
(1997) 07 BOM CK 0124

In the Bombay High Court

Case No : Criminal Application No. 535 of 1997 In Cri Appeal No. 13 of 1997
with Cri Writ Petition No. 83 of 1997

Mohd. Ismail and etc.

APPELLANT

Vs

State of Maharashtra and another

RESPONDENT

Date of Decision : 17-07-1997

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 389
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 21, 22, 26, 27, 32A

Citation : (1998) BomCR(Cri) 336 : (1998) 1 BOMLR 377 : (1998) CriLJ 136 : (1998) 1 MhLj 25

Hon'ble Judges : S.P. Kulkarni, J;M.B. Ghodeswar, J

Bench : Division Bench

Advocate : H. Ahmed and Mr. Somalkar, for the Appellant; K.S. Dhote, Assistant Public Prosecutor and S.Y. Deopujari, for the Respondent

Judgement

S.P. Kulkarni, J.—In its legislative appearance, since 1989, S. 32-A of the Narcotic Drugs & Psychotropic Substances Act found it difficult to overcome its vulnerability in the Courts of law and it often allowed legal battles to be fought over the subject of ascertaining its true meaning, and also about what it precisely spoke. It could not easily protect itself from being misunderstood or stoutly protect itself from being chosen as a target worth shooting at.

2. Before us, in the present proceedings, a question that has been posed is as to whether the High Court, while entertaining an appeal against the conviction under the NDPS Act has the same power available to it under S. 389, Cr.P.C. to allow suspension of a sentence during the pendency of such appeal and to release the appellant/accused on bail. As a further corollary of this main issue, we have been required to record our observations as to on what occasions power of suspending sentence awarded under that Act would be available to the Appellate Court viz. the High Court.

3. Before we set ourselves to the task in the hand we must express the advantage we had of certain logic employed in the process, in deciding similar controversy posed before the various High Courts. We noticed that there could not be unanimity in the judicial opinions expressed on the point. The High Court of Kerala was required to constitute a full Bench to settle this controversy and opined that the High Court had no such power of suspension in cases other than the sentences awarded to a convict under S. 27 of the NDPS Act. Few years later, the High Court of Gujarat, when faced with a similar controversy, through its full bench observed that the High Courts full powers under S. 389, Cr.P.C. are not at all affected by virtue of S. 32-A of the NDPS Act, which, in the opinion of the Full Bench, aimed at restricting the power of the Executive Government not to suspend, remit or commute sentences of those found guilty under the NDPS Act.

4. We may respectfully enumerate various decisions of the High Courts which have been cited before us to persuade us to come to a conclusion that the High Court's power under S. 389, Cr.P.C. in relation to the offences under the NDPS Act remained unaffected inspite of the introduction of S. 32-A into the NDPS Act by the amendment of 1989. On behalf of the State of Maharashtra, the learned Additional Public Prosecutor contended that S. 32-A did not merely restrict the power to suspend etc. The sentences by the Executive Government alone, but also by the High Court. In support of these respective contentions in the main, the logic that has been applied in the various decisions, have been respectively advanced on both the sides. We, therefore, respectfully enumerate the decisions from which we had the advantage in approaching the problem with certain amount of a material, available for the advancement of the task before us :-

- (1) Jyotiben Ramlal Purohit v. State of Gujarat 1997 CLJ 1549.
- (2) Burlin Joseph v. State 1992 Drug Cases 98.
- (3) Oliver Fernandeo v. Assistant Collector of Madras 1990 DC 362 Mad.
- (4) Gyan Chand v. State of Rajasthan 1993 CLJ 422.
- (5) Sita Singh Vs. State of Punjab, .

