

CASE NO.:
Appeal (crl.) 271 of 2002

PETITIONER:
AVTAR SINGH

Vs.

RESPONDENT:
STATE OF HARYANA & ANR.

DATE OF JUDGMENT: 19/02/2002

BENCH:
G.B. Pattanaik, S.N. Phukan & S.N. Variava

JUDGMENT:

WITH
WRIT PETITION NO.119 OF 2001

J U D G M E N T

Phukan, J.

Leave is granted.

This appeal by special leave and the writ petition were heard together as the questions involved are common and, therefore, by this judgment we dispose of both the appeal and the writ petition.

The appellant Avtar Singh, a convict, is undergoing the sentence of imprisonment. He filed an application before the Punjab & Haryana High Court seeking for a direction to the State Government to include the period of parole availed by him in the total period of imprisonment undergone by him. The application was dismissed by the impugned judgment holding that the period of parole cannot be counted towards the actual sentence undergone by him. Being aggrieved, present appeal by special leave has been filed. Avtar Singh has also filed the writ petition challenging the vires of sub-section (3) of Section 3 of the Haryana Good Conduct Prisoners (Temporary Release) Act, 1988 (for short 'the Act') on the ground that the sub-section is arbitrary, illegal, ultra vires and unconstitutional.

When both the appeal and the writ petition came before a Bench of this Court, these were referred to a larger Bench with the following observations:-

"In the writ petition Section 3(iii) of the Haryana Good Conduct Prisoners (Temporary Release) Act, 1988 is challenged on the ground that it is violative of Article 14 and Article 21. In State of Haryana vs. Mohinder Singh 2000 (3) SCC-394 and the Constitution Bench in Sunil Fulchand Shah vs. Union of India and Ors. 2000 (3) SCC 409, this Court held that parole and furlough period can also be counted as the period of sentence of imprisonment. But in those decisions the question of validity of the impugned sub-section of the Act mentioned above has not been considered. When the constitutional validity of the said sub-section is challenged and the focus is made on Article 21, we are

of the opinion that this must be heard by a larger bench. Registry will place this matter for orders of the Hon'ble the Chief Justice of India."

That is how both the appeal and the writ petition have come up before this Bench.

Before we proceed further to consider the contentions of the learned counsel, we extract below Sections 3 and 4 of the Act:-

"3. Temporary release of prisoners on certain grounds.-(1) The State Government may, in consultation with the District Magistrate or any other officer appointed in this behalf, by notification in the Official Gazette and subject to such conditions and in such manner as may be prescribed, release temporarily for a period specified in sub-section (2), any prisoner, if the State Government is satisfied that-

(a) a member of the prisoner's family had died or is seriously ill or the prisoner himself is seriously ill; or

(b) the marriage of prisoner himself, his son, daughter, grandson, granddaughter, brother, sister, sister's son or daughter is to be celebrated; or

(c) the temporary release of the prisoner is necessary for ploughing, sowing or harvesting or carrying on any other agricultural operation on his land or his father's undivided land actually in possession of the prisoner; or

(d) it is desirable to do so for any other sufficient cause.

(2) The period for which a prisoner may be released shall be determined by the State Government so as not to exceed-

(a) where the prisoner is to be released on the ground specified in clause (a) of sub-section (1), three weeks;

(b) where the prisoner is to be released on the ground specified in clause (b) or clause (d) of sub-section (1), four weeks; and

(c) where the prisoner is to be released on the ground specified in clause (c) of sub-section (1), six weeks:

Provided that the temporary release under clause (c) can be availed more than once during the year, which shall not, however, cumulatively exceed six weeks.

(3) The period of release under this section shall not count towards the total period of sentence of a prisoner.

(4) The State Government may, by notification authorise any officer to exercise its powers under this section in respect of all or any other ground specified thereunder.

