

(2012) 03 KAR CK 0129

In the Karnataka High Court

Case No : Writ Petition No. 6083 of 2007 (GM-RES)

Ramakrishna

APPELLANT

Vs

The Secretary, Home Dept Vidhana Soudha, Bangalore,
Manjunath @ Manjegowda and The Governor State of
Karnataka

RESPONDENT

Date of Decision : 09-03-2012

Acts Referred:

Constitution of India, 1950 — Article 161, 72
Criminal Procedure Code, 1973 (CrPC) — Section 432, 433, 433 A, 435
Penal Code, 1860 (IPC) — Section 143, 144, 148

Citation : (2012) CriLJ 3044 : (2012) 4 KarLJ 187 : (2013) 1 RCR(Criminal) 89

Hon'ble Judges : N. Kumar, J

Bench : Single Bench

Advocate : Mahantesh S Hosmath, for the Appellant; Veerappa, Hcgp, For R1 and R2; Sri R G Halesha, Advocate. For R3; and Sri N.B. Bhat As Amicus Curiae, for the Respondent

Final Decision : Allowed

Judgement

N. Kumar

1. The son of a victim of brutal murder, is crying for justice, and is knocking at the doors of this Court, challenging the State action, of granting pardon to the perpetuator of the said heinous crime who is roaming in the streets of his Village, and wants to know, "is it justice". The petitioner has preferred this Writ Petition challenging the order passed by the Higher Police Chief Director and Karnataka Chief Examiner of the Jail in Order No. J2/CR/16-2006 dated 3.8.2006 as per Annexure-B1 and the order passed by the/Governor, Karnataka State and its Chief Secretary, Under Administrative Department (Jail and Cinema) Order No. J2/CR-16/2006 dated 3.8.2006 and Government Order No. HD 140 PRA 2006, Bangalore dated 14.8.2006 vide Annexure-B1 wherein at Sl. No. 89 the name of the third respondent-Manjunath is found.

FACTS OF THE CASE

2. The case of the petitioner is that, he is the son of one Sri Honnegouda who was brutally murdered by the third respondent-accused No. 1 and other 9 accused on 11.5.1998 at Maradahalli. During trial, bail was rejected which order was confirmed by the Apex Court. After trial, the learned Sessions Judge, Mandya, in S.C. No. 4/1999 delivered a judgment holding that the first accused committed murder of Late Sri Honnegouda and therefore he was sentenced for life. The third respondent preferred an appeal. Suspension of sentence was not granted. In so far as acquittal of other accused, State preferred Criminal Appeal No. 359/2006 and the same is pending. The petitioner also preferred Crl. R. P. No. 1079/2006 against the acquittal of other accused which is also pending before this Court. However, the accused No. 1 was released, on the occasion of the celebration of "Independence Day 2006" and "Suvarna Karnataka". The mother of the petitioner was bed ridden, after shock of her husband's murder. She died on 9.1.2007. The Government has no courtesy at the victimized family. They have arbitrarily released the accused. The Government which had opposed the bail in the High Court and the Supreme Court has now released the accused holding that he is reformed. Therefore, the said action of the respondents is arbitrary, illegal and therefore he has sought for setting aside the same.

3. A perusal of the judgment rendered by the Sessions Judge at Mandya in S.C. 4/1999, discloses that the accused and eight others assaulted the deceased Honnegowda with a chopper, on his face, neck and hands, causing bleeding injuries and he was murdered. He was aged about 65 years. The Sessions Court recorded evidence of 14 witnesses on behalf of prosecution looked into 39 documents and 11 M.Os. Eight witnesses were examined on behalf of the defence and 83 documents were marked. 8 photographs were produced. It is on appreciation of the aforesaid oral and documentary evidence on record, the Sessions Court held that accused No. 1 committed the murder of Honnegouda by entering into the farm house and thereby he has committed offence punishable u/s 448 and 302 of IPC. Prosecution has failed to prove the charges levelled against accused-2 to 9 for offence u/s 143, 144, 148, 448, 301, 144 IPC. Therefore, accused No. 1 alone was sentenced to undergo life imprisonment and also pay fine of Rs. 5,000-00 for offence punishable u/s 302 IPC. He was also directed to undergo sentence of one year and also to pay a fine of Rs. 1000-00 for offence punishable u/s 448 IPC. Accused-2 to 9 were acquitted u/s 235(1) Cr.P.C. Aggrieved by the judgment of conviction, accused No. 1 preferred appeal before this Court in Criminal Appeal No. 806/06. He filed an application for suspension of sentence. This Court declined to grant interim relief and rejected the bail application. It is during the pendency of these proceedings, the impugned order at Annexure-B1 was passed granting the pardon. In view of the pardon granted to the third respondent, he has withdrawn his criminal appeal challenging the order of conviction. The petitioner has preferred this writ petition challenging the order passed by the Government according pardon.

4. Therefore, the question for consideration before this Court is,

Whether the impugned orders passed are sustainable in law?

5. The learned counsel for the petitioner assailing the impugned orders contends that neither the Government nor the Governor has applied their mind to the facts of the case, the settled legal position and have exercised the power of commutation of sentence and released the convicted person before the expiry of 14 years contrary to Section 433A of the Code of Criminal Procedure, 1973, which is patently illegal, arbitrary, without jurisdiction and therefore is liable to be set aside.

6. Per contra, the learned counsel appearing for the accused justified the order passed by the respondents. The learned Government Advocate also supported the impugned order.

8. The Court requested Sri N.B. Bhat, the learned counsel, to assist the Court, as interesting questions of law as well as interpretation of the constitutional provisions was involved. Painstakingly he has assisted the Court placing all the relevant judgments of the Apex Court.

PROVISIONS OF LAW

8. Article 72 of the Constitution of India provides for the power of the President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases. It reads as under: -

72. Power of President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases.-

(1) the President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or to suspend, remit or commute the sentence of any person convicted of any offence-

(a) in all cases where the punishment or sentence is by a Court Martial;

(b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the union extends;

(c) in all cases where the sentence is a sentence of death

(2) Nothing in sub-clause (a) of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court martial

(3) Nothing in sub-clause (c) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force.

9. However, the power of the Governor to grant pardons, etc., and to suspend, remit or commute sentences in certain cases is provided under Article 161 of the

Constitution which reads as under: -

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 the which the executive power of the State extends.

10. The Code of Criminal Procedure, 1973 (hereinafter for short called the "Code") - the procedural law of the land also deals with power to commute sentences. Section 432 deals with power to suspend or remit sentences. It reads under: -

432. Power to suspend or remit sentences.-

(1) When any person has been sentenced to punishment for on 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 reason for such opinion and also to forward with the statement of such opinion 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 un-expired 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 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;

(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.

11. However, Section 433 of the Code deals with power to commute sentence. It reads as under:-

433. Power to commute sentence.- The appropriate Government may, without the consent of the person sentenced commute-

(a) a sentence of death, for any other punishment provided by the Indian Penal Code (45 of 1860);

(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;

(d) a sentence of simple imprisonment, or fine.

12. By Act 45/1978, Section 433A was inserted which came into force with effect from 18.12.1978. It provides for restriction on power of remission or commutation in certain cases. It reads as under:-

433A. Restriction on powers of remission or commutation in certain cases.- Notwithstanding anything contained in section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by laws, or where a sentence of death imposed on a person has been commuted u/s 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment

13. Section 435 of the Code deals with the power of the State Government to

exercise powers conferred on them u/s 432 and 433 in cases where the offences are investigated by the National Agencies under the control of the Central Government. The State Government makes it obligatory on the State to consult the Central Government before exercising such power.

14. It is in the background of these statutory provisions and the constitutional provisions, the power exercised by the State, the Governor, resulting in the impugned order is to be considered. The power exercised by the President and the Governor is known as prerogative power.

WHAT IS PREROGATIVE POWER?

