
(2006) 10 KL CK 0100

In the High Court Of Kerala

Case No : Criminal M.C. No's. 400 of 2001 and 1059 of 2005

State of Kerala and Others

APPELLANT

Vs

Peoples Forum for Natural Justice

RESPONDENT

Date of Decision : 06-10-2006

Acts Referred:

Constitution of India, 1950 — Article 161, 21, 226, 227, 70
Criminal Procedure Code, 1973 (CrPC) — Section 432, 433, 433A, 482
Penal Code, 1860 (IPC) — Section 120B, 302, 376, 379, 380

Citation : (2006) 10 KL CK 0100

Hon'ble Judges : K. Padmanabhan Nair, J; J.B. Koshy, J

Bench : Division Bench

Advocate : C.P. Sudhakara Prasad AG, P.G. Thampi DGP, K.B. Suresh Amicus Curiae and Binoy Vasudevan, for the Appellant; N.J. Mathews, K. Nandini, Shaijan C. George and K.S. Madhusoodanan, for the Respondent

Judgement

K. Padmanabhan Nair, J.—This is a suo motu proceeding initiated by this Court u/s 482 of the Code of Criminal Procedure for giving effect to the orders under the Code and also to prevent abuse of the process of court and alleged violation of Section 433A of the Code to secure ends of justice. While dealing with criminal matters it came to the notice of this Court that paroles and remissions were granted to certain prisoners indiscriminately. It also came to the notice of this court that during, 1998, 1999 and 2000, a large number of convicts were released en mass prematurely. This Court considered the issue in detail. The stand taken by the State was that those convicts were released in exercise of the powers conferred on the Government under Article 161 of the Constitution of India and the provisions contained in Section 433A of the Code of Criminal Procedure are not applicable. After elaborately considering the matter, it was held that at present there are no guidelines framed to consider the cases placed for consideration under Article 161 of the Constitution of India. That decision was reported in Re State of Kerala (I.L.R. 2002 (2) Kerala 457). We also directed that an inquiry should be conducted into the indiscriminate granting of parole to

influential convicts and that the State should file a statement detailing the criteria fixed for extending parole. We reminded the Government that if no criterion is fixed, there will be arbitrary exercise of powers by the officers. Subsequently the Home Secretary filed an affidavit stating that in pursuance of the directions contained in the order dated 04-06-2002, a High Level Committee headed by Justice V.R. Krishna Iyer, former Judge of the Supreme Court of India, was constituted as per G.O.(MS) No. 201/02/Home dated 10-12-2002 to advise the Government on implementation of the orders of the Court. It was also reported that parole is extended by the Minister on applications endorsed by responsible police officers and public representatives and there is absolutely no possibility of any foul play on the part of any of the officers. It was also stated that the High Level Committee recommended guidelines for premature release under Article 161 of the Constitution of India and the Government accepted it and constituted a State Prison Review Committee under the Chairmanship of Mr. Justice Hariharan Nair, a former Judge of this Court for considering such cases.

2. It was reported that the Kerala Prison Rules 1958 have been codified and published as extra ordinary Gazette. Vol. XLVIII on 20-10-2002. A copy of the same was produced before us. We directed the Director General of Prosecutions to make available the report filed by the High Level Committee headed by Justice V.R. Krishna Iyer and also the copy of the Vigilance Inquiry Report for perusal. Those two documents were also produced. The learned Public Prosecutor produced a copy of G.O.(P) No. 228/03/Home dated 18-10-2003 prescribing guidelines for the premature release of the lifers accepting the proposals made by the High Level Committee headed by Mr. Justice V.R. Krishna Iyer.

3. An organization by name, Peoples Forum for Natural Justice filed a petition to implead it as respondent in the CrI. M.C. Sri. K.K. Lenin, Convict No. 2140, who was practising as an Advocate at Ernakulam and currently undergoing life sentence also filed a petition through the Superintendent of Open Prison, Nettukaltheri, Thiruvananthapuram praying that he may also be heard before passing any final order. Advocate Sri. K.S. Madhusoodanan entered appearance and argued for Sri. K.K. Lenin. Sri. M.R. Sethumadhavan filed a petition praying that he may be impleaded as an intervenor. Thankamony Podiyan. W/o. A. Podiyan, convict No. 2015, Open Jail, Nettukaltheri, Thiruvananthapuram filed another petition praying that she may also be heard. All those applications were allowed and they were also heard.

ADDITIONAL FACTS

CrI. M.C. No. 1059 of 2005:-

4. This proceeding is also registered suo motu u/s 482 CrI. P.C. on a petition filed by the Staff of the Central Prison Thiruvananthapuram raising very serious allegations of irregularities and illegalities against Senior Officers of the Prison Department. The following are the main allegations raised in the petition. There was only one Television installed in the Central Prison, Thiruvananthapuram for

use of the 1600 prisoners in the Central Jail, Thiruvananthapuram. On 14-4-2004, the officers unauthorisedly installed a colour Television in Block No. 7 where only 8 convicts were detained under COFEPOSA. The detainees were given freedom to watch the programmes on T.V. around the clock. One Joseph Sebastian @ Prakash and one Nandakumar gave Rs. 50,000/- as bribe to Mr. Raghunathan Nair, Superintendent for arranging these facilities in the Cell. D.I.G. Mr. Reghupathy was very close to and was interested in those detainees and he secretly visited the jail without any official duty to see these persons. A Task Force was constituted under the leadership of Assistant Jailor Mr. Sathya Raj to conduct surprise checks and they submitted a report recommending immediate removal of the colour T.V. from Cell No. 7 in addition to the T.V. a European closet was brought from outside to Block No. 7 for the use of the COFEPOSA detainees. The T.V. and European closet were brought from the house of Mr. Joseph Sebastian by Sri Vijayan the Head Warden of District Jail. Thiruvananthapuram as per the instructions from Mr. Regunathan Nair, the Superintendent of the Prison. The set is stated to have been donated by an organisation by name "Forum for Citizen's Right", Thiruvananthapuram which is a bogus organisation. The Superintendent of Central Prisons, Thiruvananthapuram passed an order restraining the Task Force from conducting further inspections in the cell wherein COFEPOSA detainees were detained. On 27-4-2004 an inspection was conducted by the Assistant Jailor. Sajeevan and they seized stick-cum-sword, knife, iron rod etc. and reported the matter to the Superintendent. Though it was a very serious issue affecting the security of the jail, the Superintendent did not take any action. On the other hand, he destroyed the report itself. The matter was reported to the Home Secretary by the Additional D.G.P. but no action was taken against the Superintendent. When further complaints were made, the D.I.G. Mr. Reghupathy who was facing vigilance inquiry was directed to conduct an inquiry. A departmental disciplinary action was initiated against him alleging that he made available liquor and mobile phone facilities to certain influential abkari prisoners. It is alleged that Mr. Reghupathy is having money and muscle power of anti social elements in the jail and he is making the appointments, transfers, paroles, transfer of prisoners and issue of food in the jail to benefit people loyal to him in accordance with his whims and fancies. He is getting commission for purchase of various items. Mr. Reghupathy has benami transaction in the jail with Mr. K.D. Sudhakaran, Head Warder. Mr. K.D. Sudhakaran is running his benami transactions in the names of Sebastian Thomas, Lokanathan and Sanku Velayudhan. Allegations are levelled against Mr. Gopakumar who is a Superintendent in Central Jail Poojappura also. It was alleged that certain valuable trees standing in the jail compound were cut and removed in the name of benamis by Mr. Gopakumar. Copies of a number of documents were enclosed with the complaint. It was requested that an impartial inquiry may be conducted.

5. A report was called for from the Director General of Police (Prisons). By letter dated 16th December, 2004 the D.G.P. forwarded a report to the Registrar. It is stated that taking into consideration the modern reformative and rehabilitative

aspect of punishment, one Television set each is provided in all jails for prisoners viewing programmes in congregation. It is admitted that an additional T.V. set was unauthorisedly provided in Block No. 7 in which COFEPOSA prisoners are detained. It is also admitted that the Forum for Citizen's Right is a fictitious organization. The allegation that an extra European closet was fitted is also admitted. It is admitted that without providing the same to other ordinary prisoners, such a facility ought not have been provided only to the COFEPOSA detainees. It is reported that at the time of conducting a routine search, some articles were seized and removed. It is admitted that the role of Deputy Inspector General of Prisons has to be probed in depth in a detailed manner. It is averred that the inquiry conducted shows that there are prima facie materials to show that Head Warder Sri, K.D. Sudhakaran had benami transactions: It is further admitted that an inquiry is to be conducted through a specialized agency like Vigilance and Anti Corruption Bureau having adequate infra structural facilities for investigation and inquiry and which is empowered to summon outside witnesses and collect evidence.

6. A complaint was received from a convict undergoing sentence in the Central Prison, Thiruvananthapuram. The following allegations were levelled against the jail officials in that petition. It was alleged that the sale of illicit arrack and ganja is very common inside the jail. The officers themselves are providing mobile phones to convicts like Manichan so as to enable him to contact people outside. Deadly weapons are brought and concealed at safe places inside the jail with the help of jail officials. In case anybody reacts against such alleged activities, he will be falsely implicated in criminal cases after planting narcotic drugs in his personal belongings. Such persons will be taken to the "Tower" and will be brutally manhandled. If anybody happened to see the illicit transactions of the officials he will be brutally manhandled. During the course of inspection by the Sessions Judge, such contraband articles will be concealed at safe places. Only those convicts who speak in favour of the officers will be allowed to meet the Judge. The complaint box kept in the jail is being tampered and any complaint which is against the officers will be taken out and destroyed and only those complaints which are harmless will be placed back.

7. Since the allegations levelled in the petition are corruption and nepotism of jail officials, this petition was incorporated in CrI. M.C. No. 1059 of 2005. The petition was forwarded to the Sessions Judge, Thiruvananthapuram for inquiry. Initially, a report was submitted by the Sessions Judge that he was unable to collect any material to substantiate the allegations in the complaint. The Sessions Judge was asked to conduct another inspection. After conducting a surprise inspection, the Sessions Judge had forwarded another report stating that he had confidential conversations with a number of prisoners and some of them told him about the disgraceful conduct of some of the jail officials. It is reported that the allegations in the anonymous petition cannot be brushed aside as baseless. Ganja is available to influential inmates and such drug trafficking in the jail premises is with the connivance of some of the jail officials. It is further stated

that since this is happening inside the four walls of the jail, it is impossible to have independent evidence in regard to such notorious activities in jail. The convicts do not dare to come forward with evidence. It is also reported that the jail authorities took the stand that when they try to impose discipline in the jail, some prisoners are resisting and filing such complaints. The learned Sessions Judge recommended that a thorough probe is to be conducted by some independent agency.

