A KRISHNAN & ORS.

v.

STATE OF HARYANA & ORS.

(Criminal Appeal No. 973 of 2008)

MAY 7, 2013

B

[DR. B.S. CHAUHAN AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

Narcotic Drugs and Psychotropic Substances Act, 1985:

C

s.32-A – Sentence awarded under the Act, not to be suspended, nor any remission/commutation to be ordered – Questions (i) Whether s.32-A is violative of Arts. 72 and 161 of Constitution of India; and (ii) whether s.32-A NDPS Act is D *violative of Arts 14 and 21 of the Constitution of India, inasmuch as the same abrogates the rights of a convict under the Act to be granted remission/commutation, etc. – Referred to larger Bench – Constitution of India, 1950 – Arts. 14, 21, 72 and 161.*

E **The instant appeal arose out of the decision of the High Court upholding the validity of the letter dated 28.6.2006 issued by the Deputy Inspector General of Prisons, Haryana giving effect to provisions of s.32-A of the Narcotic Drugs and Psychotropic Substances Act,** F **1985. The High Court held that the appellants were not entitled to relief sought for by them.**

Referring the matter to larger Bench, the Court

HELD: 1.1. The validity of s.32-A, so far as the G **competence of the court is concerned, was partly struck down. As to the question of imposing complete embargo on remission and commutation in the context of Arts 72 and 161 of the Constitution of India, the issue was not conclusively decided by the court. More so, in paragraph**

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15, the reference has been made that such exclusion cannot be held as unconstitutional on account of it not being absolute, in view of the constitutional powers conferred upon the executive. Articles 72 and 161 of the Constitution empower the President of India and the Governor of a State to grant pardons, reprieves, respites or remissions of punishments or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the Union and State exists. [para 5] [262-E-G]

Dadu @ Tulsidas v. State of Maharashtra, **(2000) 8 SCC 437 – referred to.**

1.2. In fact, Art. 72 and 161 of the Constitution provide for residuary sovereign power, thus, there could be nothing to debar the authorities concerned to exercise such power even after rejection of one clemency petition and even in the changed circumstances. [para 7] [263-E]

Krishta Goud and J. Bhoomaiah v. State of Andhra Pradesh & Ors., **(1976) 1 SCC 157;** *State of Haryana & Ors. v. Jagdish* **2010 (3) SCR 716 = AIR 2010 SC 1690;** *State of Uttar Pradesh v. Sanjay Kumar* **2012 (7) SCR 359 = (2012) 8 SCC 537– referred to**

1.3. This Court has always clarified that the punishment of a fixed term of imprisonment so awarded would he subject to any order passed in exercise of the clemency powers of the President of India or the Governor of the State, as the case may be. Pardons, reprieves and remissions under Art. 72 or Art. 161 are granted in exercise of prerogative power. There is no scope of Judicial review of such orders except on very limited grounds. The power to grant pardons and to commute sentences is coupled with a duty to exercise the same fairly and reasonably. Administration of justice

A **cannot be perverted by executive or political pressure. Of course, adoption of uniform standards may not be possible while exercising the power of pardon. Thus, directions of the court specifying a minimum term of incarceration do not interfere with the sovereign power**
B **of the State. Such directions have been passed by courts considering the gravity of the offences directing that the accused would not be entitled to be considered for premature release under the guidelines issued for that purpose i.c. under Jail Manual, etc. or even u/s 433-A**
C **Cr.P.C. [para 9] [262-C-F]**

Epuru Sudhakar & Anr. v. Government of A.P. & Ors., **2006 (7) Suppl. SCR 81 = (2006) 8 SCC 161**; *Union of India & Ors. v. Ind-Swift Laboratories Limited*, **2011 (2) SCR 1087 = (2011) 4 SCC 635**; *Sardar Syedna Taher Saifuddin Saheb*
D *v. State of Bombay* **1962 Suppl. SCR 496 = AIR 1962 SC 853– referred to**

