

(2011) 12 DEL CK 0244
In the Delhi High Court
Case No : Writ Petition (C) 5128 of 2011

Rajesh Kumar

APPELLANT

Vs

Govt. of NCT of Delhi

RESPONDENT

Date of Decision : 19-12-2011

Acts Referred:

Constitution of India, 1950 — Article 136
Criminal Procedure Code, 1973 (CrPC) — Section 389, 432

Citation : (2012) 2 Crimes 281

Hon'ble Judges : Rajiv Sahai Endlaw, J; A.K. Sikri, J

Bench : Division Bench

Advocate : Vivek Sood, for the Appellant; Pawan Sharma, Standing Counsel (Crl.) in W.P. (C) 5128 of 2011, Ms. Neha Kapoor, for Mr. Waziri for GNCTD in W.P. (C) Nos. 8810 and 8811 of 2011, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Sikri, Acting Chief Justice

1. In these writ petitions, the petitioners have challenged the vires of Clause-10 (under the heading ""Regular Parole"") of the Parole/Furlough

Guidelines, 2010.

2. Clause-10 which is the bone of contention in these petitions, reads as under :--

It is clarified that where an appeal of a convict is pending before the High Court, parole will not be granted since the convict can seek appropriate

orders from the High Court.

Thus, once the appeal against conviction is pending in this Court, Government is disentitled from considering the application for Regular Parole.

3. The grounds on which the validity of the aforesaid Clause is questioned are two fold. It is argued that regular parole is denied during pendency

of appeal before this Court for the reason of the convict being able to seek appropriate orders from this Court; however the considerations which prevail in granting suspension of sentence or interim bail during pendency of appeal are entirely different from considerations for grant of regular parole viz to maintain family and social ties, serious illness of a family member, critical conditions in the family on account of accident or death of a family member, marriage of any member of the family of the convict, delivery of a child by the wife of the convict if there is no other family member to take care of the spouse at home and serious damage to life or property of the family of the convict including damage caused by natural calamities. The petitioners contend that the right to regular parole on aforesaid considerations is a valuable right and pendency of appeal is no ground to deny the same and the convicts whose appeals are pending before this Court are being discriminated against.

4. Other contention raised is that though pendency of appeal in the High Court disentitles the convict to regular parole but if the appeal is pending in the Supreme Court challenging the conviction order, no such embargo is laid down.

5. Learned counsel for the respondent, on the other hand, has drawn our attention to the provisions of Section 389 of the Code of Criminal Procedure, 1973 which deals with suspension of sentence pending the appeal and release of the convict on bail. It inter alia provides that the appellate Court may for the reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended if he is in confinement, that he be released on bail. On this basis, it is argued that when the matter is pending before the High Court, the High Court can deal with the situation and the convict is not rendered remediless, this is the genesis and the rationale behind Clause-10.

6. The Supreme Court in *Sunil Fulchand Shah Vs. Union of India and Others*, though holding that parole has a different connotation than bail, yet observed that substantial legal effect of both, bail and parole is the release of a person from detention or custody. It was further observed that there are no statutory provisions dealing with the question of grant of parole and grant of parole generally speaking is an administrative action; parole does not suspend the sentence or the period of detention but provides conditional release from custody and changes the mode of undergoing

sentence.

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 ""convict can seek appropriate orders from the High Court"" 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 ""appropriate orders from the High Court"" 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.

8. We are of the view that the period when the Court is in seisin of the case, any other executive authority ought not to be allowed to pass any

order with respect to what the Court is seized of. We, in this regard are guided by K.M. Nanavati Vs. The State of Bombay, which was

concerned with the exercise of power by the Executive to suspend the sentence during the pendency of the matter before the Supreme Court. It

was held that suspension of the sentence when the Supreme Court was in seisin of the case could have been granted by the Supreme Court itself

and if in respect of the same period the Executive were also to be held to have the power to suspend 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 which could

not have been intended.

9. We may however notice that a similar view taken by the Division Bench of the Bombay High Court was set aside by a Full Bench of that Court

in *S. Sant Singh " Pilli Singh Vs. Secretary, Home Department, Government of Maharashtra and Others*, It was held that the considerations in grant of bail and parole are different and the two have different connotations and operate in different spheres; that the powers of the Executive of parole can be exercised notwithstanding refusal of bail or suspension of sentence; the right of parole is attracted as soon as a person is in prison governed by the Prisons Act, 1894 irrespective of the pendency of the appeal. *K.M. Nanavati (supra)* was distinguished by holding that the same dealt with the power of the Government u/s 432 Cr.P.C. to remit or suspend the sentence and has no application to parole which does not fall under remission of sentence.

10. With due respect to the Full Bench of the Bombay High Court, we are unable to concur. The ratio of *K.M. Nanavati (supra)* is that the

Executive is barred from granting the same relief which the Court is entitled to, when seized of the matter and possibility of a conflict if the same

were to be permitted. Once the said ratio is found to be applicable to a situation as before us, we fail to see as to how it matters whether the

conflict is owing to exercise of power by the Executive u/s 432 Cr.P.C. or to grant parole. What we are concerned with is that what the Court has

denied to the convict/accused cannot be permitted to be granted by the Executive and the same if permitted would be totally subversive of rule of

law. We may notice that the Supreme Court in *Rakesh Kumar Pandey Vs. Udai Bhan Singh* (2008) 17 SCC 764 deprecated the High Court for

releasing an accused whose bail had earlier been cancelled by the Apex Court, in the garb of parole. It would thus be seen that the Courts have

always looked down upon something which the Court seized of the matter has refused, being allowed to be done otherwise. As noticed above, the

effect of both bail/suspension of sentence and parole is the release of person from detention or custody. If this Court seized of the appeal, in the

facts deems it proper to keep the accused/convict behind bars, the Executive cannot be permitted to allow such sentence to run outside the bars.

11. It may also be noticed that the Supreme Court in *Kashmira Singh Vs. The State of Punjab*, itself had suggested that so long as the Court is not

in a position to hear the appeal within a reasonable time, the Court should ordinarily, unless there are cogent reasons for acting otherwise, release

the accused on bail, of course having regard to the gravity of the offence. For this reason also, we are of the view that there is nothing prohibiting

this Court when seized of the appeal from granting bail or suspending the sentence on grounds akin to those for grant of parole.

12. Insofar as challenge to the conviction order in the Supreme Court is concerned, the difference is that such an order is challenged by filing SLP

under Article 136 of the Constitution and Leave to appeal has to be obtained whereas filing an appeal in the High Court is a statutory right given to

a convict; therefore the two situations are not akin to each other.

13. Subject to the aforesaid clarification given by us, insofar as the prayer made in this petition seeking quashing of Clause-10 is concerned, we do

not find any merit therein and the same is accordingly dismissed.