

(2016) 06 SC CK 0030

In the Supreme Court Of India

Case No : Writ Petition (Crl.) No. 190 of 2014.

Tara Singh and Others

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 29-06-2016

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 — Section 21, 32A
Code Of Criminal Procedure, 1973 — Section 432, 433A
Indian Penal Code, 1860 — Section 302
Constitution of India, 1950 — Article 14, 32, 72, 142, 161

Citation : (2016) 164 AIC 184 : (2017) 1 AICLR 8 : (2016) AIR(SCW) 3058 :
(2016) 3 AIRBomRCri 338 : (2016) AIRSC 3058 : (2016) 3 ALTcrI 15 : (2016) 2
AndhLDCriminal 356 : (2016) 2 BBCJ 549 : (2016) 4 BLJud 43 : (2016) 3
BomCR(Cri) 679 : (2016) 4 CriCC 326 : (2016) C

Hon'ble Judges : Dipak Misra; Shiva Kirti Singh, JJ.

Bench : Division Bench

Advocate : J.M. Khanna, Manoj Swarup, Ms. Neha Kedia, Vipul Jindal, Mukul Kumar, Advocates, for the Appellant; Rana Mukherjee, Sr. Advocate, V. Madhukar, AAG, Ranjit Kumar, ASG, Anvita Cowshish, Kuldip Singh, Sunita Sharma, Sanjai Kumar Pathak, T.C. Sharma, Manish Sharma, Ms. Sushma Suri, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Dipak Misra, J. - In this writ petition preferred under Article 32 of Constitution of India, the petitioners, who have been convicted for the offence punishable under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for brevity, 'the NDPS Act') and sentenced to undergo rigorous imprisonment for more than 10 years and to pay a fine of Rs. 1 lakh and in default of payment of fine, to suffer further rigorous imprisonment for six months, have prayed for issue of writ of mandamus to the respondent nos. 1 to 3 commanding them to grant remission to them as per the provisions contained in Chapter XIX of the New Punjab Jail Manual, 1996 (for short, 'the Manual').

2. This writ petition was listed along with SLP(Crl) No. 4079 of 2012, wherein at the time of issue of notice, the following issue was noted:-

"The point which has been raised today on behalf of the petitioner is whether the remission granted by the Governor under Article 161 of the Constitution has an overriding effect over the provisions of Section 32A of the NDPS Act. The matter needs consideration having regard to the views expressed by this Court in the case of Meru Ram".

The special leave petition stood abated as the sole petitioner therein breathed his last during the pendency of the petition.

3. It is the case of the petitioners that Chapter XIX of the Manual lays down remission and award to the convicts depending upon good conduct and performance of duties allotted to them while they are undergoing sentence, but the benefit under the Chapter XIX of the Manual is not made available to the convicts under the NDPS Act on the ground that Section 32-A of the NDPS Act bars entitlement to such remission. It is asserted in the writ petition that the constitutional validity of Section 32-A of the NDPS Act has been upheld in *Dadu @ Tulsidas v. State of Maharashtra*, (2000) 8 SCC 437. It is contended by the learned counsel for the petitioners that in *Maru Ram v. Union of India and others*, (1981) 1 SCC 107, the constitutional validity of Section 433-A of Code of Criminal Procedure, 1973 (for short, 'CrPC') was under challenge and the larger Bench of this Court has clearly held that it does not curtail the power of the executive under Articles 72 and 161 of the Constitution. Relying on the said decision, it is submitted that this Court can remit the sentence and the said power cannot be curtailed by any legislation. According to the learned counsel for the petitioners, a conjoint reading of *Dadu's* case and *Maru Ram's* case, the legal position is that remission schemes are effective guidelines for passing orders under Article 161 of the Constitution and, therefore, they have the force of law and, in any case, the principle in *Dadu's* case clearly postulates that Section 32-A of the NDPS Act does not come in the way of executive for exercising the constitutional power under Article 72 or 161 of the Constitution. On the aforesaid basis, it has been contended that the denial of benefit sought for by the petitioner is absolutely arbitrary and in total misunderstanding of the ratio laid down in *Dadu's* case.

4. Learned counsel for the petitioners would further submit that Section 32-A of the NDPS Act cannot control the remission schemes which are effective guidelines under Article 161 of the Constitution and the statutory provision, by no stretch of imagination, create any fetter in exercise of the constitutional power. In the averments, a comparison has been made on the conviction and sentence under the NDPS Act and Section 302 of the IPC.

