

(2020) 07 DEL CK 0026

In the Delhi High Court

Case No : Criminal Writ Petition No. 871 Of 2020

Basant Vallabh

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 07-07-2020

Acts Referred:

Constitution Of India, 1950 — Article 226
Delhi Prison Rules, 2018 — Rule 1209
Code Of Civil Procedure, 1908 — Order 21 Rule 5
Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 32A

Citation : (2020) 07 DEL CK 0026

Hon'ble Judges : Yogesh Khanna, J

Bench : Single Bench

Advocate : Siddharth Yadav, Avinder Singh

Final Decision : Dismissed

Judgement

Yogesh Khanna, J

1. This petition is filed under Article 226 of the Constitution of India to assail an order dated 31.01.2020 rejecting the petitioner's representation for

grant of parole and to seek a direction in the nature of mandamus to the competent authority to release him on parole.

2. The core issue agitated in this petition is whether this Court can grant a direction in nature of mandamus to the State to release the petitioner on

parole in case the appeal of petitioner is pending before the Supreme Court.

3. The learned counsel for the petitioner has referred to Rule 1209 of the Delhi Prison Rules, 2018 which inter alia notes:-

1209. Under-trial prisoners are not eligible for regular parole and furlough, however, may be released on custody Parole, that too by

the order of the concerned trial court. It is clarified that where an appeal of a convict against conviction is pending before the High Court,

regular parole will not be granted since the convict can seek appropriate orders from the High Court.â??

4. The learned counsel for the petitioner says since the Rule does not specify if the State can grant parole to the petitioner when his appeal is pending

before the Supreme Court, hence this Court can assume the jurisdiction. It is argued parole and suspension of sentence stand on different footing as

has been held by the Supreme Court in *Dadu @ Tulsidas vs State of Maharashtra Writ Petition (Crl) Nos.169/1999 and 243/1999* decided on

12.10.2000 and it held as under:-

Bail and parole have different connotation in law. Bail is well understood in criminal jurisprudence and Chapter XXXIII of the Code of

Criminal Procedure contains elaborate provisions relating to grant of bail. Bail is granted to a person who has been arrested in a non-

bailable offence or has been convicted of an offence after trial. The effect of granting bail is to release the accused from internment though

the court would still retain constructive control over him through the sureties. In case the accused is released on his own bond such

constructive control could still be exercised through the conditions of the bond secured from him. The literal meaning of the word

â??bailâ? is surety. In *Halsburyâ?s Laws of England*, 4th Edn., Vol.11, Para 166, the following observation succinctly brings out the effect

of bail:

The effect of granting bail is not to set the defendant (accused) at liberty but to release him from the custody of law and to entrust him to the

custody of sureties who are bound to produce him to appear at his trial at a specified time and place. The sureties may seize their principal

at any time and may discharge themselves by handing him over to the custody of law and he will then be imprisoned.

â??Paroleâ?, however, has a different connotation than bail even though the substantial legal effect of both bail and parole may be the

release of a person from detention or custody.â??

5. Hence, it is argued since the parole and bail are two different things, the parole can be granted by the State even whilst the matter is subjudiced

before the Supreme Court and hence if an illegal order is passed by the State, this Court can very well assume jurisdiction to correct it.

6. The learned counsel for petitioner argues in *K.M.Nanavati vs The State of Bombay* AIR 1961 SC 112 the Supreme Court had essentially decided

qua power of suspension of sentence if it can be exercised by State whilst the appeal is pending before the Supreme Court. It was argued this decision

does not speak about grant of parole and does not elaborate about the power of the State to grant parole during the pendency of the appeal before the

Supreme Court.

7. I have heard the arguments. The submission made by the learned counsel for petitioner is without merit.

8. The Supreme Court in *Dadu @ Tulsidas (supra)* was dealing with a situation where Section 32A of the NDPS Act was in challenge and essentially

an issue before the court. The Court therein held such Article is constitutionally valid. While deciding, the Court also held that Article 32A of the

NDPS Act would not come in the way of granting parole to petitioner. The issue raised in present petition was never raised in *Dadu@s (supra)*.

9. Rather in *K.M.Nanavati (supra)* the Supreme Court inter alia held:-

â??18. Art. 161 can within certain narrow limits be exercised in the same field. The question that immediately arises is one of

harmonious construction of two provisions of the Constitution, as one is not made subject to the other by specific words in the Constitution

itself. As already pointed out, Art. 161 contains no words of limitation; in the same way, Art. 142 contains no words of limitation and in the

fields covered by them they are unfettered. ...

