
(2014) 02 MAD CK 0183
In the Madras High Court
Case No : Writ Petition No. 16625 of 2011

S.A. Miyajan

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 05-02-2014

Acts Referred:

Constitution of India, 1950 — Article 14 142 161 20(1) 21
Criminal Procedure Code, 1973 (CrPC) — Section 401 402 428 432 433
General Clauses Act, 1897 — Section 3(60)(b) 3(8)(b)
Government of India Act, 1935 — Section 11 11(5)(d) 295 295(1)
Penal Code, 1860 (IPC) — Section 302 54 55

Citation : (2014) 2 MLJ 64

Hon'ble Judges : R.K. Agrawal, C.J;M. Sathyanarayanan, J

Bench : Division Bench

Advocate : P. Wilson, A.S.G. assisted by Mr. M. Devendran, for the Respondent

Final Decision : Dismissed

Judgement

1. The writ petitioner, as party-in-person, has filed this writ petition praying for issuance of a Writ of Certiorari calling for the records relating to the pardoning power of His Excellency, the President of India, regarding death sentence relating to Article 72(1)(c) of the Constitution of India and quash the same. In the affidavit filed in support of this writ petition, the petitioner would aver among other things that he is a senior citizen and social worker and he is interested in doing special work affecting the society at large and to suggest ways and means to rectify the mistakes and his primary work is confined for the welfare of the society throughout the country. The petitioner would further aver that on an earlier occasion, he took up a public cause with regard to the abstinence on work by advocates and in this regard, he has filed W.P. No. 33028/2007 and this Court, by order dated 01.09.2008, has directed the respondents therein to desist from doing anything which would result in abstinence from courts and the efforts taken by the petitioner was also appreciated.

2. According to the petitioner when an accused involved in a murder case, after

full fledged trial, has been convicted u/s 302 of IPC and he is liable to be hanged till he is dead and once the said sentence attained finality, it cannot be interfered under the guise of invocation of Article 72(1)(c) of the Constitution of India and it is also violative of preamble of the Constitution as well as in the interest of justice. The petitioner would further contend that no time limit has been prescribed under Article 72(1)(c) of the Constitution of India and no criteria as to how the said power is to be exercised is also provided in the said Article and it may lead to arbitrariness and unreasonableness on the part of the executive, which would ultimately frustrate the penal system. The petitioner also contended that pardoning power under the said Article 72(1)(c) of the Constitution of India cannot take away the powers of the criminal courts and under the guise of said power, death sentence awarded after full fledged trial cannot be modified or commuted and therefore, he has come forward with this writ petition. A perusal of the affidavit filed in support of this writ petition would disclose that the writ petitioner wants this Court to declare that Article 72(1)(c) as ultra vires of the Constitution.

3. Counter affidavit has been filed on behalf of the respondents wherein it has been submitted among other things that the powers of the President under Article 72 of the Constitution, are discretionary and it cannot be taken away by any statutory provision and it cannot be altered, modified or interfered with, in any manner whatsoever by any statutory provision or authority and there is no limitation for the exercise of the said power and consequently, this Court has no jurisdiction to quash or review the powers vested with the President under Article 72 of the Constitution. It is further stated in the counter affidavit that consideration of mercy petition involves constitutional process and therefore, it is a time consuming one and hence, it cannot be termed as violative of fundamental rights. Counter affidavit also refers to the report of the Law Commission of India of the year 1967 and it is further stated that no fixed period of delay could be held to make the sentence of death unexecutable and hence no time limit can be prescribed for the disposal of mercy petitions. Reference was also made to Maru Ram and Others Vs. Union of India (UOI) and Others, and it is further stated that presidential power acts as a safety value in exceptional cases where the legal system fails to deliver a morally acceptable result and the said power intends to secure public welfare and the pardoning power has become virtually the only way that a sentence, once final, can be reconsidered and, in appropriate cases, reduced. In para. 4.7 of the counter affidavit, statistics with regard to mercy petitions has been given wherein it has been stated among other things that till 31.12.2011, 27 mercy petitions were submitted/resubmitted to the President's Secretariat and the President of India has decided 1 mercy petition in November 2009, 4 mercy petitions in 2010 and 8 mercy petitions till 31.12.2011 and thus, a total of 13 mercy petitions have been decided by the President since November 2009. As regard pendency, it is stated that as on 31.12.2011, 20 mercy petitions are pending under Article 72 of the Constitution; out of which 16 are pending with President's Secretariat and 4 are pending with

Ministry of Home Affairs including the 3 mercy petitions which were received in 2011. Therefore, the second respondent prays for dismissal of this writ petition.

4. The party-in-person, apart from making submissions based on the averments made in the writ petition, has submitted that while exercising the power of pardoning, the interest and welfare of the society, especially the public at large, has not at all been taken into consideration, no guidelines have been enumerated and in what circumstances, the said power can be exercised. The party-in-person further submitted that under the guise of Presidential powers of pardon, murderers are allowed to escape and the case of victims become casualty and the final decisions arrived by the Courts, which were based upon appreciation of oral and documentary evidence and other materials, is being set at naught under the guise of exercising of the said power. Lastly, it is submitted by the party-in-person that there is an unexplained and unjustifiable delay in considering the mercy petitions which enable the murderers to challenge the same before the Court of law and if this Court ultimately holds that Article 72 shall remain, appropriate direction may be issued for fixing up the time limit for considering and disposal of mercy petitions.