5. Learned counsel for the State has opposed the prayer of the petitioners on the ground that Section 32-A of the NDPS Act curtails the statutory power of the concerned Government and accordingly the same has been stipulated in the

Manual and hence, no fault can be found with action taken by the State Government. Learned counsel for the State has further contended that once Section 32-A of the NDPS Act has been held to be constitutionally valid, the effort to compare the conviction and sentence under Section 302 IPC with that under Section 32-A of the NDPS Act is an exercise in futility.

6. We have heard Mr. Ranjit Kumar, learned Solicitor General who has contended that the controversy is absolutely covered by the decision in *Dadu* (supra) and the petitioners cannot claim the benefit of the Jail Manual which is a guidance for exercise of constitutional powers by the Governor. It is his further contention that the exercise of power under Articles 72 and 161 of the Constitution is different than the remission granted under Section 433-A of CrPC.

7. It is not in dispute that the petitioners have been convicted under the NDPS Act and various offences and sentenced to suffer rigorous imprisonment for more than 10 years and to pay a fine of Rs. 1 lakh. The singular issue is whether denial of remission under the Manual is justified. Chapter XIX of the Manual deals with remission and reward. Paragraphs 563 to 588 deal with remission system. Paragraphs 589 and 590 deal with reward. Paragraph 563 states that remission can be granted to prisoners by the State Government/Inspector-General/Superintendent Jails which is subject to withdrawal/forfeiture/revocation. It is not a right and the State Government reserves the right to debar/withdraw any prisoner or category of prisoners from the concession of remission. Paragraph 565 stipulates that remission is of three types, namely, ordinary remission, special remission and the State Government remission. Paragraph 567 postulates the eligibility criteria for prisoners who will be eligible for earning the State Government remission. Paragraph 571 provides what would constitute non-eligibility to get ordinary remission. Paragraph 572 lays down that ordinary remission is not earnable for certain offences committed after admission to jail. Paragraph 576 deals with remission for good conduct. Paragraph 581 provides for special remission. It lays down that special remission may be given to any prisoner except such prisoners who are deprived of remission by way of punishment whether entitled to ordinary remission or not for special reasons. Certain examples have been incorporated in special remission.

8. The Government of Punjab, Department of Home Affairs and Justice through Governor has issued an order in exercise of powers conferred by Section 432 of CrPC and Article 161 of the Constitution of India on 13th day of April, 2007 for grant of remission of sentence to certain types of convicts. The said order contains that instructions contained in the order shall not apply to the persons sentenced under the Foreigners Act, 1946 and the Passport Act, 1967 and the Narcotic Drugs and Psychotropic Substances Act, 1985. Similar circulars have been issued on 1.9.2008, 1.6.2010, 1.4.2011, 12.4.2012, 14.8.2013 and 13.8.2014. The said orders have been passed keeping in view the language used in Section 32-A of the NDPS Act and the judgment delivered in *Dadu*'s case. Section 32-A of the NDPS Act reads as follows:-

"32-A. No suspension, remission or commutation in any sentence awarded under this Act.- Notwithstanding anything contained in the Code of Criminal Procedure, 1973 or any other law for the time being in force but subject to the provisions of Section 33, no sentence awarded under this Act (other than Section 27) shall be suspended or remitted or commuted."

9. In Dadu's case, the three-Judge Bench scanning the provisions have laid down that:-

"13. A perusal of the section would indicate that it deals with three different matters, namely, suspension, remission and commutation of the sentences. Prohibition contained in the section is referable to Sections 389, 432 and 433 of the Code. Section 432 of the Code provides that when any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without conditions or upon 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 in the manner and according to the procedure prescribed therein."

10. After so stating, the Court referred to Section 433 CrPC, which empowers the Appropriate Government to commute the sentence. Thereafter, deliberation centered on Section 389 of CrPC. The Bench referred to the decision in *Maktool Singh v. State of Punjab*, (1999) 3 SCC 321 and in that context opined:-

"... The distinction of the convicts under the Act and under other statutes, insofar as it relates to the exercise of executive powers under Sections 432 and 433 of the Code is concerned, cannot be termed to be either arbitrary or discriminatory being violative of Article 14 of the Constitution. Such deprivation of the executive can also not be stretched to hold that the right to life of a person has been taken away except, according to the procedure established by law. It is not contended on behalf of the petitioners that the procedure prescribed under the Act for holding the trial is not reasonable, fair and just. The offending section, insofar as it relates to the executive in the matter of suspension, remission and commutation of sentence, after conviction, does not, in any way, encroach upon the personal liberty of the convict tried fairly and sentenced under the Act. The procedure prescribed for holding the trial under the Act cannot be termed to be arbitrary, whimsical or fanciful. There is, therefore, no vice of unconstitutionality in the section insofar as it takes away the powers of the executive conferred upon it under Sections 432 and 433 of the Code, to suspend, remit or commute the sentence of a convict under the Act."