5. There is also a reference made to some of the decisions of the Supreme Court as regards the general principles of interpretation and how, on certain occasions, having regard to the other provisions of the statute, the controllability of the non-obstante clause came to be considered in the context of the operation of other expressed provisions of a statute. In certain cases, the controlling power of non-obstante clause came to be ascertained to be such as not to control or restrict other expressed provisions of a statute. However, the extent to which the non-obstante clause in a particular provision operates is, thus, determinable by the rest of the provisions of a statute and that the legislative intention is at times disclosed to be such as not to restrict or check something which is expressly provided under the Act to be done than by the generality of non-obstante clause. A statutory situation may some time present a picture to interprets such non-

obstante clause in a manner that the operation and the effect of such expressed provision, having been positively made, could not be supposed to have been controlled by the non-obstante clause which, on certain occasions, also came to be considered as not a part of a statute, but the clause having been used in a particular provision by way of abundant caution. Keeping these principles in our minds, we first proceed to examine the relevant provisions of the NDPS Act as well as the Code of Criminal Procedure, if need be, to ascertain if S. 32A is aimed at covering suspension, etc. of sentences awarded under the Act by the executive Government in the manner of Ss. 432 and 433, Cr.P.C. alone, or it envisages to control even any action, whether before the executive Government or before the Court where from the question of suspension of sentences of imprisonment awarded under the Act, arises for consideration. If S. 32A of the Act is referable only to the executive power of the Government to suspend a sentence, then S. 32A would not be applicable to the judicial actions of the Courts in examining the question of suspension of sentences such as the one under S. 389, Cr.P.C. But if S. 32A of the Act has an over all intention to speak about any occasion for suspending a sentence, whether by the executive Government or by the Court, and S. 32A of the Act was to be considered by such executive Government or Judicial Authorities, then, in that event, what is the effect of S. 32A of the Act even on the power of the Court to suspend a sentence awarded under the NDPS Act, is the moot question that would fall for the consideration of this Court in the present matters.

6. We have not come across any direct authority on the point from the Supreme Court or from this Court except one single Bench's decision of this Court reported in (1996) 2 MLJ 230, *Bharatsingh v. State of Maharashtra*.

7. Our attention has also been invited on behalf of the State to the statement of objects and reasons, which precedes the amendment of 1989 made to the NDPS Act, introducing some of the provisions like Ss. 32A and 36A to 36D of that Act. With a view to pointing out why more stringent provisions were contemplated and intended by the Legislature to be introduced in the Act, a reference to the statement of objects for introducing the stringent amendments in 1989 in the form of Ss. 32A, 36A to 36D of the NDPS Act, the Legislature had taken into consideration the fact of persons accused under the NDPS Act, being released on bail on technical grounds. It appears clear that the effect of such release on bail, on technical grounds, has the immediate effect of person so released, going back to the society. Likelihood of such person again associating with the contraband activities in further dealing in the contraband things must have been considered to be a result frustrating the already stringent provisions of the NDPS Act. From this point of view, the release of a person who is accused of an offence, appears to be the anxiety of the Legislature in making stringent provisions by introducing new amendments to NDPS Act in 1989.

8. We, therefore, propose to look at the provisions themselves to ascertain the meaning of those provisions and whether there appears to be any legal anomaly

or there is an occasion for interpreting the provisions harmoniously.