1.4. Keeping in view the decisions of this Court and the submissions made in the instant appeal, the appeal
E **raises the following substantial questions of law:**

(i) "Whether s.32A NDPS Act is violative of Arts. 72 and 161 of the Constitution of India"; and

(ii) "Whether s.32A NDPS Act is violative of Arts. 14
F **and 21 of the Constitution of India, inasmuch, as the same abrogates the rights of an accused/convict under the Act to be granted remission/ commutation, etc." [para 13] [267-D-F]**

G **1.5. This Court is of the opinion that the matter requires to be considered by a larger bench, either by a three Judges Bench first or by a five Judges Bench directly. [para 16] [268-E]**

Coir Board Ernakulam & Anr. v. Indira Devai P.S. & Ors.,
H **(2000) 1 SCC 224**, *Bangalore Water Supply & Sewerage*

Board v. A Rajappa, **1978 (3) SCR 207 = AIR 1978 SC 548;** *Pradip Chandra Parija & Ors. v. Pramod Chandra Patnaik & Ors.,* **AIR 2002 SC 296;** *Union of India & Anr. v. Hansoli Devi,* **(2002) 7 SCC 273– referred to**

Case Law Reference:

(2000) 8 SCC 437	**referred to**	**para 4**
(1976) 1 SCC 157	**referred to**	**para 7**
2010 (3) SCR 716	**referred to**	**para 8**
2012 (7) SCR 359	**referred to**	**Para 9**
2006 (7) Suppl. SCR 81	**referred to**	**Para 10**
2011 (2) SCR 1087	**referred to**	**Para 11**
1962 Suppl. SCR 496	**referred to**	**para 12**
(2000) 1 SCC 224	**referred to**	**Para 13**
1978 (3) SCR 207	**referred to**	**Para 14**
(2002) 7 SCC 273	**referred to**	**para 15**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 973 of 2008.

From the Judgment & Order dated 22.02.2007 of the High Court of Punjab and Haryana at Chandigarh in Criminal Misc. No. 63845-M of 2006.

Rekha Pandey for the Appellants.

Paras Kuhad (A.C.), ASG, Huzefa Ahmadi (A.C.), Pradhuman Gohil, Vikash Singh, Mrinmayee S., Rajiv Gaur 'Naseem', Kamal Mohan Gupta, Zahid Hussain for the Respondents.

The Judgment of the Court was delivered by

A **DR. B.S. CHAUHAN, J.** 1. This appeal has been preferred against the judgment and order dated 22.2.2007 passed by the High Court of Punjab and Haryana at Chandigarh in Criminal Misc. No. 63845-M of 2006, wherein the High Court has upheld the validity of the letter dated 28.6.2006 issued by
B the Deputy Inspector General of Prisons, Haryana, giving effect to the provisions of Section 32-A of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'NDPS Act').

C 2. The High Court referring to various provisions of the Punjab Jail Manual held that the appellants are not entitled to any remission in view of the provisions of Section 32-A of NDPS Act. Section 32-A of the NDPS is reproduced herein as under:

D **"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
E or remitted or commuted."

3. The High Court has held that legal provisions concerning remission are governed by the statutory provisions as laid down in Punjab Jail Manual rather than under Article 161 of the Constitution of India. The provisions of Section 32-A of NDPS
F Act would have overriding effect, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.'), or any other law for the time being in force. Thus, the appellants were not entitled for the relief sought by them.

