

(2010) 11 KL CK 0245
In the High Court Of Kerala
Case No : W.A. No. 1582 of 2010

C.S. Ramachandran Nair and Others

APPELLANT

Vs

G Balachandran and Others

RESPONDENT

Date of Decision : 26-11-2010

Acts Referred:

Constitution of India, 1950 — Article 161, 163, 166, 226
Criminal Procedure Code, 1973 (CrPC) — Section 432, 432(1), 432(5), 433
Penal Code, 1860 (IPC) — Section 323

Citation : (2011) 2 KLJ 105 : (2011) 4 RCR(Criminal) 158

Hon'ble Judges : C.N. Ramachandran Nair, J;B.P. Ray, J

Bench : Division Bench

Advocate : S. Gopakumaran Nair ; M. Chandra Bose; N. Sreekumar and A. Rajasimhans, for the Appellant; N. Manoj Kumar (GP); K. Raveendran and M.V.S. Namboothiry (SC) CBI, for the Respondent

Final Decision : Allowed

Judgement

Ramachandran Nair, J.—Of the three writ appeals, two are filed by convicts and one by the State challenging the judgment of the learned Single Judge declaring Ext. P2 produced in Writ Appeal No. 1582/2010, which is an order of remission issued by the Government u/s 432 of the Code of Criminal Procedure, as invalid. We have heard Senior counsel Sri. S. Gopakumaran Nair appearing for the appellants in the two Writ Appeals, Government Pleader for the appellant in the Writ Appeal filed by the State and Adv. Sri. K. Ravindran appearing for the first respondent in W.A. Nos. 1582 and 1905 of 2010. The facts leading to the controversy are the following. The appellants in W.A. No. 1582/2010 while serving as C.I. of Police and Police Constables respectively in a Police Station summoned the first respondent along with his wife to the Police Station on the basis of a complaint filed by some of their relatives and manhandled them. Cases were registered u/s 323 of the I.P.C. which led to conviction of all the appellants for three months" rigorous imprisonment and fine of Rs. 1,000/- each. The sentence got confirmed in appeal filed before this court and SLPs filed before the

Supreme Court were rejected for the reason that appellants did not surrender to serve sentence before moving the Supreme Court. The incident that led to the prosecution and sentence of the appellants happened in 1988 and in the course of time, the first appellant got several promotions, became Superintendent of Police and retired. The second appellant became Head Constable and the third got promotion as Sub Inspector of Police and all of them are now retired from service. On confirmation of conviction and sentence on the appellants, they filed application before the Government u/s 432 of the Code of Criminal Procedure and the Government allowed the remission completely in the case of appellants 2 and 3, while the application of the first appellant is still pending with the Government. Another development of the case is that the victim of appellants' criminal act namely, the wife of the first respondent, divorced him and supported the case of the appellants for remission of sentence. Ext. P2 order granting complete remission to appellants 2 and 3 by the Government issued on 1.1.2005 was challenged by the first respondent before this court by filing writ petition under Article 226 of the Constitution and the learned Single Judge allowed the Writ Petition by vacating the order of the Government holding that procedural impropriety in disposing of the matter has invalidated the order of the Government. It is against this judgment both the State as well as the convicts have filed separate Writ Appeals.

2. The learned Single Judge held that the order issued is one u/s 432 of Cr. P.C. and also in exercise of powers conferred on the Governor of the State under Article 161 of the Constitution of India. By holding so, he held that there is procedural violation of Section 432 of Cr. P.C. because appellants-convicts did not surrender to serve the sentence before making application for remission. The second defect noted by the learned Single Judge is that the Government did not take the opinion of the Presiding Judge of the Court which convicted the appellants or confirmed the sentence before deciding the matter in terms of sub-section (2) of Section 432. The third defect found by the learned Single Judge is that the file was forwarded to the Governor for decision under Article 161 only by the Chief Minister and not by the Council of Ministers in terms of Article 163 of the Constitution.

3. On going through the impugned order issued by the Government, we find that this is an order issued u/s 432 of Cr. P.C. by the Government and there is no reference in the said order about Article 161 or decision taken by the Governor thereunder. The Government Order is signed by the Additional Secretary to Government with the statement that it is issued "By Order of the Governor". Besides this, in the order there is no mention about Article 161 of the Constitution or any decision taken by the Governor thereunder. Admittedly the appellants also have not sent any petition under Article 161 to the Governor for his decision. Since the matter has to be decided with reference to scope of Section 432 of Cr. P.C. and Article 161 of the Constitution, we extract hereunder the said provisions for easy reference:

S.432. Power to suspend or remit sentences:- (1) When any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without conditions or upon any 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.

(2) Whenever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government may require the presiding Judge of the Court before or by which the conviction was had or confirmed, to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists.

