

(1990) 08 PAT CK 0021
In the Patna High Court
Case No : C.W.J.C. No. 140 of 1988

Satish Kr. Gupta and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 22-08-1990

Acts Referred:

Constitution of India, 1950 — Article 14, 154, 166
Criminal Procedure Code, 1973 (CrPC) — Section 428, 432
Penal Code, 1860 (IPC) — Section 124A, 326, 363A, 364, 370

Citation : (1991) 39 BLJR 88 : (1991) CriLJ 726 : (1990) 2 PLJR 549

Hon'ble Judges : S. Ali Ahmad, J; Ram Nandan Prasad, J

Bench : Division Bench

Advocate : Ambika Pd, for the Appellant; P.N. Jha, G.P. II, for the Respondent

Judgement

Ram Nandan Prasad, J.—All the petitioners are convicts confined in the Central Jail, Bhagalpur, and are undergoing sentence of imprisonment for life. On the occasion of the birth centenary of Deshratna Dr. Rajendra Prasad, the First President of India, the Government of Bihar in exercise of its powers u/s 432(i) of the Code of Criminal Procedure (hereinafter referred to as the Code) issued a notification dt. 25th of Nov. 1983 (Annexure-1) granting remission to convicted prisoners. This notification was published under memo No. 13104 dt. 25th Nov. 1983. Some days later Inspector General of Prisons Bihar, under his letter No. 9172 Jail dt. 1st December, 1983 (Annexure-5) sought to explain and clarify the government order of remission as contained in Annexure-1 and further another clarification was issued by the Law Secretary under his office letter No. 198 Jail dt. 7-1-84 (Annexure-2). The prayer in this application is to quash certain portions of the government's order of remission as contained in Annexure-1 on the ground that they are discriminatory and violative of Article 14 of the constitution inasmuch as a distinction in granting remission has been made between lifers (those undergoing imprisonment for life) and other convicts and further prayer is to quash Annexures 2 and 5 as being ultra vires and beyond the competence of the authorities issuing them.

2. The order of remission as contained in Annexure-1 states that no remission will be granted to persons convicted of offences u/s 124A (Seditions), 363A, 364, 370, 372, 376, 395 and 396 of the Penal Code. It further lays down the extent to which the remission is to be granted and the manner in which it is to be calculated for different types of convicts. Only the first two clauses of the Notification Annexure-I are relevant for determining the issues raised in this writ application. These two Clauses are to the following effect:--

Ka) For persons undergoing a sentence of imprisonment for life, remission will be at the rate of three months for each completed year of confinement.

Kha) For those prisoners who are not undergoing a sentence of imprisonment for life, the remission will be at the rate of three months for each year of the sentence imposed.

The order of remission Annexure-I was made operative from 3-12-1983.

3. Annexure-5 is the letter sent by the I.G. Prisons, Government of Bihar to all jails in the state purporting to clarify and provide guidelines for interpreting the different clauses of Annexure-I. With regard to the first the clauses the clarifications are as follows:--

In the case of lifers i.e. Clause (ka) of Anx. I the remission shall be calculated at the rate of three months for each completed year of confinement from the date of conviction up to 3-12-83 and proportionate remission for the period which is less than one year and in calculating the remission the period spent as under trial prisoner will not be taken into account and as regards the cases coming under Clause (kha) i.e. cases of prisoners not sentenced to imprisonment for life, the letter states that the remission shall be calculated at the rate of three months for each year of confinement in the jail from the date of conviction and for the period which may be less than one year, the remission shall be calculated on pro-rata basis. It further indicates that no remission shall be calculated for the period spent in completely prior to the date of conviction.