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4. This Court while examining the issue, has considered the three Judge Bench judgment of this Court in *Dadu @Tulsidas v. State of Maharashtra,* (2000) 8 SCC 437, wherein the validity of the said provisions was challenged.
H Relevant part of the judgment reads as under:

"1.....The section is alleged to be arbitrary, discriminatory and violative of Articles 14 and 21 of the Constitution of India which creates unreasonable distinction between the prisoners convicted under the Act and the prisoners convicted for the offences punishable under various other statutes. It is submitted that the legislature is not competent to take away, by statutory prohibition, the judicial function of the court in the matter of deciding as to whether after the conviction under the Act the sentence can be suspended or not. The section is further assailed on the ground that it has negated the statutory provisions of Sections 389, 432 and 433 of the Code of Criminal Procedure..... It is further contended that the legislature ***cannot make relevant considerations irrelevant or deprive the courts of their legitimate jurisdiction to exercise the discretion. It is argued that taking away the judicial power*** *of the appellate court to suspend the sentence despite the appeal meriting admission, renders the substantive right of appeal illusory and ineffective.*

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15. *The restriction imposed under the offending section, upon the executive are claimed to be for a reasonable purpose and object sought to be achieved by the Act. Such exclusion cannot be held unconstitutional, on account of its not being absolute in view of the constitutional powers conferred upon the executive. Articles 72 and 161 of the Constitution empowers the President and the Governor of a State to grant pardons, reprieves, respites or remissions of punishments or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the Union and State exists.....The distinction of the convicts under the*

A *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* B *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* C *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.*** D *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* E *of a convict under the Act.*

16. Learned counsel appearing for the parties were more concerned with the adverse effect of the section on the powers of the judiciary. Impliedly conceding F ***that the section was valid so far as it pertained to the appropriate Government, it was argued that the legislature is not competent to take away the judicial powers of the court by statutory prohibition as is shown to have been done vide the impugned section.*** G *Awarding sentence, upon conviction, is concededly a judicial function to be discharged by the courts of law established in the country. It is always a matter of judicial discretion, however, subject to any mandatory minimum sentence prescribed by the law. The award of sentence* H *by a criminal court wherever made subject to the right of*

appeal cannot be interfered or intermeddled with in a way which amounts to not only interference but actually taking away the power of judicial review. Awarding the sentence and consideration of its legality or adequacy in appeal is essentially a judicial function embracing within its ambit the power to suspend the sentence under the peculiar circumstances of each case, pending the disposal of the appeal.

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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.....

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.

27. Holding Section 32-A as void insofar as it takes away the right of the courts to suspend the sentence awarded to a convict under the Act, would neither entitle such convicts to ask for suspension of the sentence as a matter of right in all cases nor would it absolve the courts of their legal obligations

A ***to exercise the power of suspension of sentence within the parameters prescribed under Section 37 of the Act.***

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B **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.

C (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 D *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.* (Emphasis added)

5. Thus, it is evident from the aforesaid judgment that the E validity of the aforementioned provisions, so far as the competence of the court is concerned, was partly struck down. As to the question of imposing complete embargo on remission and commutation in the context of Articles 72 and 161 of the Constitution of India, the issue was not conclusively decided by the court. More so, in paragraph 15, the reference has been F made that such exclusion cannot be held as unconstitutional on account of it not being absolute, in view of the constitutional powers conferred upon the executives. Articles 72 and 161 of the Constitution empower the President of India and the Governor of a State to grant pardons, reprieves, respites or G remissions of punishments or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the Union and State exists.

H 6. A two Judge Bench of this Court heard the matter on

8.1.1993 and *prima facie* had been of the view that on a plain reading of Section 32-A of NDPS Act, it appeared to be quite draconian and to understand the matter further, the Court requested Shri Huzefa Ahmadi, learned senior counsel and Shri Paras Kuhad, learned Additional Solicitor General, to assist the Court as Amicus Curiae, as to whether Section 32-A of NDPS Act, would apply to the clemency powers of the President of India and the Governor of the State and what could be its applicability with respect to the statutory rules which have been framed by the State, in exercise of its executive powers under the Constitution. In view thereof, both Shri Huzefa Ahmadi, learned senior counsel and Shri Paras Kuhad, learned ASG made their submissions pointing out that the powers of clemency under Articles 72 and 161 of the Constitution, cannot be controlled by any statute and, therefore, it requires a clarification that the provisions of Section 32-A of NDPS Act cannot be a fetter to the said powers of clemency by any means whatsoever.

