

Jyotiben Ramlal Purohit And Etc. vs State Of Gujarat And Anr. on 14 December, 1995

Equivalent citations: 1997CRILJ1549, (1996)1GLR395

Author: N.N. Mathur

Bench: N.N. Mathur

JUDGMENT

B.C. Patel, J.

1. A Division Bench of this Court (Coram : M. B. Shah & B. C. Patel, JJ.) referred this matter to a larger bench as in the view of the Division Bench, the convict under the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act) cannot be released on parole or bail and consideration of sympathy cannot be permitted to overshadow the consideration regarding security of the Society. Considering the law as discussed in the order of the Division Bench passed on 20th July 1995, it was not possible for the Division Bench to agree with the view expressed by another Division Bench of this Court (Coram: C. K. Thakkar & S. M. Soni, JJ.) in the judgment and order passed on 7th March 1995 in Misc. Criminal Application No. 791 of 1995 in Criminal Appeal No. 4 of 1994. For deciding the controversy in question, office was directed to place the matter before the learned Chief Justice for placing it before a larger bench and as directed by the learned Chief Justice, the matter is placed before this Bench.

2. Convict Ranilal Gallaji Purohit was sentenced to undergo 10 years rigorous imprisonment and fine of Rs. 1 lakh, in default of payment of fine further rigorous imprisonment for one year against which he has preferred Criminal Appeal No. 969 of 1995. Pending the appeal, the convict preferred an application for temporary bail. Learned Single Judge, (M.S. Parikh, J.) on 2nd June 1995 released the convict on bail with a direction to report at Ellis Bridge Police Station on 5th and 6th June 1995. Considering the fact that the prisoner's mother was required to be operated, the convict was released temporarily. Thereafter, Misc. Criminal Application No. 1886/ 95 was preferred by the prisoner and considering the facts and circumstances, a Division Bench of this Court (Coram : B.C. Patel and M. R. Calla, JJ.), released the convict-prisoner on bail for a period of one month with a condition that he shall report to Ellis Bridge Police Station once in a week.

3. As the mother of the convict expired on 11-11-7-1995, on behalf of the convict, his wife preferred in application inter alia contending that the convict is the only son and he has to perform the after-death ceremonies and hence he may be continued on bail for a period of 30 days more. Along with the said application, the cremation certificate of Pyariben, the deceased mother of the convict was also produced. It was also pointed out that the wife of the convict and the deceased mother of

the convict were staying together in one house and there is none else to look after. On account of the peculiar circumstances, the Division Bench directed the jail authorities to take the convict with police escort at his house for one or two days i.e. on 22/23 July 1995 for performing the after-death ceremony of his deceased mother.

4. The petitioner being not represented by an advocate, we adjourned the matter to enable him to engage an advocate. On behalf of the State Bar Council, learned advocate Mr. Budhbhatti has appeared while on behalf of the applicant in MCA No. 2814/95, Mr. Saiyad, learned advocate appeared. Mr. Amit Panchal, learned Additional Public Prosecutor appeared for the State.

5. it has been submitted by Mr. Panchal that to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances, to provide for the forfeiture of property derived from or used in, illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Conventions on Narcotic Drugs and Psychotropic Substances and for matters connected therewith, the Parliament enacted the NDPS Act. Accordingly, stringent provisions are made to this statute. The NDPS Act also provides for special remedy for trial, prohibition, control, regulation, procedure, forfeiture of properties and penalties. Stringent punishment is provided for all the offences except for the offences punishable under Section 20(1), 26 and 27 of the Act, i.e. offences relating to Cannabis plant, Cannabis relating to Ganja and for certain acts by licensee or its servant and for illegal possession of article in small quantity for personal consumption. Sections 31(A), 32(A), 36(A), (B), (C) and (D) and Section 37 of the Act are added with a definite object by the Parliament after due deliberation. The Parliament considered the shocking escalation of serious crime of traffic in illicit drug and its serious adverse effects on the society. It has not only provided deterrent punishment, but has also provided that no sentence awarded under the Act shall be suspended, remitted or commuted. According to the submission of Mr. Panchal this will be clear from the Statement of Objects and Reasons of the Act 2 of 1989. The statement of Objects and Reasons for amendment of the Narcotics Act may be noted at this stage :-

"STATEMENT OF OBJECTS AND REASONS In recent years, India has been facing a problem of transit traffic in illicit drugs. The spill-over from such traffic has caused problems of abuse and addiction. The Narcotic Drugs and Psychotropic Substances Act, 1985, provides deterrent punishments for drug trafficking offences. Even though the major offences are non-bailable by virtue of the level of punishments, on technical grounds, drug offenders were being released on bail. In the light of certain difficulties faced in the enforcement of the Narcotic Drugs and Psychotropic Substances Act, 1985, the need to amend the law to further strengthen it, has been felt.

2. A Cabinet Sub-Committee which was constituted for combating drug traffic and preventing drug abuse, also made a number of recommendations for strengthening the existing law. In the light of the recommendations of the Cabinet Sub-Committee and the working of the Narcotic Drugs and Psychotropic Substances Act, in the last three years, it is proposed to amend the said Act. These amendments, inter alia,

provide for the following :

(i) to constitute a National Fund for Control of Drugs Abuse to meet the expenditure incurred in connection with the measures for combating illicit traffic and preventing drug abuse:

(ii) to bring certain controlled substances which are used for manufacture of Narcotic Drugs and Psychotropic Substances under the ambit of Narcotic Drugs and Psychotropic Substances Act and to provide deterrent punishment for violation thereof;

(iii) to provide that no sentence awarded under the Act shall be suspended, remitted or commuted :

(iv) to provide for pre-trial disposal of seized drugs:

(v) to provide death penalty on second conviction in respect of specified offences involving specified quantities of certain drugs.