9. While looking at S. 32A of the Act, it is noticed that there is some force in the very title of that section, which runs with a word "No" instead of a title being described as "Sentences awarded under the Act not to be suspended" It is further seen that there is a use of the word "any" in describing sentences awarded under this Act. The very title refers to word "any" which seems to be suggestive of the fact that any kind of sentence under the Act. The next feature which is noticeable to us is that a non-obstante clause is introduced into the body of the S. 32A of the Act with such a care that having said that irrespective of anything contained in the Code of Criminal Procedure, the non-obstante clause is followed by the further wordings "or any other law for the time being in force". This suggests legislative effort in increasing the strength of the provision and the effect of non-obstante clause on the subject dealt with by the said provision. Further reference to the body of the Section indicates that the subject of suspension, remission and commutation is specifically made referable to the two provisions of the Act namely S. 27 and S. 33. These two sections are, therefore, suggested to mean that they control the operation of the subject of suspension of sentence, etc. To our mind, this suggests that for the operation of the provisions of S. 32A, the provision advises to consult S. 27 and S. 33 of the Act as a first consideration. A reference to S. 33 would indicate that it refers to the powers of the Court to grant the benefit of release on probation to the offenders convicted under Ss. 26 and 27 of the Act. There is no reference to the offenders punished under any other provisions of that Act for the purposes of probation. We further notice that when S. 32A of the Act, thus, indicates for its operation the full mention of S. 33 of the Act, it suggests that while enacting provisions of S. 32A of the Act, there was a recognition to the power of the Court to grant the benefit of probation by Court and thus, in so far as that power is concerned. Which is to be exercised under S. 33 of the Act, S. 32A of the Act saves that power and suggests that the Court may grant benefit of probation to persons convicted under the provisions of Ss. 26 and 27 of the Act. It appears to us that a reason behind dealing with the subject of probation, as mentioned in S. 33 of the Act, was also the subject of a consideration under S. 32A of the Act. and that seems to us to be because of the actual effect of probation on the life of a convict. A convict who has been granted benefit of release on probation for his good conduct, is that whose liability to suffer sentence is suspended, of course, subject to his executing a bond for a good conduct. But, this direction of the Court has the effect in sending such a person back to the society. Under such kind of suspension of sentence with the umbrella of probation on his head, when such person goes back to the society, there is some amount of assurance about his good behaviour and, therefore, to that extent if the sentence awarded to the convicts under Ss. 26 and 27 of the Act, stood suspended because of probation, S. 32A seems to have anxiety to save the exercise of powers under S. 33 of the Act. The probation is virtual suspension of the sentence and such kind of suspension under S. 33 of the Act is not said to be controlled by S. 32A of the

Act. While drafting the provisions of S. 32A of the Act, therefore, the Legislature seems to have in its purview this power of the Court also which S. 32A of the Act desires to save in using the phraseology in S. 32A of the Act to the effect "..... but subject to the provisions of S. 33". The combined meaning of the provisions of S. 32A and S. 33 of the Act suggests that no suspension of sentence is permitted except that the Court may grant the benefit of probation to convicts under Ss. 26 and 27 of the Act and this power is not considered to be a separate or distinct power in the context of the suspension of sentence contemplated by S. 32A of the Act. In our view, therefore, S. 32A of the Act, thus, has a relation to the Court and proposes to envisage the power of the Court to suspend sentences, while enacting the provisions of S. 32A of the Act. Thus, the indirect result of suspension of a sentence under the machinery of probation also came to be considered by S. 32A of the Act. It does not become possible to imagine that a simple, direct and to the point power of suspension, enshrined in S. 389, Cr.P.C. must also have been lost sight of or it was a subject out of a legislative treatment under S. 32A of the Act, or that it was a subject left to be considered by implication without specificity or only under the generality of the provisions of S. 36B of the Act. What is the purpose of S. 32A in not mentioning to any authority which is to deal with the power of suspension, but only remembers the provisions of S. 27 and 33 of the NDPS Act ? On a plain reading of S. 32A of the Act, it does not appear possible to hold that S. 32A of the Act must not have in its mind Court's power to suspend sentences.

10. A reference to S. 37 of the NDPS Act reveals that remedy of bail was intended to be made more stringent. Section 37 of the Act also starts with a non-obstante clause stating that irrespective of whatever that has been provided under the Code of Criminal Procedure, no person accused of an offence punishable with imprisonment of five years or more shall be released on bail unless certain conditions are fulfilled before the Court. The first such condition is that a Public Prosecutor is to be given an opportunity to oppose and where he opposes, the Court is to be further satisfied before releasing a person on bail, that there existed reasonable grounds for believing that such person is not guilty of the offences. It is with this higher standard, that prima facie, there should be a telling circumstance which must exist, to satisfy the Court that the accused must not be guilty of an offence before he is considered eligible for bail. The next feature of S. 37 seems to be that the Court is also to be satisfied that during the period of his release on bail, he is not likely to commit any offence. All this, which is said in Sub-section 1 of S. 37, is further sought to be clarified by introducing Sub-sec. (2) to that Section. Sub-section 2 provides that the limitations on the power to grant bail, are in addition to the limitations mentioned under the Code or "any other law on the subject of granting bail".

