

HIGH COURT OF CHHATTISGARH, BILASPUR**CRMP No. 318 of 2017**

- In Reference High Court Of Chhattisgarh (Matter Relating to Grant of Permanent Probation)

---- Petitioner**Versus**

1. State Of Chhattisgarh Through The Secretary, Home Department, Mahanadi Bhawan, Naya Raipur, District Raipur, Chhattisgarh., Chhattisgarh
2. Kaushal Kumar, S/o Jhandu Ram, Aged About 61 Years R/o Village Korasi, Police Station Kharora, District Raipur, Chhattisgarh.

---- Respondents

For Petitioner	:	Shri Ranbir Singh Marhas, Amicus Curiae.
For Respondent No.1	:	Smt. Fouzia Mirza, Additional Advocate General along with Shri Gagan Tiwari, Dy. Govt. Advocate
For Respondent No.2	:	Shri Saurabh Dangi, Advocate.

Hon'ble Shri Ajay Kumar Tripathi, CJ**Hon'ble Shri Parth Prateem Sahu, J****Order on Board****Per Ajay Kumar Tripathi, CJ****8/2/2019**

1. While dealing with a batch of criminal appeals as well as acquittal appeal, the leading case being Criminal Appeal No.2165/98, the Division Bench stumbled upon a startling fact. The fact was that one of the accused in Criminal Appeal No.2025/98 withdrew his appeal since he had been granted permanent probation by the State authority. The Court was concerned as to how a person who was convicted for an offence of murder could be let off on permanent probation in a few years of conviction. Name of accused is Kaushal Kumar.

2. The Division Bench, therefore, directed the Registry to register a separate petition as a reference case looking at the seriousness of the issue and this is how the matter has been placed before the Division Bench presided over by the Chief Justice.
3. While going through the relevant legal provisions on which the State had exercised its powers of grant of permanent probation, attention of the Court has been drawn to what is known as 'Madhya Pradesh Prisoners' Release on Probation Act, 1954' (henceforth 'the Act of 1954'). Section 2 of the Act of 1954 grants power to the government to release a prisoner by license on conditions imposed by it. Section 2 of the Act of 1954 is reproduced herein below:-

“2. Power of Government to release by licence on conditions imposed by it-- Notwithstanding anything contained in Section 401 of the Code of Criminal Procedure, 1898, where a person is confined in a prison under a sentence of imprisonment, and it appears to the Government from his antecedents and his conduct in the prison that he is likely to abstain from crime and lead a peaceable life, if he is released from prison, the Government may, by licence, permit him to be released on condition that he be placed under the supervision or authority of a Government Officer or of a person professing the same religion as the prisoner or such Institution or Society as may be recognised by the Government for the purpose, provided such other person, institution or society is willing to take charge of him.”

4. There is yet another legislation known as 'Madhya Pradesh Prisoners'

Release on Probation Rules, 1964 (henceforth 'the Rules of 1964'). Rule 3 & 4 of the Rules of 1964 also have relevance to the issue and therefore the same are quoted herein below:-

“3.Classes of prisoners not to be released.- The following classes of prisoners shall not be released under Act :-

(a) Those convicted of offences under the Madhya Bharat Vagrants, Habitual Offenders and Criminals (Restrictions and Settlement) Act, 1952, or any law in force in any region of the State corresponding to the said Act, or the Explosive Substances Act, 1908 or under the following Chapters or sections of the Indian Penal Code;

“Chapters V-A, VI and VII and Section 216-A, 224 and 225 (if it is a case of an escape from a jail), 231, 232, 303, 311, 328, 364, 376, 382, 386 or 389, 392 to 402, 413, 459, 460 and 489-A.”

(b) Those convicted under Section 7 of the Act or who are serving the unexpired sentence under sub-section (3) of Section 8 of the Act or whose license has been previously revoked on account of the breach of the conditions of the license.

(c)xxxxxx

(d) Those convicted by a Court-martial;

(e) Those whose applications for temporary release under Section 31-A of the Prisoners' Act, 1990 or rules thereunder have been rejected.

(f) Those who have been prosecuted and convicted for the breach of the rules under Section 31-A of the Prisoners Act,

1900.”

4. Eligibility for release.- Save the prisoners specified in Rule 3 any other prisoner who has served one-third of his sentence of imprisonment or a total period of five years (without remission), whichever is less, may be released by the Government on licence.

