

(2010) 12 P&H CK 0561

High Court Of Punjab And Haryana At Chandigarh

Case No: Criminal M. No. M-15228 of 2010 (O and M)

Jitender Singh

APPELLANT

Vs

State of Haryana and Others

RESPONDENT

Date of Decision: Dec. 2, 2010

Acts Referred:

- Constitution of India, 1950 - Article 14, 161
- Criminal Procedure Code, 1973 (CrPC) - Section 432(1), 482
- Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) - Section 15, 27, 32A, 33

Hon'ble Judges: Ram Chand Gupta, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Ram Chand Gupta, J.

The present petition has been filed u/s 482 of the Code of Criminal Procedure (hereinafter to be referred as `Cr.P.C.") to release the Petitioner prematurely after issuing directions to Respondent No. 2 to verify the period undergone by the Petitioner, who is a convict under Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter to be referred as `NDPS Act"), including remissions, granted under paras 633-A, 639, 644 of Punjab Jail Manual and under Article 161 of the Constitution of India/ period of parole and furlough and if the Petitioner has undergone the sentence awarded to him by the Court, after adding all remissions, paroles and furlough, he be released temporarily on bail to the satisfaction of the concerned Chief Judicial Magistrate during the pendency of SLP against the order of this Court passed in Ekka Ram v. State of Punjab Crl.W.P. No. 839 of 2004, decided on 14.8.2005.

2. It is case of the Petitioner that he was convicted in FIR No. 188 dated 4.10.2000 u/s 15 of the NDPS Act, at Police Station Sadar, Tohana, District Fatehabad, by learned

Additional Sessions Judge, Fatehabad, vide judgment dated 16.11.2002 and sentenced to undergo rigorous imprisonment for a period of ten years and to pay fine of Rs. 1,00,000/-.

3. Reply has been filed by the Respondent-State.

4. I have heard learned Counsel for the parties and have gone through the whole record carefully.

5. It has been contended by learned Counsel for the Petitioner that he had already undergone five years, one month and twenty seven days of sentence as on 14.5.2010 excluding the period of parole and furlough, availed by him as per custody certificate, Annexure P1. It is further contended that Petitioner was granted remissions from the date of his conviction as per Haryana Government notification issued from time to time and, however, the same were erroneously withdrawn by Director General of Prisons, Haryana, vide letter dated 28.6.2006 on the advice of Legal Remembrancer, Haryana. It has been further contended that inspite of bar created u/s 32A of the NDPS Act, the remissions granted by Governor of the State, in exercise of powers under Article 161 of the Constitution of India, would be available to the convicts under NDPS Act, as the said provision does not effect the powers of Governor of the State to grant remissions. He has also referred to judgment rendered by this Court in Ekka Ram v. State of Punjab and Ors. in Crl.W.P. No. 839 of 2004, decided on 14.9.2005, Annexure P3. It has been further contended that the said decision was challenged by State of Punjab by filing a SLP before Hon"ble Supreme Court which was pending on the date of filing of this petition.

6. It is further contended that a similar controversy came before this Court in Crl.M. No. M-51171 of 2006 (Mahi Ram v. the Secretary & Financial Commissioner and Ors. Crl.M. No. M-51171 of 2006), Annexure P4, in which the following directions were given to the Respondent-State by this Court:

(i) Before releasing the Petitioner, the concerned Superintendent of Jail will verify the period undergone by the convict and the remissions granted under Article 161 of the Constitution of India and that if after subtracting the period of parole, the convict has undergone the sentence awarded by the Court, he shall be released temporarily on bail to the satisfaction of the Chief Judicial Magistrate during the pendency of SLP filed by the State of Punjab in the case of Ekka Ram (SLP) Crl. No. 2496 of 2006 arising from the final judgment and order dated 14.9.2005 passed in Cr.W.P. No. 839 of 2004. The convict concerned will be granted the benefit of remission as per circular issued by the Government of Punjab under Article 161 after his conviction.

(ii) The Petitioner will remain on bail during the pendency of SLP 2496 of 2006 in the Hon"ble Supreme Court. If as per judgment of Supreme Court benefit of remissions under Article 161 is not granted the convict will surrender back in jail for undergoing the unexpired period of sentence.

(iii) At the time of release on bail, the Petitioner will give an undertaking that he will not leave the country without prior permission of the Court and will keep peace and will continue informing the Chief Judicial Magistrate concerned of his residential address from time to time.

7. Learned Counsel also placed reliance upon another decision of this Court in *Krishan and Ors. v. State of Haryana* and Ors. Crl.M. No. M-63825 of 2006. On the same point he has also placed reliance upon *Dara Singh v. State of Haryana* in Crl.M. No. M-10966 of 2008 decided on 29.9.2008.

