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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Date of Decision: 20.03.2018**

% **W.P.(CRL) 513/2018**

BALDEV SINGH Petitioner

Through: Mr. Akshay Bhandari, Advocate

versus

DIRECTORATE OF REVENUE INTELLIGENCE & ORS

..... Respondent

Through: Mr. Satish Aggarwal, with
Ms. Gitanjali Kumar, Adv for DRI
Mr. Rahul Mehra, Standing Counsel
for GNCTD with Mr. Chaitanya
Gosain and Mr. Prashant Singh, Adv.
Mr. Vikas Mahajan, CGSC with Ms.
Shakshi Aggarwal, G.P., Mr. Shyam
Sundar Rai, Mr. Deepak Goyal, Adv.
for UOI

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE P. S. TEJI

VIPIN SANGHI, J. (ORAL)

1. The petitioner has preferred the present writ petition to seek a declaration that Section 32A of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) is *ultravires* to the extent it prevents the

convicts under the said Act from getting remission under the Delhi Jail Manual.

2. The petitioner is a convict under the NDPS Act. He stands convicted under Section 21 and 29 of the NDPS Act and sentenced to 12 year rigorous imprisonment with fine, vide judgment and order on sentence dated 06.01.2011 passed by the learned ASJ, Special Judge NDPS, South & South East Saket Courts in Sessions Case No.43A of 2008 titled “*Directorate of Revenue Intelligence v. Samuel John and Anr*”. The petitioner states that he accepted the judgment and order on sentence and did not prefer any appeal.

3. Section 32A of the NDPS Act bars the suspension, remission or commutation of sentence awarded under the NDPS Act, subject to provisions in Section 33. However, the said provision is not applicable to cases covered by Section 27 of the said Act. The same reads as follows:

“32A. 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.”

4. The submission of the petitioner is that remission of sentence could be provided under three different provisions. Firstly, it could be provided under Articles 72 and 161 of the Constitution of India, which relate to the power of remission vested in the President of India and the Governor of a State respectively. Secondly, the power of remission is also vested by virtue

of Section 432 of the Code of Criminal Procedure (Code/Cr PC) in the appropriate government.

5. The petitioner claims that the third provision for remission is contained under the Delhi Prisons Act, 2000 (DP Act), which is good conduct remission. In this respect, learned counsel for the petitioner places reliance on Section 71 of the DP Act, 2000 which empowers the government to make rules generally to carry out the provisions of the said Act. Sub-section (2) thereof particularises, without prejudice to the generality, the aspects on which the rules may be made. These include:

“(v) for the award of marks and the shortening of sentence;

x x x x x x x x x

(xix) for the preparation and maintenance of history tickets;

x x x x x x x x x

(xxx) for grant of parole, furlough and leave to prisoners;”

6. The petitioner is aggrieved by and challenges the bar created by Section 32A of the NDPS Act to grant of even good conduct remission under the Delhi Prisons Rules, 1998 (DP Rules), which have been framed under the DP Act.

7. The submission of learned counsel for the petitioner is that the subject of Prisons falls in Entry 4 of the State List (List II of 7th Schedule to the Constitution of India). The said entry reads as under:

“4. Prisons, reformatories, Borstal institutions and other institutions of a like nature, and persons detained therein;

arrangements with other States for the use of prisons and other institutions.”

8. Learned counsel submits that the DP Act has been framed by resort to Entry 4 of List II of 7th Schedule to the Constitution of India. He submits that in exercise of the rule making power contained in section 71 of the DP Act, the Delhi Prisons (Admission, Classification, Separation, Remission, Reward and Release of Prisoners) Rules, 1988 (DP Rules) have been framed. Learned counsel submits that Rule 67 of the DP Rules provides for four kinds of remissions i.e.

“(a) Ordinary remission;

(b) Annual Good Conduct Remission;

(c) Special remission; and

(d) State remission.”

9. Under Rule 68, the Superintendent is the authority designated to grant ordinary remission under the said Rules. Under Rule 69, the conditions have been laid down for grant of ordinary remissions.

10. Learned counsel submits that section 32A of the NDPS Act being a piece of central legislation, cannot whittle down the power of the State to provide for remissions, since the said aspect of remission is also covered by Entry 4 of List II (State List) under the 7th Schedule. Thus, to the extent that section 32A of the NDPS Act is sought to be extended to good conduct remission - which is admissible under Rule 67 of the DP Rules, the same is *ultra vires* the Constitution.

