts and the clear intendment conveyed by the language of the relevant provisions therein "(p. 615).

As indicated by us the special and specific purpose which motivated the enactment of Section 14A and Chapter III-A of the Delhi Rent Act would be wholly frustrated if the provisions of the Slum Clearance Act requiring permission of the competent authority were to prevail over them. Therefore, the newly introduced provisions of the Delhi Rent Act must hold the field and be given full effect despite anything to the contrary contained in the Slum Clearance Act.

21. For resolving such inter se conflicts, one other test may also be applied through the persuasive force of such a test is but one of the factors which combine to give a fair meaning to the language of the law. That test is that the later enactment must prevail over the earlier one. Section 14-A and Chapter III-A having been enacted with effect from December 1, 1975 are later enactments in reference to Section 19 of the Slum Clearance Act which, in its present form, was placed on the statute book with effect from February 28, 1965 and in reference to Section 39 of the same Act, which came into force in 1956 when the Act itself was passed. The legislature gave overriding effect to Section 14-A and Chapter III-A with the knowledge that Sections 19 and 39 of the Slum Clearance Act contained non-obstante clauses of equal efficacy. Therefore the later enactment must prevail over the former. The same test was mentioned with approval by this Court in *Shri Ram Narain's* case at p. 615."

20. The Supreme Court in **K.S.L. and Industries Limited (supra)** in para

70 of the report similarly held as under:-

“70. I am thus at a point where two statutes employ non obstante clause having “overriding effect”. Such a conflict, as laid down in several cases, may be resolved by judiciary on various considerations: such as the policy underlying the enactments, the language used, the object intended to be achieved; or mischief sought to be remedied, etc. One of the tests applied by Courts is that normally a later enactment should prevail over the former. The Courts would also try to reconcile both Acts by adopting harmonious interpretation and applying them in their respective fields so that both may operate without coming into conflict with each other. In resolving the clash, the Court may further examine whether one of the two enactments is “special” and the other one is “general”. There can also be a situation in law where one and the same statute may be held to be a “special” statute vis-a-vis one legislation and “general” statute vis-à-vis another legislation. On the basis of one or more tests, the Court will try to salvage the situation by giving effect to non obstante clause in both the legislations.”

21. Similarly, most of the High Courts have also taken the same line of approach on the question involved in the present matter, which shall be evident from some of such judgments. The Division Bench of Madras High Court in **Re: Registrar (Judicial) High Court (supra)** held in paragraph No.55 as under:-

“55. If the act of the accused is an offence under the POCSO Act and also an offence under the SC & ST Act, the Special Court under the POCSO Act alone shall have jurisdiction to exercise all the powers including the power to remand the accused under Section 167 of the Code, to take cognizance of the offences either on a police report or on a private complaint and to try the offender. The said Special Court shall have jurisdiction to grant all the reliefs to the victim for which the victim is entitled to under the SC & ST Act.”

22. The Andhra Pradesh High Court in **Mangali Yadagiri (supra)** in paragraph Nos.19 and 20 held as under:-

“19. A perusal of both the enactments would show that POSCO Act is a self contained legislature which was introduced with a view to protect the children from the offences of sexual assault, harassment, pornography and other allied offences. It was introduced with number of safeguards to the children at every stage of the proceedings by incorporating a child friendly procedure. The legislature introduced the non obstante clause in Section 42-A of the POSCO Act with effect from 20.06.2012 giving an overriding

effect to the provisions of the POSCO Act, though the legislature was aware about the existence of non obstante clause in Section 20 of the SC/ST Act.

20. Applying the test of chronology the POSCO Act, 2012 came into force with effect from 20.06.2012 whereas SC/ST Act was in force from 30.01.1990. The POSCO Act being beneficial to all and later in point of time, it is to be held that the provisions of POSCO Act have to be followed for trying cases where the accused is charged for the offences under both the enactments.”