Provided that in case of such prisoners who have been sentenced for life imprisonment, under Sections 302 and 305 of the Indian Penal Code, 1860 (No.45 of 1860) or under the provisions of other penal laws in which death sentence is also one of the punishments subject to the conditions that such prisoners are not barred for such consideration under the provisions of such laws, will be considered for premature release from the prison. The eligibility for release shall be after undergoing the sentence of 14 years of actual imprisonment without remission of his sentence;

Provided further that all other prisoners, undergoing the sentence of life imprisonment, will be considered for premature release only after they have undergone at least 10 years of imprisonment with remission and after the completion of 7 years of actual imprisonment without remission in sentence;

Provided also that nothing in the above provisions shall apply to the prisoners whose cases are being sent to the Hon'ble Governor for consideration under Article 161 of the Constitution of India, on special reasons of humanitarian

grounds.”

5. The State of Chhattisgarh after its creation has adopted the Act of 1954 and the Rules of 1964 on 14.6.2001, however, said adoption notification indicates that the law as amended up till 31.10.2000 shall be applicable to the State of Chhattisgarh.
6. We have noticed after going through the Act of 1954 in conjunction with the Rules of 1964 that some kind of unbridled power has been conferred on the State authorities to release a prisoner / convict even though he may have been convicted for a serious offence and sentenced to life.
7. No doubt, Rule 3 of the Rules of 1964 does have reflection on the classes of prisoners who are not required to be released, for the reasons thereof but many a heinous crime committed by an individual not only under the Indian Penal Code but various other legislations have not even been touched upon. This obviously has serious reflection for society as well as for faith in the criminal justice delivery system.
8. No person can argue that any authority, may be highest authority, can be vested with unbridled power and discretion in decision making much less on a issue as to who would be entitled to be enlarged on permanent probation despite conviction and a sentence for life.
9. There was an occasion for the Court, therefore, to take notice of the prevalent situation may be arising out of the case of Kaushal Kumar but more Kaushal Kumars' should not be allowed to get away lightly even though they have been held guilty and sentenced to life for murder.
10. We take note that the State of Madhya Pradesh has brought about certain amendments by adding a proviso to Rule 4 of the Rules of 1964. This

proviso was notified on 24.3.2008 but since such a proviso has been added in the MP Rules after the adoption of said legislation by the State of Chhattisgarh, that proviso has no applicability to the State of Chhattisgarh and therefore the discretion is left wide open for the authorities in the State of Chhattisgarh, if they want to abuse or misuse that power.

11. The Court, therefore, is of the opinion that suitable amendments, keeping in mind the kind of offences, which would be required to be incorporated in the above two legislations where early release of prisoners would not be facilitated is required to be brought about in the State of Chhattisgarh on priority.
12. This observation and direction would not have been needed provided such power was being exercised by the State under Section 433A of the Code of Criminal Procedure, 1973 but the law, as it stands today, gives widest discretion to the executives which is not in the interest of criminal justice delivery system.
13. Therefore, till such amendments are brought about on priority and since the original legislations which have been adopted by the State of Chhattisgarh are identical in nature, therefore, the interpretation which has been given by the Hon'ble Supreme Court in the case of **State of M.P. & ors vs. Bhola alias Bhairon Prasad Raghuvanshi** reported in **(2003) 3 SCC 1** will be the guiding factor where the Hon'ble Supreme Court while dealing with the Act of 1954 and the Rules of 1964 has opined as under:-

“18. We have carefully examined the scheme of the Act and particularly the provisions contained in Section 2, 9 (4) and Rule 3(a). What we find is that Rule 3(a) is a piece of 'delegated legislation.' Such a delegated legislation is recognised as valid because on certain legislative fields, it is possible for the legislature only to lay down a policy and give