7. In fact, Articles 72 and 161 of the Constitution provide for residuary sovereign power, thus, there could be nothing to debar the concerned authorities to exercise such power even after rejection of one clemency petition and even in the changed circumstances. (Vide: *Krishta Goud and J. Bhoomaiah v. State of Andhra Pradesh & Ors.*, (1976) 1 SCC 157).

8. In *State of Haryana & Ors. v. Jagdish*, AIR 2010 SC 1690, this Court has considered as under:

> *'33. Articles 72 and 161 of the Constitution provide for a residuary sovereign power, thus, there can be nothing to debar the concerned authority to exercise such power, even after rejection of one clemency petition, if the changed circumstances so warrant.*
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> *xx xx xx xx*
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> *35. In view of the above, it is evident that the clemency*

A *power of the Executive is absolute and remains unfettered for the reason that the provisions contained under Article 72 or 161 of the Constitution cannot be restricted by the provisions of Sections 432, 433 and 433-A Cr.PC. though the Authority has to meet the*
B *requirements referred to hereinabove while exercising the clemency power.*

To say that clemency power under Articles 72/161 of the Constitution cannot be exercised by the President or the Governor, as the case may be, before a convict
C *completes the incarceration period provided in the short-sentencing policy, even in an exceptional case, would be mutually inconsistent with the theory that clemency power is unfettered.*

D *The Constitution Bench of this Court in Maru Ram, (AIR 1980 SC 2147) (supra) clarified that not only the provisions of Section 433-A Cr. P.C., would apply prospectively but any scheme for short sentencing framed by the State would also apply prospectively. Such*
E *a view is in conformity with the provisions of Articles 20(1) and 21 of the Constitution. The expectancy of period of incarceration is determined soon after the conviction on the basis of the applicable laws and the established practices of the State. When a short sentencing scheme*
F *is referable to Article 161 of the Constitution, it cannot be held that the said scheme cannot be pressed in service. Even if, a life convict does not satisfy the requirement of remission rules/short sentencing schemes, there can be no prohibition for the President or the Governor of the State, as the case may be, to exercise the power of*
G *clemency under the provisions of Articles 72 and 161 of the Constitution. Right of the convict is limited to the extent that his case be considered in accordance with the relevant rules etc., he cannot claim premature release as a matter of right."*

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9. In *State of Uttar Pradesh v. Sanjay Kumar*, (2012) 8 SCC 537, this Court held that commutation of death sentence to a specified term of imprisonment without entitlement to premature release is the via media found by courts, where considering the facts and circumstances of a particular case, the court has come to the conclusion that it was not "the rarest of rare cases", warranting death penalty, but a sentence of 14 years or 20 years, as referred to in the guideline laid down by the States, would be totally inadequate. Life imprisonment cannot be equivalent to imprisonment for 14 years or 20 years, rather it always means the whole natural life. This Court has always clarified that the punishment of a fixed term of imprisonment so awarded would he subject to any order passed in exercise of the clemency powers of the President of India or the Governor of the State, as the case may be. Pardons, reprieves and remissions under Article 72 or Article 161 of the Constitution are granted in exercise of prerogative power. There is no scope of Judicial review of such orders except on very limited grounds. The power to grant pardons and to commute sentences is coupled with a duty to exercise the same fairly and reasonably. Administration of justice cannot he perverted by executive or political pressure. Of course, adoption of uniform standards may not be possible while exercising the power of pardon. Thus, directions of the court specifying a minimum term of incarceration do not interfere with the sovereign power of the State. Such directions have been passed by courts considering the gravity of the offences directing that the accused would not be entitled to be considered for premature release under the guidelines issued for that purpose i.c. under Jail Manual, etc. or even under Section 433-A Cr.P.C.

