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

\+ W.P.(CRL) 1311/2016

SHASHI SHEKHAR @ NEERAJ

..... Petitioner

Through: Ms. Neha Kapoor, Advocate.

versus

STATE OF THE NCT OF DELHI & ORS.

..... Respondents

Through: Mr. Rajesh Mahajan, ASC and Mr.Peeyush Bhatia, Advocate, for the State.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

O R D E R

% 09.11.2016

Crl. M.A. No. 17197/2016

1. Issue notice. Mr. Mahajan accepts notice. Learned counsels have addressed their submissions in this application, as well as in the writ petition itself. Accordingly, I proceed to dispose of the present application and the writ petition.

2. This application has been filed by the petitioner to direct that he be released on parole till the time Sentence Review Board (SRB) grants premature release to the petitioner. In the alternative, the petitioner prays for parole during pendency of the present writ petition.

3. The petitioner has preferred the present writ petition to assail the order dated 06.01.2016, whereby the SRB rejected his case for grant of premature release. At the time when the said application was rejected, he has undergone 19 years, 07 months and 29 days of incarceration excluding the remission period. Including the remission period, he had undergone 23 years, 10 months and 05 days. The reason found in the impugned order for rejection of his application by the SRB, *inter alia*, was that the petitioner was undergoing life sentence in three different cases, namely case FIR No.509/1995 under Section 302/392 IPC registered at PS - Vasant Vihar, Delhi; case FIR No.538/1995 under Section 302/392 IPC registered at PS – Vasant Kunj, Delhi; and case FIR No.76/1996 under Section 302/392/ 397 IPC registered at PS – C.R. Park, Delhi. All the aforesaid three cases are independent cases involving murder and robbery.

4. The impugned order dated 06.01.2016 shows that the jail conduct of the petitioner was reported to be unsatisfactory in view of the four jail punishments being imposed upon him. Pertinently, the learned Additional Sessions Judge opposed the premature release in view of the nature and gravity of the offences. The police also opposed the premature release on the ground that the petitioner was involved in 11 criminal cases. His premature release was, however, not opposed by the Probation Officer, presumably, on account of the fact that while the petitioner was released on parole earlier, his conduct was found to be satisfactory.

5. After the rejection of the application for premature release, the present writ petition was filed. The petitioner's case was again considered by the SRB and the same has been, once again, rejected by the order dated

03.11.2016 i.e. during the pendency of this writ petition. On this occasion also, the premature release of the petitioner was opposed by Delhi Police while there was no opposition by the Probation Officer. The said order records that "*The members of the Board were not convinced for his premature release in view of multiple murders committed during robberies. Moreover, his conduct is also not satisfactory in jail*". The order passed by the SRB also shows that the total undergone period was recorded as 24 years, 8 months and 13 days, including remissions earned by the petitioner.

6. Learned counsel for the petitioner submits that the said computation was incorrect inasmuch, as, the petitioner had undergone more than 25 years of sentence as per the custody certificate issued by the Jail Superintendent. In any event, the petitioner has completed 25 years of sentence, including remissions. The submission of learned counsel for the petitioner is that under the SRB guidelines in respect of certain categories of convicted prisoners undergoing life imprisonment, the SRB could consider their premature release only after they have undergone 20 years imprisonment, including remissions. The said guidelines specifically provide that "*the period of incarceration inclusive of remission even in such cases* ***should not exceed 25 years***" (emphasis supplied). Thus, the submission is that the petitioner cannot be detained in prison any longer. The petitioner is, as a matter of right, entitled to be released permanently.

7. The further submission of learned counsel for the petitioner is that the petitioner is suffering from HIV and, consequently, guideline No.3.4 of the Delhi Sentence Reviewing Board "SRB Guidelines" for short) is also attracted in the facts of this case, which reads as follows:

> *"3.4 Cases of premature release of persons undergoing life imprisonment before completion of 14 years of actual imprisonment on grounds of terminal illness or old age etc. can be dealt with under the provisions of Art. 161 of the Constitution of India."*

8. The submission of learned counsel for the petitioner is that the SRB has mindlessly rejected the petitioner's application for premature release merely on the ground that the police had objected to the same. She submits that in no case, the police ever concedes to premature release of the convict and the said objection of the police cannot be a reason for the SRB to deny the premature release of the convict. She also submits that the guidelines dated 16.07.2004 also provides in clause 5(3) that the board shall not ordinarily decline premature release of a prisoner merely on the ground that the police had not recommended his release.

