

(1997) 08 RAJ CK 0033

In the Rajasthan High Court

Case No : Civil Habeas Corpus Writ Petition No. 2702 of 1997

Smt. Santosh

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 20-08-1997

Acts Referred:

Constitution of India, 1950 — Article 14, 161, 20(1), 21, 72
Criminal Procedure Code, 1973 (CrPC) — Section 389, 432, 433, 433A, 438
Narcotic Drugs and Psychotropic Substances (Amendment) Act, 1988 — Section 32A
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 15, 16, 17, 18, 19
Penal Code, 1860 (IPC) — Section 55

Citation : (1998) CriLJ 612 : (1997) 3 RLW 1576 : (1997) 3 RLW 1576 : (1998) 1 WLC 90 : (1997) 2 WLN 375

Hon'ble Judges : V.K. Singhal, J; Mohd. Yamin, J

Bench : Division Bench

Advocate : Chaitanya Gahlot and Krishna Sharma, for the Appellant; R.K. Purohit and Sunil Joshi, on behalf of J.P. Joshi and R.S. Rathore, on behalf of K.S. Jasmatia, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Singhal, J.—By this writ petition the provisions of Section 32A, of the Narcotics Drugs and Psychotropic Substances Act, 1985 have been challenged.

2. The petitioner is the wife of Satya Narain who was convicted u/s 22 of the Act for 10 years Rigorous Imprisonment and a fine of Rs. one lac for the offence under NDPS Act. The appeal against the conviction has also been dismissed. Satya Narain was undergoing the sentence in Central Jail Sabarmati, Ahmedabad and thereafter he was transferred to Central Jail, Bikaner. He was kept in open air camp till 1996 and thereafter was sent back to Central Jail, Jodhpur. The grievance is that the provisions of Section 32A of the Act prohibits remission of sentence. It is ultra vires the provisions of Articles 14 and 21 of the Constitution of India as in respect of other offences under IPC, where punishment is of 10

years or more, the provisions of remission are applicable. Restricting the provisions by not granted the bail during trial or not to apply the provisions for suspension remission or commutation of sentence is stated to be against the object of the Act.

3. Reliance has been placed on the decision in the case of Ram Charan v. Union of India Writ Petitions Nos. 1304/90 and 1391/90 decided on 5-3-1991 wherein the provisions of Section 32A of the Act were declared ultra vires resulting in ineffective right of appeal of the accused. It is also stated that withdrawing the facility of open air jail is violative of the principles of natural justice.

4. Arguments of both the learned counsel have been heard.

5. The statement of object and reasons of the Act of 1985 are as under :-

The statutory control over narcotic drugs is exercised in India through a number of Central and State enactments. The principal Central Acts, namely the Opium Act, 1857, the Opium Act, 1878 and the Dangerous Drugs Act, 1930 were enacted along time ago. With the passage of time and the developments in the field of illicit drug traffic and drug abuse at national and international level, may deficiencies in the existing laws have come to notice, some of which are indicated below :

(i) The scheme of penalties under the present Acts is not sufficiently deterrent to meet the challenge of well organised gangs of smugglers. The Dangerous Drugs Acts, 1930 provides for a maximum term of imprisonment of 3 years with or without fine and 4 years" imprisonment with or without fine for repeated offences. Further, no minimum punishment is prescribed in the present laws, as a result of which drug traffickers have been sometimes let off by the Courts with nominal punishment. The country has for the last few years been increasingly facing the problem of transit traffic of drugs coming mainly from some of our neighbouring countries and destined mainly to western countries.

(ii) The existing Central laws do not provide for investing the officers of a number of important central enforcement agencies like narcotics, customs, Central excise, etc. with the power of investigation of offences under the said laws.

(iii) Since, the enactment of the aforesaid three Central Act a vast body of international law in the field of narcotics control has evolved through various international treaties and protocols. The Government of India has been a party to these treaties and conventions which entail several obligations which are covered or are only partly covered by the present Acts.