8. In view of the recommendation made by the learned Sessions Judge that an inquiry by an independent agency was necessary as per order dated 21-06-2005, we directed the Superintendent of Police. Vigilance and Anti Corruption Bureau (Special Investigation Unit), Poojappura to conduct a detailed inquiry into the allegations. The Deputy Superintendent of Police questioned a number of convicts and officers. It was reported that a number of convicts undergoing imprisonment had given statements to the effect that they were manhandled by the jail authorities. It was reported that the prisoners who came forward with such complaints were unable to cite any witness. No prisoner had come forward to give evidence. The stand taken by the officers was that whenever a convict is subjected to a body search in connection with any prohibited articles, such false complains are raised. The Deputy Superintendent of Police had reported that there are complaint boxes kept in all jails and those boxes are sealed and the key is in the possession of the District & Sessions Judge. The Deputy Superintendent of Police had submitted that report to the Superintendent of Police who considered the evidence recorded by the Dy. S.P. He had also endorsed that 44 convicts and 4 under trial prisoners had come forward with the grievance of manhandling by jail officials. He endorsed the view of the Deputy Superintendent of Police that there is no evidence to substantiate the allegations and recommended a departmental inquiry. Subsequently an additional report was also filed, after conducting another inspection in the Central Jail, Thiruvananthapuram. The Superintendent of Police forwarded those reports to the Director of Vigilance.

9. The Director of Vigilance and Anti Corruption Bureau, after considering the report had forwarded his comments on the report submitted by the Inquiry Officer. He did not fully agree with the recommendation of the Inquiry Officer. It was stated that though there is no conclusive evidence of manhandling, the fact that as many as 39 convicts came forward with the allegation of assault and identified the staff responsible for the same, despite the risk of victimisation by the jail staff, cannot be brushed aside. He had also taken note of the fact that such complaints were made before the Sessions Judge when he visited the jail and one of them had filed a petition before the Lok Ayuktha. He had reported that though the allegations were not conclusively proved, there is strong probability of the same being true. He had also stated that there was medical evidence to support the case of three prisoners. He had made specific recommendation that the jail authorities should monitor the activities if possible with the help of electronic equipments such as CCTV and encourage the convicts

not to be afraid of preferring genuine complaints of wrong doing by the jail staff. He had also stated that the complaints of under trial No. 8908 Babu and under trial No. 5121 Baiju are to be inquired by the D.G.R. and necessary action taken.

OBJECTIONS RAISED

10. The Government had appointed a High Level Committee headed by Justice V.R. Krishna Iyer, former Judge of the Supreme Court of India to frame guidelines for granting pardon under Article 161 of the Constitution of India. The Committee framed model guidelines and filed a report. The Government approved the guidelines recommended by the Committee. The Government issued G.O.(P) No. 228 TVM dated 8-10-2003 accepting the guidelines framed by the Committee and made an annexure to that order. A copy of the order was produced before this court for our perusal. We posted the case for further hearing.

11. The main objection raised by Advocate Sri. K.S. Madhusoodanan appearing for K.K. Lenin in his written argument is that this Court by invoking the power u/s 482 Cr. P.C. issued directions to the Government to the effect that while passing orders under Article 161 of the Constitution of India, Government is bound to follow the principles laid down in Maru Ram and Others Vs. Union of India (UOI) and Others, . It is argued that this Court cannot interfere with the powers of the Governor under Article 161 of the Constitution of India by invoking the inherent powers conferred on it u/s 482 of the Code. It is also contended that this Court had no jurisdiction to issue any injunction against the Governor from invoking the powers under Article 161 of the Constitution of India. It was also contended that the observations made by this court that the power under Article 161 is to be limited to exceptional cases is not correct.

JURISDICTION OF THIS COURT

12. We shall first consider the contention of the petitioner that in this proceedings, this Court cannot consider the power of the Governor to pass orders under Article 161 of the Constitution. The main attack is against the interim order passed by this court on 31-1-2006 by which we restrained the Committee from processing and placing any proposal for the premature release of life convicts who had not completed the 14 years of actual imprisonment. It is argued that the entire effort of the High Level Committee and accepted by the Cabinet and consideration of the same by the Governor under Article 161 have come to a standstill as there is a total ban against the Governor invoking the power under Article 161 unless the case is an exceptional one. It is contended that such an order is far beyond the jurisdiction of this court u/s 482 of Cr. P.C. According to the counsel, the power u/s 482 Cr. P.C. can be invoked to consider the correctness of an order passed by a criminal court under the provisions of the Cr. P.C. alone.

13. It is necessary to enumerate certain facts at this stage. Suo motu proceedings were initiated when it came to the notice of this court that the

Government is releasing life convicts without observing any guidelines provided they are able to exert undue influence on the Government on account of their connections with politicians. It had also come to the notice of this court that parole was being granted according to the whims and fancies of political leaders without any yardstick. We have called for the details of the orders passed by the Governor prematurely releasing 377 persons. We have noted the details of those orders in our order dated 4-6-2002. In fact, the Government was also not able to take a definite stand. The stand initially taken by the Government was that if a man has undergone 8 years of jail sentence, he is entitled to be released. But verifying the period of detention, it is found that many of the political convicts had undergone below six years of imprisonment at the time of premature release. When confronted with the legal bar u/s 433A Cr. P.C. the Government took up a stand that 377 convicts were released by the Governor under Article 161 of the Constitution. In the affidavit filed by the Principal Secretary to Government, Home and Vigilance Department it was averred that the Government had considered premature release of life convicts who had been in jail for less than 14 years objectively and was fully satisfied that there were sufficient grounds to pass appropriate orders. It was also stated that each case had been considered with due application of mind, background of the crime committed and the conduct in prison. It was stated that the State Prison Review Committee recommends premature release of life convicts who have completed 8 years of actual imprisonment after perusal of the judgment of the court, their conduct in prison and the effect of premature release of a prisoner on society at large. It was further stated that 8 years period was fixed based on the observations of the Supreme Court in paragraph 69 of the judgment in Maru Ram's case (supra). It is also stated that the convicts who are prematurely released will be under continued observation of the police as provided under Rules 547 and 548 of the Kerala Prisons Rules. It was also stated that the release will be encumbered with these conditions of surveillance, the released prisoners will be on "deemed imprisonment" and not absolutely free. They will be out but not free. They will move around in society but their mobility will be conditional. (emphasis supplied).

14. If a convict files an application before the Governor praying that he may be prematurely released in exercise of the extra ordinary powers conferred on him under Articles 161 of the Constitution of India that application shall be considered in accordance with the provisions contained in the said Article. If he wants to jump the queue, he must show special or extra ordinary reasons. The mere fact that the convict is a person hired a political party to annihilate a political opponent is not a ground to invoke the clemency power conferred on the Head of the State under Article 161 of the Constitution. So unless very genuine reasons are established, a person who is convicted to undergo life imprisonment cannot be set free under the cover of the exercise of Article 161 of the Constitution of India ignoring the statutory mandate contained in Section 433A of the CrI. Procedure Code.

15. At the outset we may state that the averments contained in the affidavit of the Secretary show that even now the Government is not clear regarding the distinction between the power of the Governor under Article 161 of the Constitution and the power given to the competent authority u/s 433A of Cr. P.C. If the decision of the Governor is an unconditional remission, the provisions of Rules 547 and 548 will have no application. In *Krishnan Nair v. State of Kerala* (I.L.R. 1983(2) Ker 649) this Court has held that Rules 547 and 548 of the Prison Rules will operate only in relation to a release pursuant to the Advisory Board's deliberation and premature release thereupon. It was also held that a reading of the above said rule would show that they deal with such a situation and not a situation arising from the exercise under Article 161. It is for the Governor to impose conditions and not the Government. So it is evidently clear that the provisions contained in Rules 547 and 548 cannot be automatically made applicable when a convict is released under Article 161 of the Constitution of India and such orders are not in accordance with the provisions of Article 161 of the Constitution. A reading of the affidavit shows that the only material considered by the Committee is the judgment of the case. The individual cases were not placed before the Council of Ministers for considering the merits of the case before making a recommendation. The records show that the recommendation of the Committee was simply forwarded to the Governor's Secretariat through the Government. The materials on record show that the Government is taking 8 years as a criteria for releasing a life convict under Article 161 of the Constitution of India with a view to get the difficulties created by Section 433A of the Code. Though the order is purported to be one issued by the Governor under Article 161 of the Constitution of India, actually it is a substitute for an order passed by the competent authority under Sections 432 and 433 Cr. P.C.

16. Now we shall consider the contention regarding the lack of jurisdiction raised in this case. This proceedings was suo motu initiated. The case records will show when it came to the notice of the Court, that the Government was granting paroles and releasing lifers in bulk indiscriminately, it was "ordered that that was a matter which requires consideration on the judicial side. The proceedings were not initiated while considering a matter arose under the provisions of the Cr. P.C. It is true that the Registry filed and registered this proceeding as a Criminal Miscellaneous Case. But the nomenclature alone is not the decisive factor. This Court is clothed with inherent power u/s 482 Cr. P.C. and also the extra ordinary jurisdiction under Articles 226 and 227 of the Constitution of India. Even though the proceedings is numbered as Crl. Miscellaneous Case, that will not be a bar to exercise the power conferred on it under Articles 226 and 227 of the Constitution of India. In fact this Court is bound to exercise that jurisdiction in appropriate cases. 17. In *Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and Others*, the Supreme Court has held as follows:-

It is settled that High Court can exercise its power of judicial review in criminal matters. The power conferred on the High Court under Articles 226 and 227 of

the Constitution and u/s 482 of the Code have no limits but more the power more due care and caution is to be exercised while invoking these powers. Nomenclature under which petition is filed is not quite relevant and that does not debar the court from exercising its jurisdiction which otherwise it possesses unless there is special procedure prescribed which procedure is mandatory. If in a case the court finds that the appellants could not invoke its jurisdiction under Article 226 the court can certainly treat the petition one under Art. 227 or S. 482 of the Code.

So the legal position is clear. In appropriate cases this Court can suo motu invoke the powers conferred on it under Articles 226 and 227 of the Constitution of India to correct the mistake committed by a Government also to see that the stream of administration of justice remains clean and pure. So there is no merit in the contention raised that in this proceedings we cannot consider the validity of the guidelines framed by the Government. In view of the factual situation stated above, we are of the considered opinion that this Court shall suo motu invoke the powers conferred on it under Articles 226 of the Constitution of India in this case.

