

Patna High Court - Orders

Ramashray Sharma & Anr vs The State Of Bihar & Ors on 25 January, 2011

IN THE HIGH COURT OF JUDICATURE AT PATNA

CR. WJC No.1054 of 2010

1. RAMASHRAY SHARMA SON OF LATE TRIVENI
SINGH

2. RAM KISHORE SHARMA SON OF LATE TRIVENI
SINGH

ALL RESIDENT OF VILLAGE AND POLICE STATION-

MOKAMA (MOLDIAR TOLA), DISTRICT-PATNA-----

- PETITIONERS

.

Versus THE STATE OF BIHAR & ORS .

For the petitioners:- Mr. Manish Kumar No.2, Advocate For the State:- Mr. Siddharth Prasad, AC to AAG 9 10 25 .01.2011 Two petitioners Ramashray Sharma and Ram Kishore Sharma have filed this application for directing the respondent authorities to release them from the custody in the light of notification of the State of Bihar, Department of Home (Special) dated 10.12.2002 contained in Memo No. 3106, since they have already remained in custody for a period, which makes them entitled for premature release from custody, in terms of Clause (iii) sub Clause (Gha) and (ch) of the Notification.

Petitioners were named as accused in Mokama P.S. case No. 23 of 1976 and faced trial vide Sessions Trial No. 92 of 1983. They were convicted by the Additional Sessions Judge Xth, Patna under Section 302 of the Indian Penal Code vide judgment and order dated 26.3.1987 and sentenced them R.I. for life. Criminal Appeal No. 120 of 1987 preferred by them against the judgment of conviction was dismissed by the High Court vide judgment dated 12.5.2000 and the Apex Court also dismissed SLP No. 2773 of 2000 preferred by them, against their conviction by the Trial Court and the High Court.

Petitioners case is that a duly constituted Medical Board as per direction of the State Government, for assessing the age of prisoners, with an object of their premature release, had examined these two petitioners and as on 23.5.2007 their age was assessed as 73 and 75 years respectively. Now they are more than 78-80 years. They have remained in custody with remission for thirteen years. Petitioners are claiming their entitlement for premature release in the light of notification dated 10.12.2002 issued under the signature of Home Commissioner, State of Bihar, wherein a guideline has issued for release of prisoners completing the sentence under different heads. Clause (iii) of this notification relates to the entitlement of convicts for premature release, on recommendation to the State Government by the State remission Board. Clause (iii) (Ka) provides that each convict, male or female who is undergoing life imprisonment and whosoever comes under the provision of section 433 (A) Cr.P.C. will be entitled for consideration of their premature release, after remaining in custody for 14 years, without remission. Clause (iii) (gha) provides that convict undergoing life imprisonment, who have completed 65 years of age will be entitled for premature release if remained in custody for seven years with remission. Clause (iii) (ch) provides that convicts undergoing life imprisonment, who are suffering from disease like cancer, aids or incurable disease

of Kidney, Heart and respiratory system or any infectious disease for which the Medical Board has certified, will be entitled for premature release after remaining in custody for actual five years or with remission 7 years.

Petitioner no.1 Ramashray Sharma and petitioner No.2 Ram Kishore Sharma both are claiming that they are suffering from incurable heart disease. In order to corroborate this claim they have annexed medical certificates of Indira Gandhi Institute of Cardiology. They also have stated that they are more than 65 years presently 78 to 80 years, as such their case comes well within Sub-Clause (Gha) and (ch) of clause

(iii) of the notification, relating to premature release.

Counsel appearing for the petitioners has submitted that in view of the notification as well as Full Bench decision of this Court in case of Umesh Prasad Singh Vs. State of Bihar reported in 1984 PLJR 724, petitioners are entitled for their premature release as they have remained in custody for more than seven years with remission.

