

(2009) 11 MAD CK 0099

In the Madras High Court

Case No : Writ Petition No. 20511 of 2008

Thenthamizhan alias Kathiravan alias Dakshinamoorthi

APPELLANT

Vs

State of Tamil Nadu

RESPONDENT

Date of Decision : 24-11-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 161, 72
Criminal Procedure Code, 1973 (CrPC) — Section 432, 433, 433A, 435, 435(2)
Explosive Substances Act, 1908 — Section 3, 6
Motor Vehicles Act, 1988 — Section 181
Penal Code, 1860 (IPC) — Section 120B, 224, 279, 302, 376
Prevention of Damage to Public Property Act, 1984 — Section 4
Railways Act, 1989 — Section 126

Citation : (2009) 11 MAD CK 0099

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : M. Radhakrishnan, for the Appellant; R. Neelakantan, GA, for the Respondent

Final Decision : Allowed

Judgement

K. Chandru, J.—Heard both sides.

2. The petitioner is a convict and at present undergoing imprisonment in the Central Prison, Tiruchirappalli. His reference Number is Life convict-80600. The petitioner has filed the present writ petition seeking for a direction to the respondents to treat him as having become eligible for premature release by G.O.Ms. No. 873, Home (Prison IV) Department, dated 14.09.2006 and G.O.Ms. No. 1326 Home (Prison IV) Department, dated 12.09.2007 and release him forthwith.

3. When the writ petition came up on 22.06.2008, the learned Assistant Government Pleader took notice. Thereafter, from time to time, it was adjourned. Subsequently, a counter affidavit, dated 4.8.2009 was filed by the Additional Secretary to the Government, Home Department on behalf of the respondents.

4. It is seen from the records that the petitioner was convicted in Crime No. 172/87 registered with Vridhachalam Railway Police Station. He was tried by the Sessions Court in SC. No. 19/1988 and awarded sentence of death u/s 302 IPC as well as Rigorous imprisonment for five years u/s 431 IPC read with Section 4 of Prevention of Damage to Public Property Act, 1984, Section 126 of the Railways Act and another R.I. for five years u/s 3 read with Section 6 of the Indian Explosive Substance Act, 1908. The Principal Sessions Judge, Tiruchirappalli, who convicted the petitioner, directed that all the sentences of imprisonment will merge with the death sentence and that they are to run concurrently.

5. The petitioner was lodged in the Central Prison, Tiruchirappalli on 4.4.1988 and had already undergone more than 14 years of imprisonment. The petitioner was also convicted in Crime No. 1 of 2001 registered by Q Branch CID in S.C. No. 75 of 2001. He was imposed with a punishment of Simple Imprisonment for one month u/s 279 IPC read with Tamil Nadu City Police Act Section 3 read with Section 181 of Motor Vehicles Act and was also given RI for two years u/s 445 of Explosive Substances Act, 1908. The learned Assistant Sessions Judge-I, Ariyalur, who convicted the petitioner, directed these sentences will also run concurrently, by his judgment, dated 26.11.2002.

6. Subsequently, the petitioner's case was sent to this Court for Referred Trial as RT No. 2/1988, and heard along with Criminal Appeal No. 219/1988 and Criminal Revision Case No. 648 of 1989. The petitioner's sentence for death was modified into imprisonment for life by judgment, dated 22.12.1989. In other respects, all other convictions were upheld.

7. While the petitioner was undergoing imprisonment, the Government issued G.O.Ms. No. 873, Home Department, dated 14.09.2006 and ordered to release the life convicts who had completed 10 years of actual imprisonment as on 15.09.2006. This was announced on the occasion of 98th Birthday of Thiru C.N. Annadurai, the late Chief Minister of Tamil Nadu. Certain conditions were imposed under the said order, which included that the general behaviour must be satisfactory and on release, the life convicts will be safe and they will be accepted by the members of their family and other social organizations. That their cases do not come u/s 435 Cr.P.C. and they will also execute bonds on the basis of usual terms and conditions.

