

(2009) 08 SHI CK 0027

In the High Court Of Himachal Pradesh

Davinder Singh and Others and Ishwar Dass and Another	APPELLANT
Vs	
State of H.P. and Others	RESPONDENT

Date of Decision : 04-08-2009

Acts Referred:

Himachal Pradesh Good Conduct Prisoners (Temporary Release) Act, 1968 — Section 3, 3(3)

Citation : (2010) 1 ShimLC 268

Hon'ble Judges : R.B. Misra, J;Kuldip Singh, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Kuldip Singh, J.—This judgment shall dispose of Cr.W.P. No. 2 of 2007 and Cr.W.P. No. 3 of 2007 as identical question of law is involved in both the petitions. In Cr.W.P. No. 2 of 2007, ten prisoners and in Cr.W.P. No. 3 of 2007, two prisoners submitted representations to Hon"ble the Chief Justice of this Court. On the basis of the aforesaid representations, this Court took suo motu cognizance of the question raised by the prisoners in the two representations and, therefore, two writ petitions came to be registered. Mr. Suneel Mohan Goel, Advocate was appointed Amicus Curie in both the writ petitions. Thereafter the petitions were amended. In view of common question of law involved in the two petitions, we are giving facts from Criminal Writ Petition No. 2 of 2007.

2. The case of the petitioners is that Sub-section (3) of Section 3 of the Himachal Pradesh Good Conduct Prisoners (Temporary Release) Act, 1968 (for short "Act") to the effect that the period of release under said Section shall not count towards total period of sentence of a prisoner is bad in law and the same is contrary to law laid down by the Supreme Court in Sunil Fulchand Shah Vs. Union of India and Others, The Supreme Court has held that period spent by a convict on parole is to be counted towards total sentence that has been undergone by the convict. It has been pleaded that in view of Article 141 of the Constitution, the judicial pronouncement of the Supreme Court is the law of the land. The Sub-section (3)

of Section 3 of the Act is bad in law and against the judgments of the Supreme Court. A mandamus has also been prayed against the respondents restraining them from enforcing Sub-section (3) of Section 3 of, the Act and to direct the respondents to include the period of parole for counting the total period of sentence undergone by a convict.

3. The respondents contested the petition by filing reply and have pleaded that the Act is valid piece of legislation. The Act is consistent with the judgments of the Supreme Court and does not violate any Article of the Constitution. It has been pleaded that u/s 3 of the Act, prisoners are released on certain emergent grounds and their release period is not counted towards the total period of sentence, whereas, the prisoners who are released u/s 4 of the Act, their release period is counted towards the total period of sentence. The respondents have thus prayed that both the petitions be dismissed.

4. In the petitions, the petitioners in support of their case have referred Poonam Lata Vs. M.L. Wadhawan and Others, ; Ashok Kumar alias Golu Vs. Union of India and others, ; Balkar Singh Vs. State of Haryana and Others, ; Sunil Fulchand Shah Vs. Union of India and Others, and State of Haryana Vs. Nauratta Singh and Others, . In other words, on the basis of these judgments the petitioners want to convey that period of parole is to be included in the actual period of sentence spent by the prisoner, whereas Sub-section 3 of Section 3 of the Act provides contrary and, therefore, Sub-section 3 of Section 3 of the Act be declared contrary to law laid down by the Supreme Court.

5. The petitioners have not challenged Sub-section 3 of Section 3 on the well known grounds such as legislative competence or Sub-section 3 of Section 3 has no nexus with the object sought to be achieved. The only ground of attack of the petitioners to Sub-section 3 of Section 3 is that this provision is contrary to law laid down by the Supreme Court and, therefore, it is illegal.

6. In Poonam Lata Vs. M.L. Wadhawan and Others, the wife of one Shital Kumar, who was detained u/s 3 (1) of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 had filed the petition under Article 32 of the Constitution. The Counsel for the petitioner confined his submission to only one aspect namely, that the period of parole i.e. from May 15, 1986 till February 28, 1987 could not be added to the period of detention specified in the impugned order under Sub-section (1) of Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 and the period of one year from the date of detention having expired on 26.2.1987, the impugned order had lapsed and the detenu became entitled to be freed from the shackles of the order of detention. The Supreme Court held that release on parole is a wing of the reformatory process and is expected to provide opportunity to the prisoner to transform himself into a useful citizen. Parole is thus a grant of partial liberty or lessening of restrictions to a convict prisoner, but release on parole does not change the status of the prisoner and the Supreme Court ultimately rejected the contention of the Counsel for the petitioner that the period of parole

from 15.5.1986 to 28.2.1987 could not be added to the maximum period of detention of the detenu Shital Kumar for one year as specified in the impugned order of detention passed under Sub-section (1) of Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974.

7. In the petitions, Ashok Kumar alias Golu Vs. Union of India and others, has also been referred. In that case, the question of parole and its effect on the actual period of sentence or imprisonment was not before the Supreme Court. Therefore, the petitioners cannot take any help from Ashok Kumar alias Golu (supra).