(iv) During recent years new drugs of addiction which have come to be known as psychotropic substances have appeared on the scene and posed serious problems to national Government. There is no comprehensive law to enable exercise of control over psychotropic substance in India in the manner as envisaged in Convention on Psychotropic Substances, 1971 to which also India, has acceded.

2. In view of what has been stated above, there is an urgent need for the enactment of a comprehensive legislation on narcotic drugs and psychotropic substances which, inter alia, should consolidate and amend the existing laws relating to narcotic drugs, strengthen the existing controls over drugs abuse, considerably enhance the penalties particularly for trafficking offences, make provisions for exercising effective control over psychotropic substances to which India has become a party."

6. Section 32A was inserted by the Act No. 2 of 1989 and the statement of objects and reasons are stated in the bill as under :-

In recent years, India has been facing a problem of transit traffic in illicit drugs. The spill-over from traffic has caused problems of abuse and addiction. The Narcotic Drugs and Psychotropic Substances Act, 1985 provides deterrent punishments for drug trafficking offences. Even though the major offences are non-bailable by virtue of the level of punishments, on technical grounds, drug offenders were being released on bail. In the light of certain difficulties faced in the enforcement of the Narcotic Drugs and Psychotropic Substances Act, 1985, the need to amend the law to further strengthen it, has been felt.

2. A Cabinet Sub-Committee which was constituted for combating drug traffic and preventing drug abuse, also made a number of recommendations for strengthening the existing law. In the light to the recommendations of the Cabinet Sub-Committee and the working of the Narcotic Drugs and Psychotropic Substances Act, in the last three years, it is proposed to amend the said Act. These amendments, inter alia, provide for the following :-

(i) to constitute a National Fund for Control of Drugs Abuse to meet the expenditure incurred in connection with the measures for combating illicit traffic and preventing drug abuse;

(ii) to bring certain controlled substances which are used for manufacture of narcotic drugs and psychotropic substances and to provide deterrent punishment for violation thereof;

(iii) to provide that no sentence awarded under the Act shall be suspended, remitted or commuted.

(iv) to provide for pre-trial disposal of seized drugs;

(v) to provide death penalty no second conviction in respect of specified offences involving specified quantities of certain drugs;

(vi) to provide for forfeiture of property and a detailed procedure relating to the, same; and

(vii) to provide that the offences shall be cognizable and non-bailable.

3. The Bill seeks to achieve the above objectives."

7. Power has been given to the Central Government to take measures for

preventing and commuting the accused, of an illicit traffic in Narcotic Drugs to permit, control and regulate and prohibit certain operations.

8. In Chapter IV of the Act, offence and penalties have been provided. The offence with relation to poppy straw, Coca plant and coca leaves, prepared opium, opium poppy and opium and embezzlement of opium by cultivator have been provided. Manufacture of drugs and preparations of psychotropic substances, illegal import into India, export from India or punishment of narcotic drugs and psychotropic substances, external dealings in narcotic drugs and psychotropic substances in contravention of Section 12 and use of the premises for commission of offence under the Act or in contravention of the orders made u/s 9A have been provided with rigorous imprisonment punishment which is not to be less than 10 years and may extend to 20 years and with fine of not less than Rs. one lac which may extend to Rs. 2 lacs and for reasons to be recorded may even exceed to Rs. 2 lacs. The contravention in relation to ganja or cultivation of cannabis plant is subject to imprisonment up to 5 years and fine up to Rs. 50,000/-.