15. Pardon is one of the many prerogatives which have been recognised since time immemorial as being vested in the sovereign, wherever the sovereignty might lie. Whether the sovereign happened to be an absolute monarch or a popular republic or a constitutional king or queen, sovereignty has always been associated with the source of power-the power to appoint or dismiss public servants, the power to declare war and conclude peace, the power to legislate and the power to adjudicate upon all kinds of disputes. The King, using the term in a most comprehensive sense, has been the symbol of the sovereignty of the State from whom emanate all power, authority and jurisdictions. As kingship was supposed to be of divine origin, an absolute king had no difficulty in proclaiming and enforcing his divine right to govern, which includes the right to rule, to administer and to dispense justice. It is a historical fact that it was this claim of divine right of kings that brought the Stuart Kings of England in conflict with Parliament as the spokesman of the people. We know that as a result of this struggle between the King, as embodiment of absolute power in all respects, and Parliament, as the champion of popular liberty, ultimately emerged the constitutional head of the Government in the person of the King who, in theory, wields all the power, but, in practice, laws are enacted by Parliament, the executive power vests in members of the Government, collectively called the Cabinet, and judicial power is vested in a Judiciary appointed by the Government in the name of His Majesty. Thus, in theory, His Majesty or Her Majesty continues to appoint the Judges of the highest courts, the members of the Government and the public servants, who hold office during the pleasure of the sovereign. As a result of historical processes emerged a clear cut division of governmental functions into executive, legislative and judicial. Thus was established the " Rule of Law " which has been the pride of Great Britain and which was highlighted by Prof. Dicey. The Rule of Law, in contradistinction to the rule of man, includes within its wide connotation the absence of arbitrary power, submission to the ordinary law of the land, and the equal protection of the laws. As a result of the historical process aforesaid, the absolute and arbitrary power of the monarch came to be canalised into three distinct wings of the Government. There has been a progressive increase in the power, authority and jurisdiction of the three wings of the Government and a corresponding diminution of absolute and arbitrary power of the King. It may, therefore, be said that the prerogatives of

the Crown in England, which were wide and varied, have been progressively curtailed with a corresponding increase in the power, authority and jurisdiction of the three wings of Government, so much so that most of the prerogatives of the Crown, though in theory they have continued to be vested in it, are now exercised in his name by the Executive, the Legislature and the Judiciary. This dispersal of the Sovereign's absolute power amongst the three wings of Government has now become the norm of division of power; and the prerogative is no greater than what the law allows. In the celebrated decision of the House of Lords in the case of Attorney General v. De Keyser's Royal Hotel, Limited which involved the right of the Crown by virtue of its prerogative, to take possession of private property for administrative purposes in connection with the defence of the realm, it was held by the House of Lords that the Crown was not entitled by virtue of its prerogative or under any statute, to take possession of property belonging to a citizen for the purposes aforesaid, without paying compensation for use and occupation. The prerogative has been defined by a learned author as the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown". It is the ultimate resource of the executive, and when there exists a statutory provision covering precisely the same ground there is no longer any room for the exercise of the Royal Prerogative. It has been taken away by necessary implication because the two rights cannot live together. The prerogative is defined by a learned constitutional writer as "the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown-". Inasmuch as the Crown is a party to every Act of Parliament it is logical enough to consider that when the Act deals with something which before the Act could be effected by the prerogative, and specially empowers the Crown to do the same thing, but subject to conditions, the Crown assents to that, and by that Act, to the prerogative being curtailed. The prerogative is thus created and limited by the common law, and the Sovereign can claim no prerogatives except such as the law allows, nor such as are contrary to Magna Carta, or any other statute, or to the liberties of the subject. The courts have jurisdiction, therefore, to inquire into the existence or extent of any alleged prerogative.

INDIAN LAW

16. The Supreme Court had an occasion to consider the concept of law of pardon in the case of K.M. Nanavati Vs. The State of Bombay, . The Constitution Bench in the said judgment held as under: -

11. We have thus briefly set out the history of the "genesis and development of the Royal Prerogative of Mercy because Mr. Seervai has strongly emphasised that the Royal Prerogative of Mercy is wide and absolute, and can be exercised at any time. Very elaborate arguments were addressed by him before us on this "aspect of the matter and several English and American decisions were cited. In so far as his argument was that the power to suspend the sentence is a part of the larger power of granting pardon it may be relevant to consider incidentally the scope

and extent of the said larger power; but, as we shall presently point out, the controversy raised by the present petition lies within a very narrow compass; and so concentration on the wide and absolute character of the power to grant pardon and overemphasis on judicial decisions which deal directly with the said question would not be very helpful for our present purpose. In fact we apprehend that entering into an elaborate discussion about the scope and effect of the said larger power, in the light of relevant judicial decisions, is likely to create confusion and to distract attention from the essential features of the very narrow point that falls to be considered in the present case. That is why we do not propose to enter into a discussion of the said topic or to refer to the several decisions cited under that topic.

17. Thereafter, they examined the statutory provisions as contained in the old Code of Criminal Procedure as well as in the Constitution. It Is stated as under : -

12. Let us now turn to the law on the subject as it obtains in India since the Code of Criminal Procedure was enacted in 1898. Section 401 of the Code gives power to the executive to suspend the execution of the sentence or remit the whole or any port of the punishment without conditions or upon any conditions which the person sentenced accepts. Section 402 gives power to the executive without the consent of the person sentenced to commute a sentence of death into imprisonment for life and also other sentences into sentences less rigorous in nature. In addition the Governor-General had been delegated the power to exercise them prerogative power vesting in His Majesty. Sub-section (5) of s. 401 also provides that nothing contained in it shall be deemed to interfere with the right of His Majesty, or the Governor-General when such right is delegated to him, to grant pardons, reprieves, respites or remissions of punishment This position continued till the Constitution came into force. Two provisions were introduced in the Constitution to cover the former royal prerogative relating to pardon, and they are Arts. 72 and 161. Article 72 deals with the power of the President to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence. Article 161 gives similar power to the Governor of a State with respect to offenses against any law relating to a matter to which the executive power of the State extends. Sections 401 and 402 of the Code have continued with necessary modifications to bring them into line with Arts. 72 and 161. It will be seen, however, that Arts. 72 and 161 not only deal with pardons and reprieves which were within the royal prerogative but have also included what is provided in SS. 401 and 402 of the Code. Besides the general power, there is also provision in ss. 337 and 338 of the Code to tender pardon to an accomplice under certain conditions.

18. Interpreting Article 161 of the Constitution, the Apex Court held as under: -

13.....Though Art. 161 does not make any reference to Art 72 of the Constitution, the power of the Governor of a State to grant pardon etc. to some extent overlaps the same power of the President, particularly in the case of a

sentence of death. Articles 75 and 161 are in very general terms. It is, therefore, argued that they are not subject to any limitations and the respective area of exercise of power under these two Articles is indicated separately in respect of the President and of the Governor of a State. It is further argued that the exercise of power under these two Articles is not fettered by the provisions of Arts. 142 and 145 of the, Constitution or by any other law.

Resorting to Article 142(1) they held as under :-

14. It will be seen that it consists of two parts. The first part gives power to this Court in the exercise of its jurisdiction to pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it. The second part deals with the enforcement of the order passed by this Court. Article 145 gives power to this Court with the approval of the President to make rules for regulating generally the practice and procedure of the Court. It is obvious that the rules made under Art 145 are in aid of the power given to this Court under Art. 142 to pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it.

Dealing with the power of the Governor to grant pardons under Article 161 it is held as under : -

21. There can be no doubt that it is open to the Governor to grant a full pardon at any time even during the pendency of the case in this Court in exercise of what is ordinarily called "mercy jurisdiction". Such a pardon after the accused person has been convicted by the Court has the effect of completely absolving him from all Punishment or disqualification attaching to a conviction for a criminal offence. That power is essentially vested in the head of the Executive, because the judiciary has no such "mercy jurisdiction". But the suspension of the sentence for the period when this Court is in seisin of the case could have been granted by this Court itself. If in respect of the same period the Governor also has power to suspend the sentence, it would mean that both the judiciary and the executive would be functioning in the same field at the same time leading to the possibility of conflict of jurisdiction. Such a conflict was not and could not have been intended by the makers of the Constitution. But it was contended by Mr. Seervai that the words of the Constitution, namely, Art 161 do not warrant the conclusion that the power was in any way limited or fettered. In our opinion there is a fallacy in the argument in so far as it postulates what has to be established, namely, that the Governor's power was absolute and not fettered in any way so long as the judiciary has the power to pass a particular order in a pending case to that extent the power of the Executive is limited in view of the words either of ss. 401 and 426 of the Code of Criminal Procedure and Arts. 142 and 161 of the Constitution. If that is the correct interpretation to be put on these provisions in order to harmonise them it would follow that what is covered in Art 142 is not covered by Art. 161 and similarly what is covered by s. 426 is not covered by s.401. On that interpretation Mr. Seervai would be right in his contention that there is no conflict between the prerogative power of the

sovereign state to grant pardon and the power of the courts to deal with a pending case judicially.

