

(1998) 08 BOM CK 0066

In the Bombay High Court

Case No : Criminal Writ Petition No. 648 of 1998, with Criminal Writ Petition No. 748 of 1998

Hassan Ismail Dalvi and another

APPELLANT

Vs

State of Maharashtra and another

RESPONDENT

Date of Decision : 10-08-1998

Acts Referred:

Constitution of India, 1950 — Article 14, 21
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 27, 32
Penal Code, 1860 (IPC) — Section 302

Citation : (1999) 5 BomCR 68 : (1999) BomCR(Cri) 68 : (1998) CriLJ 4751 : (1999) 2 MhLj 525

Hon'ble Judges : Vishnu Sahai, J;N. Arumugam, J

Bench : Division Bench

Advocate : B.G. Tangsali, for the Appellant; C.J. Sawant, A.G. of Maharashtra and Miss A.R. Kamat, for the Respondent

Judgement

N. Arumugham, J.—Rule. By consent, rule made returnable forthwith.

2. In view of the questions involved in both these writ petitions, to be decided is common and the respondents are identical though the petitioners are different, by consent, both the writ petitions are heard together and disposed off by this common Judgment.

3. In both the writ petitions, the petitioners are seeking to grant issuance of mandamus directing the respondents to issue parole as well as furlough leave respectively on the grounds mentioned in the writ petitions. Since the authorities have not inclined to grant parole as well as furlough leave, they have come forward with the above writ petitions.

4. The main throng of contention taken by the learned Additional Public Prosecutor is that both the writ petitions are not maintainable for the reasons that the parole as well as furlough leave to such of the persons convicted and having sentenced, are involved very much for the suspension of the sentence as

clearly spelt out in section 32-A of the N.D.P.S. Act. The learned Additional Public Prosecutor relied on the reply affidavit filed in Writ Petition No. 748 of 1997 as the contention in the earlier writ petition also.

5. We have heard the learned Advocate General who contended that what was provided in section 32-A of the H.D.P.S. Act is that no sentence awarded to the person held guilty under the provisions of the N.D.P.S. Act could be suspended or remitted or commuted and that therefore, since the granting of furlough leave or parole leave to a convict who is undergoing sentence has awarded for the offences committed under the N.D.P.S. Act involves the concept of suspension of sentence, no parole or furlough leave can be granted. In support of his contention, the learned Advocate General relied on a catena of case laws held in this regard which are as follows :-

(i) In *Ishwar Singh M. Rajput v. State of Gujrat*, a Division Bench of the Gujrat High Court consisting of Hon"ble the Chief Justice N.B. Shah and B.C. Patel, JJ., has held after a elaborate discussion as under :-

"There is no substance in the contention raised by the learned Advocate Mr. Mehta that section 32-A of the Narcotics Act is violative of Article 14 and/or Article 21 of the Constitution of India or that the word "shall" should be read as "may". In the result, considering section 32-A of the Narcotic Drugs and Psychotropic Substances Act, 1985 as it is prisoners, who are convicted under the said Act, are not entitled to be released on parole or furlough.

6. Before proceeding further, it has become necessary for us to advert to section 32-A as provided as follows:-

32-A "No suspension, remission or commutation in any sentence awarded under this Act- Notwithstanding anything contained in the Code of Criminal Procedure, 1973(2 of 1974) or any other law for the time being in force but subject to the provisions of section 33, no sentence awarded under this Act (other than section 27) shall be suspended or remitted or commuted."

It is significant to note that the above provision of law contains a non-obstante clause which has to be read in the context of the three concepts namely suspension, remission and commutation of sentence. What has been provided under the three concepts may not come to the rescue of the petitioner, in this case of factual matrix. It is therefore made very clear that the ratio held by the learned Judges in the above case law, could be application to and on parable with the section of law provided thereto.

7. A Division Bench of this Court in the case held between *Mohd. Ismail v. State of Maharashtra*, reported in 1998 Bom.C.R. (Cri.) 336: 1998 Cr.L.J. 136 has held in this regard as follows :-

"So far as Criminal Writ Petition No. 83 of 1997 is concerned, the petitioner Umesh son of Murlidhar Ramteke filed the petition for grant of furlough leave. Grant of such furlough is a remission of sentence. Remission as such as in

respect of a convict u/s 22 of the Act is impermissible in view of section 32-A of the Act. Grant of furlough has also an effect in suspending the sentence which he has to undergo. We are therefore of the view that the prayer for grant of furlough made by the petitioner Umesh in Criminal Writ Petition No. 83 of 1997 cannot be entertained. His petition therefore stands dismissed."

8. In yet another case held between Sheikh Salim @ Guddu s/o Sheikh Gani v. State of Maharashtra & others, reported in 1996(1) M.L.J., 843 a Division Bench of this Court, consisting of Mr. Justice B.U. Wahane and R.M. Lodha, JJ., held as follows :-

"that the provisions of section 32-A of the Act which is a special statute with special object cannot be said to be unreasonable or affecting the life and liberty and thereby violative of Article 14, and Article 21 of the Constitution. For the purpose of application of Article 14, the laws made by different legislations cannot be taken together for the purpose of comparison or contrast to show that the provisions of one are discriminatory when read with the provisions of the other. Each law must be dealt with specifically, Considering the object of the enactment of the Act, it is a reasonable prohibition in respect of the persons who are convicted under the provisions."

The learned Judges of the Division Bench further held as follows :-

"The provisions of section 32-A makes it clear that the sentence of a person convicted under the provisions of this Act, shall not be suspended or remitted or commuted. No doubt, under the Prisons (Bombay Furlough and Parole) Rules 1959, even the person who has been sentenced for the offence punishable u/s 302 of the Indian Penal Code is entitled for suspension or remission or commutation of the sentence. However, the provisions of section 32-A of the N.D.P.S. Act deprives the convicts or prisoners of the above facility even if they are sentenced for a lesser period."

9. In Smt. Santosh v. Union of India, reported in 1998 Cr.L.J. 612 (Raj.) a Division Bench of the Rajasthan High Court held as stated herein :-

"Persons dealing with Narcotics Drugs and Psychotropic Substances constitute a distinct class than those charged with commission of offence under the Penal Act. Most of the offences under the Penal Act are against individuals while the offences under the N.D.P.S. Act are against the society as a whole and are preventive also it was only in this light that section 32-A cannot be considered to be discriminatory. Position to grant bail during trial cannot be considered similar after the person is convicted for an offence and for that analogy the provisions also cannot be declared ultra vires the Constitution."

10. In Berlin Joseph @ Ravi.. Appellants. State.. Respondent, reported in 1992 (1) Crim 1221 (Kerala) follow support to the above ratios.

11. The learned Advocate General has also pointed out that a catena of the case-laws to the position that since the grant of furlough and parole leave involves

elimination of suspension of sentence while granting a prisoner to come out of prison for any reason, it clearly comes within the teeth of section 32-A of the N.D.P.S Act, 1985 and therefore, as held in many case-laws, the petitioners are not entitled to claim grant of either furlough or parole leave and the like. No contra provision with reference to case-law has been made by the bar on the other side. As we have considered very meticulously section of law which has been spelt out very clearly with unambiguousness, the three concepts namely suspension, remission or commutation of the sentence for those who are convicted for offences under the N.D.P.S. Act 1985 except u/s 33 and 27 are not entitled to get relief of either parole or furlough leave, as prayed for in these petitions. It is for this reasoning and that the law has been settled thus, we have to reject these two writ petitions.

12. Accordingly for the aforesaid reasons, the writ petitions fail and is dismissed. Rule is discharged accordingly.

13. Petitions dismissed.