

DADU @ TULSIDAS
v.
STATE OF MAHARASHTRA

OCTOBER 12, 2000

[K.T. THOMAS, R.P. SETHI AND S.N. VARIAVA, JJ.]

Narcotic Drugs and Psychotropic Substances Act, 1985

S.32A—Constitutional validity of-NDPS Act—Conviction under—Sentence—Suspension of—Provision for ouster of jurisdiction of court to suspend sentence—Held, unconstitutional—However, the provision taking away the power of Executive to suspend, remit or commute sentence, held, valid—Power of court to suspend sentence must be exercised within parameters prescribed under S.37—Convicts not entitled to suspension of sentence as a matter of right—Criminal Procedure Code, 1973—Ss. 389, 432 and 433—Constitution of India, 1950—Articles 14 and 21.

Parole—Grant—Effect—Held, does not amount to suspension, remission or commutation of sentence—Thus, authorities entitled to grant parole to a person convicted under the Act.

Constitution of India, 1950—Articles 226 and 32—Judicial Review—Exercise of—Legislative restrictions—Imposition—Permissibility of—Held, Judicial Review being heart and soul of the Constitutional scheme, cannot be encroached upon by legislature.

Words & Phrases

“Parole”—Meaning of.

In these writ petitions, the Constitutional validity of Section 32A of the Narcotic Drugs and Psychotropic Substances Act, 1985 prohibiting suspension, remission or commutation of sentence awarded under the Act has been challenged.

On behalf of appellant-convicts it was contended that Section 32A of the Act creating unreasonable distinction between the prisoners convicted under the Act and those convicted for offences under various other statutes was arbitrary, discriminatory and violative of Articles 14 and 21 of the Constitution.

A **Partly allowing the writ petitions, the Court**

HELD : 1.1. Section 32A of the Narcotic Drugs and Psychotropic Substances Act, 1985 taking away the jurisdiction of the courts under Section 389 of the Criminal Procedure Code, 1973 to suspend the sentences awarded to a convict under the Act is unconstitutional. [721-G]

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Ram Charan v. Union of India, (1991) 9 LCD 160, approved.

Ishwarsingh M. Rajput v. State of Gujarat, (1990) 2 Gujarat Law Reporter (1365) = (1991) 2 Crimes 160, overruled.

C

1.2. Awarding sentence, upon conviction, is concededly a judicial function to be discharged by the courts of law established in the country. It is always a matter of judicial discretion, however, subject to any mandatory minimum sentence prescribed by the law. The award of sentence by a criminal court wherever made subject to the right of appeal cannot be interfered or intermediate with in a way which amounts to not only interference but actually taking away the power of judicial review. Awarding the sentence and consideration of its legality or adequacy in appeal is essentially a judicial function embracing within its ambit the power to suspend the sentence under the peculiar circumstances of each case, pending the disposal of the appeal.

[716-B, C, D]

E

1.3. Not providing atleast one right of appeal, would negate the due process of law in the matter of dispensation of criminal justice. Providing a right of appeal but totally disarming the court from granting interim relief in the form of suspension of sentence would be unjust, unfair and violative of Article 21 of the Constitution particularly when no mechanism is provided for early disposal of the appeal. Thus, the appellate powers of the court cannot be denuded by Executive or judicial process. [716-E-F]

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Bhagwan Rama Shinde Gosai & Ors. v. State of Gujarat, AIR (1999) SC 1859, relied on.

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Denny v. Mattoom, 2 Allen, 361, referred to.

Thomas M. Cooley: "Treatise on the Constitutional Limitations" 8th Edition, referred to.

1.4. Judicial review is the heart and soul of the constitutional scheme.

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The judiciary is constituted as the ultimate interpreter of the Constitution

and is assigned the delicate task of determining the extent and scope of the powers conferred on each branch of the Government, ensuring that action of any branch does not transgress its limits. The judicial review was, an integral part of the Constitution as its basic structure. Similarly, the filing of an appeal, its adjudication and passing of appropriate interim orders is concededly a part of the legal system prevalent in the country. [720-D-H; 721-A]

S.P. Sampath Kumar v. Union of India, [1987] 1 SCC 124 and *S.S. Bola & Ors. v. B.D. Sardana & Ors.*, AIR (1999) SC 3127, relied on.