11. The petition is opposed on behalf of the respondents i.e. GNCTD represented through the Standing Counsel Mr. Rahul Mehra, as well as respondent no.1/DRI and respondent no.3 / UOI through the CGSC Mr. Vikas Mahajan. Firstly, it is submitted that the constitutionality of section 32A has been ruled upon by the Supreme Court in ***Dadu v. State of Maharashtra***, (2000) 8 SCC 437. The said provision was attacked before the Supreme Court in ***Dadu*** (supra) on the ground of discrimination between convicts under different provisions of law. The Supreme Court upheld the said challenge by observing as follows:

“15. The distinction of the convicts under the 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 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, 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. 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 of a convict under the Act.”

12. Thus, the Supreme Court held that there is no vice of

unconstitutionality in the section, insofar it takes away the powers of the executive conferred by Sections 432 and 433 of the Code to suspend, remit or commute the sentence of a convict. At the same time, the power of the court to suspend the sentence was preserved and, to that extent, section 32A of the NDPS Act was held to be unconstitutional. In paras 26 and 27 of the judgment in **Dadu** (supra), the Supreme Court observed:

“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 to exercise the power of suspension of sentence within the parameters prescribed under Section 37 of the Act.”

13. In **Budh Singh v. State of Haryana & Anr.**, (2013) 3 SCC 742, the Supreme Court considered the effect of section 32A of the NDPS Act on the aspect of remission. In that context, the Supreme Court also touched upon the true meaning of remission. The Supreme Court referred to its earlier decision in **Maru Ram v. Union of India**, 1981 SCC (Cri) 112. In para 11 of **Budh Singh** (supra), the Supreme Court observed as follows:

“11. In Maru Ram v. Union of India [(1981) 1 SCC 107 : 1981 SCC (Cri) 112] (SCC para 27), this Court had observed that Article 20(1) of the Constitution engrafts the rule that there can be no ex post facto infliction of a penalty heavier than what had prevailed at the time of commission of the offence. Section 32-A ex facie has nothing to do with the punishment or penalty imposed under the Act. In fact, no change or alteration in the severity of the penalty under the NDPS Act has been brought about by the introduction of Section 32-A with effect from 29-5-1989. What Section 32-A has done is to obliterate the benefit of remission(s) that a convict under the NDPS Act would have normally earned. But, if the correct legal position is that the remission(s) do not in any way touch or affect the penalty/sentence imposed by a court, we do not see how the exclusion of benefit of remission can be understood to have the effect of enlarging the period of incarceration of an accused convicted under the NDPS Act or as to how the said provision i.e. Section 32-A, can have the effect of making a convict undergo a longer period of sentence than what the Act had contemplated at the time of commission of the offence”. (emphasis supplied)

14. Mr. Mehra points out that Section 2(i) of the DP Act defines “Government” to mean the “Lieutenant Governor” referred in Article 239AA of the Constitution of India. The expression “Lieutenant Governor” is defined in section 2(l) of the DP Act to mean the Administrator of the National Capital Territory of Delhi appointed by the President under Article 239 of the Constitution. The submission of Mr. Mehra is that the rule making power conferred by section 71 of the DP Act on the government is really the power of the Lieutenant Governor of Delhi as per the Act, who is appointed by the President under Article 239 of the Constitution of India, and not of the Government of NCT of Delhi. Thus, there is no question of transgression of the power of the GNCTD.

15. The further submission of learned counsel for the respondents is that under the DP Act, there is no substantive provision dealing with the aspect of remission of sentences. Reliance placed on rule making power under Section 71 of the DP Act would be of no avail, since the said section only provides for making of Rules/ subordinate legislation by the government i.e. Lieutenant Governor of Delhi, to carry out the provisions of the Act. Without there being a substantive provision like the one contained in section 432 Cr PC or Articles 72 and 161 of the Constitution of India – which empower the named authorities to grant remission, the rule making power cannot become the source of the power of granting remission to a convict.