5. Per contra, Mr. P. Wilson, learned Additional Solicitor General-II, with regard to pardoning power, invited the attention of this Court to Section 295(1) of the Government of India Act, 1935 wherein power was conferred on the Governor General for suspension, remission or commutation of sentence for all offences committed within the province and the Governor General and Provincial Governors have also similar powers u/s 402-A of the old Criminal Procedure Code. The learned Additional Solicitor General has also invited the attention of this Court to the Constituent Assembly Debates and would submit that Article 72 was numbered as Article 59 in the Draft Constitution and an amendment was proposed and moved by Mr. Tajamul Husain as Amendment No. 1286 wherein he has contended that the President alone should have the power of suspension, remission or commutation of sentence and the said power shall not vest with the Governor.

6. Dr. B.R. Ambedkar, in response to the said Amendment, has explained the intention behind the Draft Article 59 and stated among other things that the Drafting Committee has not seen any very strong arguments for taking away the power from the Governor and all the offences committed in the particular locality and the concerned Home Minister would be advising the Governor on a mercy petition of an offender who has been sentenced to death and no harm would be done if the powers, the Governor now enjoys, is left with him. Dr. B.R. Ambedkar further answered that a safeguard is provided and in the event of rejection of mercy petition by the Governor, it is always open, under the provisions of this Article, for the offender to approach the President with another mercy petitioner and try his luck and therefore, there is no great violation of any fundamental principle involved or any inconvenience that is likely to arise if the provisions in the draft Article are retained as they are. Ultimately, the amendment moved by

Mr. Tajamul Husain was rejected and Article 59 in the Draft Constitution became Article 72 in the Constitution of India. The learned Additional Solicitor General would further submit that interpretation of the said Article came up for consideration before the Hon'ble Supreme Court of India in the following decisions:

1. K.M. Nanavati Vs. The State of Bombay,
2. Maru Ram and Others Vs. Union of India (UOI) and Others,
3. Kehar Singh and Another Vs. Union of India (UOI) and Another,
4. State of Punjab and others Vs. Joginder Singh and others,
5. Swaran Singh Vs. State of U.P. and Others,
6. Satpal and Another Vs. State of Haryana and Others,
7. Delhi Administration (Now N.C.T. of Delhi) Vs. Manohar Lal,
8. Kamalanantha and Others Vs. State of Tamil Nadu,
9. Epuru Sudhakar and Another Vs. Govt. of A.P. and Others, and
10. Devender Pal Singh Bhullar Vs. State of N.C.T. of Delhi,

7. It is the submission of the learned Additional Solicitor General that the scope and ambit of powers of the President under Article 72 of the Constitution has been considered in extenso in the above cited decisions wherein the validity has been upheld and would further submit that judicial review of the order of the President under Article 72 and of the Governor under Article 161 of the Constitution, is also available and the orders passed in exercise of powers under the said Articles can be challenged on the following grounds, namely,

- (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; and
- (e) that the order suffers from arbitrariness,

and therefore, it cannot be said that the powers exercisable under Article 72 of the Constitution are untrammelled and bristle with arbitrariness and the President of India is also entitled to reappraise the findings rendered by the Courts and he acts on the advise of the Council of Ministers. It is the further submission of the learned Additional Solicitor General that a conviction recorded by the Court is not set aside, but only the sentence and therefore, the stigma of sentence continues to attach with the concerned individual. Insofar as the delay in considering the mercy petition is concerned, it is submitted by the learned Additional Solicitor

General that no time limit can be fixed for considering the mercy petition as the Article itself does not contain any limitation as to the time in which, the said power is to be exercised and the Hon'ble Supreme Court of India even in the latest decision in *Devender Pal Singh Bhullar Vs. State of N.C.T. of Delhi*, has not fixed any time limit for the consideration of mercy petition. The learned Additional Solicitor General also invited the attention of this Court to the decisions of foreign Courts, namely, United States of America, England, New Zealand, France and Japan and would submit that the present writ petition lacks merit and substance and prays for dismissal of the writ petition.

8. In response to the said submission, the petitioner/party-in-person submitted that mercy or clemency cannot be shown to murderers as they had no regard for law and their continuous existence are harmful to the society at large and the power of pardon would definitely amounts to interference of the functioning of the judiciary and it is against the basic feature and preamble of the Constitution of India and prays for striking down, Article 72 of the Constitution of India.

9. This Court bestowed its best attention to the submissions made by the petitioner/party-in-person, the learned Additional Solicitor General and also the decisions cited before it.

10. In *Minister of Home Affairs and Another v. Collins MacDonald Fisher and Another* (1980 PC 319), the facts of the case would disclose that a Jamaican mother of four illegitimate children, all born in Jamaica, married a Bermudian in 1972 and all of them took up residence in Bermuda in the year 1975 and at all material times the children were below 18 years. In the year 1976, the Minister of Labour and Immigration ordered the children to leave Bermuda and the mother and her husband applied to the Supreme Court to quash the order and prayed for a declaration that the children were deemed to belong to Bermuda and the said prayer was declined. The mother and her husband filed an appeal and the Court of Appeal by a majority view held that the children were deemed to belong to Bermuda by virtue of Section 11(5)(d) of the Constitution and the same is extracted below:

Section 11 of the Constitution of Bermuda provides:

(5) For the purposes of this section, a person shall be deemed to belong to Bermuda if that person (a) possesses Bermudian status;.... (c) is the wife of a person to whom either of the foregoing paragraphs of this subsection applies not living apart from such person.... or (d) is under the age of 18 years and is the child, stepchild or child adopted in a manner recognized by law of a person to whom any of the foregoing paragraphs of this subsection applies. The Minister of Home Affairs and Another, aggrieved by the same, preferred an appeal before the Privy Council and the Privy Council considered among other things the interpretation of a Constitutional instrument and held as follows:

When therefore it becomes necessary to interpret the subsequent provisions of Chapter I in this case section 11 the question must inevitably be asked whether

the appellants" premise, fundamental to their argument, that these provisions are to be construed in the manner and according to the rules which apply to Acts of Parliament, is sound. In their Lordships" view there are two possible answer to this. The first would be to say that, recognizing the status of the Constitution as, in effect, an Act of Parliament, there is room for interpreting it with less rigidity, and greater generosity, than other Acts, such as those which are concerned with property, or succession, or citizenship. On the particular question this would require the court to accept as a starting point the general presumption that child means legitimate child but to recognize that this presumption may be more easily displaced. The second would be more radical it would be to treat a constitutional instrument such as this as sui generic, calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law.