9. Learned counsel for the petitioner has also sought to place reliance on orders passed by the Court whereby the petitioners in those cases were directed to be released on parole during reconsideration of the case of the said petitioners by the SRB for pre-mature release (Writ Petition Nos. 1278/2002 and 1352/2004).

10. Reliance is also placed on the judgment of the Supreme Court in ***Laxman Naskar Vs. Union of India and others*** AIR 2000 SC 986 and the judgment of Jharkhand High Court in ***Limbu Hembrom Vs. The State of Jharkhand & Ors.*** in Writ Petition (Crl.) No. 190 of 2011 decided on 23.09.2011, to submit that that SRB is obliged to apply its mind and the application for release cannot be mechanically rejected without due application of mind. Reliance is also placed for the same purpose on ***Manoj***

Kumar @ Sanjay Vs. State of Punjab and others in Writ Petition No.910 of 2013 decided on 11.11.2013 and the decision of this Court in ***Rakesh Kaushik Vs. Delhi Administration and Anr.*** 1986 Cri.L.J. 566. For the same purpose, reliance is also placed on the judgment of Punjab & Haryana High Court in ***Abdul Gaffar @ Guddu Vs. State of U.T., Chandigarh and others*** Criminal Writ Petition No. 2754 of 2011 decided on 30.05.2012.

11. On the other hand, Mr. Mahajan has referred to guideline No.3.1, relevant part whereof reads as follows:

> *"3.1 Every convicted prisoner whether male or female undergoing sentence of life imprisonment and covered by the provisions of Section 433 Cr.P.C. shall be eligible to be considered for premature release from the prison immediately after serving out the sentence of 14 years of actual imprisonment, i.e. without the remissions.* ***It is, however, clarified that completion of 14 years in prison by itself would not entitle a convict to automatic release from the prison and the Sentence Review Board shall have the discretion to release a convict at an appropriate time in all cases considering the circumstances in which the crime was committed and other relevant factors like: ... ...****"*
>
> *[emphasis supplied]*

12. Mr. Mahajan has submitted that the petitioner is undergoing life sentences in three different and independent cases involving murder and dacoity. He submits that a convict who is undergoing a life sentence has no right to be released after serving a particular number of years of imprisonment (with or without remissions). He only has a right to have his case put up by the prison authorities before the SRB for consideration of his request for pre-mature release. A convict does not get an automatic right of

release after undergoing 20 or 25 years of imprisonment. A positive order has to be passed by the State Government after due consideration for pre-mature release. Mr. Mahajan submits that imprisonment for life means actual life imprisonment and it does not mean a specific number of years. In this regard, he has placed reliance on ***Gopal Vinayak Godse Vs. The State of Maharashtra and others*** AIR 1961 SC 600; ***Maru Ram and others Vs. Union of India and others*** AIR 1980 SC 2147; ***Zahid Hussein and others Vs. State of West Bengal and another*** (2001) 3 SCC 750; and ***State of Haryana Vs. Mahender Singh and others*** (2007) 13 SCC 606. In ***Godse (supra)***, the Supreme Court further observed;

> *".....**Unless the said sentence is commuted or remitted by appropriate authority under the relevant provisions of the Indian Penal Code or the Code of Criminal Procedure, a prisoner sentenced to life imprisonment is bound in law to serve the life term in prison.** The rules framed under the Prisons Act enable such a prisoner to earn remissions — ordinary, special and State — and the said remissions will be given credit towards his term of imprisonment. For the purpose of working out the remissions the sentence of transportation for life is ordinarily equated with a definite period, but it is only for that particular purpose and not for any other purpose. As the sentence of transportation for life or its prison equivalent, the life imprisonment, is one of indefinite duration, the remissions so earned do not in practice help such a convict as it is not possible to predict the time of his death. That is why the Rules provide for a procedure to enable the appropriate Government to remit the sentence under Section 401 of the Code of Criminal Procedure on a consideration of the relevant factors, including the period of remissions earned. **The question of remission is exclusively within the province of the appropriate Government**; and in this case it is admitted that, though the appropriate Government made certain remissions under Section 401 of the Code of Criminal Procedure, it did*

*not remit the entire sentence**. We, therefore, hold that the petitioner has not yet acquired any right to release.***

From the above decision, it is clear that in the absence of subsequent order of remission by the competent government either based on Section 57 of Indian Penal Code or any other provision of the Code of Criminal Procedure, 1973, the life convict cannot be released. The above decision of the Constitution Bench has been followed in various subsequent decisions."