11. We then seek to consider S. 36D of the Act and realise the particularity and the meticulous manner in which that Section spoke of when the special court is not constituted, but the Sessions Court in the area already functioned and the Sessions Court being authorised to take cognizance of an offence and to try the

cases under the NDPS Act, and in the meantime, if the Special Court comes to be constituted, the case the hearing of which already begins before the Sessions Court, need not be transferred. Similarly, a reference to S. 36A of the Act also suggests the, meticulous manner in which the person arrested under the Act was required to be dealt with by the Magistracy in the eventualities and the manners mentioned therein. Preservation of the procedure under S. 167 of the Code of Criminal Procedure was also the subject dealt with by the said Section with appropriate details.

12. We then refer to the relevant section which is a subject matter of debate, namely, S. 36B of the NDPS Act. Before that we have observed that a reference to S. 37 of the Act revealed to us a provision for the grant of bail specifically dealt without merely recognising the general power or the special power mentioned amongst the generality of the provisions of the Criminal Procedure Code. Section 37 of the Act intends to use again a non obstante clause when it begins to speak and informs its readers that irrespective of whatever is contained in the whole Criminal Procedure Code, a person accused of offence punishable with imprisonment for five years or more shall not be released on bail unless, firstly an opportunity to oppose is given to the Public Prosecutor and more important second condition is that the Court is to be satisfied that there exist reasonable grounds for believing that the person accused of such offence is "not guilty" of it. Refusal of bail is thus to a person accused of the offence in respect of whom "grounds" exist to reasonably believe that he is guilty of the offence or that he is likely to commit such offence while on bail. The subject of mere release on bail who is merely accused of such offence (and not actually found guilty of an offence on a regular trial) thus seems to us to have been so stringently considered not only subjecting the above two factors to the test of Court's satisfaction, but by taking further clarificatory care to save applicability of all limitations on granting bail as provided by the Criminal Procedure Code, and also in "any other law" for the time being in force. Limitations on power wherever they exist are preserved for being made applicable under the Act. This exercise was specifically made by adding Sub-section (2) to S. 37 of the Act.

13. There thus appears to us certain scheme involved in bringing about more stringent amendments in 1989 and one of the important situations which appeared to have inspired the Legislature to do so was the releases of the persons on bail on "technical grounds". Release having the direct effect in such person, accused of offence, going back to resume an undesirable clandestine activity, the Legislature seems to have become anxious to prevent it. There can be no other cause behind such statute desiring stringency. Section 37 of the Act is the provision whenever the subject of bail appears under the Act. Position of the one who is actually found guilty after a trial is different, in the sense that release of such person is a situation higher in the degree of anxiety as compared to the one who is not released even on the basis of existence of grounds to satisfy Court that a person accused of cannot be said to be "not guilty". Such is the language of the provisions, which beset S. 32-A of the Act.

14. In our view, once a person on trial is found guilty, his release, in going back to the society is not envisaged till the conviction cannot be said to be bad. There may not arise question as to whether power is withdrawn. Such a power is available or not even at a stage where on one hand there is a result of a concluded trial in finding that he is guilty and on the other hand any result that it is bad is yet to be reached ? The stage is when there exist grounds to proclaim that he is guilty, until the conviction operates and no occasion arises to consider him to be reasonably believed to be "not guilty", the Act does not contemplate release, so long as there exist ground to consider him guilty. We further see a power to suspend sentence of a person convicted and punished under S. 27 of the Act, duly saved. Emphasis appears to be more on the effect of release of a person convicted of a particular nature of offence. Hence looking to the harmony between the provisions, we are inclined to hold that the non obstante clause cannot be visualised to restrain the operation of the specific provisions of the NDPS Act. Section 32-A of the Act which could have referred to the executive government's power or to chapter XXXII has also not made any mention of it. That being not the position, the limit of suspension and consequential release seems to guide all authorities whosoever think of suspending sentence in exercise of judicial powers or executive government's power. It is not possible to visualise an executive door closed to a criminal under the Act but judicial door open to go back to the society so long as his stigma under the Act is not wiped out. With the stigma under the Act (other than under S. 27 of the Act) going back to the society through any door seems impermissible in the light of the other provisions of the Act referred to by us. We see no reason to read into S. 32-A of the Act something which could have been easily enacted but which does not exist in the provisions of that Section.

