
(1987) 11 MP CK 0008

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 2 of 1987

Bankar

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

Date of Decision : 27-11-1987

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 428, 433A

Citation : (1988) MPLJ 369

Hon'ble Judges : T.N. Singh, J; R.M. Rustogi, J

Bench : Division Bench

Advocate : Suresh Gupta, for the Appellant; M.C. Jain, Dy. Advocate General for State, for the Respondent

Judgement

Dr. T.N. Singh, J.

On the nodal controversy surfaced in this bunch of seventeen petitions the holding in Bhimbhu's case (infra) decided by the Apex Court occupies the field substantially. About that, we have no doubt at all. This we say after having made further research, once again, into the field traversed partially in Nainaram (1987 MPU 685 : 1987 Cri.LJ. M.P. 203). When this Court had an occasion to undertake reappraisal of Constitution Bench's decision in Maru Ram and Others Vs. Union of India (UOI) and Others, , albeit in a different context. Because Shri Jain, Deputy Advocate General, insisted relentlessly that we took up and read with him the decision in State of Andhra Pradesh Vs. Vallabhapuram Ravi, and reappraise in that context the implications of their Lordships' desperate holding in the causa celebre (Maru Ram), we accepted his invitation to diffuse decisively the legal tension surviving on Bhimbhu 's unstated premises.

Each of the petitioners is a lifer whose eligibility is in issue for release on probation because of his being convicted after 18-12-1978. Indeed, the main question involved in each case is interplay of Sections 428 and 433A, Code of Criminal Procedure with the provisions of Madhya Pradesh Prisoners' Release on Probation Act, 1954 and the Rules framed there under.

We discharge not our constitutional duty, heeding the mandate of Article 141, and extract a small passage from the common order rendered on 16-9-1985 by their Lordships in 41 petitions heard and disposed of together in the case of Bhimbhu and others vs. The State of Madhya Pradesh and others (Writ petition No. 331 of 1985 et. al.)

The petitioners in the above Writ petitions are entitled to be considered for release on licence under the M.P. Prisoners' Release on Probation Act, 1954 but their applications for such release have not been forwarded from Jail to the District Magistrate concerned though they have undergone the required period for release on licence, including the remissions and undertrial period. We, therefore, direct a mandamus to be issued against the concerned Superintendent of Jail to forward their applications for release on licence duly filled, if in order and the petitioners are eligible.....

In case orders are not passed within that period the petitioners shall then be released on their furnishing bail to the satisfaction of concerned Sessions Judge.... In case of real hardship, the concerned Sessions Judge would see that the petitioners are released on execution of their personal bond securing their presence in Court." (Emphasis added).

Despite its being an inter parte order and entitlement of the petitioners being accepted "eligibility" in case of each petitioner was, obviously, not judicially tested in the aforesaid order. The question posed before us in specific terms remained, accordingly, unanswered in Bhimbhu. Thus, there is necessity for a renewed exercise to be undertaken in this case to vocalise the unstated premises of Bhimbhu.

True, Vallabhapuram (supra) extracts passages from Maru Ram (supra) and relying particularly on the passage extracted at para 16 of the Report, Shri Jain persuaded us to revisit Maru Ram, but what appears at para 20 of the same Report, in our opinion, clinches the issue and exposes the futility of Shri Jain's persuasion. We quote the relevant passage therefrom:--

It is obvious that Parliament which was aware of laws like the Act which were in force in the State did not choose to interfere with them by enacting Section 433A of the Code. If it intended to nullify or modify such laws the non obstante clause in Section 433A would have been more comprehensive including all local statutes enacted for the benefit of children and juvenile or adolescent offenders. Considering the case in the light of the observations made Maru Ram and Others Vs. Union of India (UOI) and Others, , I feel that Section 10-A of the Act remains unimpaired and it has to be given full effect even after the enactment of Section 433A of the Code".

If we have to add anything to underline the implications of the above holding, suffice it to say that the Mam Ram (supra) holding had saved in that case the provisions of A.P. Borstal Schools Act. And, therefore, on parity of reasoning appearing in the above extract, we hold that Mam Ram also saves the provisions

of M.P. Prisoners" Release on Probation Act, 1954. The extract at para 16 (from Mam Ram) relied on by Shri Jain, cannot be read in isolation and it is indeed not decisive of the controversy.

When Mam Ram was analysed in this Court's Bench decision in Nainaram (supra), the essence of the desperate holding thereof was distilled as below affirming the view taken in the unreported Bench decision of this court dated 5-9-1985 in Hari Singh's case:

The decision of Apex Court in Maru Ram and Others Vs. Union of India (UOI) and Others, , was invoked to hold that even when "constitutional" power under Article 72 and 161 of the Constitution was exercised in the matter of "premature release" in doing so, "irrelevant, irrational and discriminatory considerations" must be eschewed. Whenever there exists any guidelines in the nature of any statutory rules, those must be strictly adhered to, it was also held, because of what was said by the Apex Court in Mam Ram (supra)".

We need only reiterate that in Mam Ram, the question which came up squarely from their Lordships' decision was the impact of Section 433A, Code of Criminal Procedure, on the provisions of U.P. Prisoners' Release on Probation Act, 1938, which is, more or less, in pari materia with the M.P. Act under consideration before us. There is little doubt that provisions of the said U.P. Act were kept alive by Mam Ram but their Lordships also extended that holding further, saying, "similar other statutes and Rules will enjoy similar efficacy". Indeed, their Lordships expressly held that "Section 433A does not forbid parole or other release within the 14-year span". This conclusion we have reached reading the serialised "formulations" of their Lordships in para 72 of the Report, particularly in Clauses (10), (11) and (14) thereof, that "remission" is though forbidden by Section 433A, that provision's inapplicability to the M.P. Act would entitle the petitioners in the instant case to invoke Rule 4 of the Rules framed under the Act in so far as it concerns the word "remission" used therein. For earning eligibility under the said Rule, the period of 5 years' sentence undergone would include "remission" also.