The letter issued by the Law Department of the Government of Bihar, Annexure-2 also seeks to make several clarifications but those which are relevant for our consideration are contained in Clauses (5) and (6) of this letter. Clause (5) states that the benefit of remission will be available only to such convicts who are in custody on the relevant date 3-12-1983 and not to such convicts who are on bail at that time and Clause (6) of this letter states that if the convict has been allowed set off the period of set off u/s 428 shall not be taken into account in calculating the period of confinement for the purpose of giving remission. The propriety and legality of the aforesaid clarifications as contained in Annexures 2 and 5 have been challenged.

4. The learned counsel for the petitioners has raised the following points for considerations and determination by the Court:--

i) Whether grant of remission to lifers on the basis of period of confinement and

to non-lifers on the basis of the period of the sentence imposed amounts to discrimination and is violative of Article 14 of the Constitution.

ii) Whether it is valid and legal to exclude the period of set off in calculating the remission on the basis of period of actual confinement.

iii) Whether the exclusion of prisoners who have been convicted and sentenced to imprisonment but who happen to be on bail on the relevant date 3-12-83, presumably because their appeal or revision may be pending is discriminatory and violative of Article 14 of the Constitution.

iv) Whether persons who are undertrial prisoners on the relevant date and are convicted subsequently are also entitled to remission.

5. In course of arguments the learned counsel for the petitioners did not press the 4th point. Obviously this contention does not have any substance because Section 432 states that "when any person has been sentenced to punishment for an offence the government may remit the whole or any part "of the punishment to which he has been sentenced" An undertrial prisoner cannot be regarded as a person who has been sentenced to punishment for an offence" and, therefore, any remission granted in exercise of the powers u/s 432 of the Code can have no application to such persons.

6. While making his submission, the learned counsel for the petitioners accepted that the classification of prisoners into lifers and non-lifers for the purpose of remission cannot be said to be unintelligible. But his argument is that though such classification may be technically sustainable, it is inequitable and against the spirit of the law and the very negation of the social objective to be achieved by the grant of remission. In this context, he pointed out that offences against the sovereignty and security of the State or those which involve heinousness and moral turpitude (offence of sedition, rape, dacoity, kidnapping etc.) have been kept out from the scope of remission in the notification itself, and as such as regard criminal intent and motivation there is not much of a difference between lifers and non-lifers. He elaborates his argument by submitting that in cases of causing serious injury to the victim the offence may become punishable u/s 326 of the Penal Code in which case hardly over a sentence of imprisonment for life is imposed while in respect of others who may inflict similar injury in similar circumstances the offence may amount to murder if the victim due to lack of medical facilities ultimately succumbs to the injury. He, therefore, contends that for the purpose of remission the differentiation between lifers and non-lifers is neither rational nor equitable. He has argued that the very purpose of remission is to make the prisoner feel and realise that he can bury his past and will have a chance to start a new chapter in life so-as-to become acceptable to society. Putting forth his argument skillfully the learned counsel quoted before us a passage which he says is from the book. "From the Reading Gaol" written by Oscar Wild while the author was himself in prison. The quotation he placed before us is "something was dead in each of us and what was dead was hope".

Remission, therefore, is in the nature of social defence and such defence, according to the learned counsel, is all the more necessary in the case of lifers than non-lifers, because the former are surrounded with deeper gloom and darkness and have, therefore, to be treated more liberally so that the flicker of hope does not get extinguished. In this connection, he has drawn our attention to the observations of the Supreme Court in the case reported in Bhagirath Vs. Delhi Administration, . In this case their Lordships were considering the question whether set off could be made applicable to persons sentenced to imprisonment for life. I will have occasion to refer to this aspect later. The passage on which the learned counsel for the petitioners has placed reliance is as follows at page 1183 of 1985 Cri LJ:--

"Equity sustains law and the twin must meet. They cannot run in parallel streams. Equitable considerations must have an important place in the construction of beneficent provisions, particularly in the field of criminal law. To exclude such considerations is to denude law's benevolence of its true and lasting content..... As we have indicated earlier, graver the crime, longer the sentence and longer the sentence, greater the need for set offs and remissions. Punishments are no longer retributory. They are reformative".