16. Having heard learned counsels and considered their respective submissions, we are of the considered view that there is no merit in this petition. As we have noticed herein above, the constitutional validity of section 32A of NDPS Act has been upheld by the Supreme Court in *Dadu* (supra). The only aspect on which the said provision was held to be unconstitutional was insofar as it took away the power of the court to suspend, remit or commute the sentence.

17. The challenge in the present petition to section 32A is premised on the ground of legislative incompetence. The petitioner claims that section 32A encroaches upon the legislative power vested in the State legislature under Entry 4 of List II (State List) of the 7th Schedule to the Constitution of India. The submission is that the Parliament has no competence to legislate on the subjects of Prisons, Reformatories, Bostoral Institutions or Other Institutions of like nature, or persons detained therein. The submission of the petitioner

is that the aspect of remission i.e. good conduct remission falls within the subject of Prisons, as it is good conduct inside the Prison which entitles the convict to such remission.

18. The aspect of remission – of whichever kind, in our view, cannot be said to fall in either of the subjects covered by Entry 4 of the State List.

19. The content of Entry 4 of the State List concerns the setting up; regulation of; provision of infrastructure and facilities that the State may provide, in prisons, reformatories, borstal institutions and other institutions of a like nature. It also concerns the aspect of treatment and facilities that persons - who are detained in such like institutions, would be provided, and it concern arrangement with other State for use of prisons and other institutions of like nature.

20. On the other hand, the aspect of sentencing is a part of the criminal law system. Sentencing is a judicial function. The said aspect is covered by Entries 1 and 2 of List III i.e. the concurrent list in the VIIth Schedule to the Constitution of India. The said entries read as follows:

“1. Criminal law, including all matters included in the Indian Penal Code at the commencement of this Constitution but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power.

2. Criminal procedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution”.

21. A similar challenge to legislative competence was raised before the Supreme Court in respect of Section 433A of the Code in *Maru Ram* (supra) by those undergoing life sentences (called lifers by the Supreme Court). The constitutional validity of Section 433A of the Code came up for consideration. Section 433A was introduced in the Code so as to ensure that life convicts, who are convicted for an offence for which death sentence is also a punishment provided by law, or those whose death sentence has been commuted under Section 433 into one of imprisonment for life, are not released from prison unless they have served at least 14 years of imprisonment. Section 433A reads as follows:

“433-A. Notwithstanding anything contained in Section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where the sentence of death imposed on a person has been commuted under Section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment.”

22. One of the arguments raised before the Supreme Court to assail the constitutional validity of Section 433A, was that the Parliament did not have the legislative competence to enact the said provision and the aspect of suspension, remission and commutation were covered by Entry 4 of List II (State List) of the 7th Schedule. Thus, it was more or less an identical submission advanced before the Supreme Court, as learned counsel for the petitioner has advanced before us in respect of Section 32A of the NDPS Act. The Supreme Court rejected the said submission by observing as follows:

“14. We may safely assume that, but for the bar of Section 432-A, the rules of remission and short-sentencing legislation would, in all probability, result in orders of release by Government of the thousands of petitioners before us. Thus, it is of central importance to decide whether Parliament has no legislative competence to enact the impugned provision.

15. We dismiss the contention of competency as of little substance. It is trite law that the Lists in the Seventh Schedule broadly delineate the rubrics of legislation and must be interpreted liberally. Article 246(2) gives power to Parliament to make laws with respect to any of the matters enumerated in List III. Entries 1 and 2 in List III (especially Entry 2) are abundantly comprehensive to cover legislation such as is contained in Section 433-A, which merely enacts a rider, as it were, to Sections 432 and 433(a). We cannot read into it a legislation on the topic of “prisons and prisoners”. On the other hand, it sets a lower limit to the execution of the punishment provided by the Penal Code and is appropriately placed in the Chapter on Execution and Sentences in the Procedure Code. Once we accept the irrefutable position that the execution, remission and commutation of sentences primarily fall, as in the earlier Code (Criminal Procedure Code, 1898), within the present Procedure Code (Chapter XXXII), we may rightly assign Section 433-A to Entry 2 in List III as a cognate provision integral to remission and commutation, as it sets limits to the power conferred by the preceding two sections. This limited proscription as a proviso to the earlier prescription relates to execution of sentence, not conditions in prison or regulation of prisoner's life. The distinction between prisons and prisoners on the one hand and sentences and their execution, remission and commutation on the other, is fine but real. To bastardize Section 433-A as outside the legitimacy of Entry 2 in List III is to breach all canons of constitutional interpretation of legislative lists. Parliament has competency”. (emphasis supplied)