10. In *Epuru Sudhakar & Anr. v. Government of A.P. & Ors.*, (2006) 8 SCC 161, this Court held as under:

> *"34. The position, therefore, is undeniable that judicial review of the order of the President or the*

A *Governor under Article 72 or Article 161, as the case may be, is available and their orders can be impugned on the following grounds:*

(a) that the order has been passed without application of mind;

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(b) that the order is mala fide;

(c) that the order has been passed on extraneous or wholly irrelevant considerations;

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(d) that relevant materials have been kept out of consideration;

(e) that the order suffers from arbitrariness."

D 11. It has further been submitted by the said learned senior counsel that reading down of provisions of Section 32-A of NDPS Act will not serve the purpose and he has placed a very heavy reliance on the judgment of this Court in *Union of India & Ors. v. Ind-Swift Laboratories Limited,* (2011) 4 SCC 635, E wherein the Court observed:

***"19.** This Court has repeatedly laid down that in the garb of reading down a provision it is not open to read words and expressions not found in the provision/statute and thus venture into a kind of judicial legislation. It is* F *also held by this Court that the rule of reading down is to be used for the limited purpose of making a particular provision workable and to bring it in harmony with other provisions of the statute."*

G 12. In *Sardar Syedna Taher Saifuddin Saheb v. State of Bombay,* AIR 1962 SC 853, this Court while dealing with the people of Bohra community, while interpreting the provisions of Article 25 and 26 of the Constitution, and dealing with the particular Act held as under:

H *"It is not possible in the definition of excommunication*

which the Act carries, to read down the Act so as to confine excommunication as a punishment of offences which are unrelated to the practice of the religion which do not touch and concern the very existence of the faith of the denomination as such. Such an exclusion cannot be achieved except by rewriting the section."

Thus, it is submitted that as far as the plain language of Section 32-A of NDPS Act is concerned, it is absolute in its terms and gives no leeway for remission or commutation of any sentence or any ground whatsoever, thus contrary to the mandate of Articles 72 and 161. There is no scope for reading down the section, as the language is absolute in its terms and the same cannot be read down without doing violence to the language.

13. From the above, it is evident that the petition raises the following substantial questions of law:

I. Whether Section 32A NDPS Act is violative of Articles 72 and 161 of the Constitution of India.

II. Whether Section 32A NDPS Act is violative of Articles 14 and 21 of the Constitution of India, inasmuch, as the same abrogates the rights of an accused/convict under the Act to be granted remission/commutation, etc.

14. In *Coir Board Ernakulam & Anr. v. Indira Devai P.S. & Ors.*, (2000) 1 SCC 224, this Court while dealing with a similar reference by a Bench of two Judges doubting the correctness of seven Judges' Bench judgment in *Bangalore Water Supply & Sewerage Board v. A Rajappa,* AIR 1978 SC 548, held as under:-

"The judgment delivered by the seven learned Judges of the Court in Bangalore Water Supply case, does not, in our opinion, require any reconsideration on a reference being made by a two Judge Bench of the Court, which is

A *bound by the judgment of the larger Bench. The appeals shall, therefore, be listed before the appropriate Bench for further proceedings.*"

15. The Constitution Bench of this Court in *Pradip Chandra Parija & Ors. v. Pramod Chandra Patnaik & Ors.*, AIR 2002 B SC 296, while dealing with a similar situation held that judgment of a co-ordinate Bench or larger Bench is binding. However, if a Bench of two Judges concludes that an earlier judgment of three Judges is so very incorrect that in no circumstances it can be followed, the proper course for it to adopt is to refer the C matter to a Bench of three Judges setting out, the reasons why it could not agree with the earlier judgment. If, then, the Bench of three Judges also comes to the conclusion that the earlier judgment of a Bench of three Judges is incorrect, reference to a Bench of five Judges is justified. (See also: *Union of India* D *& Anr. v. Hansoli Devi,* (2002) 7 SCC 273)

16. In view of the above, we are of the opinion that the matter requires to be considered by a larger bench, either by a three Judges Bench first or by a five Judges Bench directly. E The papers may be placed before Hon'ble the Chief Justice of India for appropriate orders.

R.P. Matter referred to Larger Bench.