Power of the High Court to issue Injunction against Governor

18. The next contention raised is that this Court has no jurisdiction to issue an injunction against the Governor. We have not issued any injunction restraining the Governor from discharging the constitutional functions vested in him under Article 161 of the Constitution of India. We only restrained the Committee from presenting a case in a routine manner on the ground that a convict had undergone 8 years imprisonment, at the same time making it clear that in appropriate cases, the powers under Article 161 of the Constitution of India can be invoked. Further in S.R. Bommai and others Vs. Union of India and others etc. etc., a Constitution Bench of the Supreme Court has considered the authority of the High Court to pass interim order of injunction restraining fresh election till challenge to the Proclamation was decided finally. It was held that the High Court has got power to pass such an injunction order. In exceptional cases the Court after convicting the accused can order that his case shall not be considered for remission of sentence or amnesty on any special occasion announced. In Kamalanantha and Others Vs. State of Tamil Nadu, the Supreme Court held as follows:-

The order of the trial court that any remission of sentence or amnesty on any special occasions announced or to be announced either by the Central or the State Government shall not apply to the sentence and imprisonment imposed on all the accused, is also maintained.

It is trite law that the Court has got power to restrain the State or the Governor from ordering premature release of a convict by invoking the powers under Sections 432 and 433 of Cr. P.C. or under Article 161 of the Constitution of India. So there is no merit in the contention that this Court has no jurisdiction to pass

an order of injunction in appropriate cases.

Power of Governor to Grant Pardon

19. Now we shall consider the larger question, i.e. the power of the Governor under Article 161 of the Constitution vis-a-vis the power of the Government u/s 432, 433 and 433A Cr. P.C. Section 433A was incorporated in the Code in the Year 1978. Before the enactment of Section 433A in the year 1978 premature release was granted under Sections 432 and 433 of Criminal Procedure Code. The power conferred on the Government under Sections 432 and 433 was very wide. It gave power to the Government to give remission of the entire life sentence if the Government chooses to do so. As observed by the Constitution Bench in Maru Ram's case (supra) a murderer or other offender who could have been given death sentence by the court but has been actually awarded only life may legally bolt the very next morning, the very next year, after a decade or at any other time the appropriate Government is in a mood to remit his sentence. Political intervention was rampant. The Parliamentary Committee constituted for amendment of the Penal Code for making recommendations regarding jail sentence was seriously upset by the indiscriminate remissions granted to the lifers and the premature release of life convicts undergoing life sentences for capital offence. That is the reason why the amendment of Cr. P.C. by way of adding section 433A was recommended. That amendment was unanimously passed by Parliament without any objection. But when Section 433A was incorporated, series of writ petitions were filed challenging the validity of Section 433A. The Constitution Bench in Maru Ram's case (supra) considered the validity of that Section. It was held as follows:-

The single issue, which has proliferated into many at the hands of a plurality of advocates, is whether Section 433A is void for unconstitutionality and, alternatively, whether the said harsh provision admits of interpretative liberality which enlarges the oasis of early release and narrows down the compulsive territory of 14-years jail term.

The Court also made certain observations regarding Articles 72 and 161 of the Constitution of India also in that case.

20. The administration of justice through courts of law, is part of the constitutional scheme to secure law and order and the protection of life, liberty and property. Under that scheme it is for the judge to pronounce judgment and sentence, and it is for the executive to enforce the same. But if the enforcement of a sentence is likely to lead to bloodshed and revolution, the executive might well pause before exposing the State to such peril. Similar considerations apply to an amnesty (See H.M. Seervai - Constitutional Law of India (Third Edition) Volume - II, Page 1756.) The power to pardon exists to prevent injustice whether from harsh or unjust laws or from judgments which result in injustice. Hence the necessity of vesting of such a power in an authority other than the judiciary has always been recognised. Before our Constitution came into force, the law of

pardon in India was the same as in England since the sovereign of England was the sovereign of India also. When the Government of India Act came into force, the law of pardon in India was incorporated in Section 295 of that Act. In English legal system, a pardon is said to be a work of mercy whereby the King "either before attainder, sentence or conviction or after forgiven any crime, offence, punishment". It was frequently conditional. The legal effect of pardon was that it releases both the punishment prescribed for the offence and the guilt of the offender. When the pardon is full, it release the punishment and blots out of existence the guilt, so that in the eye of law, the offender is an innocent as if he had never committed the offence alleged against him. If granted before conviction, it prevents any of the penalties and disabilities consequent upon the conviction from attaching. If granted after conviction, it removes the penalties and disabilities and restores him to all his social rights. The power of pardon includes the power to commute or to remit the punishment in whole or in part. A person may be reprieved also. In United States of America, the pardoning power of a President is unlimited and with the exception of impeachment, extends to every offence known to the law, and may be exercised at any time after its commission. That power is not subject to legislative control and Congress can neither limit the effect of the President's pardon nor exclude from its exercise any class of offenders. A comparison of the powers of pardon conferred on the President under Article 72(1)(b) and the Governor under Article 161 of the Constitution of India show that they are related to offences against laws in respect of matters to which the executive authority of the Union and the States respectively extends. However, the President's power under Article 72 is wider than that of the Governors of States. Articles 72 and 161 of the Constitution of India have expressly provided for various powers which constitute a lessor exercise of the pardoning power than a full and complete pardon instead of leaving it to the courts to determine the content of the pardoning power. In *re Channugadu* (A.I.R. 1954 Mad 911) a Division Bench of the Madras High Court had considered the meaning of the word "amnesty" and also the nature and extent of the pardoning power conferred on the president and Governor under Articles 72 and 161 of the Constitution of India. In that case, the accused were sentenced to death. Appeals were filed. There were referred trials also. When those cases came up for hearing, the Public Prosecutor of Andhar Pradesh informed the court that the accused in those cases were released as a result of the amnesty granted by the Government of Andhra Pradesh. The Division Bench held as follows:-

As understood in common parlance, the "amnesty" is appropriate only where political prisoners are released and not in cases where those who have committed felonies and murders are pardoned. But it is clear from the G.O. above mentioned that the intention of the Government is to pardon not only political prisoners but those convicted and sentenced to the extreme penalty of the law as well as for various terms of imprisonment for non-political crimes involving moral turpitude. However that be we are not concerned with the

impropriety of the term used. The fact remains that the intention was to release the prisoners convicted and sentenced to death, transportation for life or other terms of imprisonment.

The Division Bench considered the history of the pardoning power. It was held as follows:-

...if in England and Scotland the Sovereign can exercise the prerogative of mercy, reprieve or pardon, even before there is a final decision on the guilt or innocence of an accused person, then it follows that the same power can be exercised by the Governor General or Governor. In Halsbury's Laws of England, Hailsham Edn., Vol. 6, page 477, in discussing the Royal prerogative of pardons and reprieves, it is stated as follows:-

Pardon may, in general be granted either before or after conviction.

It was also held as follows:-

The general observations here show that it is usual to tender pardon as an executive act by the chief executive authority even before conviction. The other questions raised in these cases, viz. What would be the effect of pardon, need not be considered in detail in the present context of things before us.

The Court considered the principles laid down in *Ex parte A.H. Garland* (1873) 28 Law Ed. 366 at p. 370 and also the judgment of the U.S. Court in *Ex parte Grossman* (1924) 69 Law Ed. 527. It was held as follows:-

The above resume regarding the effect of the leading decisions of the United States Supreme Court interpreting S. 2 of Art. II would therefore clearly show that in Republican countries like ours, where under a written Constitution the Head of the States is given authority by means of an executive act to tender pardons and reprieves, those functions can be exercised even before conviction.

21. The power of the Governor under Article 161 of the Constitution of India came up for consideration before a Constitution Bench of the Supreme Court in *K.M. Nanavati Vs. The State of Bombay*, . The majority view was to the effect that it is open to the Governor to grant full pardon at any time even during the pendency of the case in the Supreme Court in exercise of what is ordinarily called "mercy jurisdiction". It was held that the Governor cannot exercise the power of suspension of the sentence for the period when the Supreme Court is in seisin of the case. The effect of pardon granted by the Governor came up for consideration again in *Sarat Chandra Rabha and Others Vs. Khagendranath Nath and Others*, . The same Constitution Bench considered the effect of pardon. It was held as follows:-

Now it is not disputed that in England and India the effect of a pardon or what is sometimes called a free pardon is to clear the person from all infamy and from all consequences of the offence for which it is granted and from all statutory or other disqualifications following upon conviction.

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In the first place, an order of remission does not wipe out the offence" it also does not wipe out the conviction. All that it does is to have an effect on the execution of the sentence; though ordinarily a convicted person would have to serve out the full sentence imposed by a court, he need not do so with respect to that part of the sentence which has been ordered to be remitted. An order of remission thus does not in any way interfere with the order of the court; it affects only the execution of the sentence passed by the court and frees the convicted person from his liability to undergo the full term of imprisonment inflicted by the court, though the order of conviction and sentence passed by the court still stands as it was. The power to grant remission is executive power and cannot have the effect which the order of an appellate or revisional court would have of reducing the sentence passed by the trial court and substituting in its place the reduced sentence adjudged by the appellate or revisional court.

Though in Rabha's case the majority view had in Nanavati's case was not specifically overruled, the principle laid down in that case was deprived of its authority.

22. The power of the President under Article 72 and that of the Governor under Article 161 of the Constitution came up for consideration though incidentally in Maru Ram and Others Vs. Union of India (UOI) and Others, . The Constitution Bench of Apex Court was considering the constitutional validity of Section 433A of Code of Criminal Procedure. The reason that prompted the Parliamentary Committee for such an amendment was the ""Bizarre freaks of remissions-such, for instance, as the impertinent happenstance of a Home Minister's "hallowed" presence on an official visit to the prison resulting in remissions of sentences----- the penological sense of Parliament was apparently outraged by such extreme abbreviations of life sentences where the offence was grave as might have invited even death penalty". So the Parliament unanimously passed the amendment to the Code of Criminal Procedure in the year 1978. The court considered the distinction and difference between the powers of the President and Governor under Articles 72/161 and that of the Government under Sections 432 and 433 of Cr. P.C. It was held that one power is constitutional and the other statutory. Both are co-extensive. It was held as follows:

But two things may be similar but not the same. That is precisely the difference. We cannot agree that the power which is a 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 flowing 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 processes.

It was also held that the provisions u/s 433A do not and cannot affect even a

wee bit the pardon power of the Governor or the President. It was also held as follows:-

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 prior provisions does not violate or detract from the full operation of the constitutional power to pardon, commute and the like.

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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, discriminator) or mala fide.

It was also held thus:-

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.

The reason for using such a direction was stated as follows:-

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 Glipin 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 as follows:-

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 court. 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 sub serve the purpose for which it is meant.