24. It has been strenuously urged before us that the power of granting pardon is wide and absolute and can be exercised at any time, that is to say, it can be exercised even in respect of criminal matters which are sub judice; and the argument is that the power to suspend sentence is part of the larger power to grant pardon, and is similar in character and can be similarly exercised. This argument is fallacious; it ignores the essential difference between the general power to grant pardon etc., and the power to suspend sentence in criminal matters pending before this Court. The first is an exclusively executive power vesting in the Governor under Art. 161; it does not vest in this Court; and so the field covered by it is exclusively subject to the exercise of the said executive power; and so there can be no question of any conflict in such a case; conflict of powers obviously postulates the existence of the same or similar power in two authorities; on the other hand, the latter power vests both in this Court and the Governor, and so the field covered by the said power entrusted to this Court under Art. 142 can also be covered by the executive power of the Governor under Art. 161, and that raises the problem of a possible conflict between the two powers. That is why we have observed earlier that concentration or even undue emphasis on the character and sweep of the larger power to grant pardon is likely to distract attention from the essential features of the power to suspend sentence with which alone we are concerned in the present proceedings.

Ultimately, they concluded as under: --

25. As a result of these considerations we have come to the conclusion that the order of the Governor granting suspension of the sentence could only operate until the matter became sub judice in this Court on the filing of the petition for special leave to appeal. After the filing of such a petition this Court was seized of the case which would be dealt with by it in accordance with law. It would then be for this Court, when moved in that behalf, either to apply r. 5 of O. XXI or to exempt the petitioner from the operation of that rule. It would be for this Court to pass such orders as it thought fit as to whether the petitioner should be granted bail or should surrender to his sentence or to pass such other or further orders as this Court might deem fit in all the circumstances of the case. It follows from what has been said that the Governor had no power to grant the suspension of sentence for the period during which the matter was subjudice in this Court.

MEANING OF SENTENCE FOR LIFE

19. On the question what is the meaning to be attributed to the phrase "sentence for life", the Apex Court in the case of *STATE OF MADHYA PRADESH Vs. RATAN SINGH AND OTHER* reported in AIR 1976 SC 1532, held as under:

It is therefore, manifest from the decision of this Court that the Rules framed under the prisons Act or under the Jail Manual do not affect the total period

which the prisoner has to suffer but merely amount to administrative instructions regarding the various remissions to be given to the prisoner from time to time in accordance with the rules. The Court further pointed out that the question of remission of the entire sentence or a part of it lies within the exclusive domain of the appropriate Government under S.401 of the Code of Criminal Procedure and neither Section 57 of the Indian Penal Code nor any Rules or local Act can stultify the effect of the sentence of life imprisonment given by the Court under the Indian Penal Code. In other words, this Court has clearly held that a sentence for life would ensure till the lifetime of the accused as it is not possible to fix a particular period of the prisoner's death so any remissions given under the Rules could not be regarded as a substitute for a sentence of transportation of life. In these circumstances, therefore, it is clear that the High Court in error in thinking that the respondent was entitled to be released as of right on completing the term of 20 years including the remissions."

SECTION 433A OF THE CODE

20. While dealing with the Constitutional validity of Section 433A of the Code, the Constitution Bench of the Apex Court in the case of Maru Ram and Others Vs. Union of India (UOI) and Others, , upholding the Constitutional validity, held as under:

59. It is apparent that superficially viewed, the two powers, one constitutional and the other statutory, are coextensive. But two things may be similar but not the same. That is precisely the difference. We cannot agree that the power which is the creature of the Code can be equated with a high prerogative vested by the Constitution in the highest functionaries of the Union and the States. The source is different, the substance is different, the strength is different, although the stream may be following along the same bed. We see the two powers as far from being identical, and obviously, the constitutional power is "untouchable" and "unapproachable" and cannot suffer the vicissitudes of simple legislative process. Therefore Section 433A cannot be invalidated as indirectly violative of Articles 72 and 161. What the Code gives, it can take, and so, an embargo on Sections 432 and 433(3) in within the legislative power of Parliament

60. Even so, we must remember the constitutional status of Articles 72 and 161 and it is common ground that Section 433A does not and cannot affect even a wee bit the pardon power of the Governor or the President The necessary sequel to this logic is that notwithstanding Section 433A the President and the Governor continue to exercise the power of communication and release under the aforesaid articles.

61. Are we back to square one? Has Parliament indulged in legislative futility with a formal victory but a real defeat? The answer is "yes" and "no". Why "yes"? Because the President is symbolic, the Central Government is the reality even as the Governor is the formal head and sole repository of the executive power but is incapable of acting except on, and according to, the advice of his Council of

Ministers. The upshot is that the State Government, whether the Governor likes it or not, can advise and act under Article 161, the Governor being bound by the advice. The action of commutation and release can thus be pursuant to a governmental decision and the order may issue even without the Governor's approval although, under the Rules of Business and as a matter of constitutional courtesy, it is obligatory that the signature of the Governor should authorise the pardon, commutation or release. The position is substantially the same regarding the President. It is not open either to the President or the Governor to take independent decision to direct release or refuse release of anyone of their own choice. It is fundamental to the Westminster system that the Cabinet rules and the Queen reigns being too deeply rooted as fundamental to our system no serious encounter was met from the learned Solicitor General whose sure grasp of fundamentals did not permit him to controvert the proposition, that the President and the Governor, be they ever so high in textual terminology, are but functional euphemisms promptly acting on and only on the advice of the Council of Ministers have in a narrow area of power. The subject is now beyond controversy, this Court having authoritatively laid down the law in *Shamsher Singh* case. So, we agree, even without reference to Article 367(1) and Sections 3(8)(b) and 3(60)(b) of the General Clause Act, 1897, that, in the matter of exercise of the powers under Articles 72 and 161, the two highest dignitaries in our constitutional scheme act and must act not on their own judgment but in accordance with the aid and advice of the ministers. Article 74, after the 42nd Amendment silences speculation and obligates compliance. The Governor vis-à-vis his Cabinet is no higher than the President save in a narrow area which does not include Article 161. The constitutional conclusion is that the Government is but a shorthand expression for the State Government and the President is an abbreviation for the Central Government

62. An issue of deeper import demands our consideration at this stage of the discussion. Wide as the power of pardon, commutation and release (Articles 72 and 161) is, it cannot run riot; for no legal power can run unruly like John Gilpin on the horse but must keep sensibly to a steady course. Here, we come upon the second unconstitutional fundamental which underlies the submissions of counsel. It is that all public power, including constitutional power, shall never be exercisable arbitrarily or mala fide and, ordinarily, guide-lines for fair and equal execution are guarantors of the valid play of power.

70. The learned Solicitor-General is right that these Rules are plainly made under the Prisons Act and not under the constitutional power. The former fall under the pressure of Section 433A. But that, by no means, precludes the State from adopting as working rules the same remission schemes which seem to us to be fairly reasonable. After all the Government cannot meticulously study each prisoner and the present praxis of marks, until a more advanced and expertly advised scheme is evolved, may work. Section 433A cannot forbid this method because it is immunised by Article 161. We strongly suggest that, without break, the same rules and schemes of remission be continued as a transmigration of

soul into Article 161, as it were, and benefits extended to all who fall within their benign orbit - save, of course, in special cases which may require other relevant considerations. The wide power of executive clemency cannot be bound down even by self-created rules.

Ultimately they concluded the judgment by formulating their findings as under:

72. We conclude by formulating our findings:

(1) We repulse all the thrusts on the vires of Section 433A. Maybe, penologically the prolonged term prescribed by the section is supererogative. If we had our druthers we would have negated the need for a fourteen years gestation for reformative. But ours is to construe, not construct, to decode, not to make a code.

(2) We affirm the current supremacy of Section 433A over the Remission Rules and short-sentencing statutes made by the various States.

(3) We uphold all remissions and short-sentencing passed under Articles 72 and 161 of the Constitution but release will follow, In life sentence cases, only on government making in order en masse or individually, in that behalf.

(4) We hold that Section 432 and Section 433 are not a manifestation of Articles 72 and 161 of the Constitution but a separate, though similar power, and section 433A, by nullifying wholly or partially these provisions does not violate or detract from the full operation of the constitutional power to pardon, commute and the like.