It is possible that, as regards the question now for decision, either method would lead to the same result. But their Lordships prefer the second. This is in no way to say that there are no rules of law which should apply to the interpretation of a Constitution. A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedom with a statement of which the Constitution commences. In their Lordships" opinion this must mean approaching the question what is meant by child with an open mind. Prima facie, the stated rights and freedoms are those of every person in Bermuda. This generality underlies the whole of Chapter I which, by contrast with the Bermuda Immigration and Protection Act, 1956, contains no reference to legitimacy, or illegitimacy, anywhere in its provisions. When one is considering the permissible limitations upon those rights in the public interest, the right question to ask is whether there is any reason to suppose that in this context, exceptionally, matters of birth, in the particular society of which Bermuda consists, are regarded as relevant.

(emphasis supplied)

Ultimately, the Privy Council upheld the majority view of Court of Appeal and dismissed the appeal preferred by the Minister of Home Affairs, Bermuda.

11. In AIR 1939, Federal Court 1, a special reference was made his Excellency, the Governor General, u/s 213 of the Constitution Act in the following terms:

Is the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, or any of the provisions thereof, and in what particular or particulars,

or to what extent, ultra vires the Legislature of the Central Provinces and Berar?

While answering the reference, the Federal Court has taken into consideration, the judgment reported in (1936) AC 578 at pg. 614 and observed as follows:

The Judicial Committee have observed that a Constitution is not to be construed in any narrow and pedantic sense per Lord Wright in (1936) AC 578 at p. 614. The rules which apply to the interpretation of other statutes apply, it is true, equally to the interpretation of a constitutional enactment. But their application is of necessity conditioned by the subject-matter of the enactment itself; and I respectfully adopt the words of a learned Australian Judge:

Although we are to interpret the words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting,- to remember that it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be (1908) 6 Com. LR 469, [Attorney-General for New South Wales v. Brewery Employees Union], per Higgins J. at p. 611.

Especially is this true of a federal constitution, with its nice balance of jurisdictions. I conceive that a broad and liberal spirit should inspire those whose duty it is to interpret it; but I do not imply by this that they are free to stretch or pervert the language of the enactment in the interests of any legal or constitutional theory, or even for the purpose of supplying omissions or of correcting supposed errors. A Federal Court will not strengthen, but only derogate from, its position, if it seeks to do anything but declare the law; but it may rightly reflect that a Constitution of Government is a living and organic thing, which of all instruments has the greatest claim to be construed *ut res magis valeat quam pereat* (an instrument shall be considered favourably).

The reference was answered by the stating that Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, is not ultra vires the legislature of the Central Provinces and Berar and it is also the opinion of the whole Court.

12. In a celebrated decision in *I.C. Golak Nath and Others Vs. State of Punjab and Another*, , three writ petitions were filed challenging the validity of the Constitution (17th Amendment) Act, 1964 and 11 Judges Bench was constituted to decide the said question. While dealing with the issue, the interpretation of Constitution and essential distinction between Constitution and Statutes arose for consideration and in Para. 44 it has been held as follows:

44.... There is an essential distinction between Constitution and Statutes. Comparatively speaking, Constitution is permanent; it is an organic statute; it grows by its own inherent force. The constitutional concepts are couched in elastic terms. Courts are expected to and indeed should interpret, its terms without doing violence to the language to suit the expanding needs of the

society. In this process and in a real sense they make laws. Though it is not admitted, the said role of this Court is effective and cannot be ignored. Even in the realm of ordinary statutes, the subtle working of the process is apparent though the approach is more conservative and inhibitive. In the constitutional field, therefore, to meet the present extraordinary situation that may be caused by our decision, we must evolve some doctrine which has roots in reason and precedents so that the past may be preserved and the future protected.

13. The Privy Council in *Minister of Home Affairs and Another v. Collins MacDonald Fisher and Another* (1980 PC 319) observed that the Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a Court of law and respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language.

14. The Hon'ble Supreme Court of India in *L.C. Golak Nath* case (cited supra) while considering the essential distinction between Constitution and Statutes observed that Courts are expected to and indeed should interpret, its terms without doing violence to the language to suit the expanding needs of the society. As pointed out earlier the power of pardon was also vested with the Governor General as well as to the Provincial Governors in terms of Section 295(1) of the Government of India Act, 1935 as well as Section 402-A of the old Criminal Procedure Code, prior to independence.

15. After independence, Constituent Assembly was constituted to frame the constitution and in the Draft Constitution, the present Article 72 was numbered as Article 59 and only amendment was proposed to the said Article by Mr. Tajamul Husain stating that the said powers should not be vested with the Governor and only with the head of the federal, namely, the President. Dr. B.R. Ambedkar explained the purpose behind the said Article especially the power vested with the Governor to grant pardon and ultimately, the amendment moved by Mr. Tajamul Husain was rejected. Thus, even prior to independence, the power of pardon was available to the Governor General as well as the Provincial Governors and after independence, the power is vested with the President under Article 72 of the Constitution and with the Governor, under Article 161 of the Constitution of India.

16. It is very pertinent to point out at this juncture that no amendment was brought forth to the said article except for the substitution of the word *Raj Pramuk* with the word *Governor*. The above cited decision has also laid down the proposition that respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language and the Courts are expected to and indeed should interpret, its terms without doing violence to the language to suit the expanding needs of the society.

