

Maktool Singh

Vs

State of Punjab

Criminal Appeal No. 312 of 1999

(K. T. Thomas, M. B. Shah JJ)

17.03.1999

JUDGMENT

K.T. Thomas, J.

1. Leave granted.

2. Can the sentence, passed on a convicted person under the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the Act') be suspended during the pendency of appeal presented by him ? Answers given to the said question by different High Courts are in different tones. The question has now winched to the fore in this Court as the appellant did not succeed in getting the sentence (passed on him) suspended by the High Court though he moved for it on presentation of an appeal in challenge of the conviction and sentence.

3. Section 32A of the Act, which was inserted by Act No. 2 of 1989 reads thus :-

"32A. 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."

4. A plain reading of the above Section is that it prohibits suspension of a sentence awarded under the Act except in the case of an offence under Section 27. To make the aforesaid meaning clearer the legislature has added a non obstante limb to the Section to the effect that such prohibition is operative in spite of any other provision contained in the Code of Criminal Procedure, 1973 (for short 'the Code') or under any other law. But the impact of the aforesaid ban is sought to be diluted with the help of Section 36B of the Act which reads thus :

"36.B. Appeal and revision - The High Court may exercise, so far as may be applicable, all the powers conferred by Chapters XXIX and XXX of the Code of Criminal Procedure, 1973, 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."

5. Chapter XXIX of the Code contains a fasciculus of provisions for dealing with "Appeals" among which is included Section 389 of the Code which confers power for suspension of sentence pending appeal. Such powers can be exercised by the appellate court as well as by the High Court. In certain

cases power of suspension of sentence can be exercised by the convicting court as provided in sub-section (3).

6. The argument advanced before us is that when Section 36B of the Act preserved the powers of the High Court under Chapter XXIX of the Code while dealing with an appeal challenging conviction under the Act, it must be deemed to have preserved all the powers mentioned in Section 389 of the Code including the power to suspend the sentence. But we cannot give accord to that argument on the following grounds. When Section 36B of the Act is juxtaposed with Section 32A the latter must dominate over the former mainly for two reasons. First is that Section 32A overrides all the provisions of the Code, by specific terms, through the non obstante limb incorporated therein. Second is that Section 36B has clearly indicated that its applicability is subject to the extent of adaptability because of the words employed therein "so far as may be applicable". This means, the High Court can exercise powers under Chapter XXIX of the Code only to the extent such powers are applicable. In other words, if there is an interdict against applicability of any provision, the High Court cannot use such provision, albeit its inclusion in Chapter XXIX of the Code. That is the effect of employment of the words "so far as may be applicable" when a statute incorporates provision of another statute.

7. Otherwise Section 32A of the Act must have been intended for covering some other field altogether. Learned counsel contended that the Section is intended to cover the provisions subsumed in placitum "E" in Chapter XXXII of the Code. Sections 432 to 435 are bundled therein. The subtitle given to placitum E is this : "Suspension, Remission and Commutation of Sentences". Section 432 deals with the power of the appropriate Government to suspend execution of any sentence or to remit the whole or any part of the punishment to which any person has been sentenced. Section 433 deals with the powers of the Government to commute sentence. The contention is that Parliament has sought to curb the aforesaid powers of the Government through enactment of Section 32A of the Act, and not the power of the High Court to suspend sentence.

8. If the intention of Parliament in enacting Section 32A of the Act is only to curb Government's powers under Sections 432 and 433 of the Code the Parliament would, instead of using the present all covering words in the non obstante clause ("notwithstanding anything contained in the Code or in any other law") have employed the words "notwithstanding anything contained in Chapter XXXII of the Code". Precision and brevity are generally the hallmarks of legislative draftsmanship. Hence lesser words for achieving the purpose would have been employed by the legislature while framing a provision in the statute.

9. That apart, could parliament have labored so much if its only object was to bridle the powers of the Government under Section 432 and 433 of the Code because even apart from those provisions a Government could achieve it by exercising the constitutional powers. Article 72 of the Constitution of India confers power on the President of India "to suspend, remit or commute sentence" in all cases where punishment or sentence is for an offence against any law relating to a matter to which executive power of the Union extends. Art. 161 contains similar power which Government of a State can exercise in relation to a person convicted of any offence against law relating to a matter which the executive power of the State extends.