(5) We negate the plea that Section 433A contravenes Article 20(1) of the Constitution.

(6) We follow Godse case to hold that imprisonment for life lasts until the last breath, and whatever the length of remissions earned, the prisoner can claim release only if the remaining sentence is remitted by government

(7) We declare that Section 433A, in both its limbs (i.e., both types of life imprisonment specified in it), is prospective in effect To put the position beyond doubt, we direct the mandatory minimum of 14 years actual imprisonment will not operate against those whose cases were decided by the trial court before December 18, 1978 when Section 433A came into force. All "Lifers" whose conviction by the court of first instance was entered prior to that date are entitled to consideration by government for release on the strength of earned remissions although a release can take place only if government makes an order to that effect To this extent the battle of the tenses is won by the prisoners. It follows, by the same logic, the short-sentencing legislation, if any, will entitle a prisoner to claim release thereunder if his conviction by the court of first instance was before Section 433A was brought into effect

(8) The power under Articles 72 and 161 of the Constitution can be exercised by the Central and State Government, not by the President or Governor or their

own. The advice of the appropriate Government binds the Head of the State. No separate order for each individual case is necessary but any general order made must be clear enough to identify the group of cases and indicate the application of mind to the whole group.

(9) Considerations for exercise of power under Articles 72/161 may be myriad and their occasions protean, and are left to the appropriate Government, but no consideration nor occasion can be wholly irrelevant, irrational, discriminatory or mala fide. Only in these rare cases will the court examine the exercise.

(10) Although the remission rules or short-sentencing provisions proprio vigore may not apply as against Section 433A, they will override Section 433A if the Government, Central or State, guides itself by the selfsame rules or schemes in the exercise of its constitutional power. We regard it as fair that until fresh rules are made in keeping with experience gathered, current social conditions and accepted penological thinking - a "desirable step, in our view -- the present remission and release schemes may usefully be taken as guide-lines under Articles 72/161 and orders for release passed. We cannot fault the government, if in some intractably savage delinquents, Section 433A is itself treated as a guide-line for exercise of Article 72/161. These observations of ours are recommendatory to avoid a hiatus, but it is for Government, Central or State, to decide whether and why the current Remission Rules should not survive until replaced by a more wholesome scheme.

(11) The U.P. Prisoners' Release on Probation Act, 1938, enabling limited enlargement under licence will be effective as legislatively sanctioned imprisonment of a loose and liberal type and such licensed enlargement will be reckoned for the purpose of the 14 year duration. Similar other statutes and rules will enjoy similar efficacy.

(12) In our view, penal humanitarianism and rehabilitative desideratum warrant liberal paroles, subject to security safeguards, and other humanizing strategies for inmates so that the dignity and worth of the human person are not desecrated by making mass jails anthropoid zoos. Human rights awareness must infuse institutional reform and search for alternatives.

(13) We have declared the law all right, but law-in-action fulfils itself not by declaration alone and needs the wings of communication to the target community. So, the further direction goes from this Court that the last decretal part is translated and kept prominently in each ward and the whole judgment in the language of the State, made available to the inmates in the jail library.

(14) Section 433A does not forbid parole or other release within the 14-year span. So it interprets the section as to intensify inner tension and intermissions of freedom is to do violence to language and liberty.

Hon'ble Justice Fazal Ali, while concurring with the majority judgment expressed the following views on the nature and character of the reformatory aspect of

penology:

93. Thus, on a consideration of the circumstances, mentioned above, the conclusion is inescapable that Parliament by enacting Section 433A has rejected the reformatory character of punishment, in respect of offences contemplated by it, for the time being in view of the prevailing conditions in our country. It is well settled that the legislature understands the needs and requirements of its people much better than the courts because the Parliament consists of the elected representatives of the people and if the Parliament decides to enact a legislation for the benefit of the people, such a legislation must be meaningfully construed and given effect to so as to subserve the purpose for which it is meant

21. The Constitution Bench of the Apex Court in the case of KEHAR SINGH AND ANOTHER Vs. COTTON OF INDIA & ANR reported in 1989 SCC (Cri) 86, while interpreting Article 72 of the Constitution of India, which confers power on the President to grant pardons, respites or remission, held as under:

7. The Constitution of India, in keeping with modern constitutional practice, is a constitute document, fundamental to the governance of the country, whereby, according to accepted political theory, the people of India have provided a constitutional policy consisting of certain primary organs, institutions and functionaries to exercise the powers provided in the Constitution. All power belongs to the people, and it is entrusted by them to specified institutions and functionaries with the intention of working out maintaining and operating a constitutional order. The Preamble statement of the Constitution begins with the significant recital:

We, the people of India, having solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic...do hereby adopt, enact and give to ourselves this Constitution.

To any civilised society, there can be no attributes more important than the life and personal liberty of its members. That is evident from the paramount position given by the courts to Article 21 of the Constitution. These twin attributes enjoy a fundamental ascendancy over all other attributes of the political and social order, and consequently, the Legislature, the Executive and the Judiciary are more sensitive to them than to the other attributes of daily existence. The deprivation of personal liberty and the threat of the deprivation of life by the action of the State is in most civilised societies regarded seriously and, recourse, either under express constitutional provision or through legislative enactment is provided to the judicial organ. But, the fallibility of human judgment being undeniable even in the most trained mind, a mind resourced by a harvest of experience, it has been considered appropriate that in the matter of life and personal liberty, the protection should be extended by entrusting power further to some high authority to scrutinise the validity of the threatened denial of life or the threatened or continued denial of personal liberty. The power so entrusted is a power belonging to the people and reposed in the highest dignitary of the State.

In England, the power is regarded as the royal prerogative of pardon exercised by the Sovereign, generally through the Home Secretary. It is a power which is capable of exercise on a variety of grounds, for reasons of State as well as the desire to safeguard against judicial error. It is an act of grace issuing from the Sovereign. In the United States, however, after the founding of the Republic, a pardon by the President has been regarded not as a private act of grace but as a part of the constitutional scheme. In an opinion, remarkable for its erudition and clarity, Mr. Justice Holmes, speaking for the Court in *W.I. Biddle v. Vucro Perovich* enunciated this view, and it has since been affirmed in other decisions. The power to pardon is a part of the constitutional scheme, and we have no doubt, in our mind, that it should be so treated also in the Indian Republic. It has been reposed by the people through the Constitution in the Head of the State, and enjoys high status. It is a constitutional responsibility of great significance, to be exercised when occasion arises in accordance with the discretion contemplated by the context. It is not denied, and indeed it has been repeatedly affirmed in the course of argument by learned counsel Shri Ram Jethmalani and Shri Shanti Bhushan, appearing for the petitioners that the power to pardon rests on the advice tendered by the Executive to the President who subject to the provisions of Article 74(1) of the Constitution, must act in accordance with such advice. We may point out that the Constitution Bench of this Court held in *Manoj Ram v. Union of India*, that the power under Article 72 is to be exercised on the advice of the Central Government and not by the President on his own, and that the advice of the Government binds the Head of the State.

10. We are of the view that it is open to the President in the exercise of the power vested in him by Article 72 of the Constitution to scrutinise the evidence on the record of the criminal case and come to a different conclusion from that recorded by the court in regard to the guilt of, and sentence imposed on, the accused. In doing so, the President does not amend or modify or supersede the judicial record. The judicial record remains intact, and undisturbed. The President acts in a wholly different plane from that in which the Court acted. He acts under a constitutional power, the nature of which is entirely different from the judicial power and cannot be regarded as an extension of it. And this is so, notwithstanding that the practical effect of the Presidential act is to remove the stigma of guilt from the accused or to remit the sentence imposed on him. In *U.S.V. Bern Sutherland*, J. observed:

The judicial power and the executive power sentences are readily distinguishable. To render judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment but does not alter in qua a judgment. To reduce a sentence by amendment alters the terms of the judgment itself and is a judicial act as much as the imposition of the sentence in the first instance.

