

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Writ Jurisdiction Case No 1180 of 2016

Arising Out of PS.Case No. -null Year- null Thana -null District- PATNA

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Most Sudama Devi W/o Late Moti Lal Yadav and M/o Shiv Gope Resident of
Mohalla- Chatra Lane, Jakkanpur, District- Patna.

.... Petitioner/s

Versus

1. The State of Bihar.
2. The Principal Secretary, Department of Home, Bihar, Patna.
3. The Director General of Police, Bihar, Patna.
4. The Inspector General, Prison, Bihar, Patna.
5. The Assistant Inspector General, Prison, Bihar, Patna.
6. The State Sentence Remission Board, through I.G. Prison, Bihar, Patna.
7. The Jail Superintendent, Adarsh Central Jail, Beur, Patna.

.... Respondent/s

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Appearance :

For the Petitioner/s : M/s Uma Kant Shukla & Ratnakar Pandey, Advocates
For the S t a t e : Mr Prabhu Narayan Sharma, AC to AG

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CORAM: HON'BLE MR JUSTICE NAVANITI PRASAD SINGH

And

HON'BLE MR JUSTICE SANJAY PRIYA

ORAL JUDGMENT

(Per: HONOURABLE MR JUSTICE NAVANITI PRASAD SINGH)

Date: 16-12-2016

The writ petitioner is the mother of a life convict Shiv Gope. By judgment in Sessions Trial No 814 of 1995 arising out of Jakkanpur Police Station Case No 82 of 1985, the son of the petitioner was convicted by the Additional Sessions Judge III, Patna for an offence under Section 302 read with Section 34 of Indian Penal Code and sentenced him to imprisonment for life. This conviction and sentence has not been interfered with either in appeal by this Court or by the Apex Court. He has been in custody in the said case from



before conviction itself. It is not in dispute that, by now, he has been in physical custody in relation to the said case for over 22 years. The mother seeks his premature release. His case for premature release was earlier rejected by the State Sentence Remission Board (for brevity, *the Board*) on 29.06.2016 in view of adverse police report. The report was that if he is released, there is apprehension that he would start a gang war. There was nothing to substantiate such an apprehension or such an allegation. It was also refused on the ground that as required by Section 432 (2) of the Code of Criminal Procedure, 1973 (for brevity, CrPC), the trial Judge had not sent a report and in absence thereof, the Board could not consider the same and, therefore, could not order his release.

2 After the writ petition was filed, a counter affidavit has been filed stating that in view of amendment made to the Bihar Prison Manual 2012, which has been issued under Section 59 of the Prisons Act, 1894 whereby amendments have been made to Rule 482 (2) thereof by notification dated 26.05.2016 which required a police report and a report from trial Judge to consider a convict's premature release mandatory. The Presiding Officer of the trial Court, on 10.06.2016, sent a report that as the records were not available, they having been sent to the High Court decades back, no report could be given and there being no report from the trial Court, his case could



only be rejected. So far as adverse police report is concerned, State has annexed the communication dated 11.10.2014 of the Senior Superintendent of Police, Patna to the Superintendent, Central Jail, Beur wherein it is stated that if the petitioner's son is released, there is likely to be gang war. Then there is letter of the District Magistrate – cum- Collector, Patna dated 09.11.2016 to the Inspector General of Prisons stating that in recent times, there were activities of Maoists and if Shiv Gope is released, they would start criminal activities all over again. Similar is the report of the Senior Superintendent of Police dated 07.11.2016. What is surprising is that the petitioner's son Shiv Gope has been in custody for over 20 years continuously. Apart from these apprehensions, there is absolutely not a single chit of paper that has been brought on record to show the reasonableness of such an apprehension. It is also disclosed in the counter affidavit that Shiv Gope, along with several other so-called famous criminals, has been shifted now to Bhagalpur from Patna. Apart from this, there is no other material to deny the remission and premature release. We must take note of one submission, as made in the counter affidavit. We would rather quote from the counter affidavit, the relevant part of paragraph 6:

“06 It is submitted that remission is a kind of State Policy to grant remission to the convict on the basis of his conduct, behaviour with other allied consideration while undergoing imprisonment. Remission is not a right of the convict



prisoner, it happens to be a kindness or mercy shown at the end of the State. It is further submitted that no one can claim premature release as a matter of right. ...
... ..”