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 nor

interfered with by any statutory provision. But the fact remains that higher the power, the more cautions 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.

(emphasis supplied).

The powers of the President and Governor under Articles 72 and 161 again came up for consideration in *Kuljeet Singh alias Ranga and Another Vs. Lt.-Governor of Delhi and Others*, . The Supreme Court held as follows:-

The President has the power in an appropriate case to commute any sentence imposed by a court into a lesser sentence, and the administration of justice by the courts is not necessarily or certainly considerate of circumstances which may properly mitigate guilt. But the question as to whether the case is appropriate for the exercise of the power conferred by Art. 72 depends upon the facts and circumstances of each particular case. The necessity or the justification for exercising that power has therefore to be judged from case to case.

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it could not, therefore, be said that in refusing to commute the sentence of death into a lesser sentence, the President has in any manner transgressed his discretionary power under Art. 72, whatever be the guidelines observed for the exercise of the power conferred by Art. 72. The question whether the Government of India has formulated any uniform standard or guidelines by which constitutional power under Art. 72 or 161 can be exercised, left open.

23. This Court also had occasion to consider the scope and ambit of the power of the Governor under Article 161 of the Constitution of India. In *Krishnan Nair's* case (supra) a Division Bench of this Court considered the scope and power of the Governor under Article 161 of the Constitution of India. This Court held as follows:-

The power to grant remission is conferred on the Governor of a State under Article 161 of the Constitution. This power is absolute and being a constitutional power is not liable to be restricted by any legislative provision.

In *Kehar Singh and Another Vs. Union of India (UOI) and Another*, , another Constitution Bench of the Apex Court considered the power of the President under Article 72 of the Constitution of India. *Kehar Singh* was convicted of an offence u/s 120B read with Section 302 I.P.C. in connection with the

assassination of Smt. Indira Gandhi, then Prime Minister of India. He was sentenced to death. The sentence was confirmed, by the High Court as well as the Apex Court. On 14-10-1988, his son, Rajinder Singh presented a petition to the President of India for grant of pardon to Kehar Singh under Article 72 of the Constitution. He sought for a personal hearing also. The petitioner was informed by the Secretary to the President that the President opined that he cannot go into the merits of the case finally decided by the High Court and Supreme Court and the petition was rejected. That decision was challenged. The matter reached the Supreme Court. The first question decided was whether the President was precluded from entering into the merits of the case decided finally by the Supreme Court. The Constitution Bench of the Supreme Court, after an elaborate survey of the authorities, held that though the party has no right to insist for a personal hearing, the President can examine the materials on record and come to a conclusion different from the one taken by the court. It was held as follows:-

To any civilized 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 Court to Art. 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 deprivation of the life by the action of State is in most civilized 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.

The Constitution Bench has taken note of the principle laid down in Maru Radm's case (supra) and Kuliit Singh's case (supra) and held that the President has to exercise the powers conferred under Article 72 of the Constitution on the advice of the Central Government. It was held as follows:

We are of the view that it is open to the President in the exercise of the power vested in him by Art. 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 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 on a wholly different plane from that on 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.

It was further held as follows:

It is apparent that the power under Art. 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.

The court also considered the scope of judicial review so far as it relates to the order passed by the President under Article 72 of the Constitution. After discussing the principle laid down in Maru Ram's case (supra) it was held thus:-

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.

The Constitution Bench held that the party has no right to insist for a personal hearing. The Constitution Bench also considered the scope of framing guidelines to regulate the exercise of power. It was held as follows:-

Learned counsel for the petitioners next argued that in order to prevent an arbitrary exercise of power under Art. 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 Art. 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 Art. 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.

The Supreme Court set aside the order rejecting the petition and held that the petition must be deemed to be pending before the President and the same is to be dealt with and disposed of afresh. In Maru Ram's case, the Constitution

Bench took the view that guidelines are to be framed whereas in Kehar Singh's case another Constitution Bench took the view that there is no need to frame any guidelines.

24. Whether there is any conflict between the above two decisions? That question was considered by a Three Judge Bench of the Supreme Court in Ashok Kumar alias Golu Vs. Union of India and others, . In Asok Kumar's case, the petitioner was tried and convicted for murder for an offence u/s 302 I.P.C. He filed a Habeas Corpus Petition before the High Court of Rajasthan contending that because of the amendment of Cr. P.C. by incorporating Section 433A, his premature release is being denied. It was also contended that section 433A cannot curtail the constitutional power vested in the Governor under Article 161 of the Constitution. It was argued that the decision rendered by the Constitution Bench in Maru Ram's case reduced the efficiency of Section 433A Cr. P.C. The Apex Court was called upon to consider whether there is any conflict between Maru Ram's case on the one hand and Kehar Singh's case on the other. The Court held as follows:-

In Maru Ram and Others Vs. Union of India (UOI) and Others, the Constitution Bench reaffirmed the ratio of Gopal Vinayak Godse Vs. The State of Maharashtra and Others, and held that the nature of a life sentence is incarceration until death; judicial sentence for imprisonment for life cannot be in jeopardy merely because of long accumulation of remissions.

Regarding the observation in Maru Ram's case that the Government shall frame Rules for guidance in the exercise of pardon power it was held as follows:-

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

Regarding the scope of the decision rendered in Kehar Singh's case, it was held as follows:-

These observations do indicate that the Constitution Bench which decided Kehar Singh's case was of the view that the language of Art. 72 itself provided sufficient guidelines for the exercise of power and having regard to the wide amplitude and the status of the function to be discharged there under, 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 and Others Vs. Union of India (UOI) and Others, the Constitution Bench did recommend the framing of guidelines for the exercise of power under Arts. 72 and 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's case. Therefore, the observation made by the Constitution Bench in Kehar Singh's case does not upturn any ratio laid down in Maru Ram's case. Nor has the Bench in Kehar Singh's case said anything with regard to using the provisions of extant Remission Rules as guidelines for the exercise of the

clemency powers.

SCOPE OF JUDICIAL REVIEW

25. The power of the court to interfere with the decision taken by the President/Governor under Article 72/161 of the Constitution was considered by a Three Judge Bench of the Supreme Court in *Swaran Singh Vs. State of U.P. and Others*, . In that case, one Doodh Nath was found guilty of murdering one Joginder Singh. He was convicted and sentenced to undergo imprisonment for life by the trial court. That conviction was upheld by the High Court as well as the Supreme Court. Within a period of less than two years, he succeeded in coming out of prison as the Governor of Uttar Pradesh granted remission of the remaining long period of his life sentence. The son of the deceased filed a writ petition challenging the action of the Governor. The High Court dismissed the writ petition holding that the decision of the Governor under Article 161 of the Constitution was not justiciable. It was challenged before the Supreme Court. The Apex Court found that the very same Governor on an earlier occasion dismissed a petition filed by Dooth Nath for grant of reprieve and remission of the sentence passed on him by the Court in the very same case. Subsequently while the convict was on parole, he again moved for remission on the second occasion. In the second application he suppressed the fact of dismissal of the earlier application. The report from the police was called for and that report was unfavourable to the convict. But after a week, the same police officials forwarded another report recommending remission on humanitarian grounds. The widow of the deceased filed a petition before the Governor praying that the petition filed by Dooth Nath may be dismissed. But the Governor ordered release of the convict on furnishing a bond with two sureties. Before the Supreme Court, it was conceded that Dooth Nath was in prison only for 2 years and 3 months when he secured the remission. The Supreme Court referred to the decision of the Constitution Bench in *Kehar Singh's Case* and also *Maru Ram's Case*. It was held as follows:-

It was therefore suggested by the Bench to make rules for its own guidance in the exercise of the pardon power keeping a large residuary power to meet special situations or sudden developments.

(emphasis supplied)

The Apex Court rejected the contention of the State that an order passed by the Governor is not justifiable. The Supreme Court held as follows:-

In view of the aforesaid settled legal position, we cannot accept the rigid contention of the learned counsel for the third respondent that this Court has no power to touch the order passed by the Governor under Article 161 of the Constitution. If such power was exercised arbitrarily, mala fide or in absolute disregard of the finer canons of the constitutionalism, the by-produce order cannot get the approval of law and in such cases the judicial hand must be stretched to it." (emphasis supplied)

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In the present case, 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.

The Apex Court found that the order of the Governor impugned in the proceedings was subject to judicial review.

26. The question again came up for consideration before the Apex Court in *State of Haryana and Others Vs. Balwan etc.*, . The Supreme Court referred to the decisions in *Gopal Vinayak Godse Vs. The State of Maharashtra and Others*, and *Maru Ram's case* and held as follows:-

If the Government has framed any rule or made a scheme for early release of life convicts then those rules or schemes will have to be treated as guidelines for exercising its power under Art. 161 of the Constitution. Consequently, no life convict can validly contend that his case for premature release should be considered according to the Government policy / instructions that were in force on the date on which he came to be convicted as he acquired a right to get remissions as declared and to be released accordingly. If according to the Government policy / instructions in force at the relevant time the life convict has already undergone the sentence for a period mentioned in the policy decision / instructions, then the only right which he can be said to have acquired is the right to have his case put up by the prison authorities in time before the authorities concerned for considering exercise of power under Art. 161 of the Constitution.

The matter again came up for consideration before the Apex Court in *Laxman Naskar Vs. Union of India and Others*, . It was held as follows:-

It is settled position of law that life sentence is nothing less than life long imprisonment and by earning remissions a life convict does not acquire a right to be released prematurely; but if the Government has framed any rule or made a scheme for early release of such convicts then those rules or schemes will have to be treated as guidelines for exercising its power under Article 161 of the Constitution and if according to the Government policy instructions in force at the relevant time the life convict has already undergone the sentence for the period mentioned in the policy instructions, then the only right which a life convict can be said to have acquired is the right to have his case put up by the prison authorities in time before the authorities concerned for considering exercise of power under Article 161 of the Constitution. When an authority is called upon to exercise its powers under Article 161 of the Constitution, that will have to be done consistently with the legal position and the Government policy/instructions prevalent at that time. (emphasis supplied)

27. In *Sat pal v. State of Haryana* (A.I.R. 2000 S.C. 1702) the Supreme Court

held as follows:-

The power of granting pardon under Art. 161 is very wide and does not contain a limitation as to the time on which and the occasion 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 the 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 Government 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 Supreme Court considered the principle laid down in Maru Ram's case and Swaran Singh's case. In Satpal's case (supra), one Shri Siriyan Kumar Jain was found guilty, convicted and sentenced to undergo imprisonment for life. There also facts of the case show that the convict was inside the jail only for a short period and most of the time he was outside jail and enjoying parole under various pretexts. The Apex Court held that the Governor was not aware as to what is the total period of sentence he had undergone and if at all he has undergone any sentence. The Apex Court considered the principles laid down in Maru Ram's case and Swaran Singh's case and held as follows:-

When an accused is convicted of heinous offence of murder and is sentenced 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. (emphasis supplied)

The Apex Court also held that the entire file was processed with uncanny haste and officers showed unusual interest and zeal in processing the case. The order granting remission was quashed by the Apex Court. So it is clear that the total period of imprisonment suffered by the convict is also a relevant factor in deciding the issue.