[emphasis supplied]

13. Reliance is also placed on ***Life Convict Bengal @ Khoka @ Prasanta Sen Vs. B.K.Srivastava and Ors.*** (2013) 3 SCC 425 wherein the Supreme Court, after taking into consideration several earlier decisions, upheld the decision of the State Government rejecting the application for premature release premised on the decision taken by the Sentence Review Board. In this regard, reference was made to the observations made in ***Gopal Vinayak Godse (supra)*** wherein the Supreme Court observed that the Prisons Act does not confer any authority or power to commute or remit sentences.

14. In ***Prasanta Sen*** (supra), the Supreme Court also referred to the decision in ***State of Madhya Pradesh Vs. Ratan Singh and Ors.*** (1976) 3 SCC 470, wherein it had, inter alia, held;

"9. From a review of the authorities and the statutory provisions of the Code of Criminal Procedure the following propositions emerge:

'(1) that a sentence of imprisonment for life does not automatically expire at the end of 20 years including the remissions, because the administrative rules framed under the various Jail Manuals or under the Prisons Act cannot supersede the statutory provisions of the Penal Code. A sentence of imprisonment for life means a sentence for the entire life of the prisoner unless the appropriate Government chooses to exercise its discretion to remit either the whole or a part of the sentence under Section 401 of the Code of Criminal Procedure;

(2) that the appropriate Government has the undoubted discretion to remit or refuse to remit the sentence and where it refuses to remit the sentence no writ can be issued directing the State Government to release the prisoner;

15. In paragraph 18 of the judgment in ***Prasanta Sen*** (supra), the Supreme Court observed,

"It is clear that neither Section 57 IPC nor the Explanation to Section 61 of the W.B. Act lay down that a life imprisonment prisoner has to be released after completion of 20 years. 20 years mentioned in the Explanation to Section 61 of the W.B. Act is only for the purpose of ordering remission. If the State Government taking into consideration various aspects refused to grant remission of the whole period then the petitioner cannot take advantage of the above Explanation and even Section 57 IPC and seek for premature release. Further, the question of remission of the entire sentence or a part of it lies within the exclusive domain of the appropriate Government under Section 432 of the Code of Criminal Procedure, 1973 and neither Section 57 IPC nor any rules or local Acts (in the case on hand, the W.B. Act) can stultify the effect of the sentence of life imprisonment given by the Court under IPC. To put it clear, once a person is sentenced to undergo life imprisonment unless imprisonment for life is commuted by the competent authority, he has to undergo imprisonment for

> ***the whole of his life. It is equally well settled that Section 57 IPC does not, in any way, limit the punishment of imprisonment for life to a term of 20 years."***

16. Lastly, Mr. Mahajan has relied upon the decision of the Supreme Court in ***State of Gujarat & Anr. Vs. Lal Singh @ Manjit Singh & Ors.*** 2016 SCC OnLine SC 633. In this case, the High Court held that the order passed by the Government of Gujarat declining to grant benefit of pre-mature release was illegal. While doing so and directing reconsideration of the case of the convict to arrive at a fresh decision in the light of the discussion contained in the judgment of the High Court, the High Court further directed the release of the convict on parole for a period of three months. The said decision of the High Court was assailed before the Supreme Court. The Supreme Court in this decision, inter alia, referred to the Constitution Bench decision in ***Sunil Fulchand Shah v. Union of India [Sunil Fulchand Shah v. Union of India, (2000) 3 SCC 409 : 2000 SCC (Cri) 659].*** In ***Sunil Fulchand Shah*** (supra), the Supreme Court observed that it was a case

> *"37. .....dealing with the grant of temporary release or parole under Sections 12(1) and 12(1-A) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (the COFEPOSA Act) had observed that the exercise of the said power is administrative in character but it does not affect the power of the High Court under Article 226 of the Constitution.* ***However, the constitutional court before directing the temporary release where the request is made to be released on parole for a specified reason and for a specified period should form an opinion that request has been unjustifiably refused or where the interest of justice warranted for issue of such order of temporary release.*** *The Court further ruled that jurisdiction*

has to be sparingly exercised by the Court and even when it is exercised, it is appropriate that the Court should leave it to the administrative or jail authorities to prescribe the conditions and terms on which parole is to be availed of by the detenu.

38. We have referred to the aforesaid authority only to highlight the view expressed by the Constitution Bench with regard to grant of parole. The impugned order, as we notice, is gloriously silent and, in fact, ***an abrupt direction has been issued to release the first respondent on parole for a period of three months. It is well settled in law that a Judge is expected to act in consonance and accord with the legal principles. He cannot assume the power on the basis of his individual perception or notion.*** *He may consider himself as a candle of hope but application of the said principle in all circumstances is not correct because it may have the effect potentiality to affect the society. While using the power he has to bear in mind that "discipline" and "restriction" are the two basic golden virtues within which a Judge functions. He may be one who would like to sing the song of liberty and glorify the same abandoning passivity, but his solemn pledge has to remain embedded to the Constitution and the laws. There can be deviation."*

(emphasis supplied)

17. Mr. Mahajan submits that the orders relied upon by the petitioner directing release of the convict on parole while the case of the convicts were pending consideration/reconsideration by the SRB, without any justification, are not good law in view of the decision in ***Lal Singh*** (supra).