17. As regards placing reliance upon debates in the Constituent Assembly debates in the Parliament, the original view was that speeches made by the

members of the Constituent Assembly in the course of the debates on the draft Constitution cannot be admitted as extrinsic aid to the construction of the Constitution, however, the said rigid view was slowly given up subsequently and reference was made to the debates in the Constituent Assembly by the Hon"ble Supreme Court of India in the following decisions:

(i) A. V. S. Narasimha Rao and Others Vs. The State of Andhra Pradesh and Another,

(ii) Union of India (UOI) Vs. Shri Harbhajan Singh Dhillon,

(iii) Indra Sawhney etc. etc Vs. Union of India and others, etc. etc.,

18. The view expressed by the Hon"ble Supreme Court of India in the above cited decisions is that debates in the Constituent Assembly may be relied upon to interpret a provision in the Constitution.

19. In K.M. Nanavati Vs. The State of Bombay, , the question arose for consideration before the Constitution Bench with regard to extent of power conferred on the Governor of a State under Article 161 of the Constitution; and whether the order of the Governor of Bombay dated 11.03.1960, impinges on the judicial powers of the Supreme Court and particular reference to its powers under Article 42 of the Constitution. The Hon"ble Supreme Court of India has traced the power of Constitution and held as follows:

25. 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 Article 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 some vests both in this court and the Governor, and so the field covered by the said power entrusted to this court under Article 142 can also be covered by the executive power of the Governor under Article 161, and that arises 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.

26. 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 Rule 5 of Order 21 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 sub judice in this court.

20. In *Maru Ram and Others Vs. Union of India (UOI) and Others*, , the validity of Section 433A CrPC came up for consideration and the power under Articles 72 and 161 of the Constitution and the Hon'ble Supreme Court of India has held as follows:

57. We now move on to the second contention which deals with the power of remission under the Constitution and the fruits of its exercise vis-a-vis Section 433-A. Nobody has a case-indeed can be heard to contend-that Articles 72 and 161 must yield to Section 433-A. Cooley has rightly indicated that "where the pardoning power is vested exclusively in the top executive any law which restricts the power is unconstitutional". Rules to facilitate the exercise of the power stand on a different footing. The Constitution is the supreme lex and any legislation, even by Parliament, must bow before it. It is not necessary to delve into the details of these two articles; nor even to trace the antiquity of the royal prerogative which has transmigrated into India through the various Westminster statutes, eventually to blossom as the power of pardon vested in the President or the Governor substantially in overlapping measure and concurrently exercisable.

58. The present provisions (Sections 432 and 433) have verbal verisimilitude and close kinship with the earlier Code of 1898 (Section 401 and 402). Likewise, the constitutional provisions of today were found even in the Government of India Act, 1935. Of course, in English constitutional law, the sovereign, acting through the Home Secretary, exercises the prerogative of mercy. While the content of the power is the same even under our Constitution, its source and strength and, therefore, its functional features and accountability are different. We will examine this aspect a little later. Suffice it to say that Articles 72 and 161 are traceable to Section 295 of the Government of India Act, 1935. The Central Law Commission has made certain observations based on *Sarat Chandra Rabha and Others Vs. Khagendranath Nath and Others*, to the effect that the effect truncate its execution. There is no dispute regarding this branch of pardon jurisprudence. What is urged is that by the introduction of Section 433-A, Section 432 is granted a permanent holiday for certain classes of lifers and Section 433(a) suffers eclipse. Since Sections 432 and 433(a) are a statutory expression and modus operandi of the constitutional power, Section 433-A is ineffective because

it detracts from the operation of Sections 432 and 433(a) which are the legislative surrogates, as it were, of the pardon power under the Constitution. We are unconvinced by the submissions of counsel in this behalf.

.....

60. Even so, we must remember the constitutional status of Articles 72 and 161 and it is common ground that Section 433-A 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 433-A the President and the Governor continue to exercise the power of commutation 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 that advice. The action of communication 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 authorize 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 or 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 foundational 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 *Samsher Singh Vs. State of Punjab and Another*, . So, we agree, even without reference to Article 367(1) and Sections 3(8)(b) and 3(60)(b) of the General Clauses 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-a-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 Governor is but a shorthand expression for the State Government and the President is the abbreviation for the Central Government.

Ultimately in Para. 72, the findings were formulated:

72. We conclude by formulating our findings:

(1) We repulse all the thrusts on the vires of Section 433-A. 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 reformation. But ours is to construe, not construct, to decode, not to make a code.

(2) We affirm the current supremacy of Section 433-A 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 433-A, by nullifying wholly or partially these prior 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 433-A contravenes Article 20(1) of the Constitution.

(6) We follow *Gopal Vinayak Godse Vs. The State of Maharashtra and Others*, to hold that imprisonment for life lasts until the last breath, the 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 433-A, 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 that 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 433-A 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, that short sentencing legislations, if any, will entitle a prisoner to claim release thereunder if his conviction by the court of first instance was before Section 433-A was brought into effect.

(8) The power under Article 72 and 161 of the Constitution can be exercised by the Central and State Governments, not by the President or Governor on 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 s. 433A, they will override s. 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 guidelines under Articles 72/161 and orders for release passed. We cannot fault the Government, if in some intractably savage delinquents, s. 433A is itself treated as a guideline for exercise of Articles 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 to interpret the Section as to intensify inner tension and taboo intermissions of freedom is to do violence to language and liberty.