8. By virtue of the said order, the first respondent State released 472 life convicts including 16 women life convict prisoners. It was also stated that the Government had issued G.Ms. No. 1326, Home Department, dated 12.9.2007, ordering the release of life convicts, who had completed 10 ears of actual imprisonment as on 15.09.2007. This was done at the time of 99th Birthday of Thiru C.N. Annadurai, the late Chief Minister of Tamil Nadu. The same conditions were once again imposed. One such condition that was found in both the orders was that the prisoners who were convicted for offences specified in G.O.Ms. No. 1762, Home Department, dated 20.7.1987 were not eligible to avail this

concession. Under the second order, 190 life convicts including 5 women life convict prisoners were released.

9. Subsequent to the filing of the writ petition, it was also brought to the notice of this Court that the Government has issued G.O.Ms. No. 1155, Home Department, dated 11.09.2008 ordering premature release of convicted prisoners on 15.09.2008, which was the Birth Centenary of Thiru C.N. Annadurai, the then Chief Minister. In that order, it was decided to release those who completed 7 years of actual imprisonment as on 15.09.2008 and those who are aged 60 years and above and have completed 5 years of actual imprisonment as on 15.09.2008 subject to other conditions imposed in the earlier orders as well as one additional condition. By virtue of the said order, the Government released 1406 life convicts including 3 life convicts, who were undergoing sentence in the prisons of Kerala State on reciprocal basis. The power for issuing those orders were said to be in terms of Article 161 of the Constitution of India.

10. It is the grievance of the petitioner that the petitioner should have also been considered for his premature release on par with the eligible life convicts. When the same not having been done, it is discriminatory and violative of Article 14 of the Constitution. It was also stated that the petitioner did not come under the exception pointed out in the G.O.Ms. No. 1762, Home Department, dated 20.7.1987 as he was not convicted u/s 224 IPC. Though he might have violated the condition of leave by overstaying the leave granted, that cannot be a ground to deny his premature release.

11. It was also stated that the petitioner was convicted for offences u/s 302 read with Section 120B IPC for death sentence, which was converted into one of a life sentence. The other sentences granted under the Explosive Substances Act has to run concurrently with the life sentence. Therefore, the contention of the respondent State that in respect of the conviction for offence coming under List I of Schedule VII of Union of India will not be considered for premature release does not stand to reason. The power to order reprieve under Article 161 of the Constitution cannot be fettered by Section 435 Cr.P.C. It was also stated that the petitioner had already undergone imprisonment even for the offence committed under the Indian Explosive Substances Act. Since the petitioner was not convicted for an offence u/s 224 IPC, he comes on par with the other prisoners and therefore, he should have been released.

12. It is noted that G.O.Ms. No. 1762 Home (Prisons VI) Department, dated 20.7.1987 came to be issued on the basis of the report of the All India Committee on Prison Reforms more particularly vide its recommendation No. 560. Basing upon the said recommendation, the State Government in paragraph 2 of the order, dated 20.7.1987, stated as follows:

2. As there is no provision either in the Tamil Nadu Prison Manual Volume II or in the guidelines issued vide G.O.Ms. No. 1064, Home, dated 24.04.1986 for not considering any category of prisoners for premature release, the Government

after careful consideration accept the recommendation of All India Committee on Prison Reforms in Para 17.2 of Chapter XX of its report and direct that the following category of prisoners should not be considered for premature release:

- i) Prisoners convicted of rape, forgery, decoity, terrorist crimes, offences against the State and prisoners sentenced under Sections 224, 376, 396 to 400, 402, 467, 471, 472, 474, 489A, 489B and 489D of the India Penal Code;
- ii) Prisoners convicted of economic offences, black marketing, smuggling and misuse of power and authority; and
- iii) Prisoners sentenced under Prevention of Corruption Act, Suppression of Immoral Traffic in Women and Girls Act, Drugs Act and Prevention of Food Adulteration Act.