9. Section 32A is subject to the provisions of Section 33 of the Act. The punishment for illegal possession in small quantity for personal consumption of any Narcotic Drug and Psychotropic Substances or consumption of such drug or substance is punishable u/s 27 which provides the maximum imprisonment for a term of one year or with fine. The provisions of Section 32A have excluded its application to the punishment u/s 27 and thus for punishment Under Section. 27 there could be a suspension, remission or commutation. Besides this if the person convicted is under 18 years of age or has been convicted for offence u/s 26 or 27 then the bar of Section 32A is not applicable. Section 26 deals with the punishment for certain acts by licensee or its servant which are punishable for imprisonment which may extend to three years or with fine or with both. Thus, in respect of offences which are punishable u/s 26 or 27 or committed by a person, below 18 years of age the provisions of Section 32A of the Act are not applicable. ,

10. From the above provisions of Section 32A of the Act, it becomes clear that the power for suspension of sentence can be exercised in respect of punishment which are relatively minor offences.

11. Section 39 of the Act provides that if any addict is found guilty of an offence punishable u/s 27 and if the Court by which he is found guilty is of the opinion, regard being had to the age, character, antecedents or physical or mental condition of the offender, that it is expedient so to do, then instead of sentencing him at once to any imprisonment, with his consent, direct that he be released for undergoing medical treatment and probation can be granted. Even death penalty has been provided u/s 31A on subsequent conviction in respect of offence Under Sections 15 to 25 or Section 27A. The offences are triable by special Courts.

12. The object for inserting Section 32A as referred above, is for making the

punishment deterrent in dealing with problems of drugs trafficking for which the Parliament has seriously considered this national problem of harmful socio-economic consequences and health hazards that would accompany trafficking illegally in the dangerous drugs. The Apex Court in the case of *Durand Didier Vs. Chief Secretary, Union Territory of Goa*, while dealing with adolescent students found that this menace has assumed serious and alarming proportions in the recent years. It was observed as under: The trial Court while inflicting the punishment has expressed its view about the drug menace spreading in Goa as follows :

The spreading of the drugs in Goa is becoming day by day a terrible menace which has completely destroyed the very fibre of our society being also instrumental in subverting the tender soul of our young generation which is being badly contaminated by such danger in a very alarming provisions calling for severe punishment in case of illegal possession and transportation of drugs meant for personal consumption and eventual trade.

With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportions in the recent years. Therefore, in order to effectively control and eradicate this proliferating and becoming devastating menace, causing deleterious effects and deadly impact on the society as a whole, the Parliament in its wisdom, has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine.

13. From the above observations, it would be evident that the Parliament in its wisdom thought that the benefit of suspension, remission and commutation is not to be given to such anti-social elements. The crime is considered to be against the society as a whole and if by due. process of law restrictions have been imposed, then it cannot be considered that there is a violation of the provisions of Article 21 of the Constitution of India. Section 433A of the Cr.P.C. has also casted restrictions to an accused who has been sentenced for imprisonment for life or sentence of death imposed on a person convicted u/s 433 into one of imprisonment of life, then such person shall not be released from prison unless he had served at least fourteen years of imprisonment. The validity of this provision was challenged before the Apex Court in the case of *Maru Ram and Others Vs. Union of India (UOI) and Others*, The Court negated the contention and observed as under:-

We must remember that Parliament as legislative instrumentality, with the representatives of the people contributing their wisdom to its decisions, has title to an initial presumption of constitutionality. Unless one reaches far beyond unwisdom to absurdity, irrationality, colourability and the like, the Court must keep its hand off.

Following findings were recorded :

(1) We repulse all the thrusts on the vires of Section 433A. May be penologically the prolonged term prescribed by the section is supererogative. If we had our druthers we would have negatived the need for a fourteen year gestation for reformation. But ours is to construe, not construct, to decide, not to make a Code.

(2) We affirm the current supremacy of Section 433A over the Remission Rules and short-sentencing statutes made by various States.

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(4) We hold that Section 432 and Section 433 are not manifestation of Articles 72 and 161 of the Constitution but a separate, though similar, power and Section 433A by nullifying wholly or partially these prior provisions does not violate or detract from the full operations of the Constitutional power to pardon commute and the like.

(5) We negate the plea that Section 433A contravenes Article 20(1) of the Constitution.