23. Thus, the Supreme Court rejected the submission of the petitioners that the subject of remission or commutation is covered by Entry 4 of List II. The Supreme Court then proceeded to examine the aspect of legislative competence of the Parliament to enact Section 433A of the Code, by assuming that the said aspects are covered by Entry of List II. It held:

*“16. Let us assume for a moment that the laws of remission and short-sentencing are enacted under Entry 4 of List II. In that event, the States' competency to enact cannot be challenged. After all, even in prison-prisoner legislation, there may be beneficent provisions to promote the habilitative potential and reduce warder-prisoner friction by stick-cum-carrot strategies. Offer of remissions paroles, supervised releases, opportunities for self-improvement by family contacts, time in community work centres and even meditational centres, can properly belong to prison legislation. Rewards by remissions, like punishments by privations are permissible under Entry 4 of List II. Indeed, progressive rehabilitative prison laws which have a dynamic correctional orientation and reformatory destination, including meaningful intermissions and humane remissions, is on the Indian agenda of unfulfilled legislations. Apart from these futurological measures, we have here an existing Central law viz. the Prisons Act, 1894 which in Section 59(27) expressly sanctions rules for premature release. Even so, **the power of the State is subject to Article 246(1) and (2) and so parliamentary legislation prevails over State legislation. Moreover, Article 254 resolves the conflict in favour of parliamentary legislation. If a State intends to legislate under Entry 2 of List III such law can prevail in that State as against a parliamentary legislation only if presidential assent has been obtained in terms of Article 254(2). In the present case there is hardly any doubt that Section 433-A must hold its sway over any State legislation even regarding “Prisons and Prisoners” if its provisions are repugnant to the Central law. We may read the remission***

schemes not as upsetting sentences but as merely providing rewards and remissions for in-prison good conduct and the like. If the sentence is life imprisonment remissions, as such, cannot help as Godse [Gopal Vinayak Godse v. State of Maharashtra, (1961) 3 SCR 440 : AIR 1961 SC 600 : 1961 Cri LJ 736] has laid down. If the sentence is for a fixed term, remissions may help but Section 433-A does not come in the way. Thus, no incompatibility between Section 433-A and remission provisions exists. (emphasis supplied)

24. Thus, firstly, the Supreme Court rejected the submission that Section 433A of the Code is relatable to Entry 4 of List II of the 7th Schedule. Secondly, the Supreme Court held that, in any event, the central legislation framed by resort to Entries 1 and 2 of List III would prevail over a State legislation framed under Entry 4 of List II, even if there is an overlap.

25. The Supreme Court also held in para 23 of **Maru Ram** (supra) that sentencing is a judicial function, whereas execution of the sentence after the courts pronouncement is ordinarily a matter for the executive under the procedure code. The width of Entry 4 of List II was commented upon by the Supreme Court by observing as follows:

“23. Sentencing is a judicial function but the execution of the sentence, after the courts pronouncement, is ordinarily a matter for the executive under the Procedure Code, going by Entry 2 in List III of the Seventh Schedule. Keeping aside the constitutional powers under Articles 72 and 161 which are “untouchable” and “unapproachable” for any legislature, let us examine the law of sentencing, remission and release. Once a sentence has been imposed, the only way to terminate it before the stipulated term is by action under Sections 432/433 or Articles 72/161. And if the latter power under the Constitution is not invoked, the only source of salvation is the

play of power under Sections 432 and 433(a) so far as a “lifer” is concerned. No release by reduction or remission of sentence is possible under the corpus juris as it stands, in any other way. The legislative power of the State under Entry 4 of List II, even if it be stretched to snapping point, can deal only with Prisons and Prisoners, never with truncation of judicial sentences. Remissions by way of reward or otherwise cannot cut down the sentence as such and cannot, let it be unmistakably understood, grant final exit passport for the prisoner except by government action under Section 432(1). The topic of Prisons and Prisoners does not cover release by way of reduction of the sentence itself. That belongs to criminal procedure in Entry 2 of List III although when the sentence is for a fixed term and remission plus the period undergone equal that term the prisoner may win his freedom. (emphasis supplied)