23. The Patna High Court in **Guddu Kumar Yadav (supra)** after considering all the relevant provisions and case law held as under:-

“18. Now the Court would proceed to consider the direct conflict between Section 20 of the SC/ST Act, and Section 42 A of the POCSO Act, as both the provisions having overriding effects. Dealing with an issue identical to the case on hand, the Apex Court, in the case of Sarwan Singh (supra) held that cases of such conflict have to be decided in reference to the object and purpose of the laws under consideration. For, resolving such inter-se conflict, another test is that the later enactment must prevail over earlier one. Therefore, to resolve the issue, this Court would like to examine the object and purpose of the both enactments and further the point of time of such enactments.

19. It would be apparent from the statement of Objects and Reasons of SC/ST Act, that it was enacted with a view to prevent the commission of offences of atrocities against the members of the Scheduled Caste and the Scheduled Tribes by persons other than SC/ST and to establish Special Courts for the trial of such offences and to provide relief and rehabilitation to the victims of such offences.

Now coming to the statements of Objects and Reasons described in the statute book of POCSO Act, which indicate that it was enacted towards securing that the tender age of children are not abused and their childhood and youth are protected against exploitation. It is a self-contained comprehensive legislation inter-alia to provide protection of children from the offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and well being of the child at every stage of the judicial process, incorporating child-friendly procedures for reporting, recording of evidence, investigation and trial of offences and provision for establishment of Special Courts for speedy trial of such offences. Apart the above mentioned, abatement of such offence is also punishable under Section 17 of the POCSO Act, and Section 18 of the said Act, makes an attempt to commit an offence also punishable under the said Act.

20. Under the POCSO Act, notwithstanding anything contained in the Cr.P.C., there is a separate procedure for reporting of cases and a protocol for media, it contemplates a Special Procedure for recording of statement of child i.e. below 18 years of age. There is another safeguard that at the time of testifying, the victim is not exposed in any way to the accused and for that purpose statement may be recorded through videoconferencing or curtains or any other device. It is worthwhile to notice that the Special Court constituted under the POCSO Act, has been invested with power to pass an order for interim compensation to meet the immediate needs of the child for relief or rehabilitation at any stage after lodging the F.I.R., and also to recommend the award of compensation to be paid by the State Government within thirty days of receipt of such order. The Special Court can recommend the award of the compensation even in case of acquittal or discharge or accused being not traced or identified, if in the opinion of the Special Court the child has suffered loss or injury as a result of that offence.

21. After comparative analysis of the object, scheme and scope of the both Special Acts, i.e. POCSO Act and SC/ST Act, I, nowhere find such Special Provisions or procedure under the SC/ST Act for reporting of cases, recording of statements of the victim child, safeguard provided at the time of testifying the victim child and such a broad scheme of compensation and rehabilitation for child victim and the power invested to the Special Court as to grant interim compensation or compensations notwithstanding the result of the prosecution, as being contemplated under the POCSO Act.

In the SC/ST Act, no special procedure being contemplated for trial of the offences. The Special Court constituted under the SC/ST Act, shall follow almost procedure contemplated under the Cr. P.C. for trial of Session Cases. In the said Act there being no separate provision for investigation of the offences relating to child victims belonging to that section of the society.

22. Therefore, this Court is of the opinion that the POCSO Act takes within its fold the protection of children of all sections of the society including those belonging to SC/ST. The POCSO Act, being later legislation than the SC/ST Act, and a self-contained legislation having number of safeguards to the children at every stage of proceeding with the better scheme of compensation and rehabilitation for child victims including those belonging to SC/ST."

24. The Allahabad High Court in **Rinku (supra)** after elaborate discussions of the law in para 14 to 16 of the report held as under:-

"14. Conflict of jurisdiction between two special Acts operating in the same field, both carrying non obstante clauses, is not a new phenomenon to confront courts. When the question does arise as to

which special statute would prevail generally, or over a certain part of the rights and liabilities regulated, the procedure or jurisdiction provided, there are no thumb rules to determine the conflict. There are, however, well settled principles for guidance to be applied in such situations, in order to resolve which of the two special enactments would prevail. The first and the more pervasive of the principles to be applied, is to look to the object and the purpose of the enactments that operate in the same field. Here, it has to be the endeavor of the Court to find out the legislative priority. It has to be discerned by the Court where in the compete and conflict between two special statutes, the legislative priority lies. This conflict can arise between two provisions of the same statute, and that is why it is commonplace to come across statutory phraseology that seeks to obviate the conflict by wording the non obstante clause in one of the two provisions in the same statute saying, "notwithstanding anything in this Act or any other law for the time being in force".