The legal effect of the pardon is wholly different from a judicial super-session of

the original sentence. It is the nature of the power which is determinative, In *Sarat Chandra Rabha v. Khagendranath Nath, Wanchoo, J.* speaking for the Court addressed himself to the question whether the order or remission by the Governor of Assam had the effect of reducing the sentence imposed on the appellant in the same way in which an order of an appellate or revisional criminal court has the effect of reducing the sentence passed by the Trial Court, and after discussing the law relating to the power to grant pardon, he said:

Though, therefore, the effect of an order of remission is to wipe out that part of the sentence of imprisonment which has not been served out and thus in practice to reduce the sentence to the period already undergone, in law the order of remission merely means that the rest of the sentence need not be undergone, leaving the order of conviction by the court and the sentence passed by it untouched. In this view of the matter the order of remission passed in this case though it had the effect that the appellant was released from jail before he had served the full sentence of three years" imprisonment and had actually served only about sixteen months" imprisonment, did not in any way affect the order of conviction and sentence passed by the court which remained as it was.and again;

Now where the sentence imposed by a trial court is varied by way of reduction by the appellant or revisional court, the final sentence is again imposed by a court : but where a sentence imposed by a court is remitted in part u/s 401 of the Code of Criminal Procedure that has not the effect in law of reducing the sentence imposed by the court, though in effect the result may be that the convicted person suffers less imprisonment than that imposed by the court The order or remission affects the execution of the sentence imposed by the court but does not affect the sentence as such, which remains what it was in spite of the order of remission.

It is apparent that the power under Article 72 entitles the President to examine the record of evidence of the criminal case and to determine for himself whether the case is one deserving the grant of the relief falling within that power. We are of opinion that the President is entitled to go into the merits of the case notwithstanding that it has been judicially concluded by the consideration given to it by this Court

22. Following the aforesaid judgment, the Supreme Court in the case of *Swaran Singh Vs. State of U.P. and Others*, held, if such power was exercised arbitrarily, mala fide or in absolute disregard of the finer canons of the constitutionalism, the by product order cannot get the approval of law and in such cases, the judicial hand must be stretched to it. In that case they held as under : -

13.....when the Governor was not posted with material facts such as those indicated above, the Governor was apparently deprived of the opportunity to exercise the powers in a fair and just manner. Conversely, the order now impugned fringes on arbitrariness. What the Governor would have ordered if he were apprised of the above facts and materials is not for us to consider now

because the Court cannot then go into the merits of the grounds which persuaded the Governor in taking a decision in exercise of the said power"

23. Yet another Bench of the Supreme Court in the case of Satpal and Another Vs. State of Haryana and Others, following the aforesaid judgment of the Apex Court in Kehar Singh's case held as under : -

6. Bearing in mind the parameters of judicial review in relation to an order granting pardon by the Governor, when we examined the case in hand, the conclusion is irresistible that the Governor had not applied his mind to the material on record and has mechanically passed the order just to allow the prisoner to overcome the conviction and sentence passed by this Court. It is indeed curious to note that the order dated 25-1-1999 clearly indicates that the Governor of Haryana is pleased to grant pardon remitting the unexpired portion of the sentence passed on prisoner Siriyans Kumar Jain confined in the Central Jail, Hissar. But the said prisoner was not confined in the Central Jail, Hissar on that date and on the other hand after obtaining the order of pardon and remission of sentence to give an appearance of compliance with the order of the Supreme Court the said Siriyans Kumar Jain surrendered before the Court of Sessions Judge, Hissar on 2-2-1999 and also was released on the very same day in view of the order of the Governor dated 25-1-1999. If by order dated 25-1-1999, the accused has already been granted pardon and there has been a remission of the sentence then there was no reason for him to go and surrender before the District Judge on 2-2-1999. That apart, the Governor has not been made aware of as to what is the total period of sentence the accused has really undergone, and if at all has undergone any sentence. When an accused is convicted of the heinous offence of murder and is sentenced to imprisonment for life the authority who has been conferred with power to grant pardon and remission of sentence under Article 161 of the Constitution must be made aware of the period of sentence in fact undergone by the said convict as well as his conduct and behaviour while he has been undergoing the sentence which would all be germane considerations for exercise of the power. Not being aware of such material facts would tend to make an order of granting pardon authority and irrational, as has been held by this Court in Swaran Singh Case."

24. Again the Supreme Court dealing with Article 161 of the Constitution of India in the case of Dhananjay Chatterjee @ Dhana Vs. State of West Bengal and Others, after referring to the aforesaid judgments held as under: -

10..... the Governor was deprived of the opportunity to exercise his power in a fair and just manner. It is true that the power under Article 161 of the Constitution is to be exercised by the Governor on the basis of the aid and advice given by the State Government. However, the material facts should have been placed before the Governor. Pursuant to our direction, the relevant file was produced before this Court. We have also perused the same and we feel that all material facts, including the mitigating factors were not placed before the Governor. The appellant's mercy petition was rejected on 16-2-1994 without

there being a proper consideration of all relevant/acts.

11. Therefore, we direct the respondent authorities to put up the mercy petition filed by the appellant on 2-2-1994 to the Governor again and bring all relevant facts to the notice of the Governor for an appropriate decision in the case.

25. The Apex Court in the case of EPURU SUDHAKAR AND ANOTHER vs GOVERNMENT OF A.P. AND OTHERS 1(2006) 8 SCC 161] has held as under: -

34. The position, therefore, is undeniable that judicial review of the order of the President or the Governor under Article 72 or Article 161, as the case may be, is available and their orders can be impugned on the following grounds:

- (a) that the order has been passed without application of mind;
- (b) that the order is mala fide;
- (c) that the order has been passed on extraneous or wholly irrelevant considerations;
- (d) that relevant materials have been kept out of consideration;
- (e) that the order suffers from arbitrariness.

CONCLUSION

26. Every civilised country recognises, and has therefore provided for the pardoning power to be exercised as an act of grace and humanity in proper cases. Without such a power of clemency, to be exercised by some department or functionary of a government, a country would be most imperfect and deficient in its political morality, and in that attribute of deity whose judgments are always tempered with mercy. In England, this power has been exercised from time immemorial, and has always been regarded as a necessary attribute of sovereignty. The power is regarded as the royal prerogative of pardon exercised by the Sovereign, generally through the Home Secretary. It is a power which is capable of exercise on a variety of grounds, for reasons of State as well as the desire to safeguard against judicial error. It is an act of grace issuing from the Sovereign. In the United states, this power is extended to the President by the United States Constitution, and in the various States and territories it is either conferred by constitutional provision or organic act, or provided for by statute, the power usually being conferred upon the Governor or upon a board of which the Governor is a member. In some instances, however, the Governor's power is so limited as to render an arbitrary exercise impossible. However, after the founding of the Republic, a pardon by the President has been regarded not as a private act of grace but as a part of the constitutional scheme. Thus, the power to pardon is a part of the constitutional scheme. It is so treated also in the Indian Republic. It has been reposed by the people, through the Constitution, in the Head of the State, and enjoys high status. It is a constitutional responsibility of great significance, to be exercised when occasion arises in accordance with the discretion contemplated by the context.

27. A pardon is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed. The pardoning power is founded on considerations of the public good, and is to be exercised on the ground that public welfare, which is the legitimate object of all punishment, will be as well promoted by a suspension as by an execution of the sentence. It may also be used to the end that justice be done by correcting injustice, as where after discovered facts convince the authority invested with the power that, there was no guilt or that other mistakes were made in the operation or enforcement of the criminal law. Executive clemency also exists to afford relief from undue harshness in the operation or enforcement of criminal law.

28. The object behind grant of pardon is two fold.

(1) Acts of leniency by pardon are administered by the executive branch of the government in the interests of society and the discipline, education, and reformation of the person convicted.-

(2) A pardon is granted on the theory that the convict has seen the error of his ways, that society will gain nothing by his further confinement and that he will conduct himself in the future as an upright, law-abiding citizen.

29. The object of imposing deterrent sentences is three

(1) to protect the community/society against callous criminals for a long time;

(2) to administer as clearly as possible to others tempted to follow them into lawlessness on a war scale if they are brought to and convicted, deterrent punishment will follow, and

(3) to deter criminals who are forced to undergo long-term imprisonment from the point of view of reformatory form of punishment.

30. Prolonged" and indefinite detention is justified not only in the name of prevention but cure. The offender has been regarded in one sense as a patient to be discharged only when a response to the treatment can be regarded as safe. Long imprisonment could be regarded as the neat response to all three requirements: it would put the miscreants behind bars for a long time; it would demonstrate that the game was not worth the candle for others. Maximum penalties, upper limits to the punishment, a judge may impose for various kinds of crimes, are essential to any system which upholds the rule of law. Objections arise only when these penalties are illogical, inconsistent, at odds with people's sense of justice.