2. It cannot be held that S.32 of the Act was enacted in discharge of the international obligations. A perusal of the agreement of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 to which India is claimed to be a party, clearly and unambiguously show that the court's jurisdiction with respect to the offences relating to narcotic drugs and psychotropic substances was never intended to be ousted, taken away or curtailed. The Declaration was made, subject to "constitutional principles and the basic concepts of its legal system prevalent in the polity of a member country". The international Agreement emphasised that the courts of the member countries shall always bear in mind the serious nature of offences sought to be tackled by the Declaration while considering the eventuality of early release or parole of persons convicted of such offences. There was no International Agreement to put a blanket ban on the power of the court to suspend the sentence awarded to criminal under the Act notwithstanding the constitutional principles and basic concepts of its legal system. [718-A; 720-A-D]

3.1. Section 32A of the Act in so far as it takes away the right of the Executive under Sections 432 and 433 of the Code to suspend, remit or commute the sentence is valid and *intra vires* of the Constitution. [722-B]

3.2. The distinction of the convicts under the Act and under other statutes, in so far as it relates to the exercise of the Executive Powers under Sections 432 and 433 of the Code is concerned, cannot be termed to be either arbitrary or discriminatory being violative of Article 14 of the Constitution. Such deprivation of the Executive can also not be stretched to hold that the right to life of a person has been taken away except, according to the procedure established by law. The offending Section, in so far as it relates to the Executive in the matter of suspension, remission and commutation of sentence, after conviction, does not, in any way, encroach upon the personal liberty of the convict tried fairly and sentenced under the Act. There is, therefore, no

- A vice of unconstitutionality in the Section is so far as it takes away the powers of the Executive conferred upon it under Sections 432 and 433 of the Code, to suspend, remit or commute the sentence of a convict under the Act.

[715-E, F, G; 716-A]

- B 4. A sentence awarded under the Act can be suspended by the appellate court only and strictly subject to the conditions spelt out in Section 37 of the Act. Holding Section 32A as void in so far as it takes away the right of the courts to suspend the sentence awarded to a convict under Act, would neither entitle such convicts to ask for suspension of the sentence as a matter of right in all cases nor would it absolve the courts of their legal obligations to exercise the power of suspension of sentence within the parameters prescribed under Section 37 of the Act. [724-E; 722-D]

Union of India v. Ram Samujh & Anr., [1999] 3 SCC 429, relied on.

- D 5. Section 32A does not in any way affect the powers of the authorities to grant parole. Parole did not amount to the suspension, remission or commutation of sentences which could be withheld under the garb of Section 32A of the Act. "Parole" means the release of a prisoner temporarily for a special purpose before the expiry of a sentence, on the promise of good behaviour and return to jail. It is a release from jail, prison or other internment after actually been in jail serving part of sentence. Grant of parole is essentially an Executive function to be exercised within the limits prescribed in that behalf. It would not be open to the court to reduce the period of detention by admitting a detinue or convict on parole. Court cannot substitute the period of detention either by abridging or enlarging it. [724-D; 712-D; 709-B-C]

- F *Poonam Lata v. M.L. Wadhawan*, [1987] 3 SCC 347; *State of Haryana v. Mohinder Singh*, [2000] 3 SCC 394 and *State of Haryana v. Nauratta Singh & Ors.*, [2000] 3 SCC 514, relied on.

Sunil Fulchand Shah v. Union of India & Ors., [2000] 3 SCC 409, followed.

- G *Concise Oxford Dictionary*- (New Edition) and *Black's Law Dictionary*- (6th Edition); *Law Lexicon*, referred to.

CRIMINAL ORIGINAL JURISDICTION : Writ Petition (Crl.) No. 169 of 1999.

- H (Under Article 32 of the Constitution of India).

WITH

Writ Petition (CRI) No. 243 of 1999.

Harish N. Salve, Solicitor General, Ms. Anu Mohla (SCLSC), Aman Hingorani, Ms. Priya Hingorani, Ms. Reema Bhandari, Ashok Bhan, Ms. Sunita Sharma, D.S. Mehra, S.S. Shinde and S.V. Deshpande for the appearing parties.

The Judgment of the Court was delivered by

SETHI, J. The Constitutional validity of Section 32A of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the Act") is under challenge in these petitions filed by the convicts of the offences under the Act. The Section is alleged to be arbitrary, discriminatory and violative of Articles 14 and 21 of the Constitution of India which creates unreasonable distinction between the prisoners convicted under the Act and the prisoners convicted for the offences punishable under various other statutes. It is submitted that the Legislature is not competent to take away, by statutory prohibition, the judicial function of the Court in the matter of deciding as to whether after the conviction under the Act the sentence can be suspended or not. The Section is further assailed on the ground that it has negated the statutory provisions of Sections 389, 432 and 433 of the Code of Criminal Procedure (hereinafter referred to as "the Code") in the matter of deciding as to whether after the conviction under the Act the sentence can be suspended, remitted or commuted or not and also under what circumstances, restrictions or limitations on the suspension of sentences or the grant of bail could be passed. It is further contended that the Legislature cannot make relevant considerations irrelevant or deprive the courts of their legitimate jurisdiction to exercise the discretion. It is argued that taking away the judicial power of the appellate court to suspend the sentence despite the appeal meriting admission, renders the substantive right of appeal illusory and ineffective. According to one of the petitioners, the prohibition of suspension precludes the Executive from granting parole to a convict who is otherwise entitled to it under the prevalent statutes, jail manual or Government instructions issued in that behalf.