8. It is further contended that case of present Petitioner is similar to that of Mahi Ram's case (supra) as well as Dara Singh's case (supra) as he has already undergone five years, one month and twenty-seven days of actual sentence as on 14.5.2010, excluding parole and furlough and if the remissions granted under Article 161 of the Constitution of India from time to time by government of Haryana are included, he has already completed the sentence and hence he becomes entitled for release.

9. On the other hand it has been contended by learned Counsel for the Respondents-State that Petitioner has undergone only five years six months and nine days of sentence as on 6.10.2010. It is further contended that in view of bar created by Section 32A of the NDPS Act for suspension, remission or commutation of sentence awarded under the Act, no remission can be granted to the Petitioner. It is further submitted that vide various orders regarding remissions issued by Governor of Haryana from time to time, remission was granted to the convicts in Haryana State u/s 432(1) of the Code of Criminal Procedure and not under Article 161 of the Constitution of India and that it has also been mentioned in the orders that no remission would be granted to persons convicted under NDPS Act. Hence, it is contended that the premature release policy of Haryana Government for convicts under the NDPS Act is not on similar footings as that of State of Punjab and hence, it is contended that Petitioner cannot get any benefit of the decision in *Ekka Ram's* case (supra) or *Sukhwinder Singh alias Titoo v. State of Punjab* in Criminal Writ Petition No. 1157 of 2006 decided on 10.8.2007. It is further contended that a coordinate Bench of this Court has dismissed a similar petition on 20.3.2009, i.e. Crl.M. No. 1159 of 2008 titled *Gurmukh Singh v. State of Haryana* and Ors. Crl.M. No. 1159 of 2008

10. It is pertinent to reproduce Section 32A of the NDPS Act, which was inserted by Act No. 2 of 1989 w.e.f. 29.5.1989, which reads as under:

32A. No suspension, remission or commutation in any sentence awarded under this Act.-Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 to 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.

11. The constitutional validity of the said provision was challenged before Hon"ble Apex Court in *Dadu @ Tulsidas v. State of Maharashtra* 2000(4) RCR 275. However, Hon"ble Apex Court held that the Section in so far as it takes away right of the executive to suspend, remit or commute the sentence is valid and intra vires the Constitution of India. The relevant paragraph reads as under:

15. ... The distinction of the convicts under the Act and under other statutes, in so far as it relates to the exercise of the Executive Powers under Sections 432 and 433 of the Code is concerned, cannot be termed to 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, in so far 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 in so far 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.

12. When similar matter came up before this Court in *Gurmukh Singh's* case (supra), affidavit was given by Inspector General of Prisons, Haryana, before a coordinate Bench of this Court that remissions have been granted to convicts in the State of Haryana u/s 432(1) of the Code of Criminal Procedure and not under Article 161 of the Constitution of India and that it has also been specifically mentioned that no remission will be granted to persons convicted under NDPS Act.

13. Learned Counsel for the Petitioner has failed to show this Court any of the circular issued by Governor of Haryana under Article 161 of the Constitution of India granting remission of which benefit has not been given to the Petitioner.

14. It may also be mentioned here that SLP filed by State of Punjab in *Ekka Ram's* case (supra) has been dismissed by Hon"ble Apex Court vide order dated 27.8.2010, passed in SLP(Crl.) No. 2496 of 2006, while keeping the law point open.

15. However, as already discussed above, premature release policy of the Government of Haryana is not similar to that of State of Punjab and as no remission has been granted by Government of Haryana to convicts under NDPS Act under Article 161 of the Constitution of India, benefit of decision in *Ekka Ram's* case (supra), or *Sukhwinder Singh alias Titoo's* case (supra) cannot be given to the Petitioner-accused.

16. As per reply filed by the Respondent-State and even as per custody certificate, Annexure P1, placed on record by the Petitioner he has undergone total sentence of five years one month and twenty seven days as on 14.5.2010 minus parole and furlough availed by him. Hence, Petitioner has not undergone the awarded sentence of ten years rigorous imprisonment.

17. In view of these facts and in view of above discussion, Ekka Ram's case (supra), or Sukhwinder Singh alias Titoo's case (supra) are not applicable in the case of State of Haryana. Hence, no order can be passed for premature release of present Petitioner-accused in this case.

18. More over, no Rule or instruction can be said to be validly issued, if the same is not in accordance with the statutory provisions. Hence, even if an instruction has been issued which is violative of Section 32A of the NDPS Act, no benefit of the same can be granted to the Petitioner-convict. He has not undergone the entire period of sentence awarded, as per law.

19. Hence, in view of these facts, there is no merit in the present petition. The same is, hereby, dismissed.