(3) If any condition on which a sentence has been suspended or remitted is, in the opinion of the appropriate Government, not fulfilled, the appropriate Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer, without warrant and remanded to undergo the unexpired portion of the sentence.

(4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.

(5) The appropriate Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with:

Provided that in the case of any sentence (other than a sentence of fine) passed on a male person above the age of eighteen years, no such petition by the person sentenced or by any other person on his behalf shall be entertained, unless the person sentenced is in jail, and,--

(a) where such petition is made by the person sentenced, it is presented through the officer in charge of the jail; or

(b) where such petition is made by any other person, it contains a declaration that the person sentenced is in jail.

(6) The provisions of the above sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law which restricts the liberty of any person or imposes any liability upon him or his property.

(7) In this section and in section 433 , the expression "appropriate Government" means,--

(a) in cases where the sentence is for an offence against, or the order referred to in sub-section (6) is passed under, any law relating to a matter to which the

executive power of the Union extends, the Central Government;

(b) in other cases the Government of the State within which the offender is sentenced or the said order is passed." "Article 161 . Power of Governor to grant pardons, etc., and to suspend, remit or commute sentences in certain cases:- The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends.

4. In our view, the impugned order issued by the Government that was challenged before the learned Single in the W.P.(C) cannot be treated as a proceeding issued by the Governor in exercise of powers conferred under Article 161 of the Constitution of India. On the other hand, what we find from Ext. P2 order is that application was submitted by appellants 2 and 3 in the Writ Appeal to the Government for remission of sentence u/s 432 of Cr. P.C. As already stated, the Government issued Ext. P2 order expressly in exercise of powers conferred u/s 432 of Cr. P.C. and there is no reference of Article 161 of the Constitution or any decision taken by the Governor independently. In our view, the authority of the Government to grant remission or to suspend sentence u/s 432 of Cr. P.C. is independent of the power conferred on the Governor under Article 161 of the Constitution, no matter both the Government and Governor has concurrent powers in regard to suspension, remission and commutation of sentence. What happened in this case is that decision to grant remission on application filed by appellants 2 and 3 vide Ext. P2 order was taken by the Government in exercise of powers conferred u/s 432 of Cr. PC and since Article 166 of the Constitution provides that all executive action of the Government of a State shall be expressed to be taken in the name of the Governor, the authority which issued the order u/s 432 i.e. the Additional Chief Secretary to Government, issued it in the name of the Governor. This is only a procedural compliance of Article 166 of the Constitution and so much so, the order issued by the Government in the name of the Governor cannot be taken as a decision taken by the Governor under Article 161 of the Constitution. So much so, in our view, there was no need for the learned Single Judge to consider the procedure which the Governor should have followed for taking decision under Article 161 of the Constitution. We, therefore, do not think this is a fit case to consider whether the Governor should take decision under Article 161 of the Constitution only on the advice of the Council of Ministers and not on the advice of the Chief Minister independently. We, therefore, proceed to consider the correctness of Ext. P2 order with reference to Section 432 of the Cr. P.C. alone.

5. Counsel for the appellants challenged the judgment of the learned Single Judge on several grounds. So far as the appeal filed by the Government is concerned, Government Pleader submitted that under the Rules of Procedure of the Government, the Chief Minister can recommend any matter for decision by the Governor and there is no need to have the recommendation from Council of

Ministers in all matters. Counsel for the appellants in the connected cases also supported this argument. As already stated by us, since we find the impugned proceedings issued by the Government as an independent order issued by the Government in exercise of powers conferred u/s 432 of the Cr. P.C. and Government has not issued any proceedings under Article 161 of the Constitution, we do not think there is any need to consider the propriety or legality of the reference of the matter to the Governor by the Chief Minister in this case. Counsel for the appellants contended that Ext. P2 order issued by the Government u/s 432 is independent even though there may be procedural illegality in not forwarding the application by the appellants after surrendering and while in jail which is the requirement for maintainability of the application for remission under proviso to Section 432(5) of Cr. P.C. We find force in this contention because u/s 432(1) the Government enjoys the power to "suspend the execution of sentence or remit the whole or any part of the punishment to which the accused has been sentenced." In the normal course by virtue of the proviso to Section 432(5) of the Act, the convict should surrender in prison and the application for remission should be forwarded by him through the Jail authorities. If it is sent by the convict or under his consent by another person, it should be accompanied by a declaration that the convict is serving in Jail. However, what we find is that Government enjoys the power under sub-section (1) of Section 432 to suspend the execution of sentence or to remit the whole or part of the punishment to which he has been sentenced. Execution of sentence of imprisonment is to arrest and detain the convict in Jail. If the Government proceeds to suspend the execution of such a sentence, then the convict cannot be arrested or detained in prison. When the Government has the power to suspend execution of sentence under subsection (1) of Section 432 , it is always open to the Government first to suspend the execution of sentence i.e. by dispensing arrest and detention of the convict in prison and then to proceed for consideration of the application for remission on merit. In many cases sentence may be for such short period and if the convict is compulsorily made to surrender under the proviso to Section 432(5) even before filing application before the Government u/s 432 , then the application itself may become infructuous because by the time Government takes decision, he would have served full period of sentence in prison, the remission of which he sought in the application. So much so, unless the Government has inherent power to suspend sentence before considering application for remission, the right available to the party to get sentence for short periods remitted will have no purpose. Further, when the Government has the authority to grant remission of full period of sentence, then the requirement of surrender in prison for maintainability of application will necessarily lead to serving imprisonment for atleast a few days, which will take away the right of the convict to have the sentence fully remitted by the Government in fit cases. So much so, we hold that Government should be taken to have exercised it's express authority conferred under sub- section (1) of Section 432 to suspend the execution of sentence of the convict when the application for remission was considered on merit. In other words, it is upto to