The petitioner in W.P. No. 169/99 was arrested and upon conviction under Section 21 of the Act sentenced to undergo imprisonment for 10 years. He claims to have already undergone sentence for more than 7 years. He could not claim parole presumably under the impression that Section 32A of the act was a bar for the State to grant it. Though the petitioner has referred to Maharashtra Jail Manual, particularly Chapter XXXVIII providing various

- A kinds of remissions and authorising the grant of parole yet nothing is on the record to show as to whether he in fact applied for parole or not.

Petitioner in W.P. 243 of 1999, after trial was convicted under the Act and the bail application filed by him alongwith appeal presented in the High Court was dismissed as not pressed in view of the judgment of this Court in

- B *Maktool Singh v. State of Punjab*, JT (1999) 2 SC 176.

The vires of the section have been defended by the Union of India on the ground that as the Parliament has jurisdiction to enact the law pertaining to Narcotic Drugs and Psychotropic Substances Act, reasonable restrictions can be imposed upon the right of the convict to file appeal and seek release,

- C remission or commutation. The Act is intended to curb the drug addiction and trafficking which is termed to be eating into the vitals of the economy of the country. The illicit money generated by drug trafficking is being used for illicit activities including encouragement of terrorism. Anti-drug justice has been claimed to be a criminal dimension of social justice. It is submitted that

- D statutory control over narcotic drugs in India was being generally exercised through certain Central enactments, though some of the States had also enacted certain statutes to deal with illicit traffic in drugs. Reference is made to the Opium Act and the Dangerous Drugs Act etc. In the absence of comprehensive law to effectively control psychotropic substances in the manner envisaged by the International Convention of Psychotropic

- E Substances, 1971, a necessity was felt to enact some comprehensive legislation on the subject. With a view to meet the social challenge of great dimensions, the Parliament enacted the Act to consolidate and amend the existing provisions relating to control over drug abuse and to provide for enhanced penalties under the Act. The Act provides enhanced and stringent penalties.

- F The offending section is claimed to be not violative of Articles 14, 19 and 21 of the Constitution of India. To fulfil the international obligations and to achieve the objectives of curbing the menace of illegal trafficking, the Section was enacted not only to take away the power of the Executive under Section 433 of the Code but also the power under the Code to suspend, remit or commute the sentences passed under the Act. The convicts under the Act

- G are stated to be a class in themselves justifying the discrimination without offending guarantee of equality enshrined in the Constitution. To support the Constitutional validity of the Section, the respondents have also relied upon the Lok Sabha debates on the subject.

Before dealing with the main issue regarding the validity of Section

- H 32A, a side issue, projected in Writ Petition No. 169, is required to be dealt

with. The writ petition appears to be based upon the misconception of the provisions of law and in ignorance to the various pronouncements of this Court. A

Parole is not a suspension of the sentence. The convict continues to be serving the sentence despite granting of parole under the Statute, Rules, Jail Manual or the Government orders. "Parole" means the release of a prisoner temporarily for a special purpose before the expiry of a sentence, on the promise of good behaviour and return to jail. It is a release from jail, prison or other internment after actually been in jail serving part of sentence. B

Grant of parole is essentially an Executive function to be exercised within the limits prescribed in that behalf. It would not be open to the court to reduce the period of detention by admitting a detainee or convict on parole. Court cannot substitute the period of detention either by abridging or enlarging it. Dealing with the concept of parole and its effect on period of detention in a preventive detention matter, this Court in *Poonam Lata v. M.L. Wadhawan*, [1987] 3 SCC 347 held: C

"There is no denying of the fact that preventive detention is not punishment and the concept of serving out a sentence would not legitimately be within the purview of preventive detention. The grant of parole is essentially an executive function and instances of release of detainees on parole were literally unknown until this Court and some of the High Courts in India in recent years made orders of release on parole on humanitarian considerations. Historically 'parole' is a concept known to military law and denotes release of a prisoner of war on promise to return. Parole has become an integral part of the English and American systems of criminal justice intertwined with the evolution of changing attitudes of the society towards crime and criminals. As a consequence of the introduction of parole into the penal system, all fixed-term sentences of imprisonment of above 18 months are subject to release on licence, that is, parole after a third of the period of sentence has been served. In those countries, parole is taken as an act of grace and not as a matter of right and the convict prisoner may be released on condition that he abides by the promise. It is a provisional release from confinement but is deemed to be a part of the imprisonment. Release on parole is a wing of the reformatory process and is expected to provide opportunity to the prisoner to transform himself into a useful citizen. Parole is thus a grant of partial liberty of lessening of restrictions to a convict prisoner, but release D E F G H

- A on parole does not change the status of the prisoner. Rules are framed providing supervision by parole authorities of the convicts released on parole and in case of failure to perform the promise, the convict released on parole is directed to surrender to custody. (See *The Oxford Companion to Law*, edited by Walker, 1980 Edn. p. 931; *Black's Law Dictionary*, 5th Edn., P. 1006; *Jowitt's Dictionary of English Law*, 2nd Edn., Vol. 2, p. 1320; *Kenny's Outlines of Criminal Law*; 17th Edn., pp. 574- 76; the *English Sentencing System* by Sir Rupert Cross at pp. 31-34; 87 et seq; *American Jurisprudence*, 2nd Edn., Vol. 59, pp. 53-61; *Corpus Juris Secundum*, Vol. 67; *Probation and Parole, Legal and Social Dimensions* by Louis P. Carney). It follows from these authorities
- C that parole is the release of a very long terms prisoner from a penal or correctional institution after he has served a part of his sentence under the continuous custody of the State and under conditions that permit his incarceration in the event of misbehaviour”.