11. Thereafter, the Court addressed to the concern expressed by the learned counsel for the parties with regard to the adverse effect of the Section on the powers of the judiciary. After referring to various authorities, the Court opined thus:-

"25. Judged from any angle, the section insofar as it completely debars the appellate courts from the power to suspend the sentence awarded to a convict

under the Act cannot stand the test of constitutionality. Thus Section 32-A insofar as it ousts the jurisdiction of the court to suspend the sentence awarded to a convict under the Act is unconstitutional."

12. Thereafter, the Court held:-

"26. Despite holding that Section 32-A is unconstitutional to the extent it affects the functioning of the criminal courts in the country, we are not declaring the whole of the section as unconstitutional in view of our finding that the section, insofar as it takes away the right of the executive to suspend, remit and commute the sentence, is valid and intra vires of the Constitution. The declaration of Section 32-A to be unconstitutional, insofar as it affects the functioning of the courts in the country, would not render the whole of the section invalid, the restriction imposed by the offending section being distinct and severable."

13. The eventual conclusions in the said case are:-

"29. Under the circumstances the writ petitions are disposed of by holding that:

(1) Section 32-A does not in any way affect the powers of the authorities to grant parole.

(2) It is unconstitutional to the extent it takes away the right of the court to suspend the sentence of a convict under the Act.

(3) Nevertheless, a sentence awarded under the Act can be suspended by the appellate court only and strictly subject to the conditions spelt out in Section 37 of the Act, as dealt with in this judgment."

14. Having appreciated the analysis made in the aforesaid verdict, we may advert to the statutory scheme pertaining to suspension, remission and commutation of sentence under the CrPC. Section 432 deals with power to suspend or remit sentences. Section 433 deals with power to commute sentences. Section 433-A lays the postulate for restrictions on powers of remission or commutation in certain cases.

The said provision reads as follows:-

"433-A. 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 the 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."

15. The constitutional validity of Section 433-A was challenged in Maru Ram (supra) and the said provision has been held to be intra vires. While dealing with the constitutional validity, Krishna Iyer, J., speaking for the majority,

distinguished the power conferred under the constitutional authorities under Articles 72 and 161 and the power conferred under the Code. In the said case, it has been held that:-

"59. But two things may be similar but not the same. That is precisely the difference. We cannot agree that the power which is the creature of the Code can be equated with a high prerogative vested by the Constitution in the highest functionaries of the Union and the States. The source is different, the substance is different, the strength is different, although the stream may be flowing along the same bed. We see the two powers as far from being identical, and, obviously, the constitutional power is "untouchable" and "unapproachable" and cannot suffer the vicissitudes of simple legislative processes. Therefore, Section 433-A cannot be invalidated as indirectly violative of Articles 72 and 161. What the Code gives, it can take, and so, an embargo on Sections 432 and 433(a) is within the legislative power of Parliament.

60. Even so, we must remember the constitutional status of Articles 72 and 161 and it is common ground that Section 433-A does not and cannot affect even a wee bit the pardon power of the Governor or the President. The necessary sequel to this logic is that notwithstanding Section 433-A the President and the Governor continue to exercise the power of commutation and release under the aforesaid articles."

16. After so stating, the Court posed the question, whether the Parliament has indulged in legislative futility with a formal victory but a real defeat? The Court answered stating `yes" and `no". Explaining further, the larger Bench opined:-

"An issue of deeper import demands our consideration at this stage of the discussion. Wide as the power of pardon, commutation and release (Articles 72 and 161) is, it cannot run riot; for no legal power can run unruly like John Gilpin on the horse but must keep sensibly to a steady course. Here, we come upon the second constitutional fundamental which underlies the submissions of counsel. It is that all public power, including constitutional power, shall never be exercisable arbitrarily or mala fide and, ordinarily, guidelines for fair and equal execution are guarantors of the valid play of power. We proceed on the basis that these axioms are valid in our constitutional order".