(6) We follow Gopal Vinayak Godse Vs. The State of Maharashtra and Others, to hold that imprisonment for life lasts until the last breath, and whatever the length of remissions earned, the prisoner can claim release only if the remaining sentence is remitted by the Government.

14. In this case the judgment of Sarat Chandra Rabha and Others Vs. Khagendranath Nath and Others, was referred where it was observed as under:

A reprieve is a temporary suspension of the punishment fixed by law. A pardon is the remission of such imprisonment. Both are the exercise of Executive functions and should be distinguished from the exercise of judicial power over sentences. "The judicial power and the executive power" over sentences are readily distinguishable", observed Justice Sutherland. To render a judgment is judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment but does not alter its qua judgement.

Though, therefore, the effect of an order of remission is to wipe out that part of the sentence of imprisonment which has not been served out and thus in practice to reduce the sentence to the period already undergone, in law the order of remission merely means that the rest of the sentence need not be undergone, leaving the order of conviction by the Court and the sentence passed by it untouched.

15. In the case of Ishwar Singh M. Rajput v. State of Gujarat 1991 (2) Crimes 160, the provisions of Section 32A were held not violating the provisions of Articles 14 and 21, 72 and 161 of the Constitution of India. The Court observed as under :

If the Parliament says that sentence of prisoners convicted for the offences under the Narcotics Act shall not be suspended or remitted, it cannot be said that the classification between the prisoners convicted for the offences punishable under the Narcotics Act and the prisoners convicted under the Indian Penal Code, Customs Act or under any other law for the time being in force is, in any way, unreasonable. The object of introducing the said section is to see that drugs abuse is controlled and minimised. To check the menace of dangerous drugs flooding the market, if the Parliament wants that punishment should be deterrent, the Court should implement the law as it is. The problem of drug-trafficking is of grave national importance affecting the lives of number of young persons. It is a menace that must be fettered and curbed by all concerned with all seriousness. We should not fail to realise that adverse effect of the drugs is tremendous and is concerned with the life and death situation of numerous persons and, in that set of circumstances the Court should not resort to the so-called theory of reformation of prisoners and interfere with the decision of the Parliament, which is based upon reports of various Committees and to give a set back to the move directed at prohibiting the trade of dangerous drugs. Instead of attempting to take a holistic view of the harmful socio-economic consequences and health hazards that would accompany trafficking illegally in the dangerous drugs, the Court should implement the law in the spirit with which the Parliament, after the deliberation has amended.

The Division Bench of this Court in the case of *Anwar v. State* 1994 Cri LR (Raj) 797, rejected the plea for grant of parole in view of the provisions of Section 32A though the validity of the provisions was not examined.

16. The words "is not guilty of such offence" as a condition for grant of parole under Terrorists and Destructive Activities (Prevention) Act, 1985 were held not violative of Article 21 of the Constitution in the case of *Sanjay Dutt Vs. State through C.B.I., Bombay*,

17. In the case of *Sadhu Singh and Others Vs. State of Punjab*, it was observed by the Apex Court that the prisoner undergoing life imprisonment is entitled for pre mature release only upon commutation of his sentence u/s 55 of the Indian Penal Code or Section 433, Cr. P.C. and not on the basis of executive instructions. In case of *Gopal Vinayak Godse Vs. The State of Maharashtra and Others*, it was observed that the Prisons Act does not confer any authority power to commute or remit sentence; it provides only for the regulation of prisons and for the treatment of prisoners confined therein. It was only the State Government to make Rules.

18. In the case of *Berlin Joseph alias Ravi v. State* 1992 (1) Cri 1221 (FB), it was held by the Kerala High Court that the High Court has no power to suspend the sentence passed on an accused convicted of an offence under the NDPS Act, during the pendency of his appeal or revision, unless it relates to the offence u/s 27 of the Act. The validity of Section 32A was not in dispute in this case. Though in *Gyan Chand Vs. The State of Rajasthan*, it was observed that the power of the

High Court regarding suspension of sentence u/s 389, Cr.P.C. are not curtailed by Section 32A of the Act. Different views have been taken by different High Courts but since that is not the controversy in the present case, it is not being further considered.