19. On that principle the power under Art. 142 which operates in a very small part of the field in which the power under Art. 161

operates, namely, the suspension and execution of sentence during the period when any matter is sub-judice in this Court, must be held not

to be included in the wider power conferred under Art. 161.

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21.But the suspension of the sentence for the period when this Court is in seizin of the case could have been granted by this Court itself.

If in respect of the same period the Governor also has power-to suspend the sentence, it would mean that both the judiciary and the

executive would be functioning in the same field at the same time leading to the possibility of conflict of jurisdiction.

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25. As a result of these considerations we have come to the conclusion that the order of the Governor granting suspension of the sentence

could only operate until the matter became sub judice in this Court on the filing of the petition for special leave to appeal. After the filing of

such a petition this Court was seized of the case which would be dealt with by it in accordance with law. It would then be for this Court,

when moved in that behalf, either to apply r. 5 of O. XXI or to exempt the petitioner from the operation of that rule. It would be for this

Court to pass such orders as it thought fit as to whether the petitioner should be granted bail or should surrender to his sentence or to pass

such other or further orders as this Court might deem fit in all the circumstances of the case. It follows from what has been said that the

Governor, had no power to grant the suspension of sentence for the period during which the matter was sub judice in this Court.â??

10. In Ramesh Kumar vs State of Rajasthan 2013 CrL.J 2376 the Full Bench of Rajasthan High Court, the Court held as under:-

â??â??.In other words, the right of an accused/prisoner/convict to be released on parole cannot be considered by the State Government

under the provisions of the Rajasthan Prisoners Release on Parole Rules, 1958 during the pendency of any appeal filed by him/her against

his/her conviction.â??

11. In Vikas Yadav vs State of NCT of Delhi this Court while deciding Writ Petition No.236/2016 on 16.02.2016 also took similar view viz:-

â??14. The foregoing discussion leaves no manner of doubt that when a challenge against the sentence awarded to the petitioner is

pending determination before the Supreme Court in a criminal appeal, the power of the executive to consider a representation for parole

made by the petitioner is eclipsed and cannot, therefore, be exercised.

15. Consequently, in view of the pendency of a criminal appeal instituted on behalf of the petitioner assailing the sentence awarded to him

by the courts below, before the Supreme Court, the official respondent could not have entertained a representation for parole on his behalf

in terms of the decision of the Supreme Court in K.M. Nanavati (supra). Accordingly, the present petition assailing the order passed by the competent authority rejecting the representation on behalf of the petitioner for grant of parole and seeking a direction to the official respondent to release the petitioner on parole, is also not maintainable, and is hereby dismissed whilst reserving liberty to the petitioner to institute an appropriate proceeding in accordance with law, before the Honâ??ble Supreme Court of India.â??

12. The learned counsel for petitioner submitted this Court is not bound by the decision in Vikas Yadav (supra) since it was a decision by Coordinate Bench. I may note in Rajesh Kumar vs Govt. of NCT of Delhi 2012 (2) Crimes 281 (Delhi) the Division Bench of this Court held as under:-

7. We are however of the opinion that even when application for interim suspension of sentence or bail is filed by a convict in a pending appeal, it is always open to the convict to seek suspension/bail from this Court on the grounds as provided for regular parole and the High Court can always take those grounds in consideration while entertaining applications for suspension and/or interim suspension of the sentence. There is nothing in Section 389 or otherwise in law, barring the appellate Court from granting interim bail or suspending the sentence on considerations as for parole. Clause 10 very clearly stipulates that the â??convict can seek appropriate orders from the High Courtâ? which means that the convict can seek the order on parity of grounds for regular parole. Thus, the premise on which the petitioners impugn Clause 10, i.e of grounds as for regular parole being not available while seeking â??appropriate orders from the High Courtâ? is erroneous and thus the challenge to the vires of Clause 10 has no merit. On the contrary, we are rather of the view that the Govt./Jail Authorities cannot be permitted to exercise the powers to grant parole when this Court is seized of the matter in statutory appeal and the same if permitted would be in derogation of the Appellate Powers of this Court and may lead to a conflict.

13. Thus, the view of Division Bench was once the appeal is pending, the State would not entertain the petition for parole. Thus, Rule 1209 (supra) is in consonance with the view taken by the Courts above, hence there is no need to take any contrary view on this issue.

14. The petition is dismissed. The petitioner is well within his rights to seek appropriate remedy under law. No orders as to cost.

15. Copy of this order be sent electronically to the petitioner through the Jail Superintendent for information.