8. In Balkar Singh Vs. State of Haryana and Others, the question before a learned Single Judge was that period of parole was not added to the period actual sentence undergone by the petitioners for which they were sentenced. In that context, the learned Single Judge held that action of the respondents is obviously contrary to the various pronouncements of the Court and respondents were obliged to add the period which the petitioners have enjoyed on parole during their period of imprisonment while counting the actual sentence undergone by the petitioners. It was directed that the respondents would consider the case of the petitioners if otherwise eligible and would forward the same for decision by the competent authority while taking into account the period of parole enjoyed by each of the petitioners towards the period of actual sentence undergone by the petitioners. In Balkar Singh, no statutory provision, rule or instruction having bearing on the question of parole was noticed.

9. The question with respect to inclusion of period of parole while calculating the period of imprisonment came for consideration before a Full Bench of this Court in Cr.W.P. No. 47 of 1995 and Cr.W.P. No. 58 of 1995 both decided on 15.10.1996. In para 6 of the judgment, the Full Bench has held as follows:

In so far as the judgment of the Division Bench of this Court in Life Convict Karam Singh Vs. State of H.P. and Others, is concerned, there will be no difficulty in holding that it is not good law as it has overlooked a relevant statutory provision. In the Himachal Pradesh Good Conduct Prisoners" (Temporary Release) Act, 1968 (Act No. 12 of 1969), Section 3 provides for temporary release of prisoners on certain grounds. Sub-section (3) is to the effect that the period of release under that Section shall not count towards the total period of the sentence of a prisoner. Hence, the period for which the prisoner was permitted to go out on parole cannot be counted towards the period of sentence undergone by him. Consequently, the direction given by the Division Bench in that case to include the period of parole while calculating the period of imprisonment was directly contrary to the statutory provision and, therefore, the ruling is not in accordance with law.

The Full Bench ultimately held that it is also not open to this Court to give a direction to the State Government to include the period of parole while calculating the period of imprisonment. The ruling of this Court in Life Convict

Karam Singh Vs. State of H.P. and Others, was held not good law and overruled.

10. The question of parole again came up before the Supreme Court in Sunil Fulchand Shah Vs. Union of India and Others, In that case, the point was whether the period of detention is fixed period or the period is automatically extended by the period of parole granted to the detenu. The Supreme Court in para 30 of the report has held that period of detention would not stand automatically extended by any period of parole granted to the detenu unless the order of parole or rules or instructions specifically indicates as a term and condition of parole, to the contrary. The period during when the detenu is on parole, therefore, required to be counted towards the total period of detention. The summary of the conclusions is given in para 33 but so far as parole is concerned, the same is as follows:

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3. That parole, *stricto sensu* may be granted by way of a temporary release as contemplated by Section 12(1) or Section 12(1-A) of COFEPOSA by the Government or its functionaries, in accordance with the parole rules or administrative instructions, framed by the Government which are administrative in character. For securing release on parole, a detenu has, therefore, to approach the Government concerned or the jail authorities, who may impose conditions as envisaged by Section 12(2) etc. and the grant of parole shall be subject to those terms and conditions.

4. That the Courts cannot, generally speaking, exercise the power to grant temporary release to detenus, on parole, in cases covered by COFEPOSA during the period an order of detention is in force because of the express prohibition contained in Sub-section (6) of Section 12. The bar of judicial intervention to direct temporary release of a detenu would not, however, affect the jurisdiction of the High Courts under Article 226 of the Constitution or of this Court under Article 32, 136 or 142 of the Constitution to direct the temporary release of the detenu, where request of the detenu to be released on parole for a specified reason and/or for a specified period, has been, in the opinion of the Court, unjustifiably refused or where in the interest of justice such an order of temporary release is required to be made. That jurisdiction, however, has to be sparingly exercised by the Court and even when it is exercised, it is appropriate that the Court leave it to the administrative or jail authorities to prescribe the conditions and terms on which parole is to be availed of by the detenu.

5. That parole does not interrupt the period of detention and, thus, that period needs to be counted towards the total period of detention unless the terms for grant of parole, rules or instructions, prescribe otherwise.

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7. xxx.

11. The petitioners have also referred State of Haryana Vs. Nauratta Singh and Others, in their petition wherein the question was whether the instructions of the Government enabling me grant of remission of the period of "parole or furlough" was applicable to the period of enlargement on bail. The Supreme Court has held that the benefit extended for those who are on parole or furlough cannot be extended to those who are on bail. This is not the question involved in the present petitions.

