

(2019) 12 DEL CK 0437

In the Delhi High Court

Case No : Criminal Writ Petition No. 2428 Of 2018

Ravinder Singh

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 20-12-2019

Acts Referred:

Constitution Of india, 1950 — Article 72, 161
Indian Penal Code, 1860 — Section 45, 53, 376, 377, 506
Code Of Criminal Procedure, 1973 — Section 432, 433, 433A
Delhi Prison Act, 2000 — Section 71(2)(xix)

Citation : (2019) 12 DEL CK 0437

Hon'ble Judges : Vibhu Bakhru, J

Bench : Single Bench

Advocate : Madhav Khurana, Trisha Mittal, Riya Arora, R. S. Kundu, Piyush Singhal, Ashish Aggarwal

Final Decision : Allowed

Judgement

Vibhu Bakhru, J

1. The petitioner has filed the present petition, inter alia, impugning an order dated 23.02.2018 passed by the Director General of Prisons, Prison Headquarters, Tihar, New Delhi.
2. By the impugned order, the petitioner's request for furlough was denied on the ground that the sentence awarded to the petitioner specifically provided that he shall not be granted clemency, till he spends twenty years in prison. Thus, the only question to be addressed is whether the respondent (competent authority) is precluded from considering the petitioner's application for furlough on account of the sentence awarded to him, which proscribes the grant of clemency prior to the petitioner serving twenty years in prison.
3. The petitioner was convicted of offences punishable under Sections 376/377/506 of the Indian Penal Code, 1860 (IPC). He was sentenced to

undergo rigorous imprisonment for life for the offence under Section 376 of the IPC and was awarded a similar sentence for the offence under Section 377 of the IPC. He was sentenced to serve rigorous imprisonment for a period of two years for the offence punishable under Section 506 of the IPC. In addition, the petitioner was also imposed a fine of Rs. 25,000/- each, for the offence under Sections 376 and 377 of the IPC and in default of payment of the fines, to serve a further period of simple imprisonment for a further period of six months for each default. He was imposed a fine of Rs. 10,000/- for the offence under Section 506 of the IPC and in default of payment of such fine, directed to serve simple imprisonment for a further period of three months.

4. The Trial Court directed that all sentences awarded to the petitioner would run concurrently. In addition, the Trial Court also directed that "the convict shall not be given any clemency by the State before he spends atleast 20 years in jail".

5. The appeal preferred by the petitioner against his conviction and the sentence awarded to him was rejected. This Court is informed that the Special Leave Petition preferred by the petitioner in the Supreme Court, against the order of this court confirming the petitioner's conviction and sentence awarded to him, was also dismissed.

6. The petitioner's request for furlough has been denied, essentially, for the reason that it would run contrary to the sentence awarded by the Trial Court, which proscribes grant of any clemency prior to the petitioner serving twenty years in jail.

7. The learned counsel appearing for the petitioner submits that even though the petitioner may not be entitled to clemency, he would be entitled to parole or furlough, as granting the same does not amount to grant of any clemency to the petitioner.

8. Mr Kundu, learned ASC appearing for the State states that the use of the word 'clemency' in the order of sentence ought to be considered as 'remission'. Therefore, the directions that the petitioner not be granted clemency must be read to mean that the Trial Court has proscribed granting any reprieve to the petitioner.

9. The learned counsel appearing for the petitioner has referred to the decision of the Madras High Court in *Maddela Yerra Chennagadu & Ors. v. State*: (1954) MWN (Cri) 101 and the decision of the Supreme Court in *Union of India v. V. Sriharan alias Murugan & Others*: (2016) 7 SCC 1 in support of his contention that the expression 'clemency' must be read to mean pardon as is granted by the State in exercise of its sovereign powers.

10. Article 72 of the Constitution of India confers upon the President the power to grant pardons, reprieves, respites or remissions of punishment, remit or commute the sentence of any person convicted of an offence whereby punishment or sentence (a) in all cases where the punishment or sentence is by

a Court Martial; (b) in all cases where punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends; (c) in all cases where the sentence is a sentence of death.

11. Article 161 of the Constitution of India empowers the Governor of a State to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which executive power of the State extends.

12. It is well settled that the orders passed by the court awarding the sentence does not, in any manner, impinge with the powers of the President or a Governor, as available under Articles 72 or 161 of the Constitution of India.