21. In *Kehar Singh and Another Vs. Union of India (UOI) and Another*, the scope of Article 72 and the power of the President to grant pardon came up for consideration and the Constitutional Bench of the Hon'ble Supreme Court of India has considered the said issue in extension and held as follows:

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 scrutinize 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. Benz* 75 L. Ed. 354 at 358 Sutherland, J. observed:

The judicial power and the executive power over 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 it qua a judgment. To reduce a sentence by amendment alters the terms of the judgment itself and is judicial act as much as the imposition of the sentence in the first instance.

The legal effect of a pardon is wholly different from a judicial supersession of the original sentence. It is the nature of the power which is determinative. In *Sarat Chandra Rabha and Others Vs. Khagendranath Nath and Others*, , Wanchoo, J. speaking for the Court addressed himself to the question whether the order of 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 a 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 appellate 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 of 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.

11. In the course of argument, the further question raised was whether judicial review extends to an examination of the order passed by the President under Article 72 of the Constitution. At the outset we think it should be clearly understood that we are confined to the question as to the area and scope of the President's power and not with the question whether it has been truly exercised on the merits. Indeed, we think that the order of the President cannot be subjected to judicial review on its merits except within the strict limitations defined in *Maru Ram and Others Vs. Union of India (UOI) and Others*, .

.....

13. It seems to us that none of the submissions outlined above meets the case set up on behalf of the petitioner. We are concerned here with the question whether the President is precluded from examining the merits of the criminal case concluded by the dismissal of the appeal by this Court or it is open to him to consider the merits and decide whether he should grant relief under Article 72. We are not concerned with the merits of the decision taken by the President, nor do we see any conflict between the powers of the President and the finality attaching to the judicial record, a matter to which we have adverted earlier. Nor do we dispute that the power to pardon belongs exclusively to the President and the Governor under the Constitution. There is also no question involved in this case of asking for the reasons for the President's order. And none of the cases cited for the respondents beginning with *Mohinder Singh Vs. State of Punjab*, advance the case of the respondents any further. The point is a simple one, and needs no elaborate exposition. We have already pointed out that the Courts are the constitutional instrumentalities to go into the scope of Article 72 and no attempt is being made to analyse the exercise of the power under Article 72 on the merits. As regards *Michael de Freitas*, ((1975) 3 WLR 388) that was, case from the Court of Appeal of Trinidad and Tobago, and in disposing it of the Privy Council observed that the prerogative of mercy lay solely in the discretion of the Sovereign and it was not open to the condemned person or his legal representatives to ascertain the information desired by them from the Home Secretary dealing with the case. None of these observations deals with the point before us, and therefore they need not detain us.

14. Upon the considerations to which we have adverted, it appears to us clear that the question as to the area of the President's power under Article 72 falls squarely within the judicial domain and can be examined by the court by way of

judicial review.

.....

16. Learned counsel for the petitioners next urged that in order to prevent an arbitrary exercise of power under Article 72 this Court should draw up a set of guidelines for regulating the exercise of the power. It seems to us that there is sufficient indication in the terms of Article 72 and in the history of the power enshrined in that provision as well as existing case law, and specific guidelines need not be spelled out. Indeed, it may not be possible to lay down any precise, clearly defined and sufficiently channelised guidelines, for we must remember that the power under Article 72 is of the widest amplitude, can contemplate a myriad kinds and categories of cases with facts and situations varying from case to case in which the merits and reasons of State may be profoundly assisted by prevailing occasion and passing time. And it is of great significance that the function itself enjoys high status in the constitutional scheme.

22. In *Triveniben Vs. State of Gujarat*, , inordinate delay in execution of death sentence on account of delay in disposal of mercy petition came up for consideration and by a majority view, the Hon"ble Supreme Court of India, held as follows:

17. After the matter is finally decided judicially, it is open to the person to approach the President or the Governor, as the case may be, with a mercy petition. Some-times person or at his instance or at the instance of some of his relatives, mercy petition and review petitions are filed repeatedly causing undue delay in execution of the sentence. It was therefore contended that when such delay is caused at the instance of the person himself he shall not be entitled to gain any benefit out of such delay. It is no doubt true that sometimes such petitions are filed but a legitimate remedy if available in law, a person is entitled to seek it and it would therefore be proper that if there has been undue and prolonged delay that alone will be a matter attracting the jurisdiction of this Court, to consider the question of the execution of the sentence. While considering the question of delay after the final verdict is pronounced, the time spent on petitions for review-and repeated mercy petitions at the instance of the convicted person himself however shall not be considered. The only delay which would be material for consideration will be the delays in disposal of the mercy petitions or delay occurring at the instance of the executive.

18. So far as the scope of the authority of the President and the Governor while exercising jurisdiction under Article 72 and Article 161 are concerned the question is not at all relevant so far as the case in hand is concerned. But it must be observed that when such petitions under Article 72 or 161 are received by the authorities concerned it is expected that these petitions shall be disposed of expeditiously.

Ultimately it has been held that no fixed period of delay can make the death sentence unexecutable and the decision in *Mithu Vs. State of Punjab*, , cannot be

said to lay down the correct law and to that extent, stands overruled.

23. In *State of Punjab and others Vs. Joginder Singh and others*, in *Manual for Superintendence and Management of Jails in Punjab* came up for consideration especially with regard to remission and the Hon"ble Supreme Court of India has taken into consideration *Maru Ram* case (cited supra) and set aside the findings of the High Court that Para 516-B as amended by executive instructions of 1971 and 1976 cannot override the statutory rule contained in 631 read with the note appended thereto and held that amendment or modification of the executive order is prospective in character.

24. In *Ashok Kumar alias Golu Vs. Union of India and others*, , the petitioner, who was convicted for murder charge, filed Habeas Corpus Petition for premature release by raising the plea that he was entitled to be considered and the petition submitted by him is to be disposed of within a month and it was dismissed by the High Court of Rajasthan and thereafter, he submitted a representation to the Governor and having failed in his attempt to his premature release, he moved the extraordinary jurisdiction of the Hon"ble Supreme Court of India under Article 32 of the Constitution. The following questions arose for consideration before the Hon"ble Supreme Court of India:

5..