4. Temporary release of prisoners on furlough.- (1) The State Government or any other officer authorised by it in this behalf may, in consultation with such other officer as may be appointed by the State Government, by notification, and subject to such conditions and in such manner as may be prescribed, release temporarily, on furlough, any prisoner who has been sentenced to a term of imprisonment of not less than four years, and who-

(a) has, immediately before the date of his temporary release, undergone continuous imprisonment for a period of three years, inclusive of the pre-sentence detention, if any;

(b) has not during such period committed any jail offence (except an offence punished by a warning) and has earned at least three annual good conduct remissions:

Provided that nothing herein shall apply to a prisoner who-

(i) is a habitual offender as defined in sub-section (3) of Section 2 of Punjab Habitual Offenders (Control and Reform) Act 1952; or

(ii) has been convicted of dacoity or such other offence as the State Government may, by notification, specify.

(2) The period of furlough for which a prisoner is eligible under sub-section (1) shall be three weeks during the first year of his release and two weeks during each successive year thereafter.

(3) Subject to the provisions of clause (d) of sub-section (3) of Section 8 the period of release referred to in sub-section (1) shall count towards the total period of the sentence undergone by a prisoner."

Thus it is seen that under Sections 3 and 4 the legislature has made two categories of prisoners for temporary release; a prisoner released on parole under Section 3 is not entitled for counting the period of release towards the total period of sentence of imprisonment undergone by him whereas, a prisoner released on furlough, period of such temporary release shall be counted towards his total period of imprisonment.

Two points have been urged by the learned counsel for the appellant. Firstly, it is submitted that since the Constitution Bench of this Court in *Sunil Fulchand Shah versus Union of India* and *Ors.* [2000 (3) SCC 409] has held that the period of parole can also be counted as a period of sentence of the imprisonment, sub-section (3) of Section 3 of the Act is unconstitutional and violative of Article 21 of the Constitution. Secondly, it has been contended that sub-section (3) of Section 3 of the Act is discriminatory inasmuch as a prisoner released temporarily under Section 3 shall not be entitled to count such period of release towards the total period of sentence, whereas temporary release of a prisoner under Section 4 such temporary period of release on furlough would be counted towards the total period of sentence.

In *Sunil Fulchand Shah* (supra), the Constitution Bench by a majority after considering various dictionary meaning of the word

'Parole' held that the action for grant of parole, generally speaking is an administrative action and in paragraph 27 of the judgment it was held that parole is a form of temporary release from custody, which does not suspend the sentence of the period of detention, but provides conditional release from the custody and changes the mode of undergoing the sentence. However, in paragraph 30 of the judgment the above position of parole was further clarified as follows:-

".....Since release on parole is a temporary arrangement by which a detenu is released for a temporary fixed period to meet certain situations, it does not interrupt the period of detention and, thus, needs to be counted towards the total period of detention unless the rules, instructions or terms of grant of parole, prescribe otherwise."(emphasis supplied)

In the same paragraph the Bench also held that '.....the period of detention would not stand automatically extended by any period of parole granted to the detenu unless the order of parole or rules or instructions specifically indicates as a term and condition of parole, to the contrary'.(emphasis ours)

Parole is essentially an executive function and now it has become an integral part of our justice delivery system as has been recognised by Courts. Though, the case of Sunil Fulchand Shah (supra) was a case of preventive detention, we are of the opinion that the same principle would also apply in the case of punitive detention.

Thus, the Constitution Bench by majority decision clearly held that the period of temporary release of a prisoner on parole is to be counted towards the total period of detention, unless it is otherwise provided by legislative act, rules, instructions or terms of the grant of parole.

Under Section 3 of the Act, the State Government can temporarily release a prisoner for a specified period if the Government is satisfied that (i) any member of his family had died or seriously ill or the prisoner himself is seriously ill or (ii) marriage of himself, his son, daughter, etc. is to be celebrated or (iii) such release is necessary for ploughing, sowing or harvesting or carrying on any other agricultural operation on his land or his father's undivided land actually in possession of the prisoner or (iv) is desirable to do so for any other sufficient cause. The period of release is to be determined by the State Government in accordance with sub-section (2) and sub-section (3) provides that period of release under this section shall not be counted towards the total period of sentence of prisoner. Under Section 4 a prisoner who has been sentenced to a term of imprisonment of not less than 4 years cannot be temporarily released on furlough unless he has undergone continuous imprisonment for a period of 3 years and has not committed any jail offence (except an offence punished by a warning) and has also earned at least three annual good conduct remissions. This section also provides that the benefit of furlough cannot be granted to the class of prisoners mentioned in proviso to sub-section (1). The period of such temporary release has been fixed in sub-section (2). It is specifically provided in sub-section (3) that period of temporary release on furlough shall be counted towards total period of sentence undergone by a prisoner.