13. When the petitioner made a representation under the Right to Information Act, his counsel was informed by a communication, dated 12.10.2007 that his case cannot be considered in the light of the G.O.Ms. No. 1762, dated 20.7.1987. In paragraph 1 of its communication, dated 12.10.2007, it was stated as follows:

...He was released on leave for the period from 11.09.1995 to 25.09.1995 as per High Court order in CMP No. 584/95 on 12.09.1995. His leave was extended by 2 weeks as per the order of the High Court dated 21.09.1995 (i.e. from 25.09.1995 to 09.10.1995) and had to return to prison on 09.10.1995. But he failed to return prison on the due date and was re-captured by the Q-Branch CID in Cr. No. 1/2001 and re-admitted in prison on 20.07.2001 in connection with another case. The case initiated against him u/s 224 IPC for overstaying of leave in Palayam Police Station Cr. No. 279/95, the same was disposed u/s 498 Cr.P.C. By the Judicial Magistrate, Jayankondam as informed by the Superintendent of Police, Perambalur District in letter No. F2/13856/01 dated 18.04.2001. The said prisoner has so far completed 13 years and 7 months of imprisonment and would likely to complete 14 years of actual sentence on 08.02.2008. Although he was not convicted u/s 224 IPC the fact remains that he overstayed the leave and thereby violated the conditions of leave. His case was not recommended for premature release during general amnesty ordered on 15.09.2006 and 15.09.2007 as he had overstayed on leave and also convicted u/s 3 read with 6 of Indian Explosives Substances Act.

14. In response to the petitioner's grievance, in the counter affidavit, a reference was made to Section 433A of the Code of Criminal Procedure, wherein it was directed that in cases of person, whose death sentence was commuted into one of life imprisonment unless the person serves 14 years of imprisonment, he will not be released on general amnesty. There is no vested right to request for premature release. It is an admitted case of the respondents that the petitioner had already completed more than 14 years 7 months and 23 days of imprisonment as on 3.11.2008. Therefore, his case cannot be brought under the ambit of Section 433-A of Cr.P.C.

15. Reliance was placed upon a letter of the State Government addressed to the Additional Director General of Prisons, dated 2.4.2008. Two clarifications were given by the State Government after taking opinion from its Law Department. The first was that Article 161 of the Constitution is circumscribed by Article 162. The reason given in the said letter may be extracted below:

According to Article 161 of the Constitution of India, the Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends. As per Article 162 of the Constitution of India, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws. In this connection, it may be stated that as "Arms, firearms, ammunition and explosives" are enumerated in Entry 5 of the Union List, in the Seventh Schedule to the Constitution of India, Parliament has the power to make laws on the said subject. Hence, the Union shall have the executive power on the said subject matter. As such, the President alone shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted under the Arms Act, 1959 (Central Act 54 of 1959) and Explosive Substances Act, 1908 (Central Act VI of 1908) under Article 72 of the Constitution of India and the Government of a State shall not have the power to grant pardons, reprieves, respites etc. by invoking the power under Article 161 of the Constitution on the person convicted under the said Central Acts....

16. The second ground was based upon the limitation u/s 435(2) of Cr.P.C. and that reason also may be extracted below:

...Further Sub-section (2) of Section 435 of the said Code provides that no order of suspension, remission or commutation of sentences passed by the State Government in relation to a person, who has been convicted of offences, some of which relate to matters to which the executive power of the Union extends, and who has been sentenced to separate terms of imprisonment which are to run concurrently, shall have effect unless an order for the suspension, remission or commutation, as the case may be, of such sentences has also been made by the Central Government in relation to the offences committed by such person with regard to matters to which the executive power of the Union extends. Hence, as per the aforesaid provision of Code of Criminal Procedure Code, in the case of a person convicted of different offences, some of which are connected with matter to which the executive power of the Union Government extends and sentenced to separate terms of imprisonment to run concurrently, the orders of State Government of remission, suspension or commutation of sentences shall not be effective without the order of remission, suspension or commutation of sentence passed by the Central Government for offences committed by the person which relates to the matter to which the executive powers of the Union Government

extends. Further, it may be pointed out that there is no specific provision in the said Code to the effect that the term of imprisonment which is ordered to run concurrently along with the life sentence shall be undergone first.

Apart from these two specific objections, it was also stated that his conduct was not satisfactory.

17. In this context, it is necessary to refer to Article 161 of the Constitution of India and Section 435 Cr.P.C. and they read as follows:

161. Power of Governor to grant pardons, etc., and to suspend, remit or commute sentences in certain cases". The Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends.