(a) Whether *Maru Ram and Others Vs. Union of India (UOI) and Others*, is in conflict with *Kehar Singh and Another Vs. Union of India (UOI) and Another*, judgment on the question of necessity or otherwise of guidelines for the exercise of power under Articles 72 and 161 of the Constitution?

(b) Whether the use of two expressions "remission" and "remit" in Articles 72 and 161 convey two different meanings and if yes, whether the content of power in the two expressions is different?

(c) Whether the persons sentenced to death by Court, whose death sentence has been commuted to life imprisonment by executive clemency, form a distinct and separate class for the purpose of application of section 433A of the Code as well as for the purpose of necessity (or not) of guidelines for premature release in exercise of power under Articles 72 and 161, from the persons who at the initial stage itself were sentenced to life imprisonment by court verdict? And whether in the latter case guidelines are mandatory under Article 72 and 161 and a well designed scheme of remission must be formulated if the constitutional guarantee under Articles 14 and 21 is to be preserved?

(d) Whether the whole law of remission needs to be reviewed after *Bhagirath's* case wherein this Court held that imprisonment for life is also an imprisonment for a term and that a life convict is entitled to set off u/s 428 Cr.P.C.?

(e) Whether it is permissible in law to grant conditional premature release to a life convict even before completion of 14 years of actual imprisonment notwithstanding section 433A of the Code? If yes, whether the grant of such

conditional release will be treated as the prisoner actually serving time for the purpose of section 433A of the Code?

In Paras. 16 and 17, the Hon"ble Supreme Court has observed as follows:

16. Under the Constitutional Scheme the President is the Chief Executive of the Union of India in whom the executive power of the Union vests. Similarly, the Governor is the Chief Executive of the concerned State and in him vests the executive power of that State. Articles 72 and 161 confer the clemency power of pardon, etc., on the President and the State Governors, respectively. Needless to say that this constitutional power would override the statutory power contained in sections 432 and 433 and the limitation of section 433A of the Code as well as the power conferred by sections 54 and 55, IPC. No doubt, this power has to be exercised by the President/Governor on the advice of his Council of Ministers. How this power can be exercised consistently with Article 14 of the Constitution was one of the Questions which this Court was invited to decide in Maru Ram's case. In order that there may not be allegations of arbitrary exercise of this power this Court observed at pages 1243-44 as under:

The proper thing to do, if Government is to keep faith with the founding fathers, is to make rules for its own guidance in the exercise of the pardon power keeping, of course, a large residuary power to meet special situations or sudden developments. This will exclude the vice of discrimination such as may arise where two persons have been convicted and sentenced in the same case for the same degree of guilt but one is released and the other refused, for such irrelevant reasons as religion, caste, color or political loyalty.

Till such rules are framed this Court thought that extant remission rules framed under the Prisons Act or under any other similar legislation by the State Governments may provide effective guidelines of a recommendatory nature helpful to the Government to release the prisoner by remitting the remaining term. It was, therefore, suggested that the said rules and remission schemes be continued and benefit thereof be extended to all those who come within their purview. At the same time the Court was aware that special cases may require different considerations and "the wide power of executive clemency cannot be bound down even by self-created rules". Summing up its findings in paragraph 10 at page 1249, this Court observed:

We regard it as fair that until fresh rules are made in keeping with the experience gathered, current social conditions and accepted penological thinking-a desirable step, in our view-the present remissions and release schemes may usefully be taken as guidelines 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 guideline for exercise of Articles 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. It will be

obvious from the above that the observations were purely recommendatory in nature.

17. In Kehar Singh case on the question of laying down guidelines for the exercise of power under Article 72 of the Constitution this Court observed in paragraph 16 as under:

It seems to us that there is sufficient indication in the terms of Article 72 and in the history of the power enshrined in that provision as well as existing case-law, and specific guidelines need not be spelled out. Indeed, it may not be possible to lay down any precise, clearly defined and sufficiently channelised guidelines, for we must remember that the power under Article 72 is of the widest amplitude, can contemplate a myriad kind of and categories of cases with facts and situations varying from case to case, in which the merits and reasons of State may be profoundly assisted by prevailing occasion and passing time. And it is of great significance that the function itself enjoys high status in the constitutional scheme.

These observations do indicate that the Constitution Bench which decided Kehar Singh case was of the view that the language of Article 72 itself provided sufficient guidelines for the exercise of power and having regard to its wide amplitude and the status of the function to be discharged thereunder, it was perhaps unnecessary to spell out specific guidelines since such guidelines may not be able to conceive of all myriad kinds and categories of cases which may come up for the exercise of such power. No doubt in Maru Ram's case the Constitution Bench did recommend the framing of guidelines for the exercise of power under Articles 72/161 of the Constitution. But that was a mere recommendation and not a ratio decidendi having a binding effect on the Constitution Bench which decided Kehar Singh case. Therefore, the observation made by the Constitution Bench in Kehar Singh case does not upturn any ratio laid down in Maru Ram case. Nor has the Bench in Kehar Singh case said anything with regard to using the provisions of extent Remission Rules as guidelines for the exercise of the clemency powers.

Ultimately, the Hon''ble Supreme Court of India found that the petitioner has not completed 14 years on actual and as such, he cannot invoke the provision under Sections 432 and 433 CrPC and his detention is inconsistent with Section 433-A of the Code and there is nothing on record to show that it is illegal and citing the said reasons, dismissed the appeal filed under Article 32 of the Constitution of India.