28. In Zahid Hussein and Others Vs. State of West Bengal and Another, the Supreme Court considered the relevant factors to be considered while considering the request of a convict for remission. In Dattaraj Nathuji Thaware v. State of Maharashtra a Constitution Bench of the Supreme Court considered the scope of judicial review of an order passed under Article 161 of the Constitution. The convict in that case was found guilty of offences punishable under Sections 379, 380 and 302 of the Indian Penal Code and sentenced to death u/s 302 I.P.C. The conviction was confirmed by the High Court and the Supreme Court. Petitions were filed either by the convict or on his behalf under Articles 72 and 161 of the Constitution. All those applications were rejected. The order passed by the President of India was challenged and it was held by the Supreme Court as

follows:-

Although the decision of the President of India on a petition under Article 72 of the Constitution is open to judicial review but the grounds therefore are very limited. In the Constitution Bench decision in *Maru Ram and Others Vs. Union of India (UOI) and Others*, this Court has held that it is only a case of no consideration or consideration based on wholly irrelevant grounds or an irrational, discriminatory or mala fide decision of the President of India which can provide a ground for judicial review.

In a Division Bench decision of this Court in *Satpal v. State of Haryana (2005) 5 SCC 170*) these very grounds have been restated as (i) the Governor exercising the power under Article 161 himself without being advised by the Government; of (ii) the Governor transgressing his jurisdiction; or (iii) the Governor passing the order without application of mind; or (iv) the Governor's decision is based on some extraneous consideration; or (v) mala fides. It is on these grounds that the Court may exercise its power of judicial review in relation to an order of the Governor under Article 161, or an order of the President under Article 72 of the Constitution, as the case may be, in *Dhananjay Chatterjee @ Dhana Vs. State of West Bengal and Others*, the scope of the power of the Governor under Article 161 of the Constitution was considered by the Supreme Court. It was held as follows:-

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.

In the above case one *Dhananjay Chatterjee* was found guilty of offences punishable under Sections 376, 302 and 380 of the Indian Penal Code. The trial court convicted and sentenced him to death. The conviction and sentence were upheld by the High Court as well as the Supreme Court. The mercy petition was filed. A contention was raised on behalf of the convict that the Governor was not appraised of the relevant facts and materials and there was no proper application of mind. It was held that an order passed by the Governor under Article 161 is subject to judicial review. It was noticed by the Supreme Court that in that case the State Government examined the prayer of the convict, rejected the same and transmitted the files to the Governor because it was addressed to him. The Governor in his turn also rejected the same which was duly communicated to the convict. The Apex Court after discussing the facts held thus:-

From the above averments, it is clear that 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. (emphasis supplied)

Since the entire facts of the case were not placed, the Supreme Court set aside

the order and directed the Government to bring all relevant facts too the notice of the Governor for appropriate decision. In Govt. of A.P. and Others Vs. M.T. Khan, , the question arose for consideration was whether the Governor of a particular State in exercise of the clemency power under Article 161 of the Constitution of India could grant remission to prisoners convicted by courts outside the State concerned, but undergoing sentences in jail in the State. The court relied on the decisions reported in Gopal Vinayak Godse's case, Maru Ram's case and Joginder Singh's case and held as follows:-

The Governor, in terms of the dicta laid in the last noted case has to act on the advice of the Council of Ministers. It is inconceivable that a Council of Ministers of the State of Andhra Pradesh can render any appropriate advice in respect of accused person convicted by courts of Madhya Pradesh and Maharashtra or that it would be competent to do so. The Prisoners Act does not throw any light on the controversy as wrongly held by the High Court.

The Apex Court directed the State of Madhya Pradesh and Maharashtra to consider the cases of the convicts and take a decision as to whether their release was permissible and desirable.

29. The power of the Governor under Article 161 of the Constitution is absolute, unfettered and not guided or controlled by the provisions contained in Sections 432, 433 or 433A Cr. P.C. There is dichotomy in the procedure for premature release. First is the power of the President/Governor under Article 72/161 of the Constitution of India. Second is the power of the appropriate authority under Sections 432 and 433 Cr. P.C. The powers under Sections 432 and 433 are controlled and guided by the restriction imposed by Section 433A. At the risk of repetition, we may say that these two powers are distinct and separate and one is not a substitute for the other. The Government cannot take shelter under Article 72/161 of the Constitution so as to circumvent or by-pass the provisions contained in Section 433A. The principles laid down in Swaran Singh's case (supra) and Laxman Naskar's case (supra) make it very clear that the Government shall frame Rules for its own guidance in the exercise of pardon power keeping a large residuary power to meet special situation or sudden development. It is also trite law that the Rules of guidelines shall be consistent with the legal position. The State cannot frame guidelines bypassing the prohibition contained in Section 433A of Cr. P.C. Of course, there may be exceptional cases in which a convict may have to be released immediately after his conviction as held in Maru Ram's case (supra). Since the Government itself prescribes a time limit for recommending a case to the Governor for premature release under Article 161 of the Constitution of India, that time limit shall be in consonance with the prohibition contained in Section 433A Cr. P.C. unless exceptional circumstances exist.

"LIFE IMPRISONMENT" - MEANING

30. There is no provision of law where under a sentence for life imprisonment

without any formal remission by the appropriate Government can be automatically treated as one for a definite period. The question was considered by the Privy Council in AIR 1945 64 (Privy Council) . It was held that the sentence of transportation for life must prima facie be treated as transportation or imprisonment for the whole of the remaining period of life of the convicted persons. The matter again came up for consideration in Gopala Vinayak Godse's case (supra). A Constitution Bench of the Supreme Court discussed the principle laid down in Kishore Lal's case (supra) and held that the sentence for life imprisonment should be treated as imprisonment for the whole of the period of the convicted persons. It was further held that the Prisons Act does not confer on any authority a power to commute or remit sentences. It provides only for the regulation of prisons and for the treatment of prisoners confined therein. It was further held that unless the sentence is commuted or remitted by appropriate authority under the relevant provisions of the Indian Penal Code or Cr. P.C. a prisoner sentenced to life imprisonment is bound in law to serve the life term in prison. Gopal Vinayak Godse's case (supra) still holds the field.

31. In *State of Punjab v. Joginder Singh* (1990 SCC (Cri) 419) the Supreme Court has considered the question and held that if the sentence is of imprisonment for life, ordinarily the convict has to pass the remainder of his life in prison but remissions and commutations granted in exercise of the power under Sections 432 and 433 Cr. P.C. are not exempted category of those who have already enjoyed the generosity of executive power on the commutation of death sentence to one of life imprisonment. The Supreme Court followed the principles laid down in Gopal Vinayak Godse's case and Maru Ram's case (supra). In *Laxman Nasar v. State of W.B.* (2000 AIR SCW 3060) the Apex Court followed the principles laid down in Gopal Vinayakk Godse's case (supra) and reiterated the principle that sentence for imprisonment for life ordinarily means imprisonment for the whole of the remaining period of life of the convicted persons and unless the competent authority orders remission, he will have to remain in prison for the rest of his life. In *Shri Bhagwan Vs. State of Rajasthan*, the Supreme Court reiterated the principles laid down in Gopal Vinayak Godse's case and Laxman Naskar's case (supra) and held that sentence of imprisonment for life ordinarily means sentence of imprisonment for whole of the remaining period of the convicted person's natural life and further held that for the release of a prisoner on expiry of a particular term, an appropriate order of the Government is necessary.

32. In the ordinary course, the sentence of imprisonment for life means imprisonment for the remaining period of the natural life of the convict. Ordinarily he can be prematurely released only in case the Government remits any portion of the sentence in accordance with the provisions of the Indian Penal Code or the Code of Criminal Procedure. There was indiscriminate premature release of convicted persons. So the Parliament unanimously resolved to incorporate Section 433A into the Code of Criminal Procedure, by which it is made compulsory that in cases in which the provisions of Section 433A Cr. P.C. is

applicable life sentence shall be minimum 14 years. In the ordinary course, a person who has not completed 14 years of jail term as contemplated u/s 433A cannot be considered for premature release by the Government.

33. The next question arising for consideration is whether in order to bypass or circumvent that provision, the Government can take recourse to Article 161 of the Constitution of India. In Krishnan Nair's case (supra) a Division Bench of this Court after noting the distinction held that the power under Article 161 is to be exercised by the Governor on the advice of the Council of Ministers. After scrutinising the records in Krishnan Nair's case, the Division Bench held that the Government cannot add or substitute anything to that decision.

34. 377 convicts were prematurely released from 1996 to 2005. We had discussed in detail the procedure followed by the Committee in those cases in our order dated 4-6-2002. All that is given is serial number, Convict No. Name of the persons and a single worded recommendation either "recommended" or "not recommended". For graphics, the decision of the Prison Review Committee in respect of five persons is shown below:-

SI. No.

C. No.

Name

Name of Prison

Remarks

1.

39

Soman

Central Prison. Viyyur

Not recommended

2.

8119

Thajudin

Central Prison, Viyyur

Recommended

3.

8450

Krishnankuty

Central Prison, Viyyur

Recommended

4.

7453

Selvarajan

Central Prison, Viyyur

Recommended

5.

6141

Abdulla

Central Prison, Viyyur

Not recommended

35. The Secretary of the Prison Review Committee simply forwarded the recommendations of the Committee to the Addl. Chief Secretary to Government. It was recommended that the Government may order premature release subject to the provisions of Rules 547 and 548 of the Prison Rules. The Government forwarded the same to the Governor and orders were passed. The order reads as follows:-

In exercise of the powers conferred by Articles 161 of the Constitution of India, the Governor of Kerala is pleased to order the premature release of the following 130 life convicts subject to the conditions laid down in Rules 547 and 548 of the Kerala Prisons Rules, 1958.