- D This position was again reiterated in *State of Haryana v. Mohinder Singh*, [2000] 3 SCC 394.

The Constitution Bench of this Court in *Sunil Fulchand Shah v. Union of India & Ors.*, [2000] 3 SCC 409 considered the distinction between bail and parole in the context of reckoning the period which a detenu has to undergo in prison and held:

- E “Bail and parole have different connotation in law. Bail is well understood in criminal jurisprudence and Chapter XXXIII of the Code of Criminal Procedure contains elaborate provisions relating to grant of bail. Bail is granted to a person who has been arrested in a non-bailable offence or has been convicted of an offence after trial. The effect of granting bail is to release the accused from internment though the court would still retain constructive control over him through the sureties. In case the accused is released on his own bond such constructive control could still be exercised through the conditions of the bond secured from him. The literal meaning of the word ‘bail’ is surety. In *Halsbury's Laws of England*, 4th Edn., Vol. 11, Para 166, the following observation succinctly brings out the effect of bail:
- F
- G

The effect of granting bail is not to set the defendant (accused) at liberty but to release him from the custody of law and to entrust him to the custody of sureties who are bound to produce him to appear at his trial at a specified time and

H

place. The sureties may seize their principal at any time and may discharge themselves by handing him over to the custody of law and he will then be imprisoned. A

'Parole', however, has a different connotation than bail even though the substantial legal effect of both bail and parole may be the release of a person from detention or custody. The dictionary meaning of "parole" is: B

The Concise Oxford Dictionary - (New Edition)

"The release of a prisoner temporarily for a special purpose or completely before the expiry of a sentence, on the promise of good behaviour; such a promise; a word of honour" C

Black's Law Dictionary - (6th Edition)

"Release from jail, prison or other confinement after actually serving part of sentence. Conditional release from imprisonment which entitles parolee to serve remainder of his term outside confines of an institution, if he satisfactorily complies with all terms and conditions provided in parole order." D

According to the Law Lexicon, "Parole" has been defined as:

"A parole is a form of conditional pardon, by which the convict is released before the expiration of his term, to remain subject, during the remainder thereof, to supervision by the public authority and to return to imprisonment on violation of the condition of the parole." E

According to Words and Phrases:

"Parole" ameliorates punishment by permitting convict to serve sentence outside of prison walls, but parole does not interrupt sentence. People exrel *Rainone v. Murphy*, [135 NE 2d 567, 571, 1 NY 2d 367, 153 NYS 2d 21, 26]. F

'Parole does not vacate sentence imposed, but is merely a conditional suspension of sentence. *Wooden v. Goheen*, [Ky, 255 SW 2d 1000, 1002]. G

A 'parole' is not a 'suspension of sentence', but is a substitution, during continuance of parole, of lower grade of punishment by confinement in legal custody and under control of warden within H

A specified prison bounds outside the prison, for confinement within the prison adjudged by the court. *Jenkins v. Madigan*, [CA Ind, 211 F 2d 904, 906].

B A 'parole' does not suspend or curtail the sentence originally imposed by the court as contrasted with a 'commutation of sentence' which actually modifies it".

Again in *State of Haryana v. Nauratta Singh & Ors.*, [2000] 3 SCC 514 it was held by this Court as under:

C "Parole relates to executive action taken after the door has been closed on a convict. During parole period there is no suspension of sentence but the sentence is actually continuing to run during that period also."

D It is thus clear that parole did not amount to the suspension, remission or commutation of sentences which could be withheld under the garb of Section 32A of the Act. Notwithstanding the provisions of the offending Section, a convict is entitled to parole, subject, however, to the conditions governing the grant of it under the statute, if any, or the Jail Manual or the Government Instructions. The Writ Petition No. 169 of 1999 apparently appears to be misconceived and filed in a hurry without approaching the appropriate authority for the grant of relief in accordance with jail manual applicable in the matter.

We will now deal with the crux of the matter relating to the constitutional validity of Section 32A in the light of the challenge thrown to it. Section 32A of the Act reads:

F "32A. No suspension, remission or commutation in any sentence awarded under this Act.- Notwithstanding anything contained in the Code of Criminal Procedure, 1973 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."

G A perusal of the Section would indicate that it deals with three different matters, namely, suspension, remission and commutation of the sentences. Prohibition contained in the Section is referable to Sections 389, 432 and 433 of the Code. Section 432 of the Code provides that when any person has been H sentenced to punishment for an offence, the appropriate Government may, at

any time, without conditions or upon conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced in the manner and according to the procedure prescribed therein. Section 433 empowers the appropriate Government to commute: A

“(a) a sentence of death, for any other punishment provided by the Indian Penal Code; B

(b) a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;

(c) a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced, or for fine; C

(d) a sentence of simple imprisonment, for fine.”