26. In *Dadu* (supra), the Supreme Court upheld Section 32-A of the NDPS Act. The same was struck down only insofar as it took away the right of the courts to suspend, remit or commute the sentence awarded to a convict under the Act. The Supreme Court clarified that the preservation of the power of the Court to suspend, remit or commute the sentence 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 obligation to exercise the power of suspension of sentence within the parameters prescribed under Section 37 of the NDPS Act. Thus, the aspects of suspension, remission or commutation of sentence are not a matter of right, but they are mere concessions. This is also clearly stated in Rule 66 of the DP Rules, which provides that “*Subject to the provisions of these rules, remission may be granted as hereinafter provided as a matter of concession only and not as of right*”. (emphasis supplied)

27. In *State of Rajasthan v. J.K. Udaipur Udyog Ltd.*, (2004) 7 SCC 673, the Supreme Court held that an exemption is, by definition, a freedom from an obligation which the exemptee is otherwise liable to discharge. It is a privilege, granting an advantage not available to others. The recipient of a concession has no legally enforceable right against the government to grant of a concession except to enjoy the benefits of the concession during the period of its grant. The right to enjoy the concession is defeasible, in the sense, that it may be taken away in exercise of the very power under which the exemption was granted.

28. Thus, we reject the submission of learned counsel for the petitioner with regard to lack of legislative competence of the Parliament to enact Section 32A of the NDPS Act premised on Entry 4 of List II of the 7th Schedule to the Constitution.

29. There is yet another stumbling block that the petitioner faces to its challenge, which is peculiar to NCT of Delhi. The NCT of Delhi is not a full-fledged State under the Constitution. It is a Union Territory. This aspect has been the subject matter of judicial debate in the recent past.

30. A Division Bench of this court in *Government of National Capital Territory of Delhi Vs. Union of India & Others*, 232 (2016) DLT 196(DB), has, after examination of the relevant provisions including Article 239AA of the Constitution of India, inter alia, ruled that NCT of Delhi continues to remain a Union Territory. That being the position, the distinction between the three lists in Schedule 7 to the Constitution of India does not survive qua the NCT of Delhi and the Parliament is empowered to enact laws in relation

to all matters, including in relation to Entry 4 of List II. The said legal position takes the winds out of the sails of the petitioners primary submission. The submission of Mr. Mehra premised on the definitions contained in the DP Act does not, therefore, call for examination.

31. Reliance placed by learned counsel on clauses (v), (xix) & (xxx) of Section 71(2) of the DP Act – to claim that such clauses empower the State to grant remission/ commutation of sentence, is also misconceived. Section 71 of the DP Act only enacts the rule making power of the Government which, as noticed hereinabove, means the Lieutenant Governor referred to in Article 239AA of the Constitution of India. The Lieutenant Governor is the Administrator of NCT of Delhi. The said rule making power is conferred on the Government to enable the Government “*to make rules generally to carry out the provisions of this Act*”. The rule making power is vested in the Government so as to make the supplementary provisions for the purpose of carrying out the provisions of the Act. Such rule making power cannot supplant the provisions contained in the DP Act. Pertinently, in the DP Act, there is no substantive provision which empowers any authority to grant suspension, remission or commutation of sentence of a convict. Thus, neither clause (v), nor clause (xix), nor clause (xxx) contained in Section 71(2) can be understood to mean that they empower the Government to grant suspension, remission or commutation of sentence under the DP Act.

32. The DP Rules, no doubt, enumerate the different kinds of remission under Rule 67 and also the authority empowered to grant ordinary remission under the Rules. The DP Rules, though purported to have been framed

under the DP Act, derive their authority not only from the DP Act, but also from section 432 of the Code. Section 432 of the Code empowers the appropriate Government to, at any time, without conditions or on 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. The provisions contained in the DP Rules, particularly those relating to commutation and remission, derived their legitimacy from Section 432 of the Code.

33. For all the aforesaid reasons, we find no merit in the present petition and we reject the challenge to Section 32A of the NDPS Act on the grounds of legislative incompetence of Parliament to enact the said provision. The same is, accordingly, dismissed.

VIPIN SANGHI, J

P.S.TEJI, J

MARCH 20, 2018

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