13. In *State of Haryana and Others v. Jagdish*: (2010) 4 SCC 216, the Supreme Court has observed as under:-

"28. Nevertheless, we may point out that the power of the sovereign to grant remission is within its exclusive domain and it is for this reason that our Constitution makers went on to incorporate the provisions of Article 72 and Article 161 of the Constitution of India. This responsibility was cast upon the Executive through a constitutional mandate to ensure that some public purpose may require fulfilment by grant of remission in appropriate cases. This power was never intended to be used or utilised by the Executive as an unbridled power of reprieve. Power of clemency is to be exercised cautiously and in appropriate cases, which in effect, mitigates the sentence of punishment awarded and which does not, in any way, wipe out the conviction. It is a power which the sovereign exercises against its own judicial mandate. The act of remission of the State does not undo what has been done judicially. The punishment awarded through a judgment is not overruled but the convict gets benefit of a liberalised policy of State pardon. However, the exercise of such power under Article 161 of the Constitution or under Section 433-A Cr.PC may have a different flavour in the statutory provisions, as short-sentencing policy brings about a mere reduction in the period of imprisonment whereas an act of clemency under Article 161 of the Constitution commutes the sentence itself."

14. The Court further observed that the clemency power of the executive under Articles 72 or 161 of the Constitution remains unfettered and is not restricted by the provisions of Section 432 and 433A of the Cr.P.C. The relevant extract of the said judgment, is set out below:-

"38. In view of the above, it is evident that the clemency power of the Executive is absolute and remains unfettered for the reason that the provisions contained under Article 72 or 161 of the Constitution cannot be restricted by the provisions of Sections 432, 433 and 433-A CrPC though the Authority has to meet the requirements referred to hereinabove while exercising the clemency power. To say that clemency power under Articles 72/161 of the Constitution cannot be exercised by the President or the Governor, as the case may be, before a convict completes the incarceration period provided in the short- sentencing policy, even

in an exceptional case, would be mutually inconsistent with the theory that clemency power is unfettered.

15. In *Maru Ram v. Union of India* : (1981) 1 SCC 107, the Constitution Bench of the Supreme Court, inter alia, clarified that even if a life convict does not meet the requirement under the remission rules, the President and the Governor of a State are not prohibited to exercise their powers of clemency under Articles 72 and 161 of the Constitution of India.

16. In *State of Uttar Pradesh v. Sanjay Kumar*: (2012) 8 SCC 537, the Supreme Court had clarified as under:

".....while passing an order of punishment, the Court deals with the powers of the State under the provisions of the CrPC, the Prisons Act and the Rules framed by the States, and not with the clemency power, that is, the power of the Sovereign in this respect."

The Court had founded its observations on the concept of separation of powers between the legislature, the executive and the judiciary.

17. In *V.Sriharan @ Murugan* (supra), the Supreme Court held as under:-

"177. Imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code only means imprisonment for the rest of the life of the convict. The right to claim remission, commutation, reprieve, etc. as provided under Article 72 or Article 161 of the Constitution will always be available being constitutional remedies untouchable by the Court."

18. It is apparent from the above that the direction of the Trial Court that the petitioner shall not be given any clemency by the State before he spends at least twenty years in jail does not, in any manner, effect the powers of the President or the Governor to grant clemency in exercise of the powers under Articles 72 and 161 of the Constitution of India.

19. The word "clemency" is defined in *P. Ramanatha Aiyar's Advanced Law Lexicon*, 3rd Edition, Volume I, p.831 as under:-

"Clemency. Disposition to treat with favour and kindness, to forgive and spare offenders; tenderness. The power of the president or a governor to pardon or commute a sentence."

20. The *Oxford English Dictionary*, 2nd Edition, Volume III (Clarendon Press), p. 428, defines the expression "Clemency" as under:-

"1. Mildness or gentleness of temper, as shown in the exercise of authority or power; mercy, leniency.

2. Mildness of weather or climate; opposed to inclemency, severity."

21. The word 'clemency' is defined in the *Black's Law Dictionary*, 8th Edition, p. 269, as under:-

"clemency: Mercy or leniency; esp., the power of the President or a governor to pardon a criminal or commute a criminal sentence."

22. It does appear from the above that the word 'clemency' is usually used in the context of the power of the President or a Governor to pardon or commute a convict's sentence. Parole or furlough granted to a convict is not described as grant of 'clemency'. Although in a wider sense the word 'clemency' may also include any form of leniency or reprieve, this Court is of the view that in the context of the sentence awarded to the petitioner, the prohibition for grant of any clemency till the petitioner has served twenty years of imprisonment is an expression of the Trial Court's decision to deny the petitioner any pardon or commutation of the sentence as is exercised by the President or the Governor under Articles 72 or 161 of the Constitution of India. However, as noted above, the directions of the Trial Court cannot fetter the exercise of any such power.