17. The majority thereafter dealt with the powers conferred under the constitutional authorities under Articles 72 and 161 and eventually concluded as follows:-

"72.

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

XXXXX XXXXX

(8) The power under Articles 72 and 161 of the Constitution can be exercised by the Central and State Governments, not by the President or Governor on their own. The advice of the appropriate Government binds the Head of the State. No separate order for each individual case is necessary but any general order made must be clear enough to identify the group of cases and indicate the application of mind to the whole group.

(9) Considerations for exercise of power under Articles 72/161 may be myriad and their occasions protean, and are left to the appropriate Government, but no consideration nor occasion can be wholly irrelevant, irrational, discriminatory or mala fide. Only in these rare cases will the court examine the exercise.

18. The aforesaid decision makes it clear that the exercise of powers under Article 72 or 161 is quite different than the statutory power of remission. On that fundamental bedrock, the provision enshrined under Section 32-A, barring a part of the provision, has been held constitutionally valid in Dadu's case. The principle stated in Dadu (supra) does not run counter to the ratio laid down in Maru Ram (supra). It is in consonance with the same.

19. The petitioners have invoked the power of this Court to grant the benefit of remission in exercise of power under Article 32 of the Constitution of India. Speaking plainly, the prayer is totally misconceived. It is urged in a different manner before us that the power exercised by this Court under Article 32 and Article 142 of the Constitution cannot be statutorily controlled. Though the argument strikes a note of innovation, yet the innovation in the case at hand cannot be allowed to last long, for it invites immediate repulsion. Section 32-A of the NDPS Act, as far as it took away the power of the Court to suspend the sentence awarded to the convict under the Act has been declared unconstitutional in Dadu's case. A convict can pray for suspension of sentence when the appeal is pending for adjudication. The aforesaid authority has upheld the constitutional validity of the Section insofar as it takes away the right of the executive to suspend, remit and commute the sentence. Negation of the power of the courts to suspend the sentence which has been declared as unconstitutional, as has been held in Dadu's case, does not confer a right on the convict to ask for suspension of the sentence as a matter of right in all cases nor does it absolve the courts of their legal obligation to exercise the power of suspension within the parameters prescribed under Section 37 of the NDPS Act. The constitutional power exercised under Articles 72 and 161 is quite different than the power exercised under a statute. Recently, in *Union of India v. V. Sriharan @ Murugan and ors*, 2015 (13) SCALE 165, echoing the principle stated in Maru Ram (supra), it has been held:-

"As has been stated by this Court in Maru Ram (supra) by the Constitution Bench, that the Constitutional power of remission provided under Articles 72 and 161 of the Constitution will always remain untouched, inasmuch as, though the

statutory power of remission, etc., as compared to Constitution power under Articles 72 and 161 looks similar, they are not the same. Therefore, we confine ourselves to the implication of statutory power of remission, etc., provided under the Criminal Procedure Code entrusted with the Executive of the State as against the well thought out judicial decisions in the imposition of sentence for the related grievous crimes for which either capital punishment or a life sentence is provided for. When the said distinction can be clearly ascertained, it must be held that there is a vast difference between an executive action for the grant of commutation, remission etc., as against a judicial decision. Time and again, it is held that judicial action forms part of the basic structure of the Constitution. We can state with certain amount of confidence and certainty, that there will be no match for a judicial decision by any of the authority other than Constitutional Authority, though in the form of an executive action, having regard to the higher pedestal in which such Constitutional Heads are placed whose action will remain unquestionable except for lack of certain basic features which has also been noted in the various decisions of this Court including Maru Ram (supra)".

20. What is being urged is as constitutional powers under Articles 72 and 161 are different and they remain untouched even by sentence of this Court, similar powers can be exercised under Article 32 of the Constitution of India. Article 32 of the Constitution of India enables a citizen to move this Court for enforcement of his fundamental rights. Moving this Court for the said purpose is fundamental. The larger Bench of the Court has already upheld the constitutional validity of Section 433-A CrPC. The three-Judge Bench has declared barring a small part of Section 32-A of the NDPS Act as constitutional. The recent Constitution Bench decision in v. Sriharan (supra) has clearly opined that the constitutional power engrafted under Articles 72 and 161 are different than the statutory power enshrined under Section 433-A CrPC. The petitioners do not have a right to seek remission under the Code because of Section 32A of the NDPS Act. They can always seek relief either under Article 71 or 161 of the Constitution, as the case may be. That is in a different domain.