Counter affidavit has been filed on behalf of the Inspector General (Prison) Bihar, Patna. So far as the factual matrix regarding petitioners conviction and their period in custody is concerned, it has not been disputed. However, it has been stated that the notification of the Government relating to remission and premature release of convicts remaining in custody for longer period on account of their conviction for offences in which the life and death sentence are awarded, has been amended by State Government vide notification dated 10.12.2002 contained in Memo no. 3106. The State Government in exercise of powers conferred under Section 59 of Bihar Jail Manual has brought amendments in Rule 529 of the Bihar Jail Manual and constituted remission Board. The State remission Board will be a Board which will consider and will make recommendation to the State Government, in appropriate cases for premature release. The Board will comprise of Home Secretary, Law Secretary, one District and Sessions Judge nominated by the High Court, one Inspector General of Police, Inspector General (Prison) as well Director (Vigilance) nominated by the Director General of Police, Bihar, Patna. This Board will make recommendation for premature release of such convicts, who have acquired eligibility for premature release. So far petitioners are concerned, for premature release recommendation in their case had earlier been made by Superintendent, Adarsh Jail Beur, Patna vide letter no. 2606 dated 9.5.2006 and letter no. 1987 dated 11.4.2006. Since, at that time State Remission Board was not functional, as such their cases for premature release could not be considered. On constitution of Remission Board, recommendation made by Superintendent of concerned Jail, in favour of the petitioners was considered and rejected by the „Board , considering that they have been convicted under Section 302 I.P.C. and unless they will complete 14 years in actual confinement, they will not be entitled for premature release. Both the petitioners have been convicted under Section 302 of the Indian Penal Code and thus come under coverage of provisions contained in Section 433 (A) of Cr.P.C.. Any convict whose case comes under the provisions of section 433(A) Cr.P.C cannot be considered for premature release, unless completes 14 years of actual confinement. In this view the case of the petitioners come under Clause (iii) Sub- Clause (ka) of the notification and not within the purview of Clause (iii) (Gha) and (Ch) of the Notification.

Section 433 (A) Cr. P.c. was inserted by amendment Act of 1978. Section 433 (A) Cr.P.C. is as follows:-

"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 punishment, provided by law or where a 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.

Section 433 A was added by criminal Law Amendment Act, 1978. Object of this section is to prescribe minimum 14 years imprisonment for those, who are convicted for an offence, one of punishment for which is death, or a person whose death sentence has been commuted to life sentence. The non-obstanate clause makes it clear that such minimum imprisonment is notwithstanding any thing contained in Section 432 I.P.C. Section 432 I.P.C. empowers the appropriate Government to suspend or remit sentence of a convict, undergoing imprisonment for satisfying sentence imposed".

Section 433(A) makes the actual detention in prison for full 14 years as a mandatory minimum sentence in two classes of case (i) where the offender has been punished with death but the culprit could not be punished with death, as he survived through commutation to life imprisonment and (ii) offences in which though there is provision for punishing with death sentence being maximum sentence, the culprit has been awarded life imprisonment. Section 5 of the Cr.P.C. provides that ordinarily the Cr.P.C. will not affect any special law, any local law or any special jurisdiction or power, or any special forum of procedure but the code will override the special law where the statute do not specify any particular mode enforcing a new obligation created by it. The short sentencing measures and Remission Scheme promulgated by various State are not saved by Section 5 Cr.P.c. as Section 433 (A) is not overridden by it. Section 433(A) Cr.P.C. applies in preference to any local laws because section 5 specially declares that specific provision if any, to the contrary, will prevail upon any special or local law. Section 433(A) creates an obligation and protects that for these two special classes of offence. In case of conviction for such offences and sentence actual duration of imprisonment cannot be less than 14 years. In the Indian Penal Code there are several offences in which maximum punishment is death and alternative punishment is life imprisonment. The list of such offences are as follows:-

Section I.P.C	121	Waging, attempting wage against of India	or to war Govt.	Death or imprisonment for life and fine
Section IPC	132	Abetment mutiny, mutiny committed consequence thereof.	of if is in	Death or with imprisonment for life, or imprisonment for ten years and fine
Section	194	Giving	or	Death or

IPC		fabricating false evidence with intent to procure conviction of capital offence. If innocent person be thereby	imprisonment for life or R.I. for ten years and fine
		convicted and executed.	
Section IPC	302	Punishment for Death murder	or imprisonment for life and fine
Section IPC	303	Punishment for Death murder by life-convict.	
Section IPC	307	Attempt by life Death convict to murder, if hunt is caused.	or imprisonment for ten years and fine
Section IPC	364A	Kidnapping for Death ransom etc.	or imprisonment for life and fine.
Section IPC	396	Murder in dacoity	Death, imprisonment for life, fine or rigorous imprisonment for ten years.