(vi) to provide for forfeiture of property and a detailed procedure relating to the same, and

(vii) to provide that the offences shall be cognizable and non-bailable.

3. The bill seeks to achieve the above objectives."

Section 36-A of the Act deals with the trial by Special Courts. Sub-clause (3) of Section 36A of the Act reads as under:-

"Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under Section 439 of the Code of Criminal Procedure, 1973 (2 of 1974) and the High Court may exercise such powers including the power under Clause (b) of subsection (1) of that section as if the reference to "Magistrate" in that section included also a reference to a "Special Court" constituted under Section 36."

Thus, under-trial prisoners can be released on bail by the High Court in exercise of powers regarding bail under section 439 of the Criminal Procedure Code. Further, it is required to be noted that every offence is made cognizable and non-bailable under Section 37 of the Act. The said section reads as under:-

37. Offences to be cognizable and non-bailable. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),--

(a) every offence punishable under this Act shall be cognizable.

(b) no person accused of an offence punishable for a term of imprisonment of five years or more under this Act shall be released on bail or on his own bond unless--

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and,

(ii) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail."

Thus, stringent provisions are made even for granting of bail for an offence punishable for a term of imprisonment of five years or more and apart from the Public Prosecutor being given an opportunity to oppose the application, the Court has to satisfy that there are reasonable grounds for believing that the accused is not guilty of such offences and that he is not likely to commit any offence while on bail. Thus, when the accused is arrested for offences punishable under the NDPS Act and is produced before the Court and has made an application for bail, after giving opportunity to the Public Prosecutor, the Court must be satisfied that the accused is not guilty and that the accused is not likely to commit any offence only then the accused can be released on bail.

Submissions on behalf of defence made by Mr. E.E. Saiyed and Mr. Budhbhatti are that the Court's power of suspending sentence and granting of bail as available Under Section 389 of the Code is saved by virtue of Section 36-B of the NDPS Act and notwithstanding clause appearing in Section 32-A of the NDPS Act and the Code, as also some decisions of the Apex Court for the purpose of interpretation of the notwithstanding clause appearing in Section 32-A of the NDPS Act.

6. We have had our anxious thought and deliberations on the submissions which have been made before us. In our opinion following questions have been brought to surface for our decision :

(1) Whether the High Court's jurisdiction to suspend the sentence passed on an accused convicted of an offence under the NDPS Act and enlarge him on bail during the pendency of his appeal before the High Court is totally ousted under Section 32-A of the NDPS Act?

(2) if the answer to the first question is in the negative, whether the High Court's power is circumscribed by Section 37 of the NDPS Act or by any other provisions of the Code?

7. For the purpose of appreciating the rival submissions and rendering decision on the aforesaid questions, it would be useful to refer to certain provisions of the NDPS Act and the Code. In so far as the trial under the NDPS Act is concerned, Section 36-C is the relevant provision to be reproduced

in the first instance.

36C. Application of Code to proceedings before a Special Court:- Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) (including the provisions as to bail and bonds) shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting a prosecution before a Special Court, shall be deemed to be a Public Prosecutor."

So far as the powers of the appellate Court are concerned, section 36B is the relevant section which reads as under:-

36B. Appeal and revision-The High Court may exercise; so far as may be applicable, all the powers conferred by Chapters XXIX and XXX of the Code of Criminal Procedure, 1973 (2 of 1974) on a High Court, as if a Special Court within the local limits of the jurisdiction of the High Court were a Court of Session trying cases within the local limits of the jurisdiction of the High Court."

Section 32A and Section 33 are also relevant sections to be considered, which are as under :-

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.

33. Application of Section 360 of the Code of Criminal Procedure, 1973 and of the Probation of Offenders Act, 1958.- Nothing contained in Section 360 of the Code of Criminal Procedure, 1973 (2 of 1974) or in the Probation of Offenders Act, 1958 (20 of 1958) shall apply to a person convicted of an offence under this Act unless such person is under eighteen years of age or that the offence for which such person is convicted is punishable under Section 26 or Section 27.

Section 389 of the Code of Criminal Procedure falls in Chapter XXIX, which reads as under:-

389. Suspension of sentence pending the appeal; release of appellant on bail.

(1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond.

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of an appeal by a convicted person to a Court

subordinate thereto.

(3) Where the convicted person satisfies the Court by which he is convicted that he intends to present an appeal, the Court shall,-

(i) where such person being on bail is sentenced to imprisonment for a term not exceeding three years, or

(ii) where the offence of which such person has been convicted is a bailable one, and he is on bail, order that the convicted person be released on bail, unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the appellate Court under sub-section (1); and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

(4) When the appellant is ultimately sentenced to imprisonment for a term or to imprisonment for life, the time during which he is so released shall be excluded in computing the term for which he is so sentenced.

8. This section empowers the appellate Court to suspend a sentence pending the appeal and to release the appellant on bail. Thus, reading this section with Section 36B of the NDPS Act, the High Court can exercise all the powers conferred by Chapters XXIX and XXX of the Code of Criminal Procedure. Therefore, the power suspending the sentence pending the appeal and releasing the accused on bail cannot be said to have been taken away. Once the powers are conferred by the statute, then it is for the Court to exercise the powers. Merely because in the section the language used is that "so far as may be applicable", it cannot be inferred that the power releasing the accused on bail is taken away. Considering the principles of releasing the accused on bail under Section 37 of the NDPS Act, it can be said that the appellate Court, while considering the application of the convict should bear in mind such principles. However, to say that the Court has no power to enlarge the convict on bail is a different thing. The question is : Whether the Court has power or not?