The learned counsel has urged that the distinction made between lifers and non-lifers in the matter of remission in the notification Annexure-I runs counter to the guidelines provided by the Supreme Court in the above case. He has urged that in view of what has been laid down by the Supreme Court, the classification if any should have been otherwise and the lifers should have been given greater remission than non-lifers.

7. The learned counsel has buttressed his argument by drawing attention to a similar notification issued in Sept. 1970 (Annexure-3) granting special remission on the occasion of the Gandhi Centenary Celebration. On that occasion no distinction was made between lifers and non-lifers and the yardstick of remission was the same for both. He has, therefore, contended that there was absolutely no rationale in making such a distinction in the notification Annexure-I.

8. The submissions of the learned counsel are certainly impressive and attractive. But it has to be borne in mind that grant of remission is a matter of policy and it is for the executive branch of the government to decide as to when, to what extent and in what manner remission is to be granted. The policy decision may be based on so many factors viz prevailing general law and order situation, the impact of remission on social life and social security at the relevant time and the type of prisoners to be covered by it. Further if the reformative measures are already underway in the prisons themselves perhaps immediate release may not be desirable or beneficial and thus remission may have to be turned (sic) accordingly. It is not for the judiciary to enter into this arena. Indeed, where the judicial function ends by awarding conviction and imposing sentence, it is there that the executive function begins and it is then for the latter to consider the question of suspension, remission and commutation of

sentences. Obviously, therefore, the courts cannot give any direction in the matter of policy which is purely within the executive domain of the government. If the government decides to categorise the prisoners for grant of remission and the classification is rational and intelligible and does not discriminate between the same class of prisoners, the court is not competent to say that such classification should not be made or that the same yardstick of remission be made applicable to each class. Even if it may appear that perhaps it would have been desirable to make no distinction between lifers and non-lifers and notification on the same lines as was done at the time of the Gandhi Centenary Celebration could have been issued still the court cannot issue any directive. The degree to which judicial scrutiny may extend has been succinctly stated by the Supreme Court in the case of *The State of Jammu and Kashmir Vs. Shri Triloki Nath Khosa and Others*, . In paragraph 32 of the judgment the Supreme Court has observed as follows at page of AIR 1974 SC 11 :--

"Judicial scrutiny can therefore extend only to the consideration whether the classification rests on a reasonable basis and whether it bears nexus with the object in view. It cannot extend to embarking upon a nice or mathematical evaluation of the basis of classification for were such an inquiry permissible it would be open to the Courts to substitute their own judgment for that of the legislature or the rule-making authority on the need to classify or the desirability of achieving a particular object.

What is desirable is not (sic) justifiable. It cannot be denied that convicts sentenced to imprisonment for life form a separate and distinct class by themselves as compared to those who have not been sentenced to imprisonment for life. Therefore, the classification made in the notification Annexure-I is neither irrational nor improper and it cannot, therefore, be said to be violative of Article 14 of the Constitution. It has to be remembered that in every classification there is inherently some sort of discrimination because all persons are not placed in the same footing. In *T. N. Khosa's* case (supra) the Supreme Court has observed as follows:--

"Discrimination is the essence of classification and does violence to the constitutional guarantee of equality only if it rests on an unreasonable basis".

So the classification or the resulting discrimination has to be judged on the touch stone of rationality and reasonableness. The classification in Annexure-I satisfies this criteria. In this context, the following passage from the decision of the Supreme Court in the case of *Mohammad Shujat Ali and Others Vs. Union of India (UOI) and Others*, occurring in paragraph 23 of the judgment is illuminating at page : AIR 1974 SC 1652 :--

"The Constitutional Code of equality and equal opportunity, however, does not mean that the same laws must be applicable to all persons. It does not compel the state to run "all its laws in the channels of general legislation". It recognises that having regard to differences and disparities which exist among men and

things they cannot all be treated alike by the application of the same laws. "To recognise marked differences that exist in fact is living law; to disregard practical differences and concentrate on some abstract identities is lifeless logic".