However, Section 389 of the Code empowers an appellate court to suspend the sentence pending the appeal and release the appellant on bail. Section 32A of the Act, therefore, takes away the powers both of the Appellate Court and the State Executive in the matter of suspending, remitting and commuting the sentence of a person convicted under the Act other than for an offence under Section 27 of the Act. This Court in *Maktool Singh's* case (supra) held that Section 32A of the Act was a complete bar for the Appellate Court to suspend a sentence passed on persons convicted of offences under the Act (except under Section 27) either during the pendency of any appeal or otherwise. It has an overriding effect with regard to the powers of suspension, commutation and remission provided under the Code. After referring to some conflicting judgments of the High Courts, this Court concluded: D

“The upshot of the above discussion is that Section 32A of the Act has taken away the powers of the court to suspend a sentence passed on persons convicted of offences under the Act (except Section 27) either during pendency of any appeal or otherwise. Similarly, the power of the Government under Sections 432, 433 and 434 of the Criminal Procedure Code have also been taken away. Section 32A would have an overriding effect with regard to the powers of suspension, commutation and remission provided under the Criminal Procedure Code.” E F G

The restriction imposed under the offending Section, upon the Executive are claimed to be for a reasonable purpose and object sought to be achieved H

- A by the Act. Such exclusion cannot be held unconstitutional, on account of its not being absolute in view of the constitutional powers conferred upon the Executive. Articles 72 and 161 of the Constitution empowers President and the Governor of a State to grant pardons, reprieves, respites or remissions of punishments or to suspend, remit or commute the sentence of any person
- B convicted of any offence against any law relating to a matter to which the Executive power of the Union and State exists. For the exercise of aforesaid constitutional powers circulars are stated to have been issued by the appropriate Governments. It is further submitted that the circulars prescribe limitations both as regards the prisoners who are eligible and those who have been excluded. The restriction imposed upon the Executive, under the Section,
- C appears to be for a reasonable purpose and object sought to be achieved by the Section. While moving the Amendment Bill, which included Section 32A, in the Parliament on 16th December, 1988, the Minister of State in Department of Revenue in the Ministry of Finance explained to the Parliament that the country had been facing the problem of transit traffic in illicit drugs which
- D had been escalated in the recent past. The spill-over from such traffic had been causing problems of abuse and addiction. The Government was concerned with the developing drug situation for which a number of legislative, administrative and preventive measures had been taken resulting in checking the transit traffic to a considerable extent. However, increased internal drug traffic, diversion of opium from illicit growing areas and attempts of illicit
- E manufacture of drugs within the country threatened to undermine the effects of the counter measures taken. Keeping in mind the magnitude of the threat from drug trafficking from the Golden Crescent region comprising Pakistan, Afghanistan and Iran and the Golden Triangle region comprising Burma, Thailand and Laos and having regard to the internal situation, a 14 point
- F directive was stated to have been issued by the then Prime Minister on 4th April, 1988, as a new initiative to combat drug trafficking and drug abuse. Keeping in mind the working of the 1985 Act, the Cabinet Sub Committee recommended that the Act be suitably amended, *inter alia*, :

- G “(i) to provide for the constitution of a fund for control of drug abuse and its governing body. The Fund is to be financed by such amounts as may be provided by the Parliament, the sale proceeds of any property forfeited under the Act and any grants that may be made by any person or institution;

- H (ii) to provide for death penalty on second conviction in respect of specified offences involving specified quantities of certain drugs;

(iii) to provide that no sentence awarded under the Act, other than section 27, should be suspended, remitted or commuted; A

(iv) to provide for constitution of Special Courts;

(v) to provide that every offence punishable under this Act shall be cognizable and non-bailable; B

(vi) to provide immunity from prosecution to the addicts volunteering for treatment for dedication or detoxification once in their life time;

(vii) to bring certain substances which are neither narcotic drugs nor psychotropic substances but are used in the manufacture or production of these drugs or substances, under the ambit of the Act. Such controlled substances would be regulated by issue or order; C

(viii) violation of the provisions relating to the controlled substances would be liable for punishment with rigorous imprisonment for a term which may extend to 10 years and fine which may extend to Rs. 1 lakh; D

(ix) financing illicit traffic and harbouring drug offenders would be offences liable to punishment at the same level as per drug traffic offences." E

The distinction of the convicts under the Act and under other statutes, in so far as it relates to the exercise of the Executive Powers under Sections 432 and 433 of the Code is concerned, cannot be termed to either arbitrary or discriminatory being violative of Article 14 of the Constitution. Such deprivation of the Executive can also not be stretched to hold that the right to life of a person has been taken away except, according to the procedure established by law. It is not contended on behalf of the petitioners that the procedure prescribed under the Act for holding the trial is not reasonable, fair and just. The offending Section, in so far as it relates to the Executive in the matter of suspension, remission and commutation of sentence, after conviction, does not, in any way, encroach upon the personal liberty of the convict tried fairly and sentenced under the Act. The procedure prescribed for holding the trial under the Act cannot be termed to be arbitrary, whimsical or fanciful. There is, therefore, no vice of unconstitutionality in the Section *in so far as it takes away the powers of the Executive conferred upon it under Sections 432 and 433 of the Code, to suspend, remit or commute the sentence of a convict* F G H

A under the Act.