9. Learned Additional Public Prosecutor submitted that in the Act, it is made explicitly clear that the High Court may exercise all the powers so far as may be applicable, meaning thereby that if reading the other sections it can be culled out that the powers are limited, then with the limitations, powers are to be exercised. For that purpose, learned Additional Government Pleader has submitted that the legislature has restricted the powers by enacting Section 32-A of the Act. According to him, no sentence awarded under this Act other than under Section 27 can be suspended or remitted or commuted, subject to the provisions of Section 33 of the Act.

10. Offence under Section 26 is made punishable with imprisonment for a term which may extend to three years or with fine or with both. Section 27 provides for punishment for illegal possession in small quantity for personal consumption of any narcotic drug or psychotropic substance or consumption of such drug or substance. If there is a contravention as provided in sub-section (a) of Section 27, punishment provided is imprisonment for a term which may extend to one year or with

fine or with both. For the contravention of sub section (b) of this section, punishment provided is imprisonment for a term which may extend to six months or with fine or with both. According to the learned Addl. Public Prosecutor, in view of the punishment for contravention of these provisions under Section 27 of the Act, the legislature has thought it fit to provide for suspension, remission or commutation. With regard to probation, it is clear that the provisions contained in Section 360 of the Cr.P.C. 1973 ('Code' for short) or the Probation of Offenders Act 1958 shall apply to a person convicted of an offence under the NDPS Act if such person is under 18 years of age. If a person is above 18 years of age and he is convicted for an offence punishable under Sections 26 or 27 of the Act, he can be given the benefit as contemplated under Section 33 of the Act. Reading Section 32-A, it is canvassed before us that a person can be released on probation if he is above 18 years of age even though he is convicted for an offence punishable under Section 26 or Section 27(a) or Section 27(b) of the NDPS Act but he cannot be released on bail.

11. We have before us Section 32-A of the NDPS Act in order to answer the questions in hand. The provision begins with a non-obstante clause in these terms :-

"Notwithstanding anything contained in the Code of Criminal Procedure, 1973 or any other law for the time being in force."

Interestingly, the reference to the provisions which have been ousted, is to the provisions of Code of Criminal Procedure, 1973 (22 of 1974) or any other law for the time being in force and not the provisions of the NDPS Act. Further, the non-obstante clause has to be read in the context of what the legislature conveys in the enacting part of the provision. Reference in this connection may be made to *Ashwini Kumar v. Arvinda Bose* reported in AIR 1952 SC 369 where speaking through the learned Chief Justice, the apex Court has observed as under (at p. 377 of AIR):-

"The enacting part of a statute must, where it is clear, be taken to control the non-obstante clause where both cannot be read harmoniously; for, even apart from such clause, a later law abrogates earlier laws clearly inconsistent with it."

Two years later, the Supreme Court, while dealing with a non-obstante clause in *Requisitioned Land (Continuance of Powers) Ordinance (19 of 1946)*, clause 3, in *Dominion of India Shrinbai* reported in AIR 1954 SC 596 has observed in para 10 as under :-

"While recognising the force of this argument, it is however necessary to observe that although ordinarily there should be a close approximation between the non-obstante clause and the operative part of the section, the non-obstante clause need not necessarily and always be co-extensive with the operative part, so as to have the effect of cutting down the clear terms of an enactment. If the words of the enactment are clear and are capable of only one interpretation of a plain and grammatical construction of the words thereof a non-obstante clause cannot cut down the construction and restrict the scope of its operation. In such cases the non-obstante clause has to be read as clarifying the whole position and must be understood to have been incorporated in the enactment by the Legislature by way of abundant caution

and not by way of part of enactment."

It would, therefore, be appropriate to focus attention on the enacting part of the provision reading 'no sentence awarded under this Act . (other than Section 27) shall be suspended or remitted or commuted.' The legislature has not used the words 'sentence awarded by the Special Court or the trial Court'. However, when one thinks of sentence awarded to mean as sentence awarded by the Special Court or the trial Court, it would lead to making surplusage in the provision. The words 'sentence awarded' would ordinarily mean sentence awarded finally.

12. The word "award", as per The Oxford English Dictionary means :

"To examine a matter and adjudicate upon its merits; to decide, determine, after consideration or deliberation.

"To determine upon and appoint by judicial sentence.

"To grant or assign by judicial or deliberate decision; to adjudge;

"A decision after examination, a judicial sentence...."

Thus, from the dictionary meaning it is clear that a decision rendered by a Judicial Officer is an "award". However, if the award or judgment is challenged and the same is to be examined or after due deliberation or on appreciation of evidence, the correctness or otherwise of the award-judgment is to be decided, it cannot be said that the matter is examined and adjudicated upon its merits because the exercise of examining the matter is not completed and the matter is yet to be finally adjudicated. Therefore, it cannot be said that the sentence awarded by the trial Court is the final "award". If the order of conviction and sentence recorded by the trial Court is not challenged, then it would mean "sentence awarded" but the moment it is challenged, it cannot be said that the sentence is awarded as validity or otherwise of the same is yet to be examined by the higher forum.