23. Section 432 of the Cr.P.C. also provides for remission of sentence and Section 433 of the Cr.P.C. provides that the appropriate Government may commute the sentence, in certain cases. Section 432 of the Cr.P.C. is set out below:-

"432. Power to suspend or remit sentences. (1) When any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without Conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

(2) Whenever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government may require the presiding Judge of the Court before or by which the conviction was had or confirmed, to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists.

(3) If any condition on which a sentence has been suspended or remitted is, In the opinion of the appropriate Government, not fulfilled, the appropriate Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer, without warrant and remanded to undergo the unexpired portion of the sentence.

(4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.

(5) The appropriate Government may, by general rules or special orders give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with:

Provided that in the case of any sentence (other than a sentence of fine) passed

on a male person above the age of eighteen years, no such petition by the person sentenced or by any other person on his behalf shall be entertained, unless the person sentenced is in jail, and-

(a) where such petition is made by the person sentenced, it is presented through the officer in charge of the jail ; or

(b) where such petition is made by any other person, it contains a declaration that the person sentenced is in jail.

(6) The provisions of the above sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law which restricts the liberty of any person or imposes any liability upon him or his property.

(7) In this section and in section 433, the expression "appropriate Government" means-

(a) in cases where the sentence is for an offence against, or the order referred to in sub-section (6) is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government ;

(b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed."

24. Section 433A of the Cr.P.C. expressly provides that notwithstanding anything contained in Section 432 of the Cr.P.C., a prisoner who has been sentenced to serve life imprisonment would not be released from prison, unless he serves fourteen years of imprisonment. Thus, Section 433A of the Cr.P.C. curtails the power of appropriate Government to grant remission in certain cases. Section 433A of the Cr.P.C. is set out below:-

"433A. Restriction on powers of remission or Commutation in certain cases. Notwithstanding anything contained in section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commuted under section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment."

25. Even if the word 'clemency' as used in the order sentencing the petitioner is construed in a wider sense so as to encompass remission as contemplated under Section 432 of the Cr.P.C., the same would not exclude consideration of the petitioner's application for furlough/parole. Furlough is granted to a convict as a reward for good behaviour in terms of the Delhi Prison Rules, 2018. Section 71(2) (xix) of the Delhi Prison Act, 2000 empowers the Government to make rules for "rewards for good conduct". Grant of furlough as a reward of good conduct is not covered within ambit of remission as contemplated under Section 432 of the Cr.P.C.

26. In this regard, the decision of the Supreme Court in Maru Ram (supra) is relevant. The Supreme Court considered the import of Section 433A of the Cr.P.C. which proscribed release of any person sentenced for imprisonment of life, unless he had served at least fourteen years of imprisonment. The Supreme Court held that powers under Section 433A of the Cr.P.C. had been enacted to restrict the exercise of powers on reduction of sentence under Section 432 of the Cr.P.C. The Court had also referred to Clause 33 of the Notes on Clauses, which provided the explanation for insertion of Section 433A in the Cr.P.C. The Court (Krishna Iyer, J.), inter alia, concluded as under:-

"(14) Section 433-A does not forbid parole or other release within the 14-year span. So to interpret the section as to intensify inner tension and intermissions of freedom is to do violence to language and liberty."

27. Thus, even if it is accepted that the direction of the Trial Court not to grant clemency to the petitioner until he had served twenty years of imprisonment, should be construed as a direction to prohibit grant of remission under Section 432 of the Cr.P.C., the same would still not preclude the petitioner from seeking parole or furlough.

28. There may be cases where the Court may proscribe the grant of any remission either under the Cr.P.C. or under 'the remission system'. It is not necessary to decide whether a blanket prohibition for grant of any remission of any kind would also include furlough as the said issue does not arise in the present case. In the present case, the Trial Court had prohibited the grant of clemency to the petitioner unless he had served twenty years of imprisonment. This Court is unable to accept that the said order can be construed as prohibiting the petitioner from seeking furlough, or precluding the Competent Authority for considering grant of furlough, which is granted as a reward for good conduct.

29. In view of the above, the petition is allowed and the impugned order dated 23.02.2018 passed by the Director General of Prisons refusing grant of first spell of furlough to the petitioner, is set aside.

30. The competent authority shall re-consider the petitioner's application for furlough in accordance with law.