For such offences if death sentence has been awarded but later on commuted in imprisonment for life or life sentence has been awarded which is the alternative sentence, there will be application of section 433(A) Cr.P.C. The scheme of the remission introduced by the State Government cannot be contrary to the provisions under Section 433A Cr.P.C. In AIR 1980 SC 2147 (Maru Ram and others Vs. Union of India and ors), this view has been propagated. Full Bench decision of this Court reported in 1984 PLJR 724 has also canvassed this view that in a case where the conviction is for offence under Section 302 I.P.C., the life convict is not entitled to the benefit of States Policy of remission in contravention of the provision under section 433(A) Cr.P.C., unless has remained in custody for 14 years.

So far Clause (Gha) and (Ch) of Clause (iii) of the notification dated 10.12.2002 is concerned, it is applicable in case of such persons, who have been convicted for offence in which maximum punishment is imprisonment for life but there is no alternative punishment of death provided under the Indian Penal Code. Such convicts, if suffering from incurable disease or have become aged more than 65 years can be benefited under Sub Clause (Gha) and (Cha) of Clause (iii) in notification. The case of the petitioners not coming within the such provisions as on account of their conviction under section 302 IPC, in which maximum sentence is death with life imprisonment as an alternative sentence, they cannot be benefited under Clause (Gha) and (Ch) of the notification.

In AIR 1980 S.C. 2147, it is held:- "The fasciculus of clauses (Ss. 432, 433 and 433-A), read as a package, makes it clear that while the Code does confer wide powers of remission and commutation of sentences it emphatically intends to carve out an extreme category from the broad generosity of such executive power. The non obstante clause, in terms excludes S. 432 and the whole mandate of the rest of the Section necessarily subjects the operation of S. 433 (A) to a serious restriction. This embargo directs that commutation in such cases shall not reduce the actual duration of imprisonment below 14 years. Whether that Section suffers from any fatal constitutional infirmity is another matter but it does declare emphatically an imperative intent to keep imprisoned for at least 14 years those who fall within the sinister categories spelt out in the operative part of Section 433-A. If S. 433 A, by sheer repugnancy, forces a permanent holiday on the prison remission laws of the States vis a vis certain classes of „lifers , the former must prevail in situation of irreconcilability. Assuming that Rules under the Prisons Act are valid and cannot be dismissed as State law, a harmonious reading of S. 433A and the Prison Rules must be the way out. Otherwise, the latter law must prevail or implied repeal may be inferred."

The provisions under Section 433A Cr.P.C. is prospective, as such persons who have been convicted by the trial Court before December 18, 1978 shall be entitled to the benefits accruing to them from the remission scheme or short sentencing projects as if Section 433A did not stand in their way. These two petitioners were convicted by the trial Court in 1987 much after December, 18 1978, as such they are not entitled for benefit of any earlier remission scheme or short sentencing projects of the State Government.

One of the questions which was also raised at the time of hearing of the case, as to whether in exercise of power conferred under section 59 of Prisons Act, any amendment could have been brought in relation to premature release or remission of prisoner." Rule 59 provides a long list of items relating to which rule can be framed by the State Government, consistent with this Act. I find that in this list of subjects, item no. 27 relates to admission, custody, employment and release of prisoners. In this view item no. 27, authorizes State Government to make rule in the matter of premature release of prisoners. Amendment has been brought in exercise of powers conferred under Section 59 of the Prisoners' Act.

Considering all these facts, we are of the view that none of these petitioners are entitled for their premature release under sub- Clause (Gha) and (Ch) of clause (iii) of the notification (Annexure-3), since they have been convicted under Section 302 I.P.C., and their cases being fully covered by provisions of Section 433(A) of the Cr.P.C. They can claim their for premature release only after

remaining in custody for 14 years without remission and 20 years with remission.

This writ application, as such is rejected.

Akumar

(Mridula Mishra, J.)

(Dharnidhar Jha,J.)