10. A Constitution Bench of this Court has held in *Maru Ram v. Union of India*, AIR 1980 SC 2147 that power under Arts. 72 and 161 of the Constitution cannot be exercised by the Governor or Governor on their own but only on the advice of the appropriate Government. The said ratio has been followed by another Constitution Bench in *Kehar Singh v. Union of India*, AIR 1989 SC 653.

Thus, the position relating to Arts. 72 and 161 of the Constitution, as interpreted by this Court, is that the appropriate executive Government can advise the Head of the State to exercise powers thereunder and such advice is binding on him.

11. If the object of S. 32A of the NDPS Act is to take away the power of the Government to suspend, remit or commute and sentence, the legislative exercise in enacting the said provision is practically of futility because even without Section 432 of the Code, the appropriate Government can suspend, remit or commute sentence in exercise of the constitutional functions.

12. For the aforesaid reasons we are not impressed by the contention that the sole object of incorporating a provision like Section 32A in NDPS Act was to impose curb on the executive power under Sections 432 and 433 of the Code to suspend, remit or commute the sentence passed on a particular accused.

13. In this context the *raison d'etre* for introducing Section 32A in the Act can be looked at. In the "Statement of Objects and Reasons" for introducing Bill No. 125/1988 in the Lok Sabha (which later became Act 2 of 1989) the following passage has been mentioned as one of the statements :-

"Even though the major offences are non-bailable by virtue of the level of punishment, on technical grounds, drug offenders were being released on bail. In the light of certain difficulties faced in the enforcement of NDPS Act, 1985 the need to amend the law to further strengthen it, has been felt."

14. One of the objects mentioned therein is this : "To provide that no sentence awarded under the Act shall be suspended, remitted or commuted."

15. It must be pointed out that in the "Statement of Objects and Reasons" no concern was shown against the executive powers of remission or communication or suspension of sentence, but the main concern focussed was on the need to further strengthen the bail provisions. That apart, we are not aware of any criticism from any quarter that Government have been remitting or suspending or commuting sentences awarded to persons convicted of offences under the Act. It is preposterous to think that a situation was created by which Parliament was forced to step in to curb the executive powers of the Government to suspend sentences passed on the convicts under the Act.

16. At this juncture a reference to Section 37 of the Act is apposite. The provision makes the offences under the Act cognizable and non-bailable. It reads thus :

"37. Offences to be cognizable and non -bailable. - (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 -

(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 opposes 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 or any other law for the time being in force, on granting bail."

17. The only offences exempted from the purview of the aforesaid rigors on the bail provisions are those under Sections 26 and 27 of the Act. The former is punishable up to a maximum imprisonment for three years and latter up to a maximum imprisonment for one year. For all other offences the court's power to release an accused on bail during the period before conviction has been thus drastically curtailed by providing that if the Public Prosecutor opposes the bail application no accused shall be released on bail, unless the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence.

18. If the position was thus even before a trial Court completes adjudication, the position regarding bail cannot be more liberal and lighter after the trial court finds him guilty of the offence on completion of the adjudication. The interpretation sought to be placed by the learned counsel would lead to the consequence that power of court to release an accused on bail during pre-conviction is rigorous while it will be liberal during post-conviction period. We do not think that Parliament would have intended such a consequence to take place. Section 32A was intended to plug the lacuna which existed during the pre-amendment stage.

19. It is pertinent to notice that Section 32A itself exempted cases falling under Section 27 of the Act by putting the words "other than Section 27" within a parenthesis. This is because Section 27 deals with offences of far lesser degree when compared with the other offences in the Act. Learned counsel contended that if that was the intention of Parliament Section 26 also would have been included in the parenthesis so as to exempt that offence from the purview of Section 32A. We are not disposed to question the wisdom of Parliament as to why Section 26 was also not brought within the exemption. Perhaps it was not so done because Section 26 relates to offences which are more serious than the offences mentioned in Section 27 of the Act.