31. In India the power to remit sentence is found in Section 433 of Code of Criminal Procedure. Therefore the said power is conferred on the State Government. The said power is also conferred on the Governor of the State under Article 161 of the Constitution of India. Section 433A controls the power of

the State Government to remit sentence in cases where the accused is sentenced to death or sentenced for life. The said provision imposes embargo on the power of the State to grant remission in as much as in those two cases, the power of remission cannot be exercised by the State Government unless and until accused has completed 14 years of sentence. It is well settled law that such statutory provision cannot control the exercise of Constitutional power by the Constitutional authority. Therefore Section 433A cannot control the power vested in the Governor under Article 161 of the Constitution. Though the statutory" power contained in Section 433A cannot control the Constitutional power conferred on the Constitutional authority under the Constitution, none the less, when the Constitutional authority exercises this Constitutional power, it has to be exercised to effectuate the rule of law. In other words, as a Rule, such Constitutional power cannot be exercised to negate the intention of the Parliament which In turn represent the will of the people of the country. The Parliament has enacted Section 433A keeping In mind the public interest and after taking note of the way the power of pardon or remission of sentence as provided u/s 433 of the Code was misused and abused by successive Governments. Therefore, when a Constitutional authority is exercising a constitutional power. It cannot ignore the society, public interest involved and the objects behind such legislation. If In spite of such legislative intent as evidenced in statutory provision the said power is to be exercised, it has to be exercised in rarest of rare cases or in exceptional cases. It follows that the reasons which prompted the President or Governor to exercise the power contrary to the statutory provisions should be discernable from the order granting such remission or pardon. Exercise of executive clemency is not a matter of privilege. It is a matter of performance of official duty. It is vested In the President or the Governor, not for the benefit of the convict only, but for the welfare of the people who may Insist on the performance of the duty. This discretion, therefore, has to be exercised on public considerations alone. An undue exercise of this power is to be deplored. Every prerogative has to be subject to the Rule of Law. That rule cannot be compromised on the grounds of political expediency. To go by such considerations would be subversive of the fundamental principles of the Rule of Law and it would amount to setting a dangerous precedent. Therefore, the power of executive clemency Is not only for the benefit of the convict, but while exercising such a power the President or the Governor, as the case may be, has to keep in mind the effect of his decision on the family of the victims, the society as a whole and the precedent it sets for the future.

32. It is now judicially recognised that prerogative power is as capable of abuse as any other power. The law has to find means of controlling it. The prerogative has many times been restricted both by judicial decision and by statute. It is for the Court to determine the legal limits of the prerogative. It includes the same requirement of reasonable and proper exercise as applies to statutory powers - though with this difference, that it cannot be based upon the presumed intention of Parliament. Prerogative is the discretionary power to be exercised for the

public good. It follows that its exercise can be examined by the Courts just as any other discretionary power which is vested in the executive. It is fairly well settled that the exercise or non-exercise of pardon power by the President or Governor, as the case may be, is not immune from judicial review. Limited judicial review is available in certain cases. The function of determining whether the act of a constitutional or statutory functionary falls within the constitutional or legislative conferment of power, or is vitiated by self-denial on an erroneous appreciation of the full amplitude of the power is a matter for the Court. If the power under Article 161 of the Constitution is exercised arbitrarily, mala fide or in absolute disregard of the finer canons of the constitutionalism, the by-product order cannot get the approval of law and in such cases, the judicial hand must be stretched to it.

33. It is also equally well settled that wide as the power of pardon, commutation and release is, it cannot run riot. All public power, including constitutional power, shall never be exercisable arbitrarily or mala fide. Ordinarily, guide-lines for fair and equal execution are guarantors of the valid play of power. All power belongs to the people, and it is entrusted by them to specified institutions and functionaries with the intention of working out, maintaining and operating a constitutional order. The power so entrusted is a power belonging to the people and reposed in the highest dignitary of the State. It has been reposed by the people through the Constitution in the Head of the State, and enjoys high status. It is a constitutional responsibility of great significance, to be exercised when occasion arises in accordance with the discretion contemplated by the context. A pardon obtained by fraud or granted by mistake or granted for improper reasons would invite judicial review. The constitutional justification for judicial review, and the vindication of the Rule of Law remain constant in all areas, but the mechanism for giving effect to that justification varies. In each case, the Courts have to ensure that the authority is used in a manner which is consistent with the Rule of law, which is the fundamental principle of good administration. In each case, the Rule of law should be the constitutional justification for judicial review. The jurisdiction of pardon under Article 161 of the Constitution of India cannot be circumscribed by the provisions contained in the Code namely Section 433A. They will certainly have due regard to the legislative intention of the Parliament evidenced by the said provision in the Code and would exercise the jurisdiction consistent with the provisions of the Code. The said Constitutional power is to be exercised to effectuate the rule of law and not for abrogating it.

34. In the case of MARU RAM vs. UNION OF INDIA AND OTHERS reported in (1981) I S.C. C. 106, it is held as under:-

94. Doubtless, the President of India under Article 72 and the State Government under Article 161 have absolute and unfettered powers to grant pardon, reprieves, remissions, etc. This power can neither be altered, modified or interfered with by any statutory provision. But, the fact remains that higher the power, the more cautious would be its exercise. This is particularly so because

the present enactment has been passed by the Parliament on being sponsored by the Central Government itself. It is, therefore, manifest that while exercising the powers under the aforesaid Articles of the Constitution neither the President, who acts on the advice of the Council of Ministers, nor the State Government is likely to overlook the object, spirit and philosophy of section 433A so as to create a conflict between the legislative intent and the executive power. It cannot be doubted as a proposition of law that where a power is vested in a very high authority, it must- be presumed that the said authority would act properly and carefully after an objective consideration of all the aspects of the matter.

35. In this context when we look at the provisions contained in Section 432 and 433 of the Code and Articles 72 and 161 of the Constitution of India, this power of pardon or remission of sentence applies to all kinds of sentence. In the aforesaid provisions no limitation is prescribed for exercise of such power. However, Section 433A of the Code puts restriction on exercise of such power by the appropriate Government in respect of a sentence of imprisonment for life or a sentence of death. The Parliament after taking note of the way the appropriate Governments exercised this power u/s 432 and 433 of the Code, to prevent abuse of such power, put restriction on exercise of such power, as provided u/s 433A. After the Section became a part of the law of the land, the Government cannot exercise their power to commute sentence contrary to the aforesaid provision. If they do it, it is arbitrary, illegal. What they cannot do under the statute, they cannot advise the President or the Governor to do and thus get over the limitation imposed on them by the Parliament. Though a Governor while exercising power under Article 161 has to act, not on his own judgments, but in accordance with the aid and advice of the Ministers, the advice to be tendered by these ministers should be in accordance with law. All public power, including constitutional power, shall never be exercisable arbitrarily or mala fide. Ordinarily, guidelines for fair and equal execution are guarantors of the valid play of power. One such guideline is the law governing the subject. The power should be exercised in accordance with law and not contrary to law. If the Government/Ministers advises the Governor to commute sentence in cases which do not fall u/s 433A of the Code, probably there is no discretion left in the Governor except to act on the aid and advice of the said Ministers and the Government and give effect to their advise. But, the same cannot be said to a case which is covered u/s 433A. If the advise given by the Ministers/Government is contrary to the Parliamentary mandate contained in the statute, which represents the will of the people, the Governor is not obliged to mechanically give effect to such advise and exercise the power of pardon. The Governor before exercise of the power conferred on him under Article 161 of the Constitution, is duty bound to apply his mind to the advise so given and the materials if any on the basis of which such advise is given. If on such application of mind, he finds that the advise tendered is contrary to law, violates a statutory provision, violates the will of the people, as reflected in the law enacted by the Parliament, he is duty bound to bring it to the notice of the Government/Ministers and give them an opportunity to retrace

their steps and mould their advice in accordance with law. If the power to be exercised under Article 161 of the Constitution is to be understood in the sense that it is not open to the Governor to take independent decision or direct release or refuse release of any one of his choice, then he has no option except to put his seal to the order of the Government however illegal it is, or unconstitutional. But, that is not the legal position.

