

**(1995) 01 P&H CK 0015**

**High Court Of Punjab And Haryana At Chandigarh**

**Case No:** Criminal Miscellaneous No. 19290-M of 1994 in Criminal Appeal No. 404 SB of 1994

Sita Singh

APPELLANT

Vs

State of Punjab

RESPONDENT

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**Date of Decision:** Jan. 12, 1995

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 360, 389, 432, 432(1), 433
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 26, 27, 32A, 33, 36B

**Citation:** (1995) CriLJ 1733

**Hon'ble Judges:** V.S. Aggarwal, J

**Bench:** Single Bench

**Advocate:** K.S. Ahluwalia, for the Appellant; G.S. Gill, AAG, for the Respondent

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**Judgement**

@JUDGMENTTAG-ORDER

V.S. Aggarwal, J.

The short question involved in the bunch of criminal miscellaneous petitions is, if the High Court has the power to suspend the sentence or release the convicted persons on bail under the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter described as an "Act") during the pendency of the appeal.

2. To take grip of the situation the basic common fact be well settled. All the petitioners have been convicted under different provisions of the Act. They all seek suspension of the sentence by invoking the provisions of Section 389 of the Code of Criminal Procedure, 1973. The objection of the learned counsel for the State is that sentence cannot be suspended during pendency of the appeal in terms of specific provisions of the Act.

3. The law started taking shape with the Amendment Act (2 of 1989). Certain provisions of the Act were amended or substituted. Section 37 of the Act reads as under:-

"37. Offences to be cognizable and non-bailable:-

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) -

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for a term of imprisonment of five years or more under this Act shall be released on bail or on his own bond unless -

(i) The Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) Where the Public Prosecutor oppose the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

2. The limitations on granting of bail specified in clause (b) of Sub-section(1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974), or any other law for the time being in force on granting of bail.

4. The question had arisen if the High Court had the power to admit a person accused of an offence on bail during the pendency of the trial. It was set at rest with the decision of the Supreme Court in the case of [Narcotics Control Bureau Vs. Kishan Lal and others](#), . After scanning through various precedents, the Apex Court finally held that the powers of the High Court to grant bail u/s 439 are subject to the limitations contained in the amended Section 37 of the Act. The specific findings are reproduced below for the sake of facility :-

"For all the aforesaid reasons, we hold that the powers of the High Court to grant bail u/s 439 are subject to the limitations contained in the amended Section 37 of the NDPS Act and the restrictions placed on the powers of the Court under the said section are applicable to the High Court also in the matter of granting bail. The point of law is ordered accordingly."

5. In other words, the conclusions arrived at by the Supreme Court were that a person accused of an offence punishable for a term of imprisonment of 5 years or more can only be admitted to bail during the trial if the Court on an application being opposed by the Public Prosecutor is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail. There is no doubt that such a provision would be attracted only during the course of trial and not after the person is convicted of an offence by Special Court or Court of Session. Power to exercise u/s 439 of Code of Criminal Procedure is different than the powers exercisable u/s 389 of the Code of

Criminal Procedure. Here it is the suspension of the order against the accused and consequent release of the convict on bail. It is not so, while a person is facing trial.

6. Section 32A was also added in the Act. By virtue of the Amendment Act 2 of 1989 w.e.f. 29-5-1989, the said provisions read as under:-

"32-A. No suspension, remission or commutation in any sentence awarded under this Act:-

Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) 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."

7. It is in the fitness of things that it should be read with Section 33 of the Act which also is reproduced below for the sake of facility :-

"33. Application of Section 360 of the Code of Criminal Procedure, 1973 and of the Probation of Offenders Act, 1958 :-

Nothing contained in Section 360 of the Code of Criminal Procedure, 1973 (2 of 1974) or in the Probation of Offenders Act, 1958 (20 of 1958) shall apply to a person convicted of an offence under this Act unless such person is under eighteen years of age or that the offence for which such person is convicted is punishable u/s 26 or Section 27."