In conclusion, therefore, I find that the placing of life convicts in a separate group distinct from those who have not been sentenced to imprisonment for life and fixing separate yardsticks for remission to the two grounds is not violative of Article 14 of the Constitution. The petitioner who are life convicts cannot, therefore, claim that they should be given remission on the same lines as non-lifers.

9. The next point for consideration is whether the period of set off should be treated as part of the period of confinement of the prisoner who is undergoing the sentence imposed upon him and whether the set off period should be included in computing the quantum of remission. The provision contained in Section 428 of the Code states that the period of detention prior to the date of conviction shall be set off against the term of imprisonment imposed on him and the liability of the person to undergo imprisonment shall be restricted to the remainder, if any, of the term of imprisonment imposed on him. It is obvious, therefore, that the statute mandates that set off must be regarded as part of the sentence imposed upon and, therefore, set off period is also a period of confinement. The contention of the learned counsel that the set off period should not be excluded in computing the remission must, therefore, be upheld.

10. There is no indication in Annexure-I that the set off period will not be treated as part of the period of confinement. The exclusion of the set off period has been indicated in the letters issued by the law department Annexure-2 by way of clarification of the provisions of the notification Annexure-I. This clarification, however, has the effect of modifying and altering the substantive part of the notification. This the Law Secretary is not competent to do. It may be noted that the notification Annexure-I is an order issued by the Governor in exercise of the executive power of the State, through a subordinate officer in accordance with rules of business. This order of the government could not be altered or modified by any officer by issuing letters of clarification. The relevant provision in this regard is contained in Article 154 of the Constitution which runs as follows:--

"The executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution".

Article 166 provides how the executive power is to be done exercised and the conduct of government business is to be done. Article 166 is as follows:--

"Conduct of business of the Government of a State :--

1. All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.

2. Orders and other instruments made and executed in the name of the Governor

shall be authenticated in such manner as may be specified in rules to be made by the Governor and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.

3. The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion".

The Notification Annexure-I mentions that the same has been issued under orders of the Governor "Bihar Rajyapal ke Adesh Se". The Law Secretary was, therefore, not at all competent to alter or modify any portion of the notification Annexure-I by means of any letter of clarification Annexure-2 and like-wise, I.G. Prisons also is not competent to make any alteration in the notification Annexure-I through his letter of clarification Annexure-5. Thus to the extent these letters Annexures 2 and 5 impinge upon the substantive provisions of Annexure-I and seek to alter its content, they are ultra vires and without jurisdiction. It follows, therefore, that the set off period will be treated as part of the period of confinement for the purpose of calculating the remission in accordance with the yardstick laid down in Annexure-I.

11. The learned counsel also submitted that the benefit of set off would be available to prisoners who have been sentenced to imprisonment for life just as it is available to other convicts. He is right. This contention is fully supported by the decision of the Supreme Court in Bhagirath Vs. Delhi Administration, . Section 428 of the Code postulated that set off will be applicable when an accused person has on conviction "been sentenced to imprisonment for a term". Earlier in the case of Kartar Singh and Others Vs. State of Haryana, the apex court had held that imprisonment for life is not imprisonment for a term. But in its later judgment Bhagirath Vs. Delhi Administration, the apex court overruled its earlier decision and held that sentence of imprisonment for life is also imprisonment for a term and it is "the term of his life". In this context, the observations of the apex court in paragraph 7 of the judgment are significant and are quoted below at page 1181 of Cri LJ 1985:--

"We see but little warrant for qualifying the word "term" by the adjective fixed which is not to be found in Section 428. The assumption that the word "term" implies a concept of ascertainability or conveys a sense of certainty is Contrary to the letter of the law, as we find in that Section. Even the marginal note to the Section does not bear out that assumption. It rather belies it. And, marginal notes are now legislative and not editorial exercises. The marginal note of Section 428 shows that the object of the Legislature in enacting the particular provision was to provide that the period of detention undergone by the accused should be set off against the sentence of imprisonment" imposed upon him. There are no words of limitation either in the section or in its marginal note which would justify restricting the plain and natural meaning of the word "term"

so as to comprehend only sentences which are imposed for a fixed or ascertainable period".