25. In Satpal and Another Vs. State of Haryana and Others, , the Governor's power to grant pardon under Article 161 and the scope of judicial review of the said power came up for consideration and the Hon''ble Supreme Court of India, has taken into consideration Kehar Singh case and Maru Ram case and observed as follows:

4. There cannot be any dispute with the proposition of law that the power of

granting pardon under Article 161 is very wide and do not contain any limitation as to the time on which and the occasion on which and the circumstances in which the said powers could be exercised. But the said power being a constitutional power conferred upon the Governor by the Constitution is amenable to judicial review on certain limited grounds. The Court, therefore, would be justified in interfering with an order passed by the Governor in exercise of power under Article 161 of the Constitution if the Governor is found to have exercised the power himself without being advised by the Government or if the Governor transgresses the jurisdiction in exercising the same or it is established that the Governor has passed the order without application of mind or the order in question is a mala fide one or the Governor has passed the order on some extraneous consideration. The extent of judicial review in relation to an order of the President under Article 72 of the Constitution of India was subject matter of consideration before this Court in *Kehar Singh and Another Vs. Union of India (UOI) and Another*, , where the Constitution Bench had observed:

(I) It appears to us clear that the question as to the area of the Presidents power under Article 72 of the Constitution falls squarely within the judicial domain and can be examined by the Court by way of judicial review.

The Court had further indicated that:

As regards the considerations to be applied by the President to the Petition we need say nothing more as the law in this behalf have already been laid down by this Court in *Maru Ram and Others Vs. Union of India (UOI) and Others*, .

What has been stated in relation to the Presidents power under Article 72 equally applies to the power of Governor under Article 161 of the Constitution. In *Marurams case (supra)* the Court came to the conclusion that the power under Articles 72 and 161 can be exercised by the Central and State Governments and not by the President or Governor on their own. The advice of the appropriate Government binds the head of the State. The Court also came to the conclusion that considerations for exercise of power under Articles 72 or 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 malafide. Only in these rare cases will the Court examine the exercise. In paragraph 62 of the judgment in *Maru Rams case (supra)* the Court had observed:

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 constitutional 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, guidelines for fair and equal execution are guarantors of the valid play of power. We proceed on the basis that these axioms

are valid in our constitutional order.

It was further held that the power to pardon, grant remission and commutation, being of the greatest moment for the liberty of the citizen, cannot be a law unto itself but must be informed by the finer canons of constitutionalism.

The Hon''ble Supreme Court of India ultimately found that the order granting pardon and remitting the unexpired portion of the sentence passed in favour of the prisoner has been vitiated and that the Governor has not been advised properly and citing the said reasons, quashed the order and also further observed that quashing of the order does not debar the Governor in reconsidering the matter in the light of the materials and in accordance with the constitutional provisions.

26. The Hon''ble Supreme Court of India in the recent decision in Devender Pal Singh Bhullar Vs. State of N.C.T. of Delhi, , has considered the following questions:

16....

(a) What is the nature of power vested in the President under Article 72 and the Governor under Article 161 of the Constitution?

(b) Whether delay in deciding a petition filed under Article 72 or 161 of the Constitution is, by itself, sufficient for issue of a judicial fiat for commutation of the sentence of death into life imprisonment irrespective of the nature and magnitude of the crime committed by the convict and the fact that the delay may have been occasioned due to direct or indirect pressure brought upon the Government by the convict through individuals, groups of people and organizations from within or outside the country or failure of the concerned public authorities to perform their duty?

(c) Whether the parameters laid down by the Constitution Bench in Triveniben''s case for judging the issue of delay in the disposal of a petition filed under Article 72 or 161 of the Constitution can be applied to the cases in which an accused has been found guilty of committing offences under TADA and other similar statutes?

(d) What is the scope of the Courts power of judicial review of the decision taken by the President under Article 72 and the Governor under Article 161 of the Constitution, as the case may be?

The Hon''ble Supreme Court of India, while answering the question No. (a), held as follows:

22....

(i) the power vested in the President under Article 72 and the Governor under Article 161 of the Constitution is manifestation of prerogative of the State. It is neither a matter of grace nor a matter of privilege, but is an important

constitutional responsibility to be discharged by the highest executive keeping in view the considerations of larger public interest and welfare of the people.

(ii) while exercising power under Article 72, the President is required to act on the aid and advice of the Council of Ministers. In tendering its advice to the President, the Central Government is duty bound to objectively place the case of the convict with a clear indication about the nature and magnitude of the crime committed by him, its impact on the society and all incriminating and extenuating circumstances. The same is true about the State Government, which is required to give advice to the Governor to enable him to exercise power under Article 161 of the Constitution. On receipt of the advice of the Government, the President or the Governor, as the case may be, has to take a final decision in the matter. Although, he/she cannot overturn the final verdict of the Court, but in appropriate case, the President or the Governor, as the case may be, can after scanning the record of the case, form his/her independent opinion whether a case is made out for grant of pardon, reprieve, etc.. In any case, the President or the Governor, as the case may be, has to take cognizance of the relevant facts and then decide whether a case is made out for exercise of power under Article 72 or 161 of the Constitution.

27. In Mahendra Nath Das v. Union of India and Others decided on 01.05.2013, the question arose for consideration before the Hon''ble Supreme Court of India as to whether the delay of 12 years in disposal of the petition filed by the appellant under Article 72 of the Constitution was sufficient for commutation of death sentence into life imprisonment and the Hon''ble Supreme Court of India, in the above cited judgment, has considered its earlier decisions including Devender Pal Singh Bhullar case and found on the facts of the case that 12 years delay in disposal of mercy petition for commutation of sentence of death and allowed the appeal.