13. We may point out at this stage that powers which are exercised by the Court under Section 386 are different from the powers that may be exercised by the Government under Sections 432 and 433 of the Cr.P.C. Question of grant of suspension, remission and commutation of sentences has to be considered only after the person is sentenced for an offence and not before that i.e. after judicial proceedings are concluded finally. The words "Sentence awarded" appearing in Section 32-A clearly suggest that the sentence which is awarded is final. Appeal is nothing but a continuation of a trial. The power of releasing the convict on bail is dependant on several factors such as character of the evidence led before the Court, sufficiency of evidence pointing out to the guilt of the accused, the time that may be taken by the appellate Court in disposing of the appeal etc. If on evidence the appellate Court is prima facie satisfied about the conclusion reached by the trial Court, the appellate Court ordinarily may not be inclined to release the accused on bail while admitting the appeal.

14. Examined in this context, the use of words 'suspended or remitted or commuted' in the aforesaid provision would clearly indicate reference to the power of suspension or remission or commutation

of sentence finally awarded. Such powers are as contained in Sections 432, 433, 433A, 434 and 435 of the Code in Chapter XXXII under the head 'E' dealing with suspension, remission and commutation of sentences'. The executive power of suspending, remitting or commuting sentences operates entirely in a different field. The High Court's power of suspending sentence coupled with power of granting bail to a convict during the pendency of appeal operates totally in a different sphere. Therefore, when the legislature has used the words 'sentence awarded', first examination would be what will be the plain meaning of words so used. It may be noted that a non-obstante clause does not speak about the provisions of the NDPS Act itself. Had the legislature any intention of ousting the Courts' powers under the provisions of the NDPS Act, it would have said notwithstanding anything contained in this Act, or the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force". But, under the non-obstante clause as it stands the power of the Courts under Section 389 of the Code as referred to in Section 36-B of the NDPS Act could not be said to have been totally snapped. This would go to indicate that the legislature has clearly in its mind two different powers with regard to suspension, namely the executive power and the judicial power. The legislature clearly did not want a convict sentenced under the provisions of the NDPS Act being enlarged by the appropriate Government by exercising its executive powers of suspension, remission or commutation of sentence as contained in the aforesaid provisions of the Code. If the Legislature wanted to snap or withdraw the judicial power as contained in Section 389 of the Code saved by Section 36-B of the NDPS Act, the legislature, instead of using the plain words 'sentence awarded' could have used the words 'sentence awarded by the Special Court' (it is the first Court) or trial Court in trying the offences under the NDPS Act. It could have also snapped the power of granting of bail during the pendency of appeal as contained in Section 389 of the Code as aforesaid. The power of suspending sentence and granting of bail during the pendency of appeal conferred upon the appellate Court is an interlinked power. Such an interlinked power conferred upon the Court cannot be read into the provision by any surplusage. It has to be borne in mind that the legislature speaks its mind by use of correct expression.

15. It is submitted that by making a reference to Section 33 and exempting a sentence awarded under Section 27 of the NDPS Act, the legislature has intended to exclude the judicial power of suspending sentence and granting bail during the pendency of appeal. In our opinion, no confusion arises on account of reference to provisions of Sections 33 and 27 of the NDPS Act, if one reads the provision of Section 33 and provisions of Sections 26 and 27 referred to therein, one finds out the sphere in which Section 33 operates. Section 33 of the NDPS Act deals with application of Section 360 of the Code and the provisions, of Probation of Offenders Act, which necessarily deal with grant of probation to certain classified offenders. The powers of the Courts under Section 360 of the Code and the provisions of Probation of Offenders Act are circumscribed insofar as the provisions of NDPS Act are concerned. The Courts' power under Section 33 of the NDPS Act cannot be said to be comparable with the Court's power under Section 36-B of the NDPS Act read with Section 389 of the Code. If any confusion arises on account of reference to Section 33 made in Section 32-A of the NDPS Act, the same would immediately stand cleared by visualising the absence of Section 226 and presence of Section 227 in Section 32-A of the NDPS Act. Section 26 again is referred to in Section 33 of the NDPS Act. This would clearly go to indicate the distinction between the executive power and the judicial power present in the mind of the legislature. It is, therefore, evident from the absence of Section 26 unlike Section 27 used in Section 32-A of the NDPS Act that the legislature

has clearly in its mind the distinction between the executive power and judicial power of suspending sentence.

16. It may be recollected that Section 226 of the NDPS Act provides for maximum sentence of 3 years. Once sentence for the offence punishable under Section 26 of the NDPS Act is imposed by the Special Court, the Special Court would be entitled to suspend the operation sentence and/or enlarge the convict on bail for a limited period so as to enable the convict to prefer an appeal before the appellate Court, namely the High Court by virtue of Section 389(2) of the Code. The legislature can hardly have thought about bringing such an anomalous consequence, namely that the trial Court can grant bail but the appellate Court cannot. In our considered opinion, this is the clinching position in construing the provision contained in Section 32-A of the NDPS Act. The opinion of the learned author P. K. Jain and the decision of various Courts including the Full Bench of the Kerala High Court in *Burlin Joseph v. State* reported in 1992 Drug Cases 98 read by Mr. Panchal appear to have not had before them this view of the matter.

17. A very important clue to the consideration of provision in Section 32-A of the NDPS Act is that it makes no reference for granting of bail during the pendency of appeal. If the legislature wanted to snap absolutely the power under Section 389 of the Code read with Section 36-B of the NDPS Act, it would have positively worded the provision so as to include therein the High Court's power of granting bail during the pendency of appeal. Merely because such power of granting bail appears in conjunction with the power of suspending sentence under Section 389 of the Code, it cannot be inferred that by making a reference to power of suspension the legislature has by necessary implication made reference to the power of granting bail conferred upon the High Court, Plain reading of the provision would be disturbed if such extended meaning is to be given to the provision.