the Government to consider whether it should insist on compliance of the proviso by requiring the convict to surrender in prison and get the application forwarded u/s 432 from the prison or otherwise to suspend the execution of sentence unconditionally i.e. without requiring the convict being sent to Jail as a condition for entertaining application for remission on merit. Even though Government has not passed any separate orders suspending the execution of sentence, we feel when the Government considers the application for remission on merits, Government should be deemed to have suspended the execution of sentence by virtue of powers under sub-section (1) of Section 432 of Cr. P.C. while considering an application for remission. In the case of appellants 2 and 3, Government proceeded to grant remission of the entire sentence i.e. the sentence of three months" rigorous imprisonment and fine of Rs. 1,000/- each.

6. The next question to be considered is whether want of reference to the Presiding Judge of the Court who convicted the appellants or confirmed sentence, will invalidate proceedings for remission issued by the Government. On the face of it, we feel subsection (2) of Section 432 is only discretionary in nature and it is upto the Government to consider whether the opinion of the Presiding Judge who convicted or confirmed the sentence of the convict is required or not. The appellants being serving Police Officers and the offence having taken place in the Police Station while the appellants were on duty and the main victim pardoned the appellants and agreed for remission being granted to the appellants, probably the Government felt that there was no need for taking opinion from the Presiding Judge in terms of sub-section (2) of Section 432 before deciding the matter. We do not think the procedure contemplated under sub-section (2) is mandatory in nature and in our view, it is only a matter of discretion of the Government to take the opinion of the Presiding Judge or not. So much so, in our view, the failure of the Government to get report from the Presiding Judge under sub-section (2) does not invalidate the proceedings issued u/s 432 of the Cr. P.C. We, therefore, hold the finding of the learned Single Judge that the impugned order is illegal and invalid for the defects pointed out by him which are discussed above, is untenable.

7. The last question to be considered is only on first respondent's challenge against Ext. P2 order on merits. Even though Ext. P2 is a discretionary order, the legality or propriety of which can be questioned in writ proceedings by any aggrieved person, on merits we find no case to interfere with the same because this is a case where the main victim who is first respondent's wife, has pardoned the appellants and consented to grant remission without any condition and the appellants were otherwise not involved in any offence and were Police Officers who served for 17 years after the occurrence without any bad remarks and in fact they were granted promotions. Further, the first respondent's wife who later divorced him and who consented for the remission, though could have demanded compensation as a condition for granting consent for remission, did not demand it and therefore, the Government did not grant it. In our view, if the victim demands, the Government is, bound to consider and grant compensation in

appropriate cases while remission is ordered. In this case even though the main victim has given consent for remission, she has not demanded any compensation. First respondent also has not raised a claim for compensation from the convicts, even though we queried and offered to consider the claim. If the Government passes any conditional order granting remission, either by ordering payment of compensation to victims or otherwise, then the violation of the conditions entitles the Government to recall the order of remission granted. In this case Government has not imposed any condition for granting remission and on merits we find no ground to interfere with the order of remission granted by the Government.

8. So far as the findings of the learned Single Judge on the procedure to be followed by the Governor while considering an application under Article 161 of the Constitution is concerned, we have already noticed that this is not a case where application is considered by the Governor under Article 161 or the Government made any recommendation in this regard. On the other hand, this is a case of Government considering the application and passing orders u/s 432 which is independent of the powers conferred on the Governor under Article 161 of the Constitution. We, therefore, do not find this a fit case for this court to consider the procedure to be followed by the Government when a reference is made by the Government to the Governor on an application made under Article 161 of the Constitution. For the above reasons, we allow Writ Appeal Nos. 1582 and 1905 of 2010 by setting aside the judgment of the learned Single Judge and by dismissing W.P.(C) No. 9401/2007. So far as Writ Appeal No. 1733/2010 is concerned, we dispose of the same with direction to the Government to pass orders on Annexure-A2 representation filed u/s 432 of the Cr. P.C.