8. Learned counsel appearing for the petitioner urged that provisions u/s 32A are basically borrowed from Sections 432 & 433 of the Code of Criminal Procedure. The provisions under Sections 432 & 433 deal with the powers of appropriate Governments to suspend, remit or commute the sentences. In the view of the learned counsel, Section 32A of the Act does not deal with the powers of the High Court in appeal and it is not putting any embargo on the powers of the High Court to suspend the sentences u/s 389 of the Code of Criminal Procedure.

9. I am afraid the said plea does not cut any ice because reading of Section 32A of the Act clearly indicates that the Legislature in its wisdom has only dealt with the powers to suspend, remit or commute any sentence. It does not refer to the powers only of the appropriate Governments, but specifically makes the same subject to Section 33 of the Act. Section 33 of the Act refers to the powers of the court u/s 360 of the Code of Criminal Procedure or in the Probation of Offenders Act, 1958. Since there is specific reference to Section 33 of the Act, Section 32A of the Act by necessary implications, as is clear from the plain reading of these provisions that Section 32A refers to powers of Appellate Court also and puts an embargo in the right of the appellate Court not to suspend the sentence awarded. In this connection, one can borrow words from the decision in the case of Berlin Joseph alias Ravi v. State 1992 (1) Cri 1221. The Full Bench of the Kerala High Court held as under:-

"Next is, if legislative intent in enacting Section 32A of the NDPS Act is only to curb the governmental powers under Sections 432 and 433 of the Code, clear and necessary words in Section 32A would have been conveniently employed in the provision. Instead of saying "notwithstanding anything contained in the Code", Section 32A could have been worded as "notwithstanding anything contained in Chapter 32 of the Code". That apart, the words "or any other law for the time being in force" in Section 32A would further show that the sole aim of the provision is not to fetter exclusively the power envisaged in Sections 432 and 433 of the Code."

10. I am in respectful agreement with the said view so expressed. This is for the added reasons that Section 32A opens with non-obstante clause "notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force." It is well known that non-obstante clause is legislative device which is adopted to give over-riding effect to certain provisions, over some contrary provision that may be found in the same enactment or some other acts and this is to say to avoid the operation and effect of all contrary provisions. The powers of the Government to suspend, remit or commute the sentence passed on a particular accused are contained in Sections 432 and 433 of the Code of Criminal Procedure and at the risk of repetition the powers of the High Court to suspend the sentence of a convict during the pendency of the appeal against conviction and sentence are contained in Section 389 of the Code of Criminal Procedure. Therefore, non-obstante Clause covers the provisions contained in all these three sections.

11. In that event my attention was drawn to Section 36B of the Act. This provision was pressed into service by the learned counsel for the petitioner in an attempt to bring home the fact that powers of the High court u/s 389 have been saved. The said provisions reads as under:-

"36-B. Appeal and revision :- The High court may exercise, so far as may be applicable, all the powers conferred by Chapter XXIX and XXX of the Code of Criminal Procedure, 1973 (2 of 1974), on a High court as if a Special Court within the local limits of the jurisdiction of the High Court were a Court of Session trying cases within the local limits of the jurisdiction of the High Court.

12. A perusal of the same shows that powers of the High Court have been served as conferred by Chapter XXIX and XXX of the Code of Criminal Procedure. Section 389 of the Code of Criminal Procedure is a part of Chapter XXIX of the Code. But the words which till the balance are "as far as applicable". It clearly show that all provisions of Chapter XXIX & XXX of the Code of Criminal Procedure have not been made applicable to the powers of High Court while hearing appeals or revisions. As already pointed out above, Section 32A has intended to curtail powers of High Court to suspend the sentence. When there is a special provision relating to the same, one need not ponder further to conclude that by using the expression "as far as it may be applicable" the Legislature did not confer powers in High Court which have

specifically been withdrawn, in this case, by virtue of Section 32A of the Act.