28. The learned Additional Solicitor General also referred to the judgment of the Supreme Court of United States in Biddle, Warden v. Perovich, 274 US 480 (1927) and the facts of the case would disclose that the appellant was sentenced to death and later on, it was commuted to sentence of imprisonment for life and the question arose for consideration was "Did the President have authority to commute the sentence of Perovich from death to life imprisonment?" and in para. 4 it is observed as follows:

4. We will not go into history, but we will say a word about the principles of pardons in the law of the United States. A pardon in our days 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. See Ex parte Grossman, 267 U.S. 87, 120, 121, 45 S. Ct. 332, 69 L.Ed. 527, 38 A.L.R. 131. Just as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, the public welfare, not his consent determines what

shall be done. So far as a pardon legitimately cuts down a penalty it affects the judgment imposing it. No one doubts that a reduction of the term of an imprisonment or the amount of a fine would limit the sentence effectively on the one side and on the other would the reduced term or fine valid and to be enforced, and that the convict's consent is not required.

The Supreme Court of United States held that the President shall have to grant reprieves and pardons for offences against the United States, except in cases of Impeachment and therefore, dismissed the case.

29. Though reliance was placed upon other decisions rendered by foreign Courts, it is not necessary to refer to the said decisions as the Hon''ble Supreme Court of India in Maru Ram case as well as Kehar Singh case had considered the scope of Article 72 of the Constitution in extenso.

30. In *Epuru Sudhakar and Another Vs. Govt. of A.P. and Others*, , challenge was made in respect of the order passed by the Governor of Andhra Pradesh granting remission to one Goura Venkata Reddy in respect of unexpired portion of 7 years imprisonment. The Hon''ble Supreme Court of India, in the above cited decision, has considered the scope of Article 72 and 161 of the Constitution of India and 433-A CrPC and ultimately held that the order granting remission is clearly unsustainable and was set aside granting liberty for reconsideration. The Hon''ble Mr. Justice S.J. Kapadia (as the Hon''ble Judge then was), in the concurring judgment, observed as follows:

67. The power under Article 72 as also under Article 161 of the Constitution is of the widest amplitude and envisages myriad kinds and categories of cases with facts and situations varying from case to case. The exercise of power depends upon the facts and circumstances of each case and the necessity or justification for exercise of that power has to be judged from case to case. It is important to bear in mind that every aspect of the exercise of the power under Article 72 as also under Article 161 does not fall in the judicial domain. In certain cases, a particular aspect may not be justiciable. However, even in such cases there has to exist requisite material on the basis of which the power is exercised under Article 72 or under Article 161 of the Constitution, as the case may be. In the circumstances, one cannot draw the guidelines for regulating the exercise of the power.

68. As stated above, exercise or non-exercise of the power of pardon by the President or the Governor is not immune from judicial review. Though, the circumstances and the criteria to guide exercise of this power may be infinite, one principle is definite and admits of no doubt, namely, that the impugned decision must indicate exercise of the power by application of manageable standards and in such cases courts will not interfere in its supervisory jurisdiction. By manageable standards we mean standards expected in functioning democracy. A pardon obtained by fraud or granted by mistake or granted for improper reasons would invite judicial review. The prerogative power

is the flexible power and its exercise can and should be adapted to meet the circumstances of the particular case. 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.

69. In conclusion, it may be stated that, there is a clear symmetry between the constitutional rationale for review of statutory and prerogative power. 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 overarching constitutional justification for judicial review. The exercise of prerogative power cannot be placed in straitjacket formula and the perceptions regarding the extent and amplitude of this power are bound to vary. However, when the impugned decision does not indicate any data or manageable standards, the decision amounts to derogation of an important constitutional principle of Rule of Law.

31. The above cited decisions clearly lay down the ratio that the power of pardon under Article 72 as well as 161 of the Constitution of India can be put to challenge 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; and
- (e) that the order suffers from arbitrariness.

32. In *Devender Pal Singh Bhullar* case (cited supra), it has been held that the power of the President under Article 72 and the Governor under Article 161 of the Constitution is manifestation of prerogative of the State and it is neither a matter of grace nor a matter of privilege but it is an important constitutional responsibility to be discharged by the highest executive keeping in view the considerations of larger public interest and welfare of the people and the President, while exercising power under Article 72, is required to act on the aid and advice of the Council of Ministers and the Central Government is duty bound to objectively place the case of the convict with a clear indication about the nature and magnitude of the crime committed by him, its impact on the society and all incriminating and extenuating circumstances.

33. The power under Article 72 of the Constitution is not uncanalised and it is subject to checks and balances and the power exercisable under the said Article is also subject to judicial review on limited grounds.

34. Interpretation also requires that respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. The Constitution of India is the mother of all statutes and as held

in L.C. Golak Nath case that Constitution is permanent; it is an organic statute; it grows by its own inherent force and the constitutional concepts are couched in elastic terms and Courts are expected to and indeed should interpret, its terms without doing violence to the language to suit the expanding needs of the society.

35. In the words of Black, Hugo Lafayette, U.S. Judge and Politician "No higher duty, or more solemn responsibility rests upon this Court than that of translating into living law and maintaining this constitutional shield... for the benefit of every human being subject to our Constitution of whatever race, creed or persuasion." In the words of Marshall John, Chief Justice of U.S. Supreme Court "The people made the Constitution, and the people can unmake it. It is the creature of their own will, and lives only by their will."

36. This Court, on a careful consideration and analysis of the entire materials placed before it, is of the view that no grounds have been made out to declare Article 72(1)(c) of the Constitution of India as ultra vires of the Constitution and in fact the said issue has been settled by the Hon"ble Supreme Court of India in catena of decisions as cited above and hence, it is no longer res integra. This Court is of the considered view that the writ petition lacks merit and substance and is misconceived. In the result, this writ petition is dismissed. However, in the circumstances, there shall be no order as to costs.