19. In the case of *Sunil Batra Vs. Delhi Administration and Others etc.*, , the prisoner under sentence of death were considered forming separate class. It was observed that Article 21 forbids deprivation of personal liberty except in accordance with the procedure established by law and curtailment of personal liberty to such an extent as to be a negation of it would constitute deprivation. Bar fetters make a serious inroad on the limited personal liberty which a prisoner is left with and, therefore, before such erosion can be justified it must have the authority of law.

20. The forfeiture of property of persons convicted by Designated Court under Terrorists and Disruptive Activities (Prevention) Act, 1985 were held not violative of provisions of Articles 14 and 21 of the Constitution of India in the case of *Kartar Singh v. State of Punjab* . The provisions of Section 20(7) disentitling anticipatory bail by excluding the application u/s 438, Cr. P.C. in relation to any case under any Act or rules made thereunder was observed that it cannot be said to have deprived the personal liberty of a person as enshrined in Article 21 of the Constitution.

21. In re, *In Re: The Special Courts Bill, 1978*, the following principles were formulated by the Apex Court.

1. The first part of Article 14, which was adopted from the Irish Constitution, is a declaration of equality of the civil rights of all persons within the territories of India. It enshrines a basic principle of republicanism. The second part which is a corollary of the first and is based on the last clause of the first section of the Fourteenth Amendment of the American Constitution, enjoins that equal protection shall be secured to all such persons in the enjoyment of their rights and liberties without discrimination or favouritism. It is a pledge of the protection of equal laws that is laws that operate alike on all persons under like circumstances.

2. The State in the exercise of its governmental power, has of necessity to make laws operating differently on different groups or classes of persons within its territory to attain particular ends in giving effect to its policies and it must possess for that purpose large powers of distinguishing and classifying persons or things to be subjected to such laws.

3. The constitutional command to the State to afford equal protection of its laws sets a goal not attainable by the invention and application of a precise formula. Therefore, classification need not be constituted by an exact or scientific exclusion or inclusion of persons or things. The Courts should not insist on delusive exactness or apply doctrinaire tests for determining the validity of classification in any given case. Classification is justified if it is not palpably

arbitrary.

4. The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation and there should be no discrimination between one person and another if as regards the subject matter of the legislation their position is substantially the same.

5. By the process of classification, the State has the power of determining who should be regarded as a class for purposes of legislation and in relation to, a law enacted on a particular subject. This power, no doubt, in some degree is likely to produce some inequality but if a law deals with the liberties of a number of well-defined classes, it is not open to the charge of denial of equal protection on the ground that it has no application to other persons. Classification thus means segregation in classes which have a systematic relation usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily.

6. The law can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience. It can recognise even degree of evil but the classification should never be arbitrary, artificial or evasive.

7. The classification must not be arbitrary but must be rational, that is to say it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out by those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that differentia must have rational relation to the object sought to be achieved by the Act.

8. The differentia which is the basis of classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them. In short, while Article 14 forbids class discrimination by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liabilities proposed to be imposed, it does not forbid classification for the purpose of legislation provided such classification is not arbitrary in the sense above mentioned.

9. If the legislative policy is clear and as definite method of carrying out that policy a discretion is vested by the statute upon a body of administrators or officers to make selective application of the law to certain classes or groups of persons, the Statute itself cannot be condemned as a piece of discriminatory

legislation. In such cases, the power given to the executive body would import a duty on it to classify the subject matter of legislation in accordance with the objective indicated in the statute. If the administrative body proceeds to classify persons or things on a basis which has no rational relation to the objective of the legislature, its action can be annulled as offending against the equal protection clause. On the other hand, if the statute itself does not disclose a definite policy or objective and it confers authority on another to make selection at its pleasure, the statute would be held on the face of it to be discriminatory, irrespective of the way in which it is applied.