A perusal of the orders issued by the Government prematurely releasing the convicts invoking the powers under Article 161 shows that no reasons were stated and such orders were passed accepting the recommendation of the committee that such persons may be released subject to the provisions contained in Rules 547 and 548 of the Prison Rules. The records of the cases were not placed before the Governor. Our conclusion is fortified by an observation in paragraph 29 at page 20 of the report forwarded by the High Level Committee headed by Justice V.R. Krishna Iyer. It is stated that the "power shall be exercised only on the advice of the Home Minister". So it is evidently clear that the procedure followed by the Government so far in releasing the prisoners by the order of the Governor under Article 161 of the Constitution is against the provisions of the Constitution itself. It is also pertinent to note that the guidelines framed by the High Level Committee does not say anything about the procedure to be followed by the Government. It only provides that the recommendation of the committee should be placed before the Governor without

any delay for consideration and appropriate action. So it would appear from the files that so far no case is placed before the Council of Ministers with details and the Council of Ministers never discussed the merits of the case and reached a conclusion after considering the records of the case and the evidence adduced. So it is clear that the Government is using the provisions of Article 161 of the Constitution of India to circumvent the provisions of Section 433A of the Code of Criminal Procedure and the same cannot be allowed.

GUIDELINES - ITS VALIDITY

36. The guidelines provide that a Prison Review Committee will be formed to consider cases of life convicts and make recommendations relating to their premature release in suitable cases. Going by the provisions of Article 161 of the Constitution and various decisions of the Apex Court discussed above and also the decision of this Court in Krishnan Nair's case (supra) it is clear that the obligation and duty cast on the Council of Ministers cannot be delegated to the Prison Review Committee for scrutiny of the records and render necessary advice to it. But before forwarding the records and recommendations to the Government for a decision under Article 161 of the Constitution the Council of Ministers shall consider the records and evidence and make a reasoned recommendation.

37. Now we shall consider how far the guidelines framed by the present High Level Committee satisfy the constitutional requirements. The eligibility criteria fixed by the Committee reads as follows:-

Eligibility Criteria

The Committee will recommend premature release of life convicts who have completed 8 years of actual imprisonment including set off if any ordered by a competent court and excluding remission of any kind considering the nature of offence committed by the prisoners, nature of the crime, possible effects on the community, their conduct in the prison and in whose cases the committee feels that premature release would help in their social reformation and rehabilitation.

The Government has fixed 8 years of actual imprisonment for considering the case of the premature release of life convicts based on the above stated recommendation. The criteria further shows that once the request is rejected by the Governor, the case can be considered after a lapse of one year. A reading of the eligibility criteria shows that the Government has accepted the recommendations of by the High Level Committee. In Page 43, the Committee had discussed the reasons for fixing the eligibility criteria.

Criteria of eligibility for consideration

The previous G.Os. contemplated consideration of cases of life convicts for premature release if they have completed 8 years of actual imprisonment and 10 years with remission, considering the nature of offence committed by the prisoners, their conduct in the prison and in whose cases the committee feels that premature release would help in their social reformation and rehabilitation.

The Committee thought it fit to include set-off period ordered by a competent court within the 8 year period of actual imprisonment of the Supreme Court in para 69 of the judgment in Maru Ram's case. Besides the Committee felt that in case of a lifer whose case for premature release was rejected once, there should be a cooling-off period before next consideration and one year should be specified as such period.

We have carefully gone through the decision rendered by the Apex Court in Maru Ram's case (supra). As we have already stated, the Governor's power under Article 161 of the Constitution and that of the Government under Sections 432 and 433 Cr. P.C. are different. The Constitution Bench has observed:-

Likewise, if an opposition leader is sentenced, but the circumstances cry for remission such as that he is suffering from cancer or that his wife is terminally ill or that he has completely reformed himself, the power of remission under Article 72/ 161 may ordinarily be exercised and a refusal may be wrong-headed. If, on the other hand, a brutal murderer, bloodthirsty in his massacre, has been sentenced by a court with strong observations about his entire life sentence the very next day after the conviction merely because he has joined the party in power or is a close relation of a political high-up.

So it is trite law that in exceptional cases, the Governor can order premature release on the very same day of the conviction of a person. That power can be exercised even before conviction or before the case reaches the court.

38. The High Level Committee has stated that 8 years sentence is sufficient on the ground that in para 69 of the judgment in Maru Ram's case, there was such an observation. In Maru Ram's case the Constitution Bench has considered the same and held as follows:-

Deterrence, as one valid punitive component has been accepted in Sunil Batra Vs. Delhi Administration and Others etc., by a five-Judge Bench (see Desai, J. supra). So a measure of minimum incarceration of 14 years for the gravest class of crimes like murder cannot be considered shocking, having regard to the escalation of horrendous crime in the country and the fact that this Court has upheld even death penalty (limited though to the rarest of rare cases).

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In the current state of things and ethos of society, we have to contend ourselves with the thought that, personal opinions apart, a very long term in prison for a murderer cannot be castigated as so outrageous as to be utterly arbitrary and violative of rational classification between lifers and lifers and so blatantly barbarous as to be irrational enough to be struck down as ultra vires.

Finally it was held as follows:-

So we are not now in a position to assert, as court, that at least a 14 year term for a murderer is arbitrary, unusually cruel and unconstitutional.

39. There is an observation in paragraph 69 of the judgment that the detention of the person in prison beyond an optimum point, say 8 years, benumbs and makes nervous wreck or unmitigated brute of prisoner. It was held as follows:-

We cannot view without gloom the reversion to the sadistic superstition that the longer a life convict is kept in a case the surer will be his redemption. It is our considered view that, beyond an optimum point of, say, eight years - we mean no fixed formula - prison detention benumbs and nervous wreck or unmitigated brute of a prisoner. If animal farms are not reformatories, the remission rules and short-sentencing schemes are a humanising wheel of compassion and reduction of psychic tension.

So it is clear that in para 69 of the judgment in Maru Ram there was no finding to the effect that a life convict should be released after the expiry of 8 years, the reasoning of the committee that in paragraph 69 of the judgment in Maru Ram's case (supra) the Constitution Bench had held that a person who was detained in prison for eight years is entitled to be prematurely released is not correct. On the other hand, the finding in that case was that 14 years of term of life imprisonment for considering for premature release is reasonable.

40. On an earlier occasion, the Government constituted Kerala Jail Reforms Committee under the Chairmanship of Sri. A.P. Udayabhanu for suggesting reforms in premature release. That Committee submitted a report stating that a Prison Review Committee is to be constituted. It was recommended that the Prison Review Committee may review any case of life convicts who have actually spent not less than eight years in the Prisons. The Committee recommended that there shall be a statutory provision for reviewing the case of lifers who have completed 8 years of actual imprisonment and 10 years with remission for premature release notwithstanding the provision in Section 433A of the Code of Criminal Procedure. It was also recommended that the Prison Review Committee should forward its recommendation to the Governor for orders under Article 161 of the Constitution of India. The Committee was constituted and the Government had issued guidelines to be followed by the Review Committee. A copy of the Government Order (M.S.) No. 164/ 96/Home dated 23-09-1996 was produced by the State Prosecutor along with a report on 2-4-2002. The order shows that a Prison Review Committee was constituted also. In that guidelines the eligibility criteria was fixed as follows:-

The Committee will recommend premature release of life convicts who have completed 8 years of actual imprisonment and 10 years with remission, considering the nature of offence committed by the prisoners, their conduct in the prison and in whose cases the Committee feels that premature release would help in their social reformation and rehabilitation.

It was also stated that the Committee will consider only cases of life convicts not coming under the following categories for recommending release:

(i) Professional or hired murders:

- (ii) Persons who committed murder for religious, communal or caste reasons and those sentenced to life imprisonment for offence against the security of the State;
- (iii) Persons who committed murder while involved in smuggling operations or murder of prison staff, prison visitors and Government functionaries on duty.
- (iv) those who have intentionally violated the conditions of leave;
- (v) those who were involved in murder of women and children;
- (vi) person convicted under the N.D.P.S. Act.

A perusal of the eligibility criteria fixed by the Government Order referred to above and that of the present High Level Committee shows that apart from a minute variation of excluding the words "and 10 years with remission", the eligibility criteria fixed under both guidelines are identical. The present High Level Committee simply verbatim copies the eligibility criteria recommended by Sri. Udayabhanu Committee and the same was accepted by the Government. The High Level Committee was also of the opinion that before recommending a case of a life convict the premature release under Article 161 of the Constitution, he shall undergo a minimum period of actual sentence. The Committee had recommended imprisonment for 8 years on the ground that there was such an observation in Maru Ram which is not factually correct. There is no rationale for fixing 8 years in view of the provisions contained in Article 70/161 of the Constitution. Why not 5 years or 10 years? The Committee has not given any reason for not following the provisions contained in Section 433A Cr. P.C. which was unanimously accepted by the Parliament and found to be valid by the Constitution Bench of Apex Court headed by the Chairman of the Committee itself. A comparison of the two Government orders accepting the guidelines shows that the guidelines framed by the present High Level Committee is nothing but old wine in a new bottle. There is no application of mind at all in formulating the guidelines. The term of 8 year period fixed by the Committee is without any rationale and arbitrary.

41. We shall consider the ineligibility criteria also. A perusal of the recommendation of the High Level Committee and the Government Order issued in the year 1996, based on the recommendation of Udayabhanu Committee shows that the High Level Committee had verbatim copied the criteria for ineligibility for consideration recommended by Udayabhanu Committee. In our earlier judgment, we have noted that the real beneficiaries of premature release under Articles 72/161 and those who are fortunate enough to get indiscriminate parole regularly are accused in political murder cases. In some political murder cases, the accused involved may be with criminal background or history. But in a number of cases, the political parties who want to annihilate their political opponent recruits persons with no criminal background and train them as it is a mission for them. The attack on political opponents with intention to annihilate them are on the increase alarmingly. In most of the cases the persons convicted in such cases are granted indiscriminate parole and premature release so as to

lure others for committing similar offences. That is likely to give a very wrong message to the Society and will destroy the very foundation of democracy. So we are of the considered view that the case of political murders shall also be included in the criteria of ineligibility for consideration and shall not be considered for premature release before completing 14 years of actual imprisonment. In such cases, a man who voluntarily kills another man whom he may not have any prior acquaintance with and in some cases, whom he had even never seen, should be treated on par with the hired assassins. So the criteria for ineligibility also is without any rationale and requires reconsideration.

42. The frequency meeting fixed by the High Level Committee and that of the former Prison Review Committee is also identical. It provides that the Committee will meet at least once in three months and consider the case of life convicts and they were recommended to Government with all relevant documents. It is not for the Government to fix any interval between two meetings.

43. A reading of the recommendation of the High Level Committee which is accepted by the Government would show that it is the duty of the committee to consider the case of all convicts who had completed 8 years of imprisonment to be recommended to the Governor under Article 161. A reading of the guidelines framed would give an impression that the intention of the Government is to use Article 72/161 to overcome the hurdle created by Section 433A of the Criminal Procedure Code. As we have already stated the two are entirely different and one cannot be used as a substitute for the other to overcome the difficulty caused due to the incorporation of Section 433A in the Code.