18. Section 435 Cr.P.C. reads as follows:

435. State Government to act after consultation with Central Government in certain cases. - (1) The powers conferred by Sections 432 and 433 upon the State Government to remit or commute a sentence, in any case where the sentence is for an offence-

(a) which was investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, or

(b) which involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or

(c) which was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty,

shall not be exercised by the State Government except after consultation with the Central Government.

(2) No order of suspension, remission or commutation of sentences passed by the State Government in relation to a person, who has been convicted of offences, some of which relate to matters to which the executive power of the Union extends, and who has been sentenced to separate terms of imprisonment which are to run concurrently, shall have effect unless an order for the suspension, remission or commutation, as the case may be, of such sentences has also been made by the Central Government in relation to the offences committed by such person with regard to matters to which the executive power of the Union extends.

19. Mr. M. Radhakrishnan, learned Counsel appearing for the petitioner submitted that the stand taken by the respondents have no substance. It is

contrary to the Constitutional Philosophy underlying the issue relating to premature release.

20. The learned Counsel placed reliance upon the judgment of the Supreme Court in *Satpal and Another Vs. State of Haryana and Others*, for the purpose of showing that the power under Article 161 of the Constitution is akin to power under Article 72 of the Constitution. The exercise of power or refusal to exercise can be judicially reviewed by this Court. It is necessary to extract the following passage found in paragraph 4 of the said judgment, which is as follows:

4. There cannot be any dispute with the proposition of law that the power of granting pardon under Article 161 is very wide and does not contain any limitation as to the time on which and the occasion on which and the circumstances in which the said powers could be exercised. But the said power being a constitutional power conferred upon the Governor by the Constitution is amenable to judicial review on certain limited grounds. The Court, therefore, would be justified in interfering with an order passed by the Governor in exercise of power under Article 161 of the Constitution if the Governor is found to have exercised the power himself without being advised by the Government or if the Governor transgresses the jurisdiction in exercising the same or it is established that the Governor has passed the order without application of mind or the order in question is a mala fide one or the Governor has passed the order on some extraneous consideration. The extent of judicial review in relation to an order of the President under Article 72 of the Constitution of India was the subject-matter of consideration before this Court in *Kehar Singh* case where the Constitution Bench had observed: (SCC p.217, para 14)

[I]t appears to us clear that the question as to the area of the President's power under Article 72 falls squarely within the judicial domain and can be examined by the Court by way of judicial review.

The Court had further indicated that:

[A]s regards the considerations to be applied by the President to the petition, we need say nothing more as the law in this behalf has already been laid down by this Court in *Maru Ram* case.

What has been stated in relation to the President's power under Article 72 equally applies to the power of the Governor under Article 161 of the Constitution. In *Maru Ram* case the Court came to the conclusion that the power under Articles 72 and 161 can be exercised by the Central and State Governments and not by the President or Governor on their own. The advice of the appropriate Government binds the head of the State. The Court also came to the conclusion that considerations for exercise of power under Articles 72 or 161 may be myriad and their occasions protean, and are left to the appropriate Government, but no consideration nor occasion can be wholly irrelevant, irrational, discriminatory or mala fide. Only in these rare cases will the Court examine the exercise. In para 62 of the judgment in *Maru Ram* case the Court

had observed: (SCC p.147, para 62)

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

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

21. In the above case, after laying down the law, the Supreme Court scrutinized the pardon granted to the convicts and held that the State Government was not posted with complete information. Therefore, by the exercise the power to judicially review, the State Government's order in prematurely releasing a prisoner was set aside.

22. It must also be noted that the Supreme Court in *Laxman Naskar Vs. Union of India and Others*, held that though 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 an early release of such convict, then those scheme will have to be treated as guidelines for exercising the power under Article 161. When the authority is called upon to exercise his power under Article 161, the same will have to be done consistent with the said policy or instruction. If it is not done in that way, then judicial review is also open. The following passages found in paragraphs 3,7 and 8 of the said judgment may be usefully extracted below:

3. It is a settled position of law that life sentence is nothing less than lifelong 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.

...

7. Though the police report did not cover all the above points, the prayer of "life convicts" for premature release was rejected mainly on the ground of objections by police. The police had only reported about the chances of the petitioners committing crime again. It becomes apparent from the record that the Government did not consider the prayer for premature release as per the Rules. The Government did not pay sufficient attention to the conduct record of the petitioners while in jail nor did it consider whether they had lost their potentiality in committing crime. The relevant aspect, namely, that there is no fruitful purpose in confining them any more was also not considered nor were the socio-economic conditions of the convict's family taken into account. Thus the orders of the Government suffer from infirmities and are liable to be quashed.