10. Whether a law conferring discretionary powers on an administrative authority is constitutionally valid or not should not be determined on the assumption that such authority will act in an arbitrary manner in exercising the discretion committed to it. Abuse of power given by law does not occur but the validity of the law cannot be contested because of such an apprehension. Discretionary power is not necessarily a discriminatory power.

11. Classification necessarily implies the making of a distinction or discrimination between persons classified and those who are not members of that class, it is the essence of a classification that upon the class are cast duties and burdens different from those resting upon the general public. Indeed, the very idea of classification is that of inequality, so that it goes without saying that the mere fact of inequality in no manner determines the matter of constitutionality

12. Whether an enactment providing for special procedure for the trial of certain offences is or is not discriminatory and violative of Article 14 must be determined in each case as it arises, for no general rule, applicable to all cases can safely be laid down. A practical assessment of the operation of the law in the particular circumstances is necessary.

13. A rule of procedure laid down by law comes as much within the purview of Article 14 as any rule of substantive law and it is necessary that all litigants who are similarly situated are able to avail themselves of the same procedural rights for relief and for defence with like protection and without discrimination.

22. Article 14 ensures equality amongstequals. Its aim is to protect persons similarly placed against discriminatory treatment. A person seeking up a grievance of denial of equal treatment by law must establish that between persons similarly circumstanced, some were treated to their prejudice. Western M.P. Electric Power and Supply Company Ltd. Vs. State of U.P. and Another, The burden is always upon the person who challenges the validity of a provision of a statute to prove that such provision violates the particular provision of the Constitution. The person convicted under the Act providing the minimum punishment of 10 years form a class of themselves and it is with a view to achieve the object of the Act to eliminate the menace from the society that such a provision has been brought.

23. The decision in the case of Ram Charan v. Union of India, referred to above,

is mainly on the ground that the appeals are listed for hearing after lapse of 7-8 years making a right of appeal or nugatory, illusory, redundant and non est. In the present case, the appeal has already been preferred and dismissed. In a particular case there may be a delay, but the delay in individual case cannot be a ground for declaring the provision of the Act as ultra vires. Another analogy which was taken that the accused can be released on bail during trial and on conviction suspension, remission or curmuation of the sentence is violative of Article 21 of the Constitution. The crime by murder, robbery and rape etc. were considered more heinous than crime under this Act. Since, a person can be granted bail during pendency of the trial, it was found that he can avail the same benefit after conviction. The Court has also taken this fact into consideration that after conviction the convicts under NDPS Act and other Acts become of the same category. This approach is contrary to the objects and reasons of this Special Act and the purpose for which Section 32A was enacted.

24. We have considered the judgment in the case of Ram Charan, referred to above, in detail and the reasoning which has been given in our view is not the correct appreciation of law. 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 NDPS Act are against the society as a whole and are preventive also it was only in this light that Section 32A was enacted by Act No, 2 of 1989. Under law, provision of a statute is presumed to be constitutionally valid unless a hostile discrimination is established. The provision of Section 32A 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.

25. No argument has been raised with regard to the validity of the provisions of Section 37 and, therefore, the same is not being examined. An oral prayer is made that the accused is directed to be kept in open air jail, but no such prayer is made in the writ petition and only contention which has been raised is that withdrawing that facility without giving opportunity is against the principles of natural justice. In this regard it may be observed that it has not been brought as "to which of the provision of the Rajasthan Prisoners Open Air Camp Rules, 1972 have been violated nor the complete facts have been brought on record requiring interference by this Court in the extraordinary jurisdiction. It may also be observed that the husband of the petitioner was convicted in Gujarat and appeal was also preferred in Gujarat which has since been dismissed, but this writ petition has been filed in Rajasthan challenging the provisions of Section 32A may be for the reason that the validity of such provision has already been upheld in that State. Since the matter has been examined by us on merit, we are not considering that aspect of the matter.

26. The writ petition having no force is accordingly dismissed.