13. Reference to some of the precedents cited would be in the fitness of things. The Division Bench of the Madras High Court in the case of Oliver Fernando PTV v. Assistant Collector of Customs, reported as 1990 DC 362, observed as under:-

"Apart from that the language of the Section itself shows that it cannot refer to the powers of the Court, since the High court has no power to remit or commute the sentence which vests only with the Government under Sections 432 and 433 of the Code of Criminal Procedure, the Section is equivalent to Sections 432 and 433 of the Code. u/s 432(1) of the Code the appropriate Government is given ample powers to suspend the execution of sentence or remit the whole or any part of the punishment to which any person has been sentenced to punishment of an offence.....Apart from that we have already extracted Section 36B of the Act which in categorical terms says that the High Court may exercise as far as may be applicable all powers conferred by Chapter XXIX and XXX of the Code. It is couched in such general terms as to exclude any limitations on such powers. It is significant to note that the power of the High Court to suspend sentence is provided u/S. 389 of the Code which comes under Chapter XXIX of the Code. The Parliament in its wisdom has chosen to leave the powers of the High Court to suspend sentence unaffected by providing Section 36B of the Act."

14. My attention has also been drawn to the Division Bench decision of the Delhi High Court in the case of Amarjit Singh & Prem Parkash v. State (Delhi Administration) 1993 (2) RCR 466. The Division Bench of Delhi High Court by and large agreed with the view of the Madras High Court in the case of Oliver Fernando PTV (supra), but concluded that powers has to be exercised keeping in view provisions of Section 37 of the Act. In para 12 the following findings had been arrived at:-

"12. We are, therefore, of the opinion that High Court has power to release a convicted person under the Act on bail pending hearing of his appeal before it. But then we must sound a word of caution, Section 389 requires in that case the reasons to be recorded in writing and the High Court will certainly take into consideration the preamble of the Act and provisions of Section 37 of the Act while exercising powers to release a convict on bail pending his appeal. These will serve as proper guidelines while exercising discretion in releasing the conviction appeal. The Supreme Court has said in Kishan Lal's case 1991 (1) RCR 338 the dominant purpose underlying the Act had to be borne in mind and it will be a sound judicial discretion to take into consideration the provisions of Section 37 of the Act as well while exercising discretion in releasing the convict on bail pending his appeal. Because of the view which we have taken it is hardly necessary for us to analyse various judgments which were referred to us during the course of arguments by both the parties."

15. With respect I am unable to agree with the said view point for the reasons recorded above. The reasons recorded by me get support from the Full Bench decision of Kerala High Court in the case of Berlin Joseph alias Ravi (supra) wherein this question was specifically referred to the Bench of the Kerala High Court. It was held that Section 32A is intended to put an embargo against uspension, remittance and commutance of sentence of a convicted person if it is during pendency of the appeal or otherwise.

16. In fact the same conclusions can be arrived at from the Legislative intent. It has already been noted above that u/s 37 of the Act, a person accused of an offence during the pendency of the trial is not to be admitted to bail unless the Court is satisfied that there are reasonable grounds for believing that he has not committed such offence and that he is not likely to commit any offence while on bail. Once the Court has recorded findings and has concluded on basis of evidence that accused-appellant is guilty of the offence under the Act, the first ingredient that there are reasonable grounds for believing that he is not guilty will not be attracted. After the stage of trial, such material get sanctified as evidence proving the commission of the offence till the conviction or sentence is set aside on appeal. It is, therefore, has to be apparent that powers to suspend the sentence during the pendency of the trial had been withdrawn.

17. For these reasons, I hold that the High Court does not have powers because of embargo u/s 32A of the Act to suspend, remit or commute the sentence during the pendency of the appeal. The applications fail and are dismissed.

18. Since accused persons are in custody, it is directed that appeals should be listed for final hearing within six months.