36. The Apex Court in Maru Ram's case has categorically held that, the Governor must act not on his own judgment but in accordance with the aid and advice of the ministers. The constitutional conclusion is that the Governor is but a shorthand expression for the State Government. The State Government, whether the Governor likes it or not, can advise and act under Article 161, the Governor being bound by the advice. The action of commutation and release can thus be pursuant to a governmental decision. While exercising power under Article 161, the Governor who acts on the advice of the Council of Ministers, nor the State Government can overlook the object, spirit and philosophy behind Section 433A, so as to create a conflict between the legislative intent and the executive power. In Kehar Singh's case the Apex Court held that the power to pardon rests on the advice tendered by the Executive to the President, who subject to the provisions of Article 74(1) of the Constitution, must act in accordance with such advice. It is apparent that the power under Article 72 entitles the President to examine the record of evidence of the criminal case and to determine for himself whether the case is one deserving the grant of the relief falling within that power. They were of the opinion that the President is entitled to go into the merits of the case notwithstanding that it has been judicially concluded by the consideration given to it by this Court. In Swaran Singh's case, the Apex Court held that, when the Governor was not posted with material facts such as those indicated above, the Governor was apparently deprived of the opportunity to exercise the powers in a fair and just manner. Conversely, the order impugned fringes on arbitrariness. Again in Satpal's case, the Apex Court held, Governor had not applied his mind to the material on record and has mechanically passed the order just to allow the prisoner to overcome the conviction and sentence passed by this Court. When an accused is convicted of the heinous offence of murder and is sentenced to imprisonment for life, the authority who has been conferred with power to grant pardon and remission of sentence under Article 161 of the Constitution must be made aware of the period of sentence in fact undergone by the said convict as well as his conduct and behaviour while he has been undergoing the sentence which would all be germane considerations for exercise of the power. Again in Dhanamjoy Chatterjee's case, the Apex Court held the Governor was deprived of the opportunity to exercise his power in a fair and just manner. It is true that the power under Article 161 of the Constitution is to be exercised by the Governor on the basis of the aid and advice given by the State Government. However, the material facts should have been placed before the Governor. Therefore, they directed the authorities to put up the mercy petition filed by the appellant on 2-2-1994 to the Governor again and bring all relevant facts to the notice of the

Governor for an appropriate decision in the case. Again in Epuru Sudhakar's case, the Apex Court held, when the principles of law as noted above are considered in the factual background, it is clear that the irrelevant and extraneous materials entered into the decision making process, thereby vitiating it. The order granting remission which is impugned in the petitions is clearly unsustainable and is set aside. However, it is open to Respondents 1 to treat the petition as a pending one for the purpose of reconsideration. It shall be open to the Governor to take note of materials placed before him by the functionaries of the State, and also to make such enquiries as considered necessary and relevant for the purpose of ascertaining the relevant factors otherwise.

37. From the aforesaid judgments of the Apex Court it is abundantly clear that though the Governor while exercising the power under Article 161 of the Constitution, has to exercise the same on the aid and advice of the Government, he cannot mechanically pass an order granting pardon. After such advice is given he is under an obligation to apply his mind and then exercise the power in a fair and just manner. If the advice is contrary to law, if the advice is based on facts which are extraneous to the exercise of such power and would not constitute a sufficient justification for exercise of power under Article 161 of the Constitution, he owes a duty to bring it to the notice of the Government the illegality, impropriety in the advice given. While exercising power under Article 161 of the Constitution, the Governor who acts on the advice of the Council of Ministers, or the State Government, can overlook the object, spirit and philosophy behind Section 433A so as to create a conflict between the legislative intent and the executive power. Where a power is vested in a very high authority, it must be presumed that the said authority would act properly and carefully after an objective consideration of all aspects of the matter. The order of the Governor cannot be subjected to judicial review on its merits except within the strict limitations defined in Maru Ram's case. The function of determining whether the act of a constitutional or statutory functionary falls within the constitutional or legislative conferment of power, or is vitiated by self-denial on an erroneous appreciation of the full amplitude of the power is a matter for the Court. Therefore, the area of the Governor's power under Article 161 falls squarely within the judicial domain and can be examined by the Courts by way of judicial review. It is in this background we have to look into the facts of the case and decide whether the said power is properly exercised.

ON FACTS

38. The records produced by the State discloses that on 24.07.2006, the Additional Director General of Police and Inspector General of Prisons, made recommendation for release of 74 prisoners during the Independence Day celebrations of the year 2006. In the recommendation, he has suggested that 53 prisoners who have completed 10 years of sentence, one prisoner who is aged about 65 years and who has completed 5 years of imprisonment, two women who are aged about 50 years and who have completed three years of

imprisonment and another nine prisoners who have completed 50% of their sentence, could be considered for remission of sentence. Thus, in all the recommendation was to remit sentence of 74 persons. On 10 occasions in the past, exercising the power under Article 161 of the Constitution, the prisoners were released. It is also stated that before that remission could be done, first, approval of the concerned departmental Minister is required. Thereafter approval of the cabinet is required. After the approval of the cabinet, the approval of the Governor under Article 161 of the Constitution is required. Therefore, a note was put up before the Home Minister. When the note was put up before the Home Minister on 27.07.2006. he called for a meeting in his chambers on 28.07.2006 at 12.30 p.m. The record discloses that there was a discussion. After the discussion, they informed the same to the Chief Minister over phone. The opinion of the Department was explained. The Chief Minister suggested that prisoners who had completed 8 years of imprisonment, are to be released. It is stated that the same should not be quoted as an example in future, for, remission of sentence on the occasion of Independence Day as well as Suvarna Karnataka Day. The relevant note which is In Kannada, reads as under:

In view of the aforesaid suggestion of the Chief Minister, as against 74 prisoners who were entitled to remission, the persons who were entitled to remission, in all, became 309, of whom, 285 persons were convicted for life, but who had completed 8 years of imprisonment. The file also contains the letter written by the Additional Inspector General of Police and Inspector General of Prisons dated 02/03-08-2006 addressed to the Secretary of Prisons, enclosing the list of prisoners for premature release on 15.08.2006 on the occasion of Independence Day celebration. In the column meant for conduct during prison, it is stated that it is "satisfactory" Thereafter, the matter was brought before the cabinet and the cabinet approved the said proposal. Thereafter, the matter was submitted to the Governor of Karnataka for his approval. While approving the remission, the Governor has made the following observations:

Proceed on the assumption that the Home Department did consult the law Department before submitting to the cabinet approval The file does not make it clear. The Supreme Court has also laid down certain parameters in this regard and I take it that they have been guided by them. Approval under this Article of the Constitution as recommended by the cabinet.

The file is returned back to Government accordingly.

39. From the aforesaid material, what follows is as under: -

(1) There is no record to show the Home Department did take the opinion of the Law Department. As rightly observed by the Governor, the file does not make it clear. During the agreement, the learned Government Advocate was not able to throw any light on this aspect. The Governor proceeds on the assumption that the Law Department has been consulted. But, he did not have the benefit of their opinion, while he accorded approval.

(2) Secondly, the Governor proceeded on the basis that the Government has taken into consideration the parameters laid down by the Supreme Court. It shows that the Governor did not personally take note of the parameters prescribed by the Supreme Court, which he ought to have done, which is a condition precedent for exercise of the prerogative power under Article 161 of the Constitution.

(3) The record produced in the case do not disclose that the Government looked into the law laid down by the Supreme Court, as set out, in the earlier paragraphs of the judgment.

(4) The Government has over looked the object, spirit, and philosophy behind Section 433A of the Code. Section 433A, imposes an embargo on the power of the State Government to commute the sentence, in the case of sentence of death and sentence of life, unless he has served fourteen years of imprisonment. In the instant case 285 persons sentenced for life, but who had completed only eight years of imprisonment, are granted commutation of sentence, which is on the face of it illegal, against the will of the people as reflected in the said provision enacted by the Parliament.