The Supreme Court further observed in paragraph 8 at page of 1985 Cri LJ 1181:--

"To say that a sentence of life imprisonment imposed upon an accused is a sentence for the term of his life does offend neither to grammar nor to the common understanding of the word "term". To say otherwise would offend not only against the language of the Statute but against the spirit of the law that is to say, the object with which the law was passed. A large number of cases in which the accused suffer long undertrial detention are cases punishable with imprisonment for life. Usually those who are liable to be sentenced to imprisonment for life are not enlarged on bail. To deny the benefits of Section 428 to them is to withdraw the application of a benevolent provision from a large majority of cases in which such benefit would be needed and justified."

Thus in the above case the Supreme Court held that imprisonment for life is also imprisonment for a term and, therefore, set off as postulated in Section 428 of the Code will be applicable to convicts sentenced to imprisonment for life. In this context it may be noted that normally a sentence of imprisonment for life is reckoned as equivalent to imprisonment for twenty years vide Section 57 of the Indian Penal Code.

12. I have already mentioned above that the officers of the government were not competent on their own to modify the provisions of the government order as contained in Annexure-I by issuing letters of clarification as contained in Annexures 2 and 5. The I.G. Prisons by his letter (Annexure-5) indicated that even for convicts who have not been imprisoned for life the remission will be calculated at the rate of three months for every year of confinement instead of three months for every year of the total sentence imposed. Thus under the cover of clarification he sought to modify what has been provided in the government notification Annexure-I. He had no jurisdiction to do so and the clarification in this regard must be treated as *ultra vires*. It follows, therefore, that in respect of persons who have not been sentenced to imprisonment for life, the remission will be calculated at the rate of three months for each year of the total sentence imposed. I have already mentioned above that the exclusion of the set off period by the letter of the Secretary, Law Department is also invalid and without jurisdiction. The conclusion, therefore, is that the set off will be taken into account in computing the remission.

13. I now come to the last point urged by the learned counsel, namely, denial of remission to persons who happened to be on bail on the relevant date 3-12-83. Firstly, such persons were not excluded in the Notification Annexure-I and, therefore, the Law Secretary had no jurisdiction to modify the provisions of Annexure-I and exclude such persons from its application. Even otherwise, the exclusion of persons who happened to be on bail on the relevant date is

discriminatory, irrational and violative of Article 14 of the Constitution. A convicted persons may be on bail during the pendency of any appeal or revision preferred by him. He may even be on provisional bail for a few days on some special ground. But this does not place him in a category seperate from other convicts of the same class. In case the appeal or revision is dismissed, or after the period of provisional bail is over, the convict would have to undergo the sentence of imprisonment imposed upon him in the same manner as other convicts. There is no difference so far as the suffering of imprisonment is concerned by virtue of the sentence imposed upon them and, therefore, it is held that any distinction on this ground is discriminatory and violative of Article 14 of the Constitution. Consequently, that portion of Annexure-2 which prescribes that the benefit of remission will not be available to convicts who happened to be on bail on the relevant date is ultra vires and invalid.

14. Before I conclude, I may mention that the petitioners' learned counsel, who is a retired I.G. of prisons and Director of probations of this State, conducted the case with a sense of missionary zeal and in course of hearing enlightened us about the conditions in the jail, the Psychology of the prisoners including life convicts, and their mental agony and turmoil as he himself had occsion to see first hand. But his labour has not gone in vain, and as indicated above he has succeeded on two points out of the three he placed before us.

15. This application thus stands partly allowed.