substantial compliance has been made with the said rule even if it is interpreted in the manner desired by the counsel for the petitioner.

(28) For all these reasons this petition must fail, and is accordingly dismissed though without any order as to costs.

B. R. TULI, J.—(29) I entirely agree.

M. R. SHARMA, J.—(30) I agree.

K. S. K.

FULL BENCH

Before R. S. Narula, C.J., A. D. Koshal and B. S. Dhillon, JJ.

HUKAM SINGH,—*Petitioner.*

versus

THE STATE OF PUNJAB, ETC.,—*Respondents.*

Civil Writ No. 812 of 1971.

November 12, 1974

Code of Criminal Procedure (Act V of 1898)—Section 401—Constitution of India (1950)—Articles 72 and 161—Power of pardon, clemency and remission of sentence—Scope and extent of—Order of pardon and remission of sentence—Whether justiciable and on what grounds—Sentence of a convict in a cognizable case of injury remitted by the State Government—Injured person—Whether has locus standi to challenge such remission—Government—Whether bound to disclose the reasons in support of the order of remission—Provisions of section 401(2) of the Code—Whether mandatory.

Held, that powers of pardon and clemency vested in the President of India under Article 72, in the Governor under Article 161 of the Constitution of India, 1950 and in the State Government under section 401 of the Code of Criminal Procedure, 1898, are essentially executive powers of mercy which operate in a completely different field. The trial of criminals and the passing of sentences is purely in the domain of the judiciary whereas the execution of sentences is purely with the Executive Government. The order passed by State Government under section 401 of the Code is no doubt basically an executive order but the Courts have jurisdiction to determine its validity and to find out whether the authority granting the pardon has the power to do so. If the repository of

the powers fails to comply with the requirements of the purposes for which the said power is given and takes into consideration irrelevant and extraneous considerations, it acts *ultra vires.*

Held, that an order passed under Articles 72 and 161 of the Constitution of India and under section 401 of the Code of Criminal Procedure, is justiciable on any of the following grounds: (1) That the authority, which purports to have exercised the power has no jurisdiction to exercise the same. (2) That the impugned order goes beyond the extent of the power conferred by the provisions of law under which it is purported to be exercised. (3) That the order has been obtained on the ground of fraud or that the same having been passed, taking into account the extraneous considerations not germane to the exercise of the power conferred. In other words, that the order is a result of *mala fide* exercise of power. However, the exercise of power in this regard cannot be questioned on the ground of adequacy or inadequacy of the reasons which resulted into the passing of the said order. The Court is not entitled to investigate the matter on merits but can certainly go into the question whether the power given has been exercised *mala fide* or not.

Held, that when the State Government remits the sentence of a convict in a cognizable offence of injury, no doubt the State is the prosecutor but the order of pardon or clemency can be challenged by the person who has been injured in the occurrence. He is the person who is aggrieved having been injured. He can apprehend that the grant of remission to the convict may endanger his life. He has, therefore, a *locus standi* to challenge the order in the High Court by way of writ petition.

Held, that the law does not enjoin upon the State Government to give reasons for remitting the unexpired portion of the sentence in the order of remission. It is also not the legal duty of the Government to give reasons which lead to the passing of the order, if the order is challenged in the High Court. It is the petitioner who challenges the order who has to give grounds supported by *prima facie* evidence in support of the grounds of challenge. It cannot be presumed that the highest authority, which is vested with this wide and unfettered powers, will misuse the said power until and unless the misuse of the power is proved. On the other hand, the presumption of correctness is attached to the acts done in the official discharge of the duties until and unless it is proved otherwise.