21. The issue here is whether a writ of mandamus can be issued to authorities to grant remission to the petitioners. In Ramdas Athawale (5) v. Union of India and others, (2010) 4 SCC 1, it has been held by the Constitution Bench that:-

"46. It is equally well settled that Article 32 of the Constitution guarantees the right to a constitutional remedy and relates only to the enforcement of the right conferred by Part III of the Constitution and unless a question of enforcement of a fundamental right arises, Article 32 does not apply. It is well settled that no petition under Article 32 is maintainable, unless it is shown that the petitioner has some fundamental right. In Northern Corpn. v. Union of India, (1990) 4 SCC 239 this Court has made a pertinent observation that when a person complains and claims that there is a violation of law, it does not automatically involve breach of fundamental right for the enforcement of which alone Article 32 is attracted.

47. We have carefully scanned through the averments and allegations made in the writ petition and found that there is not even a whisper of any infringement of any fundamental right guaranteed by Part III of the Constitution. We reiterate the principle that whenever a person complains and claims that there is a violation of any provision of law or a constitutional provision, it does not automatically involve breach of fundamental right for the enforcement of which alone Article 32 of the Constitution is attracted. It is not possible to accept that an allegation of breach of law or a constitutional provision is an action in breach of fundamental right. The writ petition deserves dismissal only on this ground".

22. The present factual matrix does not remotely suggest that there has been violation of any fundamental right. There is no violation of any law which affects the fundamental rights of the petitioners. The argument that when a pardon or remission can be given under Article 72 or 161 of the Constitution by the constitutional authority, this Court can exercise the similar power under Article 32 of the Constitution of India is absolutely based on an erroneous premise. Article 32, as has been interpreted and stated by the Constitution Bench and well settled in law, can be only invoked when there is violation of any fundamental right or where the Court takes up certain grievance which falls in the realm of public interest litigation, as has been held in *Bandhua Mukti Morcha v. Union of India and others*, (1984) 3 SCC 161 and *Samaj Parivartana Samudaya and others v. State of Karnataka and others*, (2013) 8 SCC 154. Therefore, we repel the submission on the said score. It has also been argued that this Court can issue a direction to do complete justice to grant remission. In this context, a passage from *Supreme Court Bar Association v. Union of India and another*, (1998) 4 SCC 409 is apt quoting:-

"48. The Supreme Court in exercise of its jurisdiction under Article 142 has the power to make such order as is necessary for doing complete justice 'between the parties in any cause or matter pending before it'. The very nature of the power must lead the Court to set limits for itself within which to exercise those powers and ordinarily it cannot disregard a statutory provision governing a subject, except perhaps to balance the equities between the conflicting claims of the litigating parties by 'ironing out the creases' in a cause or matter before it. Indeed this Court is not a court of restricted jurisdiction of only dispute-settling. It is well recognised and established that this Court has always been a law-maker and its role travels beyond merely dispute-settling. It is a 'problem-solver in the nebulous areas' (see *K. Veeraswami v. Union of India*, (1991) 3 SCC 655) but the substantive statutory provisions dealing with the subject-matter of a given case cannot be altogether ignored by this Court, while making an order under Article 142. Indeed, these constitutional powers cannot, in any way, be controlled by any statutory provisions but at the same time these powers are not meant to be exercised when their exercise may come directly in conflict with what has been expressly provided for in a statute dealing expressly with the subject."

[emphasis in original]

23. In *Narendra Champaklal Trivedi v. State of Gujarat*, (2012) 7 SCC 80 a two-Judge Bench of this Court while dealing with reduction of sentence in respect of mandatory sentence has held:-

"...where the minimum sentence is provided, we think it would not be at all appropriate to exercise jurisdiction under Article 142 of the Constitution of India to reduce the sentence on the ground of the so-called mitigating factors as that would tantamount to supplanting statutory mandate and further it would amount to ignoring the substantive statutory provision that prescribes minimum sentence for a criminal act relating to demand and acceptance of bribe. The amount may be small but to curb and repress this kind of proclivity the legislature has prescribed the minimum sentence".

In view of the aforesaid, the argument to invoke Article 142 in conjunction with Article 32 of the Constitution is absolutely fallacious and we unhesitatingly repel the same.

24. Consequently, we do not perceive any merit in this writ petition and accordingly, the same stands dismissed.