20. A Full Bench of the Kerala High Court in *Berlin Joseph @ Ravi v. State, 1992(1) Crimes 1221 = 1992 KLT 514* has adopted the view that Section 32A of the Act has curtailed the powers of the Court to suspend the sentence passed on a convicted person of offences under the Act, except the offences under Section 27. A Division Bench of Rajasthan High Court in *Anwar v. State, 1994(2) Crimes 687* and a Full Bench of Madhya Pradesh High Court in *Rajendra Singh v. State of M.P., 1995 CrL. Law Journal 3248* have also adopted the same view.

21. But a Division Bench of the Delhi High Court in *Amarjit Singh v. State, 1993(2) Recent CrL. Reports 466* has taken a different view on Section 32A. Though the Full Bench decision in *Berlin Joseph v. State* (supra) was brought to the notice of the Division Bench it was skipped by a curt observation in the following lines :

"Mr. Handa strongly relied on a later Full Bench decision of the Kerala High Court in *Berlin Joseph @ Ravi v. State, 1992(1) Crimes 1221* where the Full Bench has taken the view that High Court has no power to suspend the sentence of a convicted person under the Act during the pendency of his appeal or revision. With respect we are unable to agree to this view. Section 32A of the Act is neither a proviso to Section 36B of the Act nor it controls it."

22. The Delhi High Court has not adverted to any of the reasoning contained in Berlin Joseph's decision. But a Full Bench of the Gujarat High Court in *Jyotiben Ramlal Purohit v. State of Gujarat, 1997(3) Recent Crl. Reports 607* considered the question, rather at length, and differed from the ration in Berlin Joseph (supra). Three premises were put forward by the Gujarat High Court in the said decision. First is that Section 36B has clearly conferred all powers provided in Chapter XXIX of the Code. Second is, the word "award" used in Section 32A of the Code denotes only the sentence passed by the final court and not the trial court. Third is, that under Section 289(3) of the Code a trial court is empowered to suspend the sentence for the offence under Section 26 of the Act and if that be so "the legislature can hardly have thought about bringing such an anomalous consequence, namely that the trial court can grant bail but the appellate court cannot."

23. We must observe that the aforesaid three premises are faulty. We have already dealt with the contention that Section 36B would take care of powers of the appellate court to suspend the sentence and we found that the provision cannot override the clear ban contained in Section 32A of the Act. The second premises that the word "award" should be construed not as a sentence passed by the trial court cannot be upheld at all. How can it be said that when trial court awards a sentence that cannot be treated in law as a sentence awarded. Then what is the legal import of such a sentence ? To say that a sentence passed by a trial court would be no awarding of sentence merely because the conviction has been challenged, appears to us to be too tenuous for countenance.

24. The third premise adopted by the Gujarat High Court is based on a fallacious assumption that in spite of Section 32A the trial court has power to suspend the sentence passed on a conviction under Section 26 of the Act. Learned judges wrongly assumed that under Section 289(3) of the Code a trial court has such a power. The effect of any order passed under Section 389(3) of the Code is to suspend the sentence, as can be discerned from the words in the specific "and the sentence of imprisonment shall be deemed to be suspended". When power of suspending the sentence is taken away by the legislative interdict, it would apply to the court which convicts the accused as well. A legal premises cannot be made up on a wrong assumption.

25. The upshot of the discussion is that Section 32A of the Act has taken away the powers of the court to suspend a sentence passed on persons convicted of offences under the Act (except Section 27) either during pendency of any appeal or otherwise. Similarly, the power of the Government under Section 432, 433 and 434 of the Criminal Procedure Code have also been taken away. Section 32A would have an overriding effect with regard to the powers of suspension, commutation and remission provided under the Criminal Procedure Code.

26. Before parting with the matter we must deal with a possible fall-out of adopting such a view. Learned counsel for the appellant has voiced a concern that if High Courts have no power to suspend sentence under any contingency its consequence is that long duration of pendency of appeals would result in serious miscarriage of justice in many cases. We are aware of such hard consequences which might erupt. The solution to such problems can be worked out by Parliament. Till then the High Courts should direct the Registry to board appeals under the Act on a priority basis and dispose them of as early as possible. As a temporary measure to lessen the problem we direct the Registry of each High Court to include every appeal (against conviction of offences under the Act) in the hearing list as soon as such appeal becomes ripe for hearing. We express the hope that the Bench of the High Court concerned would give preference to such appeal for early hearing. The appeal is disposed of accordingly.