Lest any confusion lingers, let it be made clear that G.M. Morey Vs. Government of Andhra Pradesh and Another, has also considered Mam Ram (supra) but the question in that case was different. It relied on Mam Ram's holding, rendered on the interpretation of Section 433A and its non obstante clause was related to power of commutation of sentence of the State Government envisaged u/s 432 as in that case, Government of Andhra Pradesh "had issued a "General Order" in exercise of its powers u/s 432, Code of Criminal Procedure. That was not a case of exercise of power by the State Government under Article 161 of the Constitution.

What remains however to be indicated is that Clause (10) of their Lordships' "formulations" significantly makes an exception to the "existing guidelines" (namely of existing statutes and Rules enacted by several States,

saved by the decision) saying, "We cannot fault the Government, if in some intractably savage delinquents-,Section 433A is itself treated as a guideline for exercise Articles 72/161". It is also to be added that their Lordships had saved the existing enactments current in several States, dealing with release on probation for prisoners, as an interim measure "to avoid a hiatus" and, therefore, power of the State or Central Government to frame appropriate Rules for exercise of their power under Articles 72/161 of the Constitution in the same matter in derogation or supersession of the existing enactment has not been touched and has rather been recognised. Indeed, what further follows from their Lordships' formulation in Clause (10) is that while dealing with cases of "savage delinquents", if the Government prefers to avoid the guidelines of the existing enactments orders may be passed in such cases refusing release on probation. But, needless to stress the obvious that the Government will be bound even in such cases to state reasons for the decision taken because of the constitutional imperative of Articles 14 and 21 postulated in *Mrs. Maneka Gandhi Vs. Union of India (UOI)* and *Another*, and? *E.P. Royappa Vs. State of Tamil Nadu and Another*, . The same view would result from the judicial mandate to frame rules for the exercise of powers under Articles 72/161 and ensuring continuance of the existing rules till then because statutory discretion is never exercised in absolute terms so as not to be supported by reasons. (See - *Khudiram Das Vs. The State of West Bengal and Others*, . The Government shall have to refer to the judicial finding recorded in the conviction of the applicant to substantiate the view taken on the "savage" character of the delinquent's particular act as the offence of murder is per se heinous and yet a lifer on that ground is not denied the benefit of the rehabilitative measures judicially continued by Manx Ram.

However, Shri Jain took pains still to persuade us to accord, for another reason, primacy to the language of Rule 4 which, it is necessary, therefore, to extract in extenso:

Save the prisoners specified in Rule 3 any other prisoner who has served one-third of his sentence of imprisonment or a total period of five years with remissions, whichever is less, may be released by the Government on licence".

Because of the Constitutional mandate of Article 141, we have no doubt that *Bhimbhu (supra)* as also indeed *Mam Ram (supra)* itself leaves no scope for us to yield to the persuasion of Shri Jain. However, few words we have to say about his contention that though the word "remission" occurs in the aforequoted Rule, the provision being silent on the question of considering also period undergone by an applicant as an under-trial prisoner, we need not enlarge the scope of the provision. To this contention, there is a short answer that *Bhimbhu (supra)* not only extends to an applicant for probation the benefit of "remission", but also of "under-trial period" in express terms, but there is an additional reason for us to say that Shri Jain's contention has no merit even otherwise. In *Bhagirath Vs. Delhi Administration*, the Constitution Bench was required to consider the question as to whether Section 433A was in derogation of Section 428 and

whether the decision in Kartar Singh and Others Vs. State of Haryana, laid down the correct law that set-off contemplated u/s 428 was not available to lifers. Kartar Singh was overruled and it was held that the application for premature release made by the lifer under the provisions of paragraph 516-B of Punjab Jail Manual could not be rejected by applying Section 433A, Code of Criminal Procedure without giving him the benefit of the provisions of Section 428 and reckoning the period undergone by the applicant as under-trial prisoner.

We have no hesitation, therefore, to reach the conclusion that the legal landscape has not changed and that circumstances hardly merit our departure from the practice so far followed by this Court in considering prayers made by prisoners under the provisions of the aforesaid Act in terms of the decision of their Lordships rendered in Bhimbhu s case, whose material holding we have quoted in extenso hereinabove.

However, it is necessary for us to consider the grievance of each petitioner separately to dispose of the several petitions on the facts and circumstances of each case. In this case, from return, it appears that petitioner has earned eligibility for release on probation under the Act having completed more than six years in prison, including remission and under-trial period of imprisonment. His application dated 18-8-1986 was forwarded to District Magistrate, Shivpuri, by Superintendent, Central Jail, Gwalior and the admitted position is that no decision has been rendered till today by the State Government on that application and indeed the unfortunate position is also that till the date of return, namely, 23-3-1987, the matter did not even go before the Probation Board constituted under the Act.

We direct, accordingly, the State Government, following the norms set down in Bhimbhu 's case, to ensure that the application of the petitioner pending disposal for more than a year now, is disposed of by a reasoned order within a period of two months and we also direct that in default, the petitioner shall be released on furnishing bail to the satisfaction of the concerned Sessions Judge on the condition of his surrendering to custody in the event of his application being rejected and intimation in that regard being made to him.

With the above observation and directions, this petition is disposed of. Separate orders are being passed in the other sixteen petitions.