B Learned counsel appearing for the parties were more concerned with the adverse effect of the Section on the powers of the judiciary. Impliedly conceding that the Section was valid so far as it pertained to the appropriate Government, it was argued that the Legislature is not competent to take away the judicial powers of the Court by statutory prohibition as is shown to have been done vide the impugned section. Awarding sentence, upon conviction, is concededly a judicial function to be discharged by the courts of law established in the country. It is always a matter of judicial discretion, however, subject to any mandatory minimum sentence prescribed by the law. The award of sentence by a criminal court wherever made subject to the right of appeal cannot be interfered or intermediate with in a way which amounts to not only interference but actually taking away the power of judicial review. Awarding the sentence and consideration of its legality or adequacy in appeal is essentially a judicial function embracing within its ambit the power to suspend the sentence under the peculiar circumstances of each case, pending the disposal of the appeal.

E Not providing atleast one right of appeal, would negate the due process of law in the matter of dispensation of criminal justice. There is no doubt that the right of appeal is the creature of a statute and when conferred, a substantive right. Providing a right of appeal but totally disarming the court from granting interim relief in the form of suspension of sentence would be unjust, unfair and violative of Article 21 of the Constitution particularly when no mechanism is provided for early disposal of the appeal. The pendency of criminal litigation and the experience in dealing with pending matters indicate no possibility of early hearing of the appeal and its disposal on merits atleast in many High Courts. As the present is not the occasion to dilate on the causes for such delay, we restrain ourselves from that exercise. In this view of the matter, the appellate powers of the court cannot be denuded by Executive or judicial process.

G This Court in *Bhagwan Rama Shinde Gosai & Ors. v. State of Gujarat*, AIR (1999) SC 1859 held that when a convicted person is sentenced to a fixed period of sentence and the appellate court finds that due to practical reasons the appeal cannot be disposed of expeditiously, it can pass appropriate orders for suspension of sentence. The suspension of the sentence by the appellate court has, however, to be within the parameters of the law prescribed by the Legislature or spelt out by the courts by judicial pronouncements. The

exercise of judicial discretion on well recognised principles is the safest possible safeguards for the accused which is at the very core of criminal law administered in India. The Legislature cannot, therefore, make law to deprive the courts of their legitimate jurisdiction conferred under the procedure established by law. A

Thomas M. Cooley in his "Treatise on the Constitutional Limitations" 8th Edition observed that if the Legislature cannot thus indirectly control the action of the courts by requiring of them a construction of the law according to its own views, it is very plain it cannot do so directly, by setting aside their judgments, compelling them to grant new trials, ordering the discharge of offenders, or directing what particular steps shall be taken in the progress of a judicial inquiry. In *Denny v. Mattoon*, 2 Allen, 361, it was stated: B C

"If, for example, the practical operation of a statute is to determine adversary suits pending between party and party, by substituting in place of the well settled rules of law the arbitrary will of the legislature, and thereby controlling the action of the tribunal before which the suits are pending, no one can doubt that it would be an unauthorised act of legislation, because it directly infringes on the peculiar and appropriate functions of the judiciary. It is exclusive province of courts of justice to apply established principles to cases within their jurisdiction, and to enforce their decisions by rendering judgments and executing them by suitable process. The legislature have no power to interfere with this jurisdiction in such manner as to change the decision of cases pending before courts, or to impair or set aside their judgments, or to take cases out of the settled course of judicial proceeding. It is on this principle that it has been held that the legislature have no power to grant a new trial or direct a rehearing of a cause which has been once judicially settled. The right of a review, or to try a new facts which have been determined by a verdict or decree, depends on fixed and well-settled principles, which it is the duty of the court to apply in the exercise of a sound judgment and discretion. These cannot be regulated or governed by legislative action". D E F G

Cooley further opined that forfeiture of rights and property cannot be adjudged by legislative act, confiscations without a judicial hearing after due notice would be void as not being due process of law. Rights of the parties, without the authority of passing consequential or interim orders in the interest of justice, would not be a substantive one. H

- A** Offending Section is stated to have been enacted in discharge of the international obligations as claimed by the concerned Minister in the Parliament. This submission also appears to be without any substance. Countries, parties to the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, in the 6th Plenary Meeting held on 19th December, 1988 resolved to adopt means and measures to curb the rising trend in the illicit production of demand for and traffic in narcotic drugs and psychotropic substances which posed a serious threat to the health and welfare of the human beings and adversely affected the economic, cultural and political foundations of the Society. The member countries, inter alia agreed to adopt such measures as may be necessary to establish as criminal offences in its domestic law when committed intentionally:
- B**
- C**