15. The test of looking to the object of the two special statutes to determine which of the two would prevail, in cases where there is a conflict between the two, is the more enduring one to guide. The other that is invariably applied, or may be alongside the first, is to see which of the two special statutes, both carrying non obstante clauses was enacted subsequent in point of time. It is a dependable principle that a subsequent legislation is enacted by the legislature with knowledge of the provisions of the earlier special statute. Thus, it is presumed that if a subsequent statute gives overriding effect to a particular provision, that impinges upon the field occupied by an existing special statute, the legislature is presumed to have intended the subsequent enactment to take precedence over the former. But, it may not be always so. There the wider tests relating to the objects of the two legislations is to be applied alongside, in order to arrive at a construction that resolves the conflict, giving fullest effect to the legislative intent.

16. It is in the aforesaid background of facts and fundamental legal principles adumbrated above, that the submissions of learned counsel appearing for the parties, and the learned Amicus Curiae, may be considered with reference to the first of the two questions formulated supra. The learned counsel appearing for the applicants have relied heavily upon the provisions of Section 28(2) of the POCSO Act, to submit that the Court constituted under the said statute is invested with exclusive jurisdiction to try offences, other than those under the POCSO Act, about which provision is made under Section 28(1) of the said Act, wherever the accused may be charged under the Code with such offences, at the same trial. They submit that wherever it is permissible under the Code to try an accused for an offence under the POCSO Act, and under any other law, special or general, at the same trial, exclusive jurisdiction would lie with the Special Court under the POCSO Act, and not with any court under any other law. They have further referred to the provisions of Section 42-A of the POCSO Act, that gives overriding effect to the provisions of the said Act, over those of any other law, to the extent that provisions of such other law are inconsistent."

25. On this very question of law, the Gujarat High Court in **Vikrambhai Amrabhai Malivad (supra)** in para 12 and 13 of the report held as under:-

“12. In the present application, the applicant accused had approached the Court of Additional Sessions Judge & Special POCSO Judge & Special Atrocity Judge by filing Criminal Misc. Application No.272 of 2020 under section 439 of the Cr.P.C, which resulted into rejection. The applicant, thereafter has filed the captioned application seeking bail by invoking the provisions of section 439 of the Cr.P.C. The powers of granting bail by the High Court under section 439 of the Cr.P.C. will not get diluted even after the special court has exercised such powers. Once it is established that the POCSO Act will have overriding effect on the Atrocity Act, the provisions of section 31 of the POCSO Act will come into play which speaks of applicability of the provisions of Cr.P.C. The same declares that the Special Court shall be deemed to be a Sessions Court, whereas such deeming fiction is conspicuously absent in section 14 of the Atrocity Act. Section 33 of the POCSO Act mandates the procedure for safeguarding the interest of the child during the trial proceedings. Thus, the comparative analysis of provisions of both the Acts, leads to sole conclusion, that the legislature in its wisdom has conferred precedence on the POCSO Act above the Atrocity Act. Hence, the only remedy available for the applicant will be of filing an application under section 439 of the Cr.P.C. before the High Court.

13. Before parting with the observations, I would like to deal with the case law cited by the respective advocates appearing for the parties. The R/CR.MA/11014/2020 CAV ORDER judgement of the Coordinate Bench of this Court in case of Anilaben (supra) will not apply in light of the given facts, since the issue before the Coordinate Bench only pertained to applicability of section 14-A of the Atrocity Act vis-à-vis section 439 of the Cr.P.C. The Coordinate Bench has held that section 14-A of the Amendment Act, 2015 will have overriding effect on the provision of section 378 of the Cr.P.C. The Coordinate Bench was not seisin of any other Special Act having non-obstante clause. With regard to the judgement of the Patna High Court, it appears that while considering the provision of section 14-A of the Atrocity Act, the Court was invited the attention to the date of Amendment Act which was promulgated subsequent in 2015 after the POCSO Act. However, I am in complete agreement with the final opinion expressed by the Patna High Court with regard to the maintainability of an application for bail in terms of section 439 of the Cr.P.C. in a case involving the POCSO Act and the Atrocity Act.”