18. Having considered the aforesaid submissions, and the several decisions relied upon by the learned counsel on both sides, it is, firstly, clear that life sentence is not limited to either 14 years, or 20 years, or even 25 years. A life sentence means the actual life imprisonment for the entire life

of the convict. The same may be curtailed by the State by premature release. However, that is the discretion of the State Government to be exercised on the advice of the SRB. The SRB itself has to arrive at its opinion on the aspect of premature release on sound principles. It should have good reasons for allowing or disallowing the application for premature release made by a convict. The Courts cannot substitute the discretion of the State/ SRB with its own discretion. If the Court finds that the said discretion has not been properly exercised with due application of mind, the Court may set aside the order rejecting the application seeking grant of premature release and may remit the case back for reconsideration. However, the Court would not, on its own, undertake the exercise of considering whether or not to grant premature release to a convict.

19. It is also well settled that the guidelines that may be framed for consideration of a case by the SRB cannot override the statutory scheme contained in the IPC. The said guidelines are to be taken into consideration by the SRB while considering any case placed before it. The SRB guidelines themselves show that the SRB has to exercise its discretion by considering the circumstance of each case placed before it - irrespective of the number of years that a convict may have spent behind the bars. Thus, the reliance placed by learned counsel for the petitioner on the guidelines, which provides that the period of incarceration (including remission) should not exceed 25 years cannot have the effect of effacing the life sentence awarded to the petitioner in the aforesaid three independent cases, where he stands convicted for dacoity and murder.

20. The submission of learned counsel for the petitioner that the petitioner

being a HIV positive patient is also entitled to consideration under guideline 3.4 does not appear to have force. Guideline 3.4 talks about premature release of persons who are undergoing a terminal illness or old age etc. The Andhra Pradesh High Court in ***Mr. X, Indian Inhabitant, Vizianagaram, A.P. v. Chairman, State Level Police Recruitment Board, Hyderabad. A.P.***, 2006 (8) SLR 588 (DB) considered the issue whether a person who tests HIV positive could be categorized as terminally ill. In this decision, the Division Bench of the Andhra Pradesh High Court held that if a person tests HIV positive, that does not mean that such person has AIDS, nor does it mean that such a person is terminally ill, or will become terminally soon. It may take several years for the HIV to completely damage the immune system. On the basis of information placed before the court, the Division Bench held that the asymptomatic period could last between 3 to 18 years. In fact, 65% of HIV positive patients develop AIDS within 12 years, and 85% within 18 years. The timing of the terminal stage is uncertain. The Division Bench also observed that even if a person is infected with HIV, he or she may well lead a healthy, active and productive life for a period of upto 18 years, which period can be extended further with the introduction of ART i.e. Antiretroviral drugs, which inhibit the replication of HIV. When antiretroviral drugs are given in combination, HIV replication and immune deterioration can be delayed and survival and quality of life is improved. The Division Bench further observed in para 33 as follows:

> "*33. ... ... Medical evidence placed on record reveals that, in terms of physical and mental fitness, not all persons who have tested HIV positive constitute a single class, for there are different categories among them, some of whom are in the early stages of the asymptomatic period and others in the final stages and suffer from*

*AIDS. While those in the final stages who suffer from AIDS may justifiably be denied appointment in the police establishment on the ground that they lack the required physical and mental fitness, the same cannot be said of those in the early stages of the asymptomatic period which, as stated supra, may range anywhere between 3 to 18 years, since during the prolonged asymptomatic carrier stage of HIV infection one remains fully active, physically and mentally. (**MX of Bombay Indian Inhabitant v. ZY & Anr.,** AIR 1997 Bom 406) … …*"

21. I may observe that a detailed discussion is also found in the judgment of the Bombay High Court taken note of herein above in ***MX of Bombay Indian Inhabitant*** (supra).

22. The SRB is bound to take into consideration all the relevant factors in relation to a convict while dealing with his application for premature release. It is not possible to lay down in general terms as to what are the considerations that the SRB should look into in each particular case. The facts of each case would dictate the decision that the SRB may arrive at. The SRB may consider a case of a convict more favourably than that of another by taking into account the nature of the offence; the brutality with which the same was committed; whether the offender/ convict is a repeated offender – which would also have a bearing on the aspect as to whether he could be considered as a hardened criminal and habitual offender; his age and stage in life when he has made the application for premature release, and other relevant considerations.