44. A perusal of the decisions of the Supreme Court referred to above shows that in all those cases either the convict or his close relatives had filed petitions before the President/Governor and those petitions were considered by the President/Governor and orders passed. No constitutional obligation or statutory duty is cast upon the Government or committee to consider all cases in which the person convicted had undergone 8 years imprisonment for premature release under constitutional provision. According to us the proper procedure to be followed is that the convict or his close relative should file a petition before the Governor claiming remission and that petition shall be processed in accordance with the provisions contained in Article 72/161 of the Constitution.

45. Clause 7 of the guidelines which deals with miscellaneous powers of the Committee provides that rejection of the case of a prisoner for premature release on one or more occasions by the Committee will not be a bar for reconsidering his case. It is further provided that reconsideration of the case of a convict rejected once shall be done after a period of one year. We are of the considered opinion that if any convict claims the extra ordinary reliefs under Article 72/161 of the Constitution, the entire case shall be considered and a decision taken. If his request is turned down once, normally his case cannot be re-considered on the mere ground of passage of time as held in Swaran Singh's case (supra). Of course, if any new materials are brought out such cases can be considered again.

Otherwise, in the ordinary course, a person whose request is once turned down by the Governor, is not entitled to approach the Governor again merely on the ground that an year has elapsed since the date of the earlier order.

46. A combined reading of the frequency of meeting along with clause 7(4) makes it very clear that the intention of the committee is to frame a guideline only to bypass the hurdle created by section 433A of Cr. P.C. under the cover of Article 161 of the Constitution. In Balwan Singh's case (supra) one of the reasons stated by the Apex Court for setting aside the order of premature release of the accused was that the fact of dismissal of an earlier petition by the accused for premature release under Article 72/161 was suppressed.

47. Clause 6 of the Government Order specified the documents to be produced. The proforma which deals with the documents to be placed before the committee shows that those records are identical to the one stated in the proforma considered by the Jail Advisory Board constituted under the Prison Rules. The only record which has any connection with the case is the details of judgment and the date of conviction. A perusal of the documents to be placed before the Committee shows that the records of the case such as final report, charge framed by the court, the depositions of the witnesses etc. will not be placed before the Committee for its consideration. A perusal of the criteria shows that the term of 8 years and the conduct of the convict after his admission in jail are alone taken into account by the Committee for premature release. Going by the proforma, it can be seen that the Committee need not consider the merits of the case and make any speaking recommendation. It is true that in the miscellaneous powers it is provided that the recommendation of the Committee shall be in the nature of a speaking order and a detailed analysis of the case shall be made. How can the Committee consider the details of the case without seeing the records of the case? The mere statement that the Committee shall make a detailed analysis of the case is not sufficient. A reading of clause 8 also makes it clear that the intention of the Committee is to use the provisions of Articles 72/ 161 as a substitute for Section 433A Cr. P.C.

48. While considering the case under Article 72/161 the Council of Ministers and the Governor is bound to consider the merits of the case and not the conduct of the prisoner alone. The conduct of the prisoner subsequent to the conviction may also be relevant. But that is not the sole criteria to invoke the power under Article 161 of the Indian Constitution by the Governor. The matters required to be placed before the Committee and considered by it under the guidelines are against the procedure laid down in Kehar Singh's case (supra) and subsequent decision of the Supreme Court.

49. The facts discussed above clearly show that the guidelines prescribed by the High Level Committee and accepted and approved by the Government as per G.O. (P) No. 228/ 03/Home are against the provisions contained in Articles 72/161 of the Constitution and the law laid down by the Constitution Bench and are liable to be quashed. We quash G.O.(P) No. 2128/03 Home dated 18-10-2003 and the

guidelines framed by the High Level Committee and appended to the above said Government Order.

50. It is for the Government to frame its own guidelines but that should be in accordance with the principles laid down by the Apex Court in the various decisions cited above. In the normal course the period shall be fixed taking into account the provisions contained in Section 433A Cr. P.C. It is open to the Government to form Prison Review Committee. If the Government constitutes a committee to consider the cases of convicts it should study the entire case records of the prisoners and make a reasoned recommendation and such recommendation along with the case records shall be placed before the Council of Ministers. The Council of Ministers shall consider the same and make a reasoned recommendation taking into account the principles laid down in Kehar Singh's case and Swaran Singh's case (supra). The recommendations along with the records of the case shall be placed before the Governor. The Governor shall decide the matter in accordance with the principles laid down by the Apex Court in Swaran Singh's case and Dhananjay Chatterjee's case (supra).

PRISON ADVISORY BOARD

51. This Court has received a number of complaints from various persons including convicts undergoing sentence in three prisons and their relatives in the State alleging that the Government is releasing only those convicts who are having political connections and muscle or money power. It is alleged that the Government is not considering the cases of persons who had completed more than 20 years of actual imprisonment for premature release.

52. We have received a letter from the Sessions Judge, Thiruvananthapuram in which it was stated that he had received a number of oral complaints from several life convicts regarding the non-convening of Jail Advisory Board, The Sessions Judge has reported that on 24-4-2006, he had directed the Superintendent of Central Prison, Thiruvananthapuram to send a status report to him. The Superintendent has forwarded a status report on 27-4-2006. A copy of the same is forwarded to this Court. It reveals shocking state of affairs. It is reported by the Superintendent that though the period of the Advisory Board has expired long back, the Government has not issued any orders re-constituting the Advisory Board. It was reported that the last meeting of the Board was held on 30-12-2003 as per the orders issued by the Government on 10-06-2002. It was further reported that the convicts are divided into two groups- long term prisoners and short term convicts. It was reported that the Advisory Board is considering the case of short term convicts who underwent 2/3rd of their sentence. According to the Superintendent, it is the duty of the Government to take a decision to convene the meeting of the Board. It was further reported that in respect of the persons who were sentenced to undergo life imprisonment, the Government has constituted a Prison Review Committee headed by Justice M.R. Hariharan Nair, former Judge of this Court, as Chairman and the Committee has considered the cases of 100 convicts who underwent more than actual

imprisonment of 8 years. It was also reported that for the release of short term convicts a District Level Committee is constituted and it met on March 2006. The Sessions Judge has brought to our notice that he took up the matter to the Secretary to Government, Home Department and his attention was invited to Chapter XXXII of Kerala Prison Rules, 1958 but the Government has not re-constituted the Jail Advisory Board till date.

53. In view of the provisions contained in Article 72/161 of the Constitution, the President or Governor can order remission of sentence. A statutory power is conferred on the Government also under Sections 432 and 433 Cr. P.C. to order remission. The power under Article 432 Cr. P.C. can be invoked only on application. But the power conferred on the competent authority u/s 433 Cr. P.C. can be invoked even without an application.

54. Chapter XXXII of the Kerala Prison Rules are framed for the purpose of considering the case of convicts for premature release. Rules 543 to 54 of the Kerala Prison Rules deal with the constitution of the Advisory Board and its powers. Rule 543 deals with the Advisory Board. It reads as follows:-

There shall be a Standing Advisory Board to investigate and report on the sentences of prisoners confined in each Central Prison, Open Prison and Prison for Women.

In the year 1998, a proviso was added to Rule 543 to the effect that the provisions of Chapter XXXII of the Kerala Prison Rules cannot be invoked in respect of prisoners sentenced under the provisions of Narcotic Drugs and Psychotropic Substances Act, 1985. That proviso was omitted in the years 2005. So the rule as stands now provides that there shall be a Standing Advisory Board to investigate and report on the sentences of prisoners confined in each Central Prison, Open Prison and Prison for Women. Rule 544 deals with Constitution of the Board. It reads as follows:-

Constitution of the Board.- The Advisory Board shall consist of:-

- (1) The Inspector General of Prisons (Chairman).
- (2) The District Collector of the District in which the Prison is situate.
- (3) the Local District and Sessions Judge.
- (4) 3 non-official members appointed by Government, and
- (5) The Local District Superintendent of Police as members.

The Superintendent of the concerned Prison, will be Secretary to the Board. The term of office of the non-official members will ordinarily be fixed at 2 years. The Board shall sit at least once in six months. The quorum of the meeting shall be three.

Provided that Government may if they so desire, cancel the nomination of any or all the non-official members at any time during such term for good and sufficient

reasons.

Rule 545 deals with the functions of the Board. It reads as follows:-

Functions of the Board.- The Board shall consider the cases of all prisoners who satisfy the following conditions:

(a) In the case of lifers and long-terms (i.e. those who are sentenced to 3 years and above-

(i) that the prisoner has served two-thirds of his sentence including remission and further;

(ii) that he has served not less than two and a half years including remission.

Provided that 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 law, or where a sentence of death imposed on a person has been commuted into one of imprisonment for life u/s 433 of the Code of Criminal Procedure, 1973, such person should have served at least fourteen years of imprisonment.

(b) In the case of short-termers (i.e., those sentenced to less than 3 years)-

(i) that the prisoner has been sentenced to a minimum period of two years and further;

(ii) that he has served two-thirds of his sentence excluding remission.

(c) Under the Old Age Scheme-

(i) that the prisoner is aged 65 or above in the case of a male prisoner and 55 or above in the case of a female prisoner and has served not less than 2 a years of his/her sentence including remission; and

(ii) that he/she is serving the sentence for his/her first and only conviction.

Rule 545 A is also relevant. It reads as follows:

"14-Year Rule"- The cases of prisoners whose aggregate sentence is more than 20 years shall be submitted together with the records specified under Rule 545 for special orders of Government as to their premature release or completion of 14 years of sentence including remission in each case.

Provided that where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death imposed on a person has been commuted u/s 433 of the Code of Criminal Procedure, 1973 such person shall not be considered for release from prison unless he has served at least fourteen years of imprisonment.