26. The Bombay High Court in **Suraj S. Paithankar (supra)** where a similar question arose, followed most of the judgments which have been

referred to above and held that in the composite offence involving POCSO Act and S.C. S.T. Act, the provision of the POCSO Act will prevail. The trial of the case will also be done by Special Court constituted under POCSO Act. Similarly, the Rajasthan High Court in **Lokesh Kumar Jangid (supra)** also held that no appeal will lie in a composite offence of POCSO and SC ST Act and a regular bail application under Section 439 would be maintainable.

27. The Chhattisgarh High Court in **Ram Swarup Rajwade (supra)** on this aspect of the matter had the following observations to make in para 40 and 41 of the report:-

“40. A careful perusal of Section 28(2) read with Sections 31 and 42A of the POCSO Act read with Sections 26 and 220 of the Code of 1973, would reveal that it makes the path for operation / provisions of other laws particularly the trial of offences under the provisions of other law if the accused is charged at the same trial. In other words, the POCSO Act harmoniously allows the incorporation of other Acts for their operation by virtue of Section 28(2) of the POCSO Act. In this regard, there is neither any inconsistency nor any conflict in the POCSO Act and as such, the SC-ST Act of 1989 and the POCSO Act can co-exist and stand independently together with each other for operational purpose and as such, “Special Court” designated under the POCSO Act would have exclusive jurisdiction to try the offence of both the Acts if arise out of same crime in one incident.

41. Similarly, it is well settled position of law that if two Acts operate in the same field then the Act which is later enacted will prevail over the earlier one. This legal principle is based on the foundation that at the time of enactment of the later statute, the Legislature was well aware of the earlier legislation and its non obstante clause. Since the Legislature still confers the later enactment with a non obstante clause, it means that the Legislature wanted that enactment to prevail.”

28. In view of the above, it must be held that “even though the learned Single Judge in last para of the judgment in **Mohd. Juned (supra)** mentioned that if the offences have been registered under the Atrocities Act and POCSO Act and such offences would be tried by the Court of Sessions under the

provisions of Atrocities Act with the aid of Section 9 of Cr.P.C. and as per language of the notification”. But at the same time, the learned Single Judge also made it clear that “POCSO Act being latter enactment shall prevail to the provisions of the Atrocities Act in case of any inconsistency”. Then learned Single Judge further held that “mere filing of challan before the Court of Sessions as appears in the present case will not vitiate the trial in the light of the judgment of the Apex Court in **Rattiram (supra)**”. The observances in the first and third part of this para should, therefore, be taken to have been confined to the facts of that particular case in view of peculiarity attached to that case by relying on the ratio of the Supreme Court in **Rattiram (supra)** to repel the argument that trial of the case was vitiated but simultaneously it was also held by the learned Single Judge in that very judgment on the authority of several Supreme Court judgments that in case of conflict between two enactments having non-obstante clause, apart from object and purpose for which the Act has been enacted, the latter enactment shall prevail over the provisions of the former Act. This was the precious view taken by another Single Bench in **Smt. Sunita Gandharva (supra)**. That being the crux of the judgment in **Mohd. Juned (supra)**, it must be held that there in fact is no conflict between the ratio of the two judgments.

29. In view of the above discussions, the question No.1 is answered in the terms that the trial of a case instituted under the provisions of two special Acts viz. Atrocities Act and POCSO Act, shall be conducted by the Special Courts constituted under the POCSO Act.

30. That in a case involving trial of the accused for the offences under both the Atrocities Act and POCSO Act shall be conducted by the Special Court constituted under Section 28 of the POCSO Act and remedy of the accused against the order of rejection of bail under Section 439 of Cr.P.C. by the such Special Judge, would be by filing the bail applications under Section 439 of Cr.P.C. before the High Court. Question No.2 is answered accordingly.

31. Referred questions having been answered as per above, let this matter be listed before the Single Bench as per Roster for appropriate orders.

(MOHAMMAD RAFIQ)
CHIEF JUSTICE

(SANJAY DWIVEDI)
JUDGE