“(a) (i) The production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention;

(ii) The cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs contrary to the provisions of the 1961 Convention and 1961 Convention as amended;

(iii) The possession or purchase of any narcotic drug or psychotropic substance for the purpose of any of the activities enumerated in (i) above;

(iv) The manufacture, transport, or distribution of equipment, materials or of substances listed in Table I and Table II, knowing that they are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;

(v) The organisation, management or financing of any of the offences enumerated in (i), (ii), (iii) or (iv) above;

(b) (i) The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph (a) of this paragraph, or from an act, of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or

offences to evade the legal consequences of his actions,

A

(iii) The concealment or disguise of the true nature, source, location, disposition, movement rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with paragraph (a) of this paragraph or from an act of participation in such an offence or offences;

B

It was further agreed that subject to the constitutional principles and the basic concept of its legal system each country shall provide for:

“(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such offence or offences;

C

(ii) The possession of equipment or materials or substances listed in Table I and Table II, knowing that they are being or are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;

D

(iii) Publicly inciting or inducing others, by any means, to commit any of the offences established in accordance with this article or to use narcotic drugs or psychotropic substances illicitly;

(iv) Participation in, association or conspiracy to commit, attempts to commit and aiding, facilitating and counselling the commission of any of the offences established in accordance with this article.”

E

The parties to the Convention further resolved to provide in addition to conviction and punishment for an offence that the offender shall undergo measures such as treatment, education, after care, rehabilitation or social re-integration. It was further agreed:

F

“The parties shall endeavour to ensure that any discretionary legal powers under their domestic law relating to the prosecution of persons for offences established in accordance with this article are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.

G

The parties shall ensure that their courts or other competent authorities bear in mind the serious nature of the offences enumerated in paragraph 1 of this article and the circumstances enumerated in paragraph 5 of

H

- A. this article when considering the eventuality of early release or parole of persons convicted of such offences.”

B. A perusal of the agreement of the Convention to which India is claimed to be a party, clearly and unambiguously show that the court’s jurisdiction with respect to the offences relating to narcotic drugs and psychotropic substances was never intended to be ousted, taken away or curtailed. The Declaration was made, subject to “constitutional principles and the basic concepts of its legal system prevalent in the polity of a member country”. The international Agreement emphasised that the courts of the member countries shall always bear in mind the serious nature of offences sought to be tackled by the Declaration while considering the eventuality of early release or partly of persons convicted of such offences. There was no International Agreement to put a blanket ban on the power of the court to suspend the sentence awarded to a criminal under the Act notwithstanding the constitutional principles and basic concepts of its legal system. It cannot be denied that judicial review in our country is the heart and soul of our constitutional scheme. The judiciary is constituted the ultimate interpreter of the Constitution and is assigned the delicate task of determining the extent and scope of the powers conferred on each branch of the Government, ensuring that action of any branch does not transgress its limits. A Constitution Bench of this Court in *S.P. Sampath Kumar v. Union of India*, [1987] 1 SCC 124 held that “it is also a basic principle of the Rule of Law which permeates very provision of the Constitution and which forms its very core and essence that the exercise of power by the executive or any other authority must not only be conditioned by the Constitution but also be in accordance with law and it is the judiciary which has to ensure that the law is observed and there is compliance with the requirements of law on the part of the executive and other authorities.

F. This function is discharged by the judiciary by exercise of the power of judicial review which is a most potent weapon in the hands of the judiciary for maintenance of the Rule of Law. The power of judicial review is an integral part of our constitutional system and without it, there will be no government of laws and the Rule of Law would become a teasing illusion and a promise of unreality”. Again in *S.S. Bola & Ors. v. B.D. Sardana & Ors.*, AIR (1999) SC 3127 it was reiterated that judicial review is the basic feature upon which hinges the checks and balances blended with hind sight in the Constitution as people’s sovereign power for their protection and establishment of egalitarian social order under the rule of law. The judicial review was, therefore, held to be an integral part of the Constitution as its basic structure. Similarly, the

H filing of an appeal, its adjudication and passing of appropriate interim orders

is concededly a part of the legal system prevalent in our country.