Thus, the legislature for the purpose of temporary release has created two classes of prisoners. If we compare these two sections, we find that conditions of temporary release on furlough under Section 4 is more rigorous and a prisoner shall not be entitled to such temporary release unless he fulfills the conditions laid down

in the said section. But in Section 3 no such rigorous condition has been imposed and only the circumstances under which the temporary release can be granted have been stated. Moreover certain classes of prisoners cannot get the benefit of furlough.

Before a Constitution Bench of this Court in *Sunil Batra versus Delhi Administration and Others etc.* and *Charles Gurmukh Sobraj versus Delhi Administration and Others* [1978 AIR 1675 = 1979 SCR (1) 392], Section 30 of the Prisons Act came up for consideration. The said section runs as follows:-

"30.(1) Every prisoner under sentence of death shall, immediately on his arrival in the prison after sentence, be searched by, or by order of, the Jailor and all articles shall be taken from which the Jailor deems it dangerous or inexpedient to leave in his possession.

(2) Every such prisoner shall be confined in a cell apart from all other prisoners, and shall be placed by day and by night under the charge of a guard."

The gravamen of the argument in that case was that sub-section (2) does not authorise the prison authorities in the garb of securing a prisoner under sentence of death, to confine him in a cell apart from other prisoners by imposing solitary confinement upon him. This argument was rejected and it was held that it was hardly be questioned that prisoners under sentence of death form a separate class and their separate classification has to be recognised.

This Court in *State of Haryana and Others versus Mohinder Singh and Others* [2000 (3) SCC 394] held that 'furlough' and 'parole' are two distinct terms now being used in the Jail Manuals or laws relating to temporary release of prisoners. In *Sunil Batra* (supra), the Constitution Bench has given recognition of creation of a separate class of prisoners undergoing death sentence. Section 3 has been enacted to meet the urgent pressing personal problem of a prisoner. As noted above, under this section any prisoner irrespective of his period of sentence or detention can be released on parole to meet such problem, whereas the condition for releasing a prisoner on furlough under Section 4 is rigorous and such release on furlough cannot be claimed by certain classes of prisoners as mentioned in the section. On close look at both the sections it would appear that these sections operate on different fields. Section 3 has been enacted to meet certain situation of the prisoner but Section 4 has been enacted as a reformative measures as a prisoner has to show good conduct while in incarceration. In our considered opinion this classification is based on rational criteria and cannot be said to be discriminatory in nature. We, therefore, find no force in the first contention of the learned counsel for the appellant.

The second contention of the learned counsel for the appellant has also to be rejected in view of the decision of this Court in *Sunil Fulchand Shah* (supra). The Constitution Bench has clearly held that though ordinarily the period of temporary release of a prisoner on parole needs to be counted towards the total period of detention but this condition can be curtailed by legislative act, rules, instructions or terms of grant of parole.

We also do not find force in the contention of the learned counsel for the appellant that sub-section (3) of Section 3 of the Act is hit by Article 21 of the Constitution. By a valid legislative act the period of temporary release on parole has been denied while counting the actual sentence undergone by the prisoner. It cannot be said that such right of a prisoner has been taken away without due process of law. Consequently, these contentions of the learned counsel for the appellant are rejected.

We, therefore, find no merit in the appeal as well as in the writ petition and consequently both the appeal and the writ petition are dismissed.

.....J.
[G. B. PATTANAIAK]

.....J.
[S.N. PHUKAN]

.....J.
[S.N. VARIAVA]

February 19, 2002

JUDIS