Held, that provisions of sub-section (2) of section 401 of the Code are not mandatory. The Legislature in enacting the sub-section has used the word 'may' and not 'shall'. Though the use of word 'may' and 'shall' may not be conclusive to infer whether the provision is mandatory or directory but in order to see the nature

of the provision, other relevant provisions of the Code can throw light on the interpretation of the word 'may' or 'shall'. Since in no other provision of the Code, the word 'may' is used as 'shall', this word in section 401(2) has to be taken in its ordinary sense which is that of directory nature and not mandatory. Moreover, the sub-section is only made applicable whenever an application is made to the appropriate Government under sub-section (1) of Section 401 of the Code. When the matter is taken in hand *suo motu* by the State Government for suspending or granting remission of the punishment, the provisions of sub-section (2) are not applicable. The powers vested in the President of India under Article 72 of the Constitution, and in the Governor under Article 161 of the Constitution are much wider powers or pardon and clemency whereas the powers under section 401 of the Code of Criminal Procedure are only limited powers for suspending the execution of the sentence or remitting the whole or any part thereof. If the framers of the Constitution intended to curb the powers of pardon and clemency given to the Heads of the respective Governments, analogous provisions of sub-section (2) of Section 401 of the Code of Criminal Procedure would have been introduced in the Constitution. There is no such provision in the Constitution which requires the President of India or the Governor to send for the opinion of the Presiding Judge of the Court which convicts the accused person or of the Judge of the Court which confirms conviction in appeal. There is also no penalty provided for the non-observance of the provisions of sub-section (2). Hence the provisions of sub-section (2) of Section 401 are not mandatory in nature and the non-compliance thereof in any manner does not make the order without jurisdiction.

Case referred by the Division Bench consisting of Hon'ble Mr. Justice P. C. Pandit and Hon'ble Mr. Justice Bhopinder Singh Dhillon, on 16th August, 1972, to a Full Bench, for decision of the following points of law involved in the case. The Full Bench consisting of the Hon'ble the Chief Justice Mr. R. S. Narula, the Hon'ble Mr. Justice A. D. Koshal and Hon'ble Mr. Justice Bhopinder Singh Dhillon, finally decided the case on 12th November, 1974:—

(1) *Is the impugned order justiciable ?*

(2) *Has the petitioner* locus standi *to file this petition ?*

(3) *Was the Government bound to disclose the reasons for remitting the unexpired portion of the sentence passed on Dr. Abchal Singh and directing his release in the impugned order ? If not, is it obliged to disclose the said reasons in the return filed by it in answer to the writ petition or produce in Court the relevant file of the case, in which the said reason might have been incorporated ?*

(4) *In case it is held that the reasons for which the Government made the impugned order are to be scrutinised,*

what is the nature and extent of the powers of remission or pardon ?

(5) *Is the initial onus on the petitioner to give prima facie evidence to show that the power had been abused by the Government in a particular case, or the impugned order itself must on the face of it show that the power had not been exercised arbitrarily, but in accordance with the policy and object of the enactment and on grounds which were not extraneous to the purpose for which the said power was conferred ?*

(6) *Are the provisions of section 401 (2), Code of Criminal Procedure, mandatory in character, the non-compliance of which vitiates the impugned order ?*

Petition under Articles 226/227 of the Constitution of India praying that a writ in the nature of Certiorari, or any other appropriate writ, order or direction be issued quashing the orders of respondent No. 1, dated 21st July, 1970, (Annexure 'C') and declaring Section 401 of the Code of Criminal Procedure ultra vires Article 14 of the Constitution of India.

Anand Swaroop, Senior Advocate with R. P. Bali, & K. G. Chaudhari, Advocates, *for the petitioner.*

M. J. S. Sethi, Vinod Kataria & S. Kumar, Advocates, *for Advocate-General, Punjab, Respondent No.* 1.

S. S. Kang, and Satish Bhanot, Advocates, ***for respondent No.*** 3.

Kuldip Singh, Bar-at-law, *for the Union of India.*

JUDGMENT

DHILLON, J.—This is a petition under Articles 226 and 227 of the Constitution of India. Respondent No. 3, Dr. Abchal Singh, purchased a piece of agricultural land on April 10, 1968 from Sarvshri Lilak Chand and Raj Kumar, owners of the land situate in village Hebowal Kalan, Tehsil and District Ludhiana. The petitioner Hukam Singh claimed himself to be a tenant in possession of the said land. Dr. Abchal Singh, after having purchased the said land, is alleged to have made attempts to disposses Hukam Singh petitioner from the land in dispute. On May 19, 1968 at about 5.30 A.M., Dr. Abchal Singh fired a gun shot at the petitioner which hit him on his right leg and caused multiple injuries. At