In *Ram Charan v. Union of India*, (1991) 9 LCD 160, the Allahabad High Court while dealing with the question of the constitutional validity of Section 32A found that as the Section leaves no discretion to the court in the matter of deciding, as to whether, after conviction the sentence deserves to be suspended or not without providing any guidelines regarding the early disposal of the appeal within a specified period, it suffers from arbitrariness and thus violative of mandate of Articles 14 and 21 of the Constitution. In the absence of right of suspending a sentence, the right of appeal conferred upon accused was termed to be a right of infructuous appeal. However, Gujarat High Court in *Ishwarsingh M. Rajput v. State of Gujarat*, (1990) 2 Gujarat Law Reporter 1365 =1991(2) Crimes 160] while dealing with the case relating to grant of parole to a convict under the Act found that Section 32A was Constitutionally valid. It was held:

“Further, the classification between the prisoners convicted under the Narcotics Act and the prisoners convicted under any other law, including the Indian Penal Code is reasonable one, it is with specific object to curb deterrently habit forming, booming and paying (beyond imagination) nefarious illegal activity in drug trafficking. Prisoners convicted under the Narcotics Act are class by themselves. Their activities affect the entire society and may, in some cases, be a death-blow to the persons, who become addicts. It is much more paying as it brings unimaginable easy riches. In this view of the matter, the temptation to the prisoner is too great to resist himself from indulging in same type of activity during the period, when he is temporarily released. In most of the cases, it would be difficult for him to leave that activity as it would not be easy for the prisoner to come out of the clutches of the gang, which operates in nefarious illegal activities. Hence, it cannot be said that Section 32A violates Article 14 of the Constitution on the ground that it makes unreasonable distinction between a prisoner convicted under the Narcotic Act and a prisoner convicted for any other offences.”

Judged from any angle, the Section in so far as it completely debars the appellate courts from the power to suspend the sentence awarded to a convict under the Act cannot stand the test of constitutionality. Thus Section 32A in so far as it ousts the jurisdiction of the court to suspend the sentence awarded to a convict under the Act is unconstitutional. We are, therefore, of the opinion that Allahabad High Court in *Ram Charan's* case (Supra) has

- A correctly interpreted the law relating to the constitutional validity of the Section and the judgment of Gujarat High Court in *Ishwarsingh M. Rajput's* case cannot be held to be good law.

- B Despite holding that Section 32A is unconstitutional to the extent it affects the functioning of the criminal courts in the country, we are not declaring the whole of the section as unconstitutional in view of our finding that the Section, in so far as it takes away the right of the Executive to suspend, remit and commute the sentence, is valid and *intra vires* of the Constitution. The Declaration of Section 32A to be unconstitutional, in so far as it affects the functioning of the courts in the country, would not render the whole of the section invalid, the restriction imposed by the offending section being distinct and severable.

- C Holding Section 32A as void in so far as it takes away the right of the courts to suspend the sentence awarded to a convict under the Act, would neither entitle such convicts to ask for suspension of the sentence as a matter of right in all cases nor would it absolve the courts of their legal obligations to exercise the power of suspension of sentence within the parameters prescribed under Section 37 of the Act. Section 37 of the Act provides:

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

(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—

- F (i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and
- G (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.

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

This Court in *Union of India v. Ram Samujh & Anr.*, [1999] 9 SCC 429 held that the jurisdiction of the court to grant bail is circumscribed by the aforesaid section of the Act. The bail can be granted and sentence suspended in a case where there are reasonable grounds for believing that the accused is not guilty of the offence for which convicted and he is not likely to commit any offence while on bail and during the period of suspension of the sentence. The Court further held:

“The aforesaid section is incorporated to achieve the object as mentioned in the Statement of Objects and Reasons for introducing Bill No. 125 of 1988 thus:

“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”. (emphasis supplied)

It is to be borne in mind that the aforesaid legislative mandate is required to be adhered to and followed. It should be borne in mind that in a murder case, the accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting death-blow to a number of innocent young victims, who are vulnerable; it causes deleterious effects and a deadly impact on the society; they are hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. Reason may be large stake and illegal profit involved. This Court, dealing with the contention with regard to punishment under the NDPS Act, has succinctly observed about the adverse effect of such activities in *Durand Dillier v. Chief Secretary, Union Territory of Goa*, [1990] 1 SCC 95 as under: (SCC p. 104, para 24)

“24, With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportions in the recent years.

A Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, Parliament in its wisdom, has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine.”

B 8. To check the menace of dangerous drugs flooding the market, Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless the mandatory conditions provided in Section 37, namely,

C (i) there are reasonable grounds for believing that the accused is not guilty of such offence; and

(ii) that he is not likely to commit any offence while on bail.

are satisfied.”

D Under the circumstances the writ petitions are disposed of by holding that (1) Section 32A does not in any way affect the powers of the authorities to grant parole; (2) It is unconstitutional to the extent it takes away the right of the court to suspend the sentence of a convict under the Act; (3) Nevertheless, a sentence awarded under the Act can be suspended by the appellate court only and strictly subject to the conditions spelt out in Section
E 37 of the Act as dealt with in this judgment.

F The petitioner in Writ Petition No. 169/99 shall be at liberty to apply for parole and his prayer be considered and disposed of in accordance with the statutory provisions, if any, Jail Manual or Government Instructions without implying Section 32A of the Act as a bar for consideration of the prayer. Similarly petitioner in Writ Petition No. 243/99 is at liberty to move the High Court for suspension of sentence awarded to him under the Act. As and when any such application is filed, the same shall be disposed of in accordance with law and keeping in view the limitations prescribed under Section 37 of the Act and the law laid down by this Court.

S.V.K.

Petitions partly allowed.