18. It is in the above light that the two decisions referred to by Mr. A. M. Panchal, learned Additional Public Prosecutor for the State might be considered, The first one is in the case of *Lt. Col. Pirthi Pal Singh Bedi v. Union of India*, AIR 1982 SC 1413 : (1983 Cri LJ 647) and second is in (he case of *Union of India v. G.M. Kokil*, AIR 1984 SC 1022. In the first case, the principle of interpretation head-note reads as under :-

"The dominant purpose in construing a statute is to ascertain the intention of the Parliament. One of the well recognised canons of construction is that the legislature speaks its mind by use of" correct expression and unless there is any ambiguity in the language of the provision, the Court should adopt literal construction if it does not lead to an absurdity. The first question to be posed is whether there is any ambiguity in the language used in the provision. If there is none, it would mean the language used, speaks the mind of Parliament and there is no need to look some where else to discover the intention or meaning. If the literal construction leads to an absurdity, external aids to construction can be resorted to. To ascertain the literal meaning it is equally necessary first to ascertain the juxtaposition in which the rule is placed, the purpose for which it is enacted and the object which it is required to subserve and the authority by which the rule is framed."

In paragraph 10 of the second decision, following observations with regard to the interpretation of a non-obstante clause appear :-

'It is well known that a non obstante clause is a legislature device which is usually employed to give overriding effect to certain provisions over some contrary provision that may be found either in the same enactment or some other enactment, that is to say, to avoid the operation and effect of all contrary provisions.'

19. If the provision contained in Section 32-A of the NDPS Act is considered in its true perspective as aforesaid, the conclusion on the interpretation of the said provision noted hereinabove would aptly fit in the observations reproduced from the case of Lt. Col. Pirthi Pal Singh Bedi and G. M. Kokil (supra). In fact even if the provision is examined from different points of view, the conclusion that the High Court's power under Section 36-B of the NDPS Act read with Section 389 of the Code is not ousted, would hold good.

20. So far as the power to be exercised by Executive for suspension of sentence is concerned, it is in exercise of powers under Sections 432 or 433 of the Cr.P.C. or under the Prisons Act, and that is for altogether a different purpose. Under the Prisons Act, with a view to enable the prisoner to return to the outside world, to enable continuity with his family life and to deal with family matters etc. he is released from jail for a short time. The convict, though undergoing sentence for a crime, for the purposes referred to hereinabove, may be released for a temporary period even after his conviction is confirmed by the appellate Court. Before the Court, when there is a question of releasing the convict on bail arises, the Court will consider the merits, nature and character of evidence. For an offence punishable under Section 302 of the Penal Code, when the accused-convict has preferred an appeal, the Court, while admitting the appeal may not be inclined to release the convict on bail; Yet, after conviction is confirmed, the State Government may exercise the power either under the Prisons Act or under the Criminal Procedure Code and may release the convict in accordance with law. Habitual criminals and persons convicted of offences relating to robbery, dacoity under Sections 392 to 402 of the Penal Code or persons convicted under the Prohibition Act either singly or together with any other offence or such convict whose presence is considered dangerous or prejudicial to the public peace and tranquility by the District Magistrate concerned or Commissioner of Police as the case may be or prisoner whose conduct in jail is, in the opinion of the Superintendent of Jail not satisfactory, then such a convict is not entitled and eligible for release even for a short time (1990 (2) GLR 1365.) In such cases, the Executive may refuse to exercise the powers.

21. From the case law, under Section 432, it can be said that under the following circumstances, executive may exercise the power under Section 432 :

(1) When the punishment prescribed by law is more rigorous than circumstances of the case.

(2) Other mitigating circumstances such as young age of convict, minor part played by the convict, participation in the crime not pre-planned or may be accidental etc.

etc. ..

22. The apex Court, in the case of Alijan v. State of Maharashtra reported in AIR 1981 SC 645 : (1981 Cri LJ 163) had an occasion to consider the case where the accused was sentenced to the minimum term of seven years rigorous imprisonment for lifting money from the palm of a person standing in the queue before the ticket window of a railway station with the tip of a sword and carrying it away and entering the booking office. The apex Court recommended that it was a fit case where the Government may remit or reduce sentence of the accused under Section 432 of the Criminal Procedure Code as the accused was a primary school teacher without bad antecedents and the amount alleged to have been robbed was a trivial amount and also neither caused physical hurt to anybody nor made any attempt to rob the cash in the booking office nor resisted his arrest nor attempted to conceal his identity. Thus, powers under Section 432 are to be exercised considering facts of the case and gravity of an offence.

23. Thus, power of suspension, remission and commutation of sentence is different from the suspension of sentence during the pendency of appeal. One is at the hands of the Executive and the other by the competent Court. Both operate in different fields. Unless and until powers given to the Court under Section 389 of the Code are taken away explicitly, it cannot be said that the Court is not entitled to exercise powers under Section 389 of the Code. Reading Section 36-B of the Act, it is clear that provisions contained in Chapters XXIX and XXX of the Code are made applicable and powers conferred under these chapters are preserved. There is a recognized principle that ousting of jurisdiction of the Court is not to be readily inferred except by express provision or by necessary implication. Again Section 32-A of the Act will come into play only after the Court proceedings are over. In the case of K.M. Nanavati v. State of Bombay reported in AIR 1961 SC 112 : (1961 (I) Cri LJ 173), the general power to grant pardon, etc. vested in the executive, i.e. the Governor, under Article 161 of the Constitution and the powers conferred on the judiciary to pass a particular order in a pending case as envisaged by the old Section 426 of the Code of Criminal Procedure (present Section 389 of the 1973 Code) fell for consideration before the Supreme Court. The Supreme Court found that there was no conflict between the two and held that so long as the judiciary had the power to pass a particular order in a pending case, to that extent, the power of the executive will have to be held limited in view of the words of Section 401 (now Section 432 of 1973 code) and Section 426 (now Section 389 of 1973 Code). The Supreme Court in paragraph 17 observed as under:--