3 It was argued that petitioner’s son has suffered conviction and sentence of life imprisonment. He is a condemned criminal. He has no right. He is at the mercy of the State. It is then pointed out that Section 432 (1) of CrPC does not make it obligatory on the Government to grant premature release. The expression used therein is that the Government *may*, at any time, without conditions or upon any conditions, suspend the execution of his sentence or remit the whole or any part of the punishment. The Section is quoted hereunder:

“432. Power to suspend or remit sentences.”-(1) *When any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without conditions or upon any 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.”*

4 It is, thus, submitted that it is the sweet will of the Government to release or not to release. We are indeed surprised at the arguments as made especially after India became independent of the British Rules, it became independent of the Zamindars and it was to be governed by the Constitution and not fancies and discretion of the Government. Such an argument has been noticed only to be



rejected outright. We take it that the argument is that the Government has discretion in the matter by use of the expression *may*. It may or may not exercise the power and no one can complain. All I can say is similar was the argument of the State in the case of *L Hirday Narain – Versus- Income Tax Officer, Bareilly* since reported in *AIR 1971 Supreme Court 33*. Section 35 of the Income Tax Act, 1922 gives power to rectify mistake to the Income Tax Officer and was couched in similar terms giving power to the Income Tax Officer who may rectify a mistake in the order of assessment. An application was made by an assessee for correction. The Income Tax Officer refused the same saying that he is not obliged to act as the Section confers the power with discretion by using the expression *may*. The assessee moved the High Court. The High Court dismissed the writ petition on the ground that by using the word *may*, discretion has been conferred on the Income Tax Officer who may or may not exercise the power. The matter then reached the Apex Court. The Apex Court allowed the writ petition and set aside the judgment of the High Court clearly holding that when a discretionary power is coupled with certain conditions and is for public purpose, once conditions are fulfilled then *may* has to be read as *shall* and it becomes a duty enforceable by law. There is nothing like absolute discretion. Relevant part of the judgment is quoted hereunder:

“12.



The High Court observed that under Section 35 of the Indian Income-tax Act, 1922, the jurisdiction of the Income-tax Officer is discretionary. If thereby it is intended that the Income-tax Officer has discretion to exercise or not to exercise the power to rectify, that view is in our judgment erroneous. Section 35 enacts that the Commissioner or Appellate Assistant Commissioner or the Income-tax Officer may rectify any mistake apparent from the record. If a statute invests a Public Officer with authority to do an act in a specified set of circumstances, it is imperative upon him to exercise his authority in a manner appropriate to the case when a party interested and having a right to apply moves in that behalf and circumstances for exercise of authority are shown to exist. Even if the words used in the statute are prima facie enabling, the Courts will readily infer a duty to exercise power which is invested in aid of enforcement of a right-public or private-of a citizen.

13. *In Julius v Bishop of Oxford, (1880) 5 AC 214 it was observed by Cairns L C at pp 222-223 that “the words “it shall be lawful” conferred a faculty or power, and they did not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so.” Lord Blackburn observed in the same case at pp 244-245 that the enabling words give a power which prima facie might be exercised or not, but if the object for which the power is conferred is for the purpose of effectuating a right there may be a duty cast upon the donee of the power to exercise it for the benefit of whose who have that right when required on their*



behalf. Lord Penzance and Lord Selborne made similar observations at pp 229 and 235.

14. Exercise of power to rectify an error apparent from the record is conferred upon the Income-tax Officer in aid of enforcement of a right. The Income-tax Officer is an Officer concerned with assessment and collection of revenue, and the power to rectify the order of assessment conferred upon him is to ensure that injustice to the assessee or to the Revenue may be avoided. It is implicit in the nature of the power and its entrustment to the authority invested with quasi-judicial functions under the Act, that to do justice it shall be exercised when a mistake apparent from the record is brought to his notice by a person concerned with or interested in the proceeding.

15. The High Court was, in our judgment, in error in assuming that exercise of the power was discretionary and the Income-tax Officer could, even if the conditions for its exercise were shown to exist, decline to exercise the power.”

5 We may only add that we are governed by rule of law and not rule of discretion. It is too late in the day to make such a submission. Once statute gives the power pursuant whereto statutory policies are laid out then if the conditions therein are fulfilled, there is no discretion left with the State. It becomes the duty and consequently becomes the right of a citizen to claim the privilege thereunder. It cannot be denied.

6 Thus seen, for the 20 years that the son of the petitioner has been in custody, not a single overt act has been brought



on record, it is only unfounded, unsubstantiated apprehension that is being spoken about, the rights of a citizen cannot be jeopardized in such a manner.

7 We may add that sub-section (1) of Section 432 of CrPC itself provides that the reduction in sentence or remission or suspension of sentence could be made subject to conditions and sub-section (3) further provides that if the conditions are violated then the Government has a right to withdraw the said remission or suspension of sentence. There are checks and balances inbuilt as provided in the scheme of Section 438 (2) of CrPC itself.

8 Thus, in our view, the manner in which the son of the petitioner is being denied to be released is not sanctioned or countenanced by law. We would, thus, have to hold that there being no adverse ground for denying the petitioner's son to be released having already served out more than 20 years of physical imprisonment, the Board would immediately take a decision accordingly and pass appropriate orders forthwith.

9 This writ petition is, accordingly, disposed of.

(Navaniti Prasad Singh, J)

(Sanjay Priya, J)

M.E.H./-

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