8. In the result, we set aside all the orders of the State Government and direct the authorities to reconsider the cases for premature release of all "life convicts" who have approached us by filing the present writ petitions as per relevant rules/guidelines within a period of one month from the receipt of this order.

23. The Supreme Court vide its judgment in *Sanaboina Satyanarayana Vs. Government of Andhra Pradesh and Others*, held that while granting premature release, the Government is at liberty to exclude certain class of persons, who have committed certain types of offence to be outside the purview of the Government's policy of release and the same cannot be questioned as violative of Article 14 of the Constitution. The Supreme Court also held that such measures of premature release is only a boon and concession and no one has a vested right. The following passage found in paragraph 9 from the said judgment may be usefully extracted below:

9. ...Consequently, the classification in this regard to keep away convicts of crimes against women from the benefits of remission under the order dated 25-1-2000 cannot be said to violate any reasonable principle or concept of law so as to call for its condemnation in exercise of the powers of judicial review. The classification therefore sounds just, reasonable, proper and necessitated in the larger interests of society and greater public interest and consequently, cannot by any stretch of imagination be branded to be invidious to attract the vice of Article 14 of the Constitution of India. A careful scrutiny of the various excepted classes of convicts only shows that the real object is to ensure that those who prey on the community and violate fundamental values of mankind, society and national interest should not get undeserved benefit.

24. The same line of reasoning was rendered by the Supreme Court vide its judgment in *Govt. of A.P. and Others Vs. M.T. Khan*, . The following passages found in paragraphs 6 and 8 may be usefully extracted below:

6. In our considered opinion, the High Court went wrong in putting such restrictive interpretation or understanding of the ratio of the decision. The High Court came to the conclusion that the decision of the Government not to extend remission was not because it did not want to do so but because it was under the

belief that it had no such power. The High Court thought that it had. The question is not so much of what the Government wanted to do, but whether it had the power of clemency in a matter like the one under consideration. It was considered expedient that the power is to be exercised in respect to a particular category of prisoners. The Government had full freedom in doing that and even excluding a category of persons which it thinks expedient to exclude. To extend the benefit of clemency to a given case or class of cases is a matter of policy and to do it for one or some, they need not do it for all, as long as there is no insidious discrimination involved. In the case at hand it was not only due to lack of power, but also because of conscious decision to exclude in the background of what it considered to be lack of authority, and in our view no exception could be taken to the same, legitimately.

...

8. 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 persons 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. It only enables transfer of prisoners from one State to another. It does not purport to confer jurisdiction on the transferee State the power of remission in respect of transferred prisoners. In *Sanaboina Satyanarayana v. Govt. of A.P.* it was held that the grant of remission as well as the conditions formed a compendious single common pattern or scheme of concession by way of remission, pregated with a policy designed in public interest and safety and interests of the society. There is no scope for judicial modification or modulating the same so as to extend the concession in excess of the very objective of the maker of the order which seems to have been guided by considerations of State policy. The scheme of remission cannot be modified or extended to the category of prisoners which it specifically excluded.

25. In both the above cases, the High Court has tried to reinterpret the scheme or modify the scheme while making a judicial review. But, in the present case, there is no attempt by the prisoner to expand the scope of the guideline laid down by the State. On the contrary, the attempt by the petitioner is to point out that his case fell very much within the norms laid by the State and the refusal can be judicially reviewed.

26. The Supreme Court once again in *Epuru Sudhakar and Another Vs. Govt. of A.P. and Others*, dealt with the case of premature release under Article 161. In its elaborate order, it considered various facets of Article 161. Paragraphs 65 to 69 of the said judgment may be usefully extracted below:

65. Exercise of executive clemency is a matter of discretion and yet subject to certain standards. It is not a matter of privilege. It is a matter of performance of

official duty. It is vested in the President or the Governor, as the case may be, not for the benefit of the convict only, but for the welfare of the people who may insist on the performance of the duty. This discretion, therefore, has to be exercised on public considerations alone. The President and the Governor are the sole judges of the sufficiency of facts and of the appropriateness of granting the pardons and reprieves. However, this power is an enumerated power in the Constitution and its limitations, if any, must be found in the Constitution itself. Therefore, the principle of exclusive cognizance would not apply when and if the decision impugned is in derogation of a constitutional provision. This is the basic working test to be applied while granting pardons, reprieves, remissions and commutations.