"They can be harmonised without any difficulty. If Section 426 is held to deal with a special case restricted to the period while the appeal is pending before an appellate Court while Section 401 deals with the remainder of the period after conviction. We see no difficulty in adopting this interpretation nor is there any diminution of powers conferred on the executive by Section 401 by this interpretation. The words "at any time" emphasize that the power under Section 401 can be exercised without limit of time, but they do not necessarily lead to the inference that this power can also be exercised while the Court is seized of the same matter under Section 426."

Thus, from this judgment, it is very clear that the powers which may be exercised under the Code of Criminal Procedure 1973 or under any law for suspension, remission or commutation of any

sentence awarded can be exercised only after the proceedings are finally concluded by the Court and when no proceedings are pending in the Court. There is no question of applying this Section i.e. 32-A of the NDPS Act when an appeal is pending before the Court.

24. Learned Additional Public Prosecutor submitted that in an appropriate case, the High Court, while exercising the powers under Article 226 to issue appropriate writ, direction or order in exceptional cases at the behest of the convict of an offence, may entertain the application and release for a temporary period. If the jurisdiction of this Court under Article 226 is invoked, then according to the learned A.P.P. the matter would be different. The jurisdiction of the High Court is not expressly excluded under the Act. In our opinion, the jurisdiction of the High Court under Article 226 is wide and can be exercised. Power of the High Court exercising appellate jurisdiction under the NDPS Act is not specifically taken away and the same is preserved, therefore, ordinarily, this Court should prefer to exercise the powers under the statute.

25. A Division Bench of the High Court of Kerala, in the case of Phasalu v. State of Kerala reported in 1992 Drug Cases 37 had an occasion to consider a similar situation. Pareed Pillay, J. took the view that the High Court's powers under Chapters XXIX and XXX of the (sic), are taken away in view of Section 32-A of the NDPS Act. In view of Section 32-A of the NDPS Act, the position is manifestly made clear that the High Court has no jurisdiction to suspend the sentence.

Balakrishnan, J. another member of the Bench held that the provisions would indicate that the High Court has got all the powers conferred on it under Chapter XXIX of the Code while dealing with an appeal preferred against conviction and sentence passed under the NDPS Act and the power under Section 389 of the Code is one such power conferred under Chapter XXIX of the Code and therefore, even though the provisions of the NDPS Act should prevail over the general enactments like Cr.P.C., the power of the High Court under Section 389 is saved by Section 36-B of the Act.

The matter was therefore referred to a larger bench and the Full Bench of the Kerala High Court in the case reported in Burlin Joseph alias Ravin v. State, 1992 Drug Cases 98 agreed with the view taken by Pareed Pillai, J. and held that Section 32-A cannot be confined to Governmental powers and it applies to suspension of sentence during the pendency of appeal also and High Court has no power to suspend the sentence of a convicted person either during the pendency of his appeal or revision, unless it relates to the offence under Section 27.

26-27. In the case of Oliver Fernando v. Assistant Collector of Madras reported in 1990 Drugs cases 362, a Division Bench of the Madras High Court had an occasion to consider the effect of Sections 32-A, 36 and 37 of the Act and Section 439 of the Cr.P.C. Some of the accused sought for bail and others for suspension of sentences imposed by the trial Court during the pendency and disposal of the appeals filed by them before the Division Bench whereas a preliminary contention was raised that in view of Section 32-A of the Act and as the power is restricted in granting bail, as per Section 37 of the Act, power of the High Court is restricted to extent provided by its sub-section. In paragraph 16 of the judgment, Sivasubramaniam, J. held :-

"Therefore, Section 32-A coming in the Scheme of the Act as noticed above can refer only to the provisions regarding punishment and it cannot refer to the power of the High Court to suspend the sentence after conviction. Apart from that, the language of the section itself shows that it cannot refer to the powers of the Court, since the High Court has no power to remit or commute the sentence which vests only with the Government under Sections 432 and 433 of the Code. The said Section is equivalent to Sections 432 and 433 of the Code. Under Section 432(1) of the Code the appropriate Government is given ample powers to suspend the execution of sentence or remit the whole or any part of the punishment to which any person has been sentenced to punishment of an offence. The other part of the section deals with the procedure of suspending or remitting the sentence. Section 433 of the Code confers on the Government to commute the sentence. These two powers do not vest with the Court and, therefore, the language of Section 32-A of the Act, which speaks of suspension, remission and commutation of sentence clearly shows that it refers only to the Government and not to the Court. Apart from that, we have already extracted Section 36-B of the Act which, in categorical terms, says that the High Court may exercise, so far as may be applicable, all powers conferred by Chapters XXIX and XXX of the Code. It is couched in such general terms as to exclude any limitations on such powers. It is significant to note that the power of (sic. if) the High Court to suspend sentence is provided under Section 389 of the Code which comes under Chapter XXXI of the Code, The parliament in its wisdom has chosen to leave the powers of the High Court to suspend sentence unaffected by providing Section 36B of the Act. If the framers of the Act had intended to restrict the power of the High Court to suspend sentence after conviction they would have certainly made a specific provision to that effect. The Supreme Court has repeatedly held that the exclusion of jurisdiction cannot be inferred and that a statute ousting the jurisdiction of a Court must be strictly construed. The bar imposed under Section 32-A of the Act shows that the Parliament intended to curtail the unlimited powers the Government to suspend, remit and commute the sentence since the intention of the Act is to impose deterrent punishment in order to curb the notorious activities in drug trade which affects the health and the well being of human beings. Every possible effort to bring in political influence is sought to be avoided under this provision. Therefore, we have no hesitation in holding that the power available under Section 389 of the Code to suspend sentence is not taken away by Section 32A of the Act. However, we must add that the limitations contained in Section 37 of the Act will have to be borne in mind by the High Court while suspending the sentence and enlarging the accused on bail. Even at this stage, the High Court will have to bear in mind the object of the Act and it should exercise its powers with great care and caution, so that the very object of the Act is not defeated."

