

(2010) 08 BOM CK 0102
In the Bombay High Court
Case No : Writ Petition No. 3094 of 2009

Abdul Gaffar Tota Patel

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 16-08-2010

Acts Referred:

Constitution of India, 1950 — Article 20(1), 226
Criminal Procedure Code, 1973 (CrPC) — Section 362, 482
Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001 — Section 1(2), 41, 41(1)
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 20

Citation : (2010) 08 BOM CK 0102

Hon'ble Judges : B.H. Marlapalle, J;Anoop V. Mohta, J

Bench : Division Bench

Advocate : P.B. Shah, for the Appellant; F.R. Shaikh, APP, for the Respondent

Judgement

B.H. Marlapalle, J.—The petitioner was one of the three accused tried in Sessions Case No. 42/1998 by the learned Additional Sessions Judge at Malegaon for the offence punishable u/s 20(b)(i) of Narcotic Drugs and Psychotropic Substance Act, 1985 (for short, "NDPS Act") and by the judgment and order dated 27.06.2002 only the petitioner was convicted for the said offence and was sentenced to suffer RI for 10 years and to pay fine of Rs. 1,00,000/, in default to suffer RI for one year. This order of conviction and sentence was challenged in Criminal Appeal No. 749/2002 and the Appeal was dismissed as per the judgment dated 03.11.2003. The petitioner approached the Supreme Court in SLP (Criminal) No. 6998/2004 and it was dismissed on 30.07.2004.

2. By this petition filed under Article 226 of the Constitution, the petitioner seeks to invoke inherent powers of this Court u/s 482 of Cr. PC to correct the order of sentence and more particularly, the order dated 03.11.2003 passed by this Court (SB) in Criminal Appeal No. 749/2002. As per the petitioner, Section 20(b)(i) as on the date of the offence i.e. 9.1.1998 of NDPS Act, read as under:

whoever in contravention of any provision of this Act or rule or order made or condition of licence granted thereunder:

(a) ... X

(b) Produces, manufactures, possesses, sells, purchases, transports, imports interState, exports interState or uses cannabis, shall be punishable:

(i) Where such contravention relates to ganja or the cultivation of cannabis plant, with rigorous imprisonment for a term which may extend to five years and shall also be liable to fine which may extent to fifty thousand rupees;

3. Section 20(b)(i) of the NDPS Act, came to be amended with effect from 2.10.2001 and the amended Act did not state that it was applicable retrospectively. The amended Act enhanced the sentence to ten years and a fine amount to Rs. 1,00,000/. As on the date of the order of conviction and sentence passed by the trial Court i.e. on 27.06.2002 the amened Section 20(b)(i) of the NDPS Act was in force, and it was not pointed out to the trial Court or it was not claimed that the petitioner was required to be sentenced as per the provisions as existed on the date of the offence i.e. 09.01.1998. It is under these circumstances, the learned trial Court, on the basis of the amended Act and as prevailing on 27.06.2002 sentenced the petitioner to suffer RI for ten years and to pay a fine of Rs. 1,00,000/. When Criminal Appeal No. 749/2002 was heard and decided by this Court, there was no specific direction to reduce the period of sentence as well as the amount of fine i.e. the sentence period to be reduced to 5 years and fine amount to Rs. 50,000/.

4. Mr. Shah, the learned Counsel for the petitioner, has placed reliance on the following observations made by this Court, while dismissing the Appeal and submitted that this Court was aware and reiterated that the petitioner ought to have been sentenced to suffer RI for five years and pay a fine of Rs. 50,000/:

9. ...Section 20 has been amended on 02.10.2001. In the year 1998, possession of ganja was punishable with RI extending to 5 years and fine amount was Rs. 50,000/. Therefore, the appellant should have been sentenced for an imprisonment of RI of 5 years and fine of Rs. 50,000/....

5. As noted earlier, the petitioner's SLP before the Supreme Court came to be dismissed on 30.07.2004 and the said order read as under:

Delay condoned. Heard. The SLP is dismissed.

6. As per Section 362 of Cr.PC, a review application is not maintainable in the decided Criminal Appeal No. 749/2002. Section 41 of the amending Act of 2001 (Amending Act to the NDPS Act) reads as under:

41(1). Notwithstanding anything contained in Sub-section (2) of Section 1, all cases pending before the Courts or under investigation at the commencement of this Act, shall be disposed off in accordance with the provisions of the principal Act as amended by this Court and accordingly, any person found guilty of any

offence punishable under the principal Act, as it stood immediately before such commencement, shall be liable for a punishment which is lesser than the punishment for which he is otherwise liable on the date of the commission of such offence, provided that nothing in this section, shall apply to cases pending any Appeal.

7. Article 20(1) of the Constitution of India states that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

8. Having regard to the scheme of Article 20(1) of the Constitution of India and Section 41(1) of the Amending Act No. 1 of 2001, thereby bringing into the amendment to Section 20(b)(i) of NDPS Act that on 2.10.2001, it is clear that on the date of the order of conviction and sentence i.e. on 27.06.2002, the petitioner ought to have been sentenced as per the provisions prevailing as on the date of the offence i.e. 9.1.1998 and as the said sentence was less than the amended sentence. It is also evident from the above observations made by the learned Single Judge, while deciding Criminal Appeal No. 749/2002 that the period of sentence ought to have been five years with a fine of Rs. 50,000/ and the trial Court's order under Appeal was required to be corrected to that extent partly allowing the appeal. When the petitioner was tried, he was about 66 years of age and by now he is about 78 years of age. He has been undergoing sentence after his Appeal was dismissed and by now he has suffered eight years of imprisonment. Mr. Shah rightly relied upon the decision in the case of *Jawahar Singh @ Bhagat Ji Vs. State of GNCT of Delhi*, .

9. Section 482 of Cr. PC states that nothing in the said Code shall be deemed to limit or affect the inherent powers of this Court to make such orders, as may be necessary to give effect to any order under the said Code. The order dated 3.11.2003 passed by the learned Single Judge in Criminal Appeal No. 749/2002 is an order passed under the Code and the inherent powers u/s 482 of the Code are required to be invoked to give effect to the said order in keeping with the scheme of the NDPS Act, regarding the period of sentence and the fine amount. The Full Bench of this Court has reconsidered the scope of Section 482 in *Abasaheb Yadav Honmane v. State of Maharashtra* and *Ashwini Abasaheb Honmane* 2008 ALL MR (Cri) 952.

10. We are, therefore, satisfied that this is a fit case to invoke the inherent powers u/s 482 of Cr. PC read with Article 20(1) of the Constitution and allow this petition. Hence, the petition succeeds and it is directed that the petitioner's sentence shall be reduced to RI for five years with a fine of Rs. 50,000/. If the petitioner has already undergone the period of sentence i.e. five years plus one year in defaults of payment of the fine amount, he is directed to be released forthwith, unless required to be detained in any other criminal case.

11. Rule is made absolute accordingly.

12. We make it clear that this Order will not entitle the petitioner to claim compensation from the State Government.