A reading of Rules 544 and 545 makes it clear that the rules apply to all types of convicts whether short-term convicts or long-term convicts or life prisoners. A reading of the rules makes it clear that the provision is mandatory and it is the

duty of the State to constitute. Jail Advisory Boards. A statutory duty is cast upon the Jail Authority Board to consider the case of all prisoners who satisfy the conditions of the Rules for premature release. A combined reading of Rule 545 and Rule 545 A makes it clear that a statutory duty is cast upon the Board to hold a sitting at least once in six months. No Government Order convening the meeting is necessary. The stand taken by the Superintendent of Central Prisons that since the Government had not issued any orders convening a meeting, it is not possible to hold a meeting is without any merit. The quorum fixed is 3. So even if non official members are not appointed, meeting can be convened once in six months. The stand taken by the Superintendent of Central Prison that since the Government has not re-constituted the Board and not issued any order convening the meeting, the meeting was not convened is illegal and against the mandatory provisions of the rules. In this connection, we may also refer to Rules 546 and 547 of the Kerala Prison Rules. Rule 546 deals with records and information to be made available to the Board. It provides that it is the duty of the Superintendent of Central prison to collect the details. Of course, an obligation is cast on the Police and Magistrate to render necessary assistance. Rule 547 deals with release of the prisoners. The provisions contained in Chapter XXXII of the Kerala Prison Rules 1958 cast a mandatory duty on the part of the Superintendent of Central Prisons who is the Secretary of the Board to convene a meeting. He shall convene a meeting after ascertaining the convenience of the ex-officio members. The meeting shall be held at least once in six months. The Committee shall consider the case of all convicts and make recommendation to the Government in accordance with law. On receipt of the recommendation of the Committee, the Government shall consider the same and pass appropriate orders in accordance with law without further delay.

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55. Very serious allegations of favouritism, corruption and nepotism are levelled against the senior officers of the Prison Department. We have called for a report from the Director General of Police (Prisons). The report reveals certain shocking facts. It is reported that a colour television was unauthorisedly installed in Block No. 7 in Central Prison, Thiruvananthapuram, in addition to the television already installed in the jail. It was reported to be donated by an organization by name Forum for Citizens' Right, Trivandrum. That organization is reported to be a fictitious organization. It was reported that there was no evidence to show that Sri. K.V. Reghunathan Nair received a bribe of Rs. 50,000/- from COFEPOSA prisoners. But it is reported that the role of Sri. T.S. Reghupathy, the then Deputy Inspector General of Prisons has to be probed in depth in a detailed manner. It was reported that the action of the Superintendent preventing the task force from inspecting the cell meant for COFEPOSA prisoners was malafide. It was further reported that there is substance in the allegation that Sri. K.D. Sudhakaran, Head Warder had benami transaction in the supply of dietary items in several sub jails against the existing rules. It is reported that there is no proper auditing. It is reported that an investigation and inquiry may be ordered

by a specialised agency having adequate infrastructure facilities for investigation and inquiry which is empowered to summon outside witnesses and collect evidence such as Vigilance and Anti-Corruption Bureau.

56. We are also of the view that such an inquiry is to be conducted by an independent agency like Vigilance and Anti Corruption Bureau. So in exercise of the powers conferred on this Court under Article 226 of the Constitution, we direct the State/Director, Vigilance and Anti Corruption Bureau, to constitute a team headed by an officer not below the rank of Inspector General of Police of Vigilance and Anti Corruption Bureau to enquire into the various allegations of corruption and nepotism levelled against the officers. The members of the team so constituted shall be allowed to continue unless the Head of the team recommends the removal of any member from the team. A copy of the complaint along with its accompaniments and the copy of the letter written by the Director General of Police (Prisons) and other relevant papers shall be furnished to the Head of the team for conducting the inquiry / investigation. The team shall conduct inquiry / investigation and complete the same as expeditiously as possible.

57. The learned Sessions Judge after conducting a surprise jail visit had reported that few prisoners confidentially disclosed to him that ganja is available to influential convicts. He was also told that drug trafficking is done with the connivance of some of the jail officials. The Sessions Judge had reported that it is impossible to have independent evidence with regard to such nefarious activities going on inside the jail. The learned Sessions Judge that a thorough probe is required and a detailed inquiry may be ordered. On 21-06-2005, we directed the Superintendent of Police, Vigilance and Anti Corruption Bureau to conduct an inquiry in the matter and submit a report to this Court.

58. In pursuance of the order passed by this Court, the Deputy Superintendent of Police, Vigilance and Anti Corruption Bureau, Special Investigation Unit, Poojappura, Thiruvananthapuram, conducted an enquiry into the allegation of torture of prisoners. The Dy. S.P questioned a number of convicts and recorded their statements. He had reported that number of convicts raised the allegation of torture but none of them was able to cite any witnesses. He had reported that a detailed departmental inquiry by the Jail Department is warranted so as to elicit the truth. An additional inquiry report was also submitted. The report of Inquiry Officer along with the recommendations of the Superintendent of Police was placed before the Director of Vigilance and Anti Corruption Bureau. He did not fully agree with the recommendation of the Inquiry Officer. The Director had reported that the fact that 39 convicts came forward with the allegation of assault and also identified the staff responsible for it, despite the risk of victimisation by the jail staff shows that the allegations may be true. It is reported that there are three instances in whose case the allegation of assault is supported by medical records. It is reported that the jail officers responsible for the assault on these 3 convicts be proceeded against departmentally. Finally it

was recommended that the activities in the jail shall be monitored with the help of electronic equipments such as CCTV. It is reported as follows-

In addition, the jail authorities should monitor the activities within the jail more closely, if possible, with the help of electronic equipments such as CCTV and encourage the convicts not to be afraid of preferring genuine complaints of wrong doing by the jail staffs.

It is to be noted that the learned Sessions Judge, after a surprise inspection has also reported that since the incidents are taking place inside the four walls of a jail, it is not possible to get any direct evidence. It is submitted that recently a convict undergoing sentence in one of the Central Jails committed suicide.

59. Considering all these aspects, we are of the considered opinion that there shall be continuous monitoring of what is happening inside the jail. It is to be noted that it is practically impossible to have a surprise inspection. To avoid recurrence, the actual culprits are to be caught red-handed using new invention of electronic equipments. The Director of Vigilance has recommended the installation of Closed Circuit Television. We are told that such a system has some inherent defects, The recording of the data and storage of the same using CC T.V. may be costly and difficult. But if monitoring is done by web camera using wireless technology, it will be more easy. Dozens of cameras are to be placed at strategic locations to cover the entire area inside the jail and monitored by a limited numbers of monitors. If wireless network is used, there is no need to lay cables which are likely to be damaged. The cameras can be linked to an observation station. Such technique are used in the main Airport lounges in India. The advantage of the system is that the Director General of Police (Prisons) sitting in his Headquarters at Thiruvananthapuram can watch as to what exactly is happening in every nook and corner of the jail. So we are of the view that necessary arrangements for on-line monitoring/ CCTV is to be made to monitor constantly as to what is actually happening inside the jail. In addition to monitoring the same shall be recorded and shall be kept for a period of at least one year and shall be destroyed/erased only after getting orders of the D.G.P. (Prisons). So it is only just and proper to direct the Government to take steps to install CCTV or necessary system for on-line monitoring in the three Central Prisons and District Jail within a reasonable period. Initially such system shall be installed in the three Central Prisons and the District Jail. The same shall be provided to the Sub Jails also in a phased manner.

60. There is also an allegation that there is tampering of the complaint boxes kept inside the jail. At present boxes made up of wooden planks are used. It is easy to tamper with such boxes. If single moulded metal boxes with devices to prevent taking out paper outside the box are used and locked with quality locks this can be avoided. So there will be a direction to the Director General of Police, Prisons to take steps to replace the wooden boxes with tamper proof metal boxes. The slot made for putting letters into the boxes shall be fitted with devices like the one fitted to the letter boxes of BSNL to prevent taking out the

letters / complaints once put into the box. The locks to be used in such boxes shall be purchased by Sessions Judges concerned. They shall purchase quality locks and keep the keys in safe custody. The boxes purchase shall be taken to the Sessions Court to be locked and sealed.

FEMALE In the result, the following orders are passed in exercise of the powers conferred on this Court under Article 226 of the Constitution of India.

(a) G.O.(P) No. 228/03/Home dated 18-10-2003 is hereby quashed. It is made clear that this order will not be a bar for the Government to frame rules for guidance for premature release of convicts under Article 72/161 of the Constitution of India. While framing the Rules the Government shall take into account the bar u/s 433A of the Criminal Procedure Code. It is made clear that in the guidelines itself the Government can make provisions for premature release of the prisoners in exceptional cases before the expiry of the minimum period fixed. It is also ordered that no duty is cast upon the State Government to consider the case of all lifers irrespective of the fact whether they make such an application or not. It is further ordered that except in exceptional cases, a person who is desirous of claiming the benefit of extra ordinary powers conferred on the Head of the State shall file necessary application explaining the grounds which he seeks for invocation of the clemency power. The petition shall be filed either by the convict himself or by his close relatives such as son, daughter etc. If such petitions are filed, the Government shall consider those applications individually in accordance with the principles laid down in various decisions of the Supreme Court referred to supra and place the application along with the case records before the Council of Ministers. The Council of Ministers shall discuss the merits of the claim put forward by the prisoner and take a decision and forward the file to the Governor with their remarks. The practice of considering en masse release of prisoners cannot be resorted to in the usual course. Even if a number of cases are taken up for consideration, each case shall be considered individually. In rare cases the Government may suo motu consider individual cases and forward the same to the Governor with their recommendation.

(b) There will be a direction to the Government to re-constitute the Jail Advisory Board as provided under Rule 544 of the Kerala Prison Rules as expeditiously as possible.

(c) The Superintendent of Central Prison who is the Secretary of the Committee shall convene a meeting after consulting the convenience of the ex-officio members. It is ordered that it is not necessary for the Committee to wait for any orders from the Government for convening the meeting. It is the duty of the Secretary to convene a meeting at least once in six months. The Committee shall consider cases of all prisoners, short-term or long-term, in accordance with the rules and guidelines and forward the report to the Government for orders. On receipt of such a report, the competent authority shall consider the same and take a decision as expeditiously as possible, at any rate, within three months from the date of receipt of a copy of the report.

(d) There will be direction to the State/Director, Vigilance and Anti Corruption Bureau to constitute a team headed by an officer-not below the rank of I.G. of Police. Vigilance and Anti Corruption Bureau to conduct an inquiry/investigation into the various allegations of corruption and nepotism levelled against the officers of the Central Prisons and take appropriate action in accordance with law. The team shall conduct inquiry/investigation and proceed in accordance with law.

(e) There will be a direction to the Director General of Prisons to conduct an inquiry into the incidents of U.T. No. 8908 Babu and U.T. No. 5121 Baiju, who sustained injuries and take appropriate action in accordance with law. There will be a direction to the Director General of Police to constitute a team of officers of Crime Branch to conduct an investigation into those incidents, register case and file final report in accordance with law as expeditiously as possible.

(f) The D.G.P. Prisons shall take necessary steps to replace the wooden complaint boxes with tamper proof metal boxes within a period of three months from the date of receipt of a copy of this order.

(g) There will also be a direction to the Government to take action to install online monitoring system or CCTV to monitor the activities taking place in every place inside the three Central Prisons and the District Jail as expeditiously as possible, at any rate, within one year from the date of receipt of a copy of this order.