Arunachalam J., another member of the Bench, concurring with the views expressed by the other member of the Bench held as under :-

Therefore, the answer to the two questions referred to us are :-

(1) The powers of the High Court in the matter of granting bail preserved under Section 36-A of the Act are not in any way restricted by the provisions contained in Section 37(1)(b) and Sub-section (2) of the Act, though while exercising the unfettered power, the High Court will bear in mind the policy behind the enactment of Section 37, of the Act; and, (2) Section 32-A of the Act is not a bar for the High Court exercising its power in the matter of granting suspension of sentence and bail pending disposal of an appeal. The powers of suspension under Section 389 of the Code are preserved by Section 36-B of the Act. Section 32-A will refer only to the Government and not to Courts.

28. Rajasthan High Court, in the case of Gyan Chand v. State of Rajasthan reported in 1993 Cri LJ 422 held as under (at p. 425 of Cri LJ):

"The powers of the High Court regarding suspension of sentence under Section 389, Cr. P.C. are thus not curtailed by Section 32-A of the Act, rather Section 32-A of the Act does not deal with the power of the High Court but. it deals with the powers of the appropriate Government only and has no connection whatsoever so far as the judicial powers of the High Court are concerned.... Both the provisions have to be harmonised so that there may not be any conflict between them and they can be harmonized without any difficulty, if Section 36-B of the Act is held to be dealt with the power of the appellate Court of suspension of sentence passed by the Court below during the pendency of the appeal, while Section 32-A of the Act, which puts restriction on the powers dealing with the powers of the appropriate Government regarding the suspension, remission or commutation of the sentence after conviction. This power of the State with respect to suspension, remission or commutation has been taken away by Section 32-A of the Act, while the judicial powers of the appellate Court under Section 36-B of the Act have been preserved. Both these Sections, i.e. Section 32-A and Section 36-B of the Act, thus, do not operate in the same field and operate in different fields. Section 32-A of the Act deals with the Executive powers of the appropriate Government while Section 36-B of the Act deals with the judicial powers of the Courts. Even as per the Rule of Statutory Construction, if two sections of the statute are repugnant in any way to the first, the latter provision will prevail for it stands last in the enactment and speaks the last intention of the makers. Even on this statutory Rule of Interpretation, powers under Section 389, Cr. P.C. of the appellate Court regarding suspension of sentence, have been preserved by Section 36-B of the Act, as it appears that Section 32-A of the Act and both the provisions were enacted together."

29. In view of the aforesaid discussion, we come to the conclusion that the power conferred on the appellate Court under Section 389 of the Code is not taken away. It is open for the Court to exercise that power. However, the question is: looking to the object of the Act, would it be proper to release the convict as the appeal is preferred and the same is admitted? The Court has to bear in mind the object, reasons and guidelines contained in Section 37 of the Act, Before conviction, the Court has to assess the police papers or the statements recorded by the Investigating Officer but once evidence is

tested by cross-examination and the judicial officer has held that the accused is guilty, much weight is to be given to that decision and with strong emphasis, we would say that for a serious offence such as under the NDPS Act, the convict should not be released on bail pending hearing and final disposal of the appeal if he is sentenced to undergo rigorous imprisonment for a period of 5 years or more. It depends upon nature and character of evidence adduced before the Court and the prayer for bail made under peculiar circumstances in each case. Even before passing the order of bail in case of special or peculiar circumstances arising, the Court has to hear the Public Prosecutor, who may, by making thorough inquiry through police officers or other agency report to the Court and make his submissions before the Court and thereafter it is for the Court to deal with the matter,

30. In view of the aforesaid discussion, we hold that powers under Section 389 of the Criminal Procedure Code are preserved as it is but the Court has to exercise discretion in the light of the aforesaid observations. Both the questions would accordingly stand answered.

31. These applications are required to be rejected as they have outlived the cause set up therein. Otherwise also no case is made out at this stage for exercise of the powers.

Accordingly, these applications are dismissed.

32. The apex Court, in the case of S.C. Legal aid Committee Representing Undertrial Prisoners v. Union of India reported in (1994) 6 SCC 731 : (1994 AIR SCW 5115) has held as under (at page 747) (of .SCC) : (at pp. 1531-32 of AIR SCW) :