66. Granting of pardon is in no sense an overturning of a judgment of conviction, but rather it is an executive action that mitigates or sets aside the punishment for a crime. It eliminates the effect of conviction without addressing the defendant's guilt or innocence. The controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject-matter. It can no longer be said that prerogative power is ipso facto immune from judicial review. An undue exercise of this power is to be deplored. Considerations of religion, caste or political loyalty are irrelevant and fraught with discrimination. These are prohibited grounds. The Rule of Law is the basis for evaluation of all decisions. The supreme quality of the Rule of Law is fairness and legal certainty. The principle of legality occupies a central place in the Rule of Law. Every prerogative has to be subject to the Rule of Law. That rule cannot be compromised on the grounds of political expediency. To go by such considerations would be subversive of the fundamental principles of the Rule of Law and it would amount to setting a dangerous precedent. The Rule of Law principle comprises a requirement of "Government according to law". The ethos of "Government according to law" requires the prerogative to be exercised in a manner which is consistent with the basic principle of fairness and certainty. Therefore, the power of executive clemency is not only for the benefit of the convict, but while exercising such a power the President or the Governor, as the case may be, has to keep in mind the effect of his decision on the family of the victims, the society as a whole and the precedent it sets for the future.

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

power.

68. As stated above, exercise or non-exercise of the power of pardon by the President or the Governor is not immune from judicial review. Though, the circumstances and the criteria to guide exercise of this power may be infinite, one principle is definite and admits of no doubt, namely, that the impugned decision must indicate exercise of the power by application of manageable standards and in such cases courts will not interfere in its supervisory jurisdiction. By manageable standards we mean standards expected in functioning democracy. A pardon obtained by fraud or granted by mistake or granted for improper reasons would invite judicial review. The prerogative power is the flexible power and its exercise can and should be adapted to meet the circumstances of the particular case. The constitutional justification for judicial review, and the vindication of the Rule of Law remain constant in all areas, but the mechanism for giving effect to that justification varies.

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

27. Upon the journey into the various legal precedents cited above, the following propositions of law emerges:

- (a) The power under Article 161 is akin to Article 72 of the Constitution.
- (b) Exercise of power under Article 161 is not dependent upon the exercise of power u/s 435 Cr.P.C. and it is a plenary power.
- (c) The power exercised under Article 161 or whether in favour of or against the beneficiaries can be judicially reviewable.
- (d) If the Government issues certain policy guidelines, then a person who comes under the guidelines if he is denied the benefit of such guidelines, can legitimately seek for a direction from the Court.
- (e) Though the power of clemency/pardon is not a matter of right, yet when there is discrimination, the Court can come to the rescue of the beneficiary and enforce such guidelines issued by the State.

28. If it is seen in the light of the factual matrix and the legal precedents cited, then the stand taken by the respondents do not stand to reason. The Government's clarification in terms of letter No. 416, Home (Pri. IV)

Department, dated 2.4.2008 based upon the remarks of its Law Department is in derogation of the law laid down by the State.

29. In the present case, the petitioner's sentence on his conviction under Explosive Substances Act and the Railways Act have already been undergone by him. But, for the offence u/s 302 read with Section 120(b) IPC, the petitioner would have undergone full sentence for those offences and would have been released from the prison long ago. The only conviction for which he is now undergoing sentence is for the offence u/s 302 read with Section 120-B IPC on a prosecution launched by the State Prosecution. Therefore, the respondent State cannot contend that they have no power under Article 161 to consider the case of the petitioner for his premature release. The reference of limitation under Articles 161 and 162 of the Constitution will arise only when such power is sought to be exercised to release a person who is actually undergoing sentence for offences enumerated under List I of Schedule VII of the Constitution and not otherwise.