(5) The note discloses that though this remission of sentence is made on the occasion of Independence Day, and Golden Jubilee Celebration of Karnataka Rajyothsava, it was made clear that in future the same shall not be cited as a precedent. It is implicit in the said statement, the celebration of Independence Day or Golden Jubilee Celebrations of the State cannot constitute a ground or reason to exercise the prerogative power of commutation of sentence. The reason is obvious. The Independence Day is celebrated throughout the country to mark the great occasion when the country and its people became free from the shackles of the foreign rule. That is the day we have to remember, respect and salute the noble, courageous souls who sacrificed every thing belonging to them including their life for freedom of the country and for the future of this Country. We are the beneficiaries of the same. Certainly on such a great occasion one cannot think of setting free those persons who committed heinous crimes against humanity, society and who took away the life of law abiding citizens of the country. It would be an insult to those great men who sacrificed their life for liberation of this Country, if independence is to be celebrated in the aforesaid manner. Similarly, Karnataka Rajyothsava Day is the day on which Kannada speaking people who were scattered in five different places in the country were brought together and unification was done, as a result of which the present State of Karnataka came into existence. That is the day when Kannada speaking people rejoice about their language, culture and their achievements. Certainly that day cannot be turned into a day of granting freedom to people who killed Kannada speaking people and rendered their family members destitutes. Therefore, there is no nexus between these two days and exercise of power of commutation of sentence.

(6) In the column meant for "conduct during prison" it is stated that it is

"satisfactory". It is on that basis this commutation of sentence has been granted. Merely because the conduct of a prisoner is satisfactory, is no justification for commuting his sentence to a period less than what is imposed. If the conduct of a person is satisfactory for the period prescribed u/s 433A, may be that is one of the factors which has to be taken into consideration while granting the remission. That by itself cannot be a ground for remission.

(7) A distinction is sought to be made between men and women, i.e., on the ground of sex. The discrimination is, men who had completed 8 years of imprisonment and women who had completed 4 years of imprisonment are held to be entitled to the benefit of remission. It is contrary to the Constitutional mandate and is hit by Article 14 of the Constitution of India.

(8) The Government and the Governor has not kept in mind the effectiveness of criminal justice administration in the country. At present the rate of conviction is hardly 7%. That is one of the reason why there is spurt in criminal activities and the criminals who have the support of muscle, money, power and even status, are roaming in the streets without any fear of law. These criminal trials take years before an order of conviction is passed which is subject to appeal to the High Court as well as to the Supreme Court. It is in this background, if persons who are sentenced to undergo life Imprisonment are sought to be released even before the expiry of 14 years prescribed u/s 433A of the Code, which represents the will of the people of this Country, then there will be no fear in the society about the State and its criminal justice delivery system. It would lead to situation where law abiding, hapless, peace loving citizens of this Country have to live in constant fear of these criminals. Certainly the release of such persons before the expiry of the minimum period of sentence prescribed under law is not in the interest of public. On the contrary it is against the interest of the public.

40. Therefore, it is clear that the Governor has not applied his mind. He has simply acted on the advise of the cabinet and proceeds on the assumption that before coming to the conclusion that these prisoners should be released, the Government has followed all the procedure that is prescribed under the Rules without actually verifying the same personally which he ought to have done. As is clear from the material on record, it is not clear with whom the Home Minister had discussion in his chambers and what is that he communicated to the Chief Minister and on what basis the Chief Minister in turn suggested to release persons who have undergone eight years of imprisonment in respect of male prisoners and four years imprisonment in respect of female prisoners and on what basis the said suggestion was made. All this is done over a phone call. Certainly this is not the manner in which the prerogative power is to be exercised. Thereafter, the record discloses that the matter was placed before the cabinet, which has approved it and the only material to show the conduct of these accused is, the statement prepared by the Additional Inspector General of Police and Inspector General of Prisons, where it is recorded that their conduct in jail is "satisfactory".

41. Therefore, it is clear that the Parliament by enacting Section 433A has rejected reformatory character of punishment in respect of offences contemplated by it in view of the prevailing conditions in the country. Legislature understands the needs and requirements of its people much better than the Courts. If the Parliament decides to enact a legislation for the benefit of the people, such a legislation must be meaningfully construed and given effect to so as to subserve the purpose for which it is meant. The Constitutional validity of Section 433A has been upheld by the Apex Court. The reformatory theory cannot override statutory and Constitutional provisions. It has to be given effect to within the parameters of law. The Constitutional powers shall never be exercised arbitrarily or mala fide or on extraneous or wholly irrelevant considerations. Exercise of executive clemency is not a matter of privilege. It is a matter of performance of official duty. Every prerogative has to be subject to the Rule of Law. That Rule cannot be compromised on the grounds of political expediency. Prerogative is the discretionary power to be exercised in the public good. Therefore, the aforesaid material and in particular the order passed by the Governor clearly demonstrates that there is no application of mind, relevant materials have not been kept in mind, the order has been passed on extraneous or wholly irrelevant considerations. 285 prisoners who were undergoing life imprisonment, who had completed just 8 years of imprisonment are released by commutation of sentence contrary to the mandate of Section 433A of the Code of Criminal Procedure. Therefore, the order passed is non est in the eye of law and requires to be quashed.

42. It is to be noticed that by the impugned order 285 persons who are convicted to undergo imprisonment for life have been released prematurely on completion of 8 years of imprisonment. But it is only the commutation of sentence of the third respondent herein, which is challenged before this Court. Remaining 284 persons are not before the Court. Therefore, this order is to be confined only to the third respondent.

43. That takes us to the next question, what should happen to the remaining 284 persons whose commutation of sentence is also void ab initio for the same reasons. Whether the Government and the Governor have the power to cancel the suspension or remission of the sentence granted. It is in this context it is necessary to look at Section 432 (3) of the Code of which reads as follows :-

432, (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.

44. The said question did arise for consideration by the Apex Court in the *Epuru Sudhakar*'s case, wherein it has been held as under:-

45. So far as the second aspect relating to withdrawal is concerned, it is submitted that though there is no specific reference in this regard in either Article 72 or Article 161 of the Constitution yet by application of the provisions of the General Clauses Act, 1897 (in short "the General Clauses Act") the same would be permissible. It is also highlighted that similar provisions are specifically provided in Sections 432 and 433 CrPC. Merely because Article 72 and Article 161 of the Constitution have not been so provided specifically that would not mean that such power was not intended to be exercised.

46. Sections 14 and 21 of the General Clauses Act deal with powers conferred to be exercisable from time to time and a power to issue, to include power to add to, amend, vary or rescind notifications, orders, rules or bylaws. They read as follows:-,

14. Powers conferred to be exercisable from time to time.- (1) Where, by any Central Act or regulation made after the commencement of this Act any power is conferred, then, unless a different intention appears, that power may be exercised from time to time as occasion requires.

(2) This section applies also to all Central Acts and regulations made on or after the fourteenth day of January, 1887,

21. Power to issue, to include power to add to, amend, vary or rescind notifications, orders, rules or bye-laws. -Where, by any central Act or regulation, a power to issue notifications, orders, rules, or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any) to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued.

47. The scope and ambit of Sections 14 and 21 of the General Clauses Act have been analysed by this Court in *Sampat Prakash v. State of J& K*. It was inter alia held in AIR para 11 as follows: (SCR p. 375 A-B)

[11.]... This provision is clearly a rule of interpretation which has been made applicable to the Constitution in the same manner as it applies to any Central Act or regulation. On the face of it, the submission that Section 21 cannot be applied to the interpretation of the Constitution will lead to anomalies which can only be avoided by holding that the rule laid down in this section is fully applicable to all the provisions of the Constitution.

49. The position in USA is summed up in *Corpus Juris Secundum*, Vol. 67.A p.21, para 16 as follows:

There is authority for the view that a pardon may be held void where it appears from the pardon that the pardoning power was misinformed; but there is also authority for the view that intentional falsehood or suppression of truth is necessary, and that misinformation given in good faith and in the belief in its truth is insufficient to avoid a pardon....A pardon procured by false and fraudulent representations or by intentional suppression of the truth is void, even

though the person pardoned had no part in perpetrating the fraud.

50. Inevitable conclusion, therefore, is that if it comes to the knowledge of the Government that the pardon has been obtained on the basis of manifest mistake or patent misrepresentation or fraud, the same can be rescinded or cancelled.

45. Therefore, the Government and the Governor is not helpless. To uphold the rule of law and in public interest, they could take remedial steps as set out above and do the needful in the matter so that the message would be loud and clear that in future, such commutation of sentence contrary to the statutory provisions and without justification would not benefit convicts.

46. This Court appreciates the assistance rendered by Mr. N. B. Bhat, Advocate, as amicus curiae in this matter. In the result, I pass the following order:-

(a) Writ Petition is allowed.

(b) The impugned order granting commutation of sentence to the third respondent is hereby set aside.

(c) The first respondent is directed to take appropriate steps for arrest of respondent No. 3 without warrant, and remand him to undergo the unexpired portion of the sentence.

(d) No costs..