12. In Dadu @ Tulsidas Vs. State of Maharashtra, the constitutional validity of Section 32-A of the Narcotic Drugs and Psychotropic Substances Act, 1985 was challenged. It was contended that legislature is not competent to take away, by statutory prohibition, the judicial function of the Court in the matter of deciding as to whether after the conviction under the Narcotic Drugs and Psychotropic Substances Act, 1985, the sentence can be suspended or not. The Section was also assailed on the ground that it has negated the statutory provisions of Sections 389, 432 and 433 of the Code of Criminal Procedure in the, matter of deciding as to whether after the conviction under the said Act the sentence can be suspended, remitted or commuted or not and also under what circumstances, restrictions or limitations on the suspension of sentences or the grant of bail could be passed. The prohibition of suspension precludes the executive from granting parole to convict who is otherwise entitled to it under the prevalent statutes, ail manual or Government instructions.

13. The Supreme Court after noticing various judgments held that it is clear that parole did not amount to the suspension, remission or commutation of sentences which could be withheld under the garb of Section 32-A of the Narcotic Drugs and Psychotropic Substances Act, 1985. Notwithstanding the provisions of the offending Section, a convict is entitled to parole, subject however, to the conditions governing the grant of it under the statute, if any, or the jail manual or the government instructions.

14. The Supreme Court regarding the constitutionality of Section 32-A in Dadu alias Tulsidas (supra) in para 26 has held as follows:

Despite holding that Section 32-A is unconstitutional to the extent it affects the functioning of the criminal Courts in the country, we are not declaring the whole of the Section as unconstitutional in view of our finding that the Section, insofar as it takes away the right of the executive to suspend, remit and commute the sentence, is valid and intra vires of the Constitution. The declaration of Section 32-A to be unconstitutional, insofar as it affects the functioning of the Courts in the country, would not render the whole of the Section invalid, the restriction imposed by the offending Section being distinct and severable.

15. Section 3 of the Act is reproduced here-in-below:

3. Temporary release of prisoners on certain grounds.--(1) the Government may, in consultation with the District Magistrate and subject to such conditions and in such manner as may be prescribed, release temporarily for a period specified in

Sub-section (2) any prisoner if the government is satisfied that,--

(a) a member of the prisoner's family has died or is seriously ill; or

(b) the marriage of the prisoner's son or daughter is to be celebrated; or

(c) the temporary release of the prisoner is necessary for ploughing, sowing or harvesting or carrying on any other agricultural operation on his land and no friend of the prisoner or a member of the prisoner's family is prepared to help him in this behalf in his absence; or

(d) it is desirable so to do for any other sufficient cause.

(2) The period for which a prisoner may be released shall be determined by the Government so as not to exceed,-

(a) where the prisoner is to be released on the ground specified in clause (a) of Sub-section (1), two weeks;

(b) where the prisoner is to be released on the ground specified in Clause (b) or Clause (d) of Sub-section (1), four weeks; and--

(c) where the prisoner is to be released on the ground specified in clause (c) of Sub-section (1), six weeks.

(3) The period of release under this Section shall not count towards the total period of the sentence of a prisoner.

(4) The Government may, by notification, authorize any officer to exercise its power under this Section in respect of all or any of the grounds specified therein.

16. The grievance of the petitioners is that not counting of the period of parole towards total period of sentence of a prisoner released u/s 3 is illegal. The prisoner remains a person undergoing sentence, only his mode of undergoing sentence is changed u/s 3 of the Act and, therefore, Sub-section (3) of Section 3 of the Act, is illegal which provides that period of parole shall not be counted towards total period of sentence of prisoner. The petitioners have challenged Sub-section (3) of Section 3 only on the basis of pronouncements of the Supreme Court where "parole" has been interpreted. Therefore, the limited question in these petitions is whether the Supreme Court has held any paramateria provision illegal.

17. The petitioners have not shown any judgment of the Supreme Court wherein paramateria provision for not counting the period of parole towards total period of sentence has been considered and held illegal. The Supreme Court in *Dadu alias Tulsidas* (supra) has upheld the constitutionality of Section 32-A insofar as it takes away the right of the executive to suspend, remit and commute the sentence. The Sub-section (3) of Section 3 of the Act, authorizes the Government to release the prisoner on parole.

18. In State of Himachal Pradesh in view of Sub-section (3) of Section 3, there is

statutory provision that period of release shall not be counted towards the total period of sentence of a prisoner. In *Sunil Fulchand Shah* (supra), the Supreme Court has held that the parole does not interrupt the period of detention unless the terms for grant of parole, rules or instructions, prescribe otherwise. The Supreme Court has not said that no rule or instruction can be made to the effect that the period of parole shall not be counted towards the total period of sentence of a prisoner. In other words, if there are rules, instructions or condition in the parole order, then the period of parole will extend the period of detention. In view of the above, the Sub-section (3) of Section 3 of the Himachal Pradesh Good Conduct Prisoners (Temporary Release) Act, 1968 is valid and not invalid as contended on behalf of the petitioners.

19. No other point was urged.

20. The result of the above discussion, both the petitions being Cr.W.P. No. 2 of 2007 and Cr.W.P. No. 3 of 2007 are dismissed. We appreciate and place on record valuable assistance rendered by Mr. Suneel Mohal Goel, Amicus Curie in the case.