30. The second contention that the power under Article 161 is circumscribed by Section 435(2) IPC is also misconceived and contrary to the dictum laid down by the Supreme Court. The power under Article 161 is plenary power and not circumscribed by the procedural code like Cr.P.C.

31. The third contention that there is no right to demand premature release has also no substance in the light of the legal precedents cited above. As has been laid by the Supreme Court, once the State lays down certain parameters and frames guidelines and directions in the form of Government Orders and if any person comes within those norms, he can seek to enforce his rights based on those guidelines. A non exercise of such power will be violative of Articles 14 and 21 of the Constitution.

32. Therefore, the only question that is left to be decided is the stand taken in the counter affidavit, dated 4.8.2009 stating that the petitioner had overstayed his leave. This reason was taken note of when the petitioner's release was demanded in respect of order issued by the Government in G.O.Ms. No. 873 Home (Prison IV) Department, dated 14.09.2006. Six conditions were laid down in those G.Os. for ordering premature release, which are as follows:

- i) That the prisoners who are convicted for the offences specified in G.O.Ms. No. 1762, Home, dated 20.07.1987 will not be eligible for this concession;
- ii) That their general behaviour in the prison should have been satisfactory;
- iii) That the life of the convict would be safe if released;
- iv) That they would be accepted by the members of their families or any other social organization which can give guarantee for the safety of their lives;
- v) That their cases do not come u/s 435 Criminal Procedure Code; and
- vi) That they will execute bonds, according to the usual terms and conditions.

33. It is not stated as to how the petitioner had suffered any disqualification with reference to any of the conditions Nos. 2 to 6. With reference to the first condition, this Court had already answered the question against the respondents.

34. In the letter, dated 12.10.2007 sent by the respondents to the petitioner's counsel, the only ground raised was that the petitioner had completed 13 years and 7 months. It was also stated that he was not convicted u/s 224 IPC. The only ground raised was that he had overstayed the leave. That cannot be said to be a behaviour inside prison as set out in condition No. 2 above.

35. Subsequent to these orders, the State Government had issued another Government Order in G.O.Ms. No. 1155, Home (Pri. IV) Department, dated 11.09.2008, wherein the respondents had introduced one more additional condition in paragraph 1(b), which is as follows:

b) the prisoners who were awarded death penalty and whose sentence was later commuted to life imprisonment by the appellate Court and the prisoners who committed offences on religious prejudices.

But this condition did not deter the Government in releasing some convicts involved in the Coimbatore serial bomb blast case as pointed out by the petitioner's counsel while ordering release during the year 2009.

36. It must be stated that the said condition was not found when the prisoners were given amnesty on the 99th Birthday anniversary of Thiru C.N. Annadurai, the late Chief Minister of Tamil Nadu. But this condition has now been imposed by the State. It is also not clear as to how such a condition was not enforced during the premature release of prisoners during the Centenary completion of Thiru C.N. Annadurai during September, 2009. If the petitioner was considered in terms of G.O.Ms. No. 1326, Home (Prison IV) Department, dated 12.09.2007, the said condition was not available to the State. Since the said condition imposed as condition No. 1(b) in terms of G.O.Ms. No. 1155, Home (Pri. IV) Department, dated 11.09.2008 was not attacked before this Court, this Court is not going into the wisdom behind the imposition of the said condition. But, at the same time, the petitioner's case cannot be allowed to be decided in terms of that new G.O., but it has to be considered in the light of the present judgment and in the light of the G.O.Ms. No. 1326, Home (Prison IV) Department, dated 12.09.2007.

37. The Supreme Court vide its judgment in Laxman Naskar Vs. Union of India and Others, held that if the report of the State do not answer all the conditions raised therein and only based upon the objections by the police, then the Government's decision will suffer from infirmities and are liable to be set aside. Therefore, this Court is obliged to issue the following direction to the first respondent State.

38. The respondents shall consider within two months from the date of receipt of copy of this order, the case of the petitioner for premature release in the light of

G.O.Ms. No. 1326 Home (Prison IV) Department, dated 12.09.2007 and in the light of the present judgment and without reference to the Government letter No. 416, dated 02.04.2008 and communicate the result to the petitioner without fail.

39. The writ petition is allowed accordingly. However, there will be no order as to costs.