sufficient guidelines for the executive authorities to carry it into effect. The legislation before us aims at giving effect to the current penal philosophy of reforming the prisoners while they are undergoing sentences of imprisonment. For the above purpose, Section 2 confers the power on the authorities to release a prisoner on probation keeping in view his antecedents and his conduct in the prison. Section 9 contains the rule making power and sub-section 4 clearly authorises the State Government to frame rules to define or specify the class of offenders who can be conditionally released. By specifying in Rule 3(a) the offenders undergoing imprisonment under certain offences of serious nature as not eligible for release on licence, there is implied specification of offences excluded in Rule 3(a) to be the class of offenders whose cases can be considered for release on probation under the Act. It was, therefore, an error of interpretation on the part of the Lucknow Bench of Allahabad High Court that specification of offenders under certain sections of penal provisions in Rule 3(a) frustrates the object of the Act contained in Section 2. The preamble of the Act has been quoted by us. It indicates the intention of the legislature that the benefit of release on probation for good conduct in prison is to be made available not to all but to "certain prisoners" meaning prisoners of a particular class. Thus they can be classified in relation to the offences committed by them for which they are sentenced. Reformatory system of punishment by releasing prisoners on the basis of their good conduct in prison and for turning them out as good citizens after they serve out their periods of sentences is not to be resorted to indiscriminately without reference to the nature of offence for which they are convicted. It is open to the legislature to lay down a general policy permitting reformatory method of punishment but by limiting its application to less serious crimes. Gravity of offence is an integral dimension in deciding whether a prisoner should be released or not. If we see the offences mentioned in rule 3(a), in the category of exclusion therein are such serious or heinous offences which are against community and society in general where even release on probation may be found hazardous because of the possibility of the crime being repeated or the prisoner escaping. Habitual offenders or those dealing in explosive substances or involved in dacoities and robberies are treated as criminals guilty of heinous crimes who deserve to be treated differently from other offenders guilty of less serious crimes. The offenders could be classified thus reasonably with the object to be fulfilled of reformation of those prisoners who show prospects of some reform. Classification can also be made between habitual offenders and non-habitual offenders or between corrigibles and incorrigibles. Such a classification through delegated legislation of a rule cannot be held to be a legislative step defeating the substantive provisions of the Act. In our considered opinion, the judgment of the Lucknow Bench of Allahabad High Court which has been upheld by two Judges Bench of this Court proceeds on

misinterpretation and misconception of Rule 3(a). Rule 3(a) which excludes certain offences from the application of the Act for release of the prisoners on probation impliedly makes the Act applicable to other kinds of prisoners and in no manner defeats the object of the Act. Thus the Act is intended to be made applicable to categories of offenders - not mentioned in Rule 3(a).

19. The two Judges Bench of this Court in the case of State of U.P. (Supra) has confirmed the judgment of the Lucknow Bench of Allahabad High Court only on the limited finding that Rule 3(a) of U.P. Rules is in excess of the rule making authority and the rule falls outside the ambit of section 2 of the Act. In the concluding part of its judgment, the two-Judges Bench observes that it would be open to the State Legislature to make the impugned rule 3 (a) as part of the Act itself. The above observation necessarily leads to an inference that the Bench was also of the opinion that the contents of the impugned rule could have formed the part of the main Act. The only vice found in the rule was that it was in excess of the rule making authority.

20. A delegated legislation can be declared invalid by the Court mainly on two grounds firstly that it violates any provision of the Constitution and secondly it is violative of the enabling Act. If the delegate which has been given a rule making authority exceeds its authority and makes any provision inconsistent with the Act and thus overrides it, it can be held to be a case of violating the provisions of the enabling Act but where the enabling Act itself permits ancillary and subsidiary functions of the legislature to be performed by the executive as its delegate, the delegated legislation cannot be held to be in violation of the enabling Act.

21. In the instant case, the legislative policy of permitting release of prisoners on probation, after considering their antecedents and conduct in the prison, is laid down in the provision of Section 2 read with the preamble and other provisions of the Act. It was not possible for the legislature at the time of enactment of the statute to envisage and encompass in its provisions all penal laws and punishments leading to incarceration of the offenders and desirability for releasing them on probation. The subject of classifying the offenders based on their antecedents and conduct and/or offences for which they have been convicted, has to be left to the executive authority to determine and specify from time to time by rules and amendments to be made to it if and when found necessary. Such delegation of power by the legislature to the executive cannot be held to be either in violation of any constitutional provision or in excess of the rule making provision of the Act. We are not prepared to accept the reasoning of the High Court of Allahabad that the rule prohibits release of specified classes of offenders in relation to the offences for which they are convicted and thus defeats the very object of the Act."

14. The Court hopes that till the appropriate amendments and mechanism are put in place, the State would be loath to exercise its power under the above provisions.

15. The reference is answered accordingly.

Sd/-

(Ajay Kumar Tripathi)
Chief Justice

Sd/-

(Parth Prateem Sahu)
Judge

roshan/-