23. It is not for this Court to guess as to what are the reasons for which the petitioner's application for premature release may have been rejected on two occasions. But the fact remains that the petitioner is a convict in three

different cases of murder and dacoity. The years of the registration of FIR show that the said three cases relate to 1995 and 1996. The petitioner even now is only 40 years of age and person of such an age has the drive and zest for life. He still has a lot to achieve for himself and his family in material terms. His hunger for money and material things in life is very much alive at such an age. What drives a person to commit theft or dacoity is his material need or may be even greed. Thus, a person at the age of 40 still has the potentiality of falling to the same ways which he may have adopted earlier on repeated occasions, and that too with brutal force leading to murder, to satisfy his needs.

24. The SRB is entitled to take into consideration the potentiality of the convict to commit the same or similar offences for which he may be convicted. Thus, the submission of counsel for the petitioner that the police may have routinely, and without application of mind, not recommended the premature release of the petitioner cannot be accepted in the facts of this case. Pertinently, the SRB consists of an experienced judicial officer of the rank of District & Sessions Judge as its Member, who is trained to look at the cases for premature release of convicts in a dispassionate and objective manner. The consideration of such application is not left only to the police officials. Thus, it cannot be said that the order impugned by the petitioner rejecting his application for premature release by the SRB suffers from non application of mind or bias. There appears to be no justified reason for quashing the same.

25. The petitioner seeks a mandamus directing the respondent to consider his case for premature release. The said case has also been considered twice

and under the guidelines, it is open to the petitioner to apply for reconsideration of his case in terms thereof. If the petitioner were to apply again for his premature release in terms of the guidelines, this Court has no doubt that the same shall be considered on its own merits. The prayer made by the petitioner that he be released prematurely is not maintainable in view of the judgment of the Supreme Court taken note of herein above.

26. The petitioner seeks his release on parole till such time as his name is not considered by the authorities and approved for his premature release. Such a relief, in my view, cannot be granted as it would tantamount to doing indirectly, what the Court cannot directly. The Supreme Court in ***Rashmi Rekha Thatoi and Anr. v. State of Orissa and Odrs.***, (2012) 5 SCC 690 while dealing with an order passed by the High Court under section 438 Cr PC observed as follows:

> "*37. In this regard it is to be borne in mind that a court of law has to act within the statutory command and not deviate from it. It is well-settled proposition of law what cannot be done directly, cannot be done indirectly. While exercising a statutory power a court is bound to act within the four corners thereof. The statutory exercise of power stands on a different footing than exercise of power of judicial review. This has been so stated in Bay Berry Apartments (P) Ltd. v. Shobha (2006) 13 SCC 737 and U.P. State Brassware Corpn. Ltd. v. Uday Narain Pandey (2006) 1 SCC 479.*"

27. Similarly, while dealing with an order cancelling the grant of bail under section 439 Cr PC, the Supreme Court in ***Abdul Basit alias Raju and Odrs. V. Mohd. Abdul Kadir Chaudhary and Anr.*** (2014) 10 SCC 754 observed:

"*25. It is a well-settled proposition of law that "what cannot be done directly, cannot be done indirectly". While exercising a statutory power a court is bound to act within the four corners of a statute. The statutory exercise of the power stands on a different pedestal than the power of judicial review vested in a court. The same has been upheld by this Court in Bay Berry Apartments (p) Ltd. v. Shoba (2006) 13 SCC 737, U.P. State Brassware Corpn. Ltd. v. Uday Narain Pandey (2006) 1 SCC 479 and Rashmi Rekha Thatoi v. State of Orissa (2012) 5 SCC 690. It is the duty of the superior courts to follow the command of the statuary provisions and be guided by the precedents and issue directions which are permissible in law.*"

28. Reliance placed by the petitioner on several orders, wherein the courts routinely granted parole to convicts whose cases were pending before the SRB are of no avail in view of the subsequent decision of the Supreme Court taken note of herein above in ***Sunil Fulchand Shah*** (supra).

29. In view of the aforesaid discussion, I find no merit in the present petition as well as the present application and dismiss the same. It is, however, made clear that it shall be open to the petitioner to independently seek reconsideration of his case on its own merits by the SRB, and also to seek parole on legally sustainable grounds.

30. Dismissed.

31. Dasti.

VIPIN SANGHI, J

NOVEMBER 09, 2016
B.S. Rohella