15. We respectfully feel persuaded by the Full Bench decision of the Kerala High Court to conclude that the power under S. 389 Criminal Procedure Code in respect of convicts other than those under S. 27 of the Act is not available for exercise in view of S. 32-A of the Act which limits that power, the exercise of which, as envisaged by S. 36B of the Act, is to be made "in so far as" the powers under the Criminal Procedure Code are considered "applicable". Powers under S. 389 Criminal Procedure Code are thus not fully applicable under the Act, i.e. in respect of convicts under S. 27 of the Act, in respect of releasing on probation of good conduct the convicts under Ss. 26 or 27 of the Act the powers of release and virtual suspension of sentence seems available to the Court and duly saved by Ss. 32A and 33 of the Act.

16. Various arguments advanced by the learned advocates in support of a proposition that power to grant suspension is available in respect of the respective appellant and the petitioner before us and the further nicety from decided cases which they pointed out in support of their main contention that the power to suspend sentence or to grant furlough exists, in our view, cannot be accepted. We have adequately recorded our reasons above. We also do not see any reason to be called upon to interpret S. 32A of the NDPS Act, the provisions

of which appear to us to be adequately clear. When this contention meticulously advanced by the learned Advocates in support of a proposition, than that in relation to the cases of the appellant and the petitioner asking for a relief of furlough cannot be accepted because, in our view, in relation to the convicts of the two types before us, the High Court will have no power to suspend the sentence under S. 389 of the Criminal Procedure Code. The power under S. 389 Cr.P.C. is limited and firstly it is available in relation to a convict under S. 27 of the Act. It is specifically available. Whether, however, under S. 33 of that Act, the Court desires to consider it fit and proper to grant the relief of probation of good conduct in relation to convicts under Ss. 26 and 27 of the Act, the virtual suspension of the sentence awarded to these two categories of convicts is available to the Court and in relation to no other convicts under the Act as provided by the very provisions of the NDPS Act. In the light of these views to which we have arrived, we now propose to deal with the two matters; one for the suspension of sentence under S. 389 of Cr.P.C. and the other in relation to the prayer for grant of furlough.

17. Thus, the contentions advanced on behalf of the appellant in Criminal Appeal No. 13 of 1997, that his request for suspending the sentence pending appeal, cannot be accepted. The appellant Mohd. Ismail Karim Patel Ansari has been convicted for possession of 87 gms. 500 milligrams of Brown Sugar along with certain cash amount of Rs. 9,758/-. The appellant was convicted for the offence punishable under S. 21 of the NDPS Act and sentenced to suffer R.I. for 10 years any to pay a fine of Rs. 1,00,000/- in default to suffer R.I. for two years. His sentence and conviction being not, thus, the one either under S. 27 of the Act as contemplated by S. 32-A of the Act, or there being no question before us as regards granting of probation of good conduct to the appellant, we see no ground to suspend his sentence. We are clearly of the view that the convict under S. 21 of the NDPS Act is not entitled to suspension in view of S. 32-A of the Act read with S. 389 Criminal Procedure Code. In respect of such convict the High Court has no power to suspend the sentence. His application for bail during the pendency of appeal and for suspension of the sentence will have to be and is hereby dismissed.

18. 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 obviously has effect of releasing the petitioner who has been convicted for the offence punishable under S. 22 of the NDPS Act. Grant of furlough is a remission of sentence. Remission as such in respect of a convict under S. 22 of the Act, is impermissible in view of S. 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.

19. The present judgment, thus, governs the disposal of the Criminal Application

No. 535 of 1997 in Criminal Appeal No. 13 of 1997, and Criminal Writ Petition No. 83 of 1997. Both stand disposed of accordingly.

20. Petition dismissed.