"As stated earlier, Section 37 of the Act makes every offence punishable under the Act cognizable and non-bailable and provides that no person accused of an offence punishable for a term of five years or more shall be released on bail unless (i) the Public Prosecutor has had an opportunity to oppose bail and (ii), if opposed, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of the offence and is not likely to indulge in similar activity. On account of the strict language of the said provision, very few persons accused of certain offences under the Act could secure bail. Now to refuse bail on the one hand and to delay trial of cases on the other is clearly unfair and unreasonable and contrary to the spirit of Section 36(1) of the Act, Section 309 of the Code and Articles 14, 19 and 21 of the Constitution. We are conscious of the statutory provision finding place in Section 37 of the Act prescribing the conditions which have to be satisfied before a person accused of an offence under the Act can be released. Indeed we have adverted to this section in the earlier part of the judgment. We have also kept in mind the interpretation placed on a similar provision in Section 20 of the TADA Act by the Constitution Bench in Kartar Singh v. State of Punjab (1994 Cri LJ 3139) (SC) Despite this provision, we have directed as above mainly at the call of Article 21 as the right to speedy trial may even require in some cases quashing of a criminal proceedings altogether, as held by a Constitution Bench of this Court in A.R. Antulay v. R.S. Nayak (1992 Cri LJ 2717 : AIR 1992 SC 1701), release on bail, which can be taken to be embedded in the right of speedy trial, may, in some cases, be the demand of Article 21. As we have not felt

inclined to accept the extreme submission of quashing the proceedings and setting free the accused whose trials have been delayed beyond reasonable time for reasons already alluded to, we have felt that deprivation of the personal liberty without ensuring speedy trial would also not be in consonance with the right guaranteed by Article 21. Of course, some amount of deprivation of personal liberty cannot be avoided in such cases; but if the period of deprivation pending trial becomes unduly long, the fairness assured by Article 21 would receive a jolt. It is because of this that we have felt that after the accused persons have suffered imprisonment which is half of the maximum punishment provided for the offence, any further deprivation of personal liberty would be violative of the fundamental right visualised by Article 21, which has to be telescoped with the right guaranteed by Article 14 which also promises justness, fairness and reasonableness in procedural matters."

After observing as above, the apex Court issued certain directions for releasing the accused on bail in certain cases. Therefore, it is clear that inspite of stringent provisions, considering the relevant provisions contained in the Constitution of India, the Court has preferred to preserve the fundamental rights guaranteed under the Constitution of India. These are the cases where the trial is concluded. Therefore, the principles laid down will not apply but at the same time, one has to bear in mind that it is the duty of the Court to see that constitutional rights are preserved.

33. In the case of Kartar Singh v. State of Punjab reported in (1994) 3 SCC 569 : (1994 Cri LJ 3139), the apex Court has observed as under in paras 85, 86, 87 and 88 (of SCC) (Paras 90, 91 and 92 of Cri LJ) as under :-

85. The right to a speedy trial is not only an important safeguard to prevent undue and oppressive incarceration, to minimise anxiety and concern accompanying the accusation and to limit the possibility of impairing the ability of an accused to defend himself but also there is a societal interest in providing a speedy trial. The right has been actuated in the recent past and the Courts have laid down a series of decisions opening up new vistas of fundamental rights. In fact, lot of cases are coming before the Courts for quashing of proceedings on the ground of inordinate and undue delay stating that the invocation of this right even need not await formal indictment or charge.

86. The concept of speedy trial is read into Article 21 as an essential part of the fundamental right to life and liberty guaranteed and preserved under our Constitution. The right to speedy trial begins with the actual restraint imposed by arrest and consequent incarceration and continues at all stages, namely, the stage of investigation, inquiry, trial, appeal and revision so that any possible prejudice that may result from impermissible and avoidable delay from the time of the commission of the offence till it consummates into a finality, can be averted. In this context, it may be noted that the constitutional guarantee of speedy trial is properly reflected in Section 309 of the Code of Criminal Procedure.

87. This Court in *Hussainara Khatoon 1980 (1) SCC 81 : 1979 Cri LJ 1036* v. Home Secretary, State of Bihar while dealing with Article 21 of the Constitution of India has observed that: (SCC p. 89 (at p. 1041 of AIR) para 5).

"No procedure which does not ensure a reasonably quick trial can be regarded as 'reasonable' fair or just and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21. The question which would, however, arise is as to what would be the consequences if a person accused of an offence is denied speedy trial and is sought to be deprived of his liberty by imprisonment as a result of a long delayed trial in violation of his fundamental right under Article 21, would he be entitled to be released unconditionally freed from the charge levelled against him on the ground that trying him after an unauily long period of time and convicting him after such trial would constitute violation of his fundamental right under Article 21."

34. Thus, it is very clear that if there is undue delay in hearing the appeal, the concept of speedy trial as envisaged by Article 21 of the Constitution of India can be said to have been denied. In the aforesaid judgment, the Honourable Court has also Observed as under in para 92 (of SCC) : (para 98 of Cri LJ) of the judgment:-

"Of course, no length of time is per se too long to pass scrutiny under this principle nor the accused is called upon to show the actual prejudice by delay of disposal of cases. On the other hand, the Court has to adopt a balancing approach by taking note of the possible prejudices and disadvantages to be suffered by the accused by avoidable delay and to determine whether the accused in a criminal proceeding has been deprived of his right of having speedy trial with unreasonable delay which could be identified by the factors -

(1). length of delay, (2). the justification for the delay, (3) the accused's assertion of his right to speedy trial, and (4) prejudice caused to the accused by such delay. However, the fact of delay is dependent on circumstances of each case because reasons for delay will vary, such as delay in investigation on account of widespread ramification of crimes and its designed network either nationally or internationally, the deliberate absence of witness or witnesses, crowded dockets on the file of the Court etc.'

35. If the trial is concluded and the appeal is not disposed of on account of pendency of appeals, it would be just and proper to direct the registry to prepare a cause list of the appeals preferred by convicts undergoing sentence under the provisions contained in the NDPS Act for more than 5 years and to place the appeals before the appropriate Court for final hearing immediately. This direction will take care of the grievance of delay.