the same time he fired another gun shot which hit Bawa Singh, brother of the petitioner, who later on succumbed to the injuries. A case under sections 302/307/447 of the Indian Penal Code etc. was registered against Dr. Abchal Singh and some others in which the Additional Sessions Judge, Ludhiana, *vide* his order dated January 6, 1969, convicted Dr. Abchal Singh under section 302 of the Indian Penal Code and awarded him life imprisonment. He was also convicted under section 307 of the Indian Penal Code and was sentenced to undergo rigorous imprisonment for seven years and a fine of Rs. 200, and also three months rigorous imprisonment was awarded to him under section 447 of the Indian Penal Code. The other co-accused of Dr. Abchal Singh were acquitted by the learned Additional Sessions Judge, Ludhiana. Dr. Abchal Singh preferred an appeal against the said order of conviction which appeal was registered as Criminal Appeal No. 145 of 1969 in this Court. This appeal was dismissed by a Division Bench of this Court on May 14, 1970, upholding the conviction and sentences awarded to Dr. Abchal Singh. The copy of the judgment of the High Court dated May 14, 1970, is attached as Annexure 'A' with the writ petition. No further appeal was preferred by Dr. Abchal Singh, respondent No. 3, to the Supreme Court and the order of the High Court became final.

(2) The State Government exercising its powers under section 401 of the Code of Criminal Procedure, *vide* its order dated July 21, 1970, copy of which is attached as Annexure 'C' with the writ petition, remitted the unexpired portion of the sentence of Dr. Abchal Singh and issued a direction for releasing him, if he accepted the conditions mentioned in that order. It is this order of the State Government which is being challenged in this writ petition on a number of grounds, which are mentioned in the petition.

(3) This petition came up for hearing before a Division Bench consisting of P. C. Pandit J. (as he then was) and myself, when we, after hearing the learned counsel for the parties, thought that a number of questions of law involved in this case are not free from difficulty and the said questions of law are of public importance which will have far reaching consequences. Since there is no direct authority of any Court on the points involved, we thought it proper to refer this case to be heard by a larger Bench. The

points of law refered by us to the larger Bench, are in the following terms:—

1. Is the impugned order justiciable?

2. Has the petitioner *locus standi* to file this petition?

3. Was the Government bound to disclose the reasons for remitting the unexpired portion of the sentence passed on Dr. Abchal Singh and directing his release in the impugned order? If not, is it obliged to disclose the said reasons in the return filed by it in answer to the writ petition or produce in Court the relevant file of the case, in which the said reason might have been incorporated?

4. In case it is held that the reasons for which the Government made the impugned order are to be scrutinised, what is the nature and extent of the powers of remission or pardon?

5. Is the initial onus on the petitioner to give *prima facie* evidence to show that the power had been abused by the Government in a particular case, or the impugned order it self must on the face of it show that the power had not been exercised arbitrarily, but in accordance with the policy and object of the enactment and on grounds which were not extraneous to the purpose for which the said power was conferred?

6. Are the provisions of section 401(2), Code of Criminal Procedure, mandatory in character, the non-compliance of which vitiates the impugned order?

(4) This is how the case is before us..

(5) The impugned order has been assailed before us by Shri Anand Swaroop, the learned counsel for the petitioner, mainly on the ground that the said order is *mala fide* exercise of power. The grounds on which this order is sought to be held to be *mala fide* precisely are, firstly, that the impugned order was passed within a few months of the passing of the final order of conviction of Dr. Abchal Singh by this Court. Secondly, it has been alleged that the said order has been passed without obtaining the opinion

of the learned trial Court or that of this Court as was mandatory under the provisions of sub-section (2) of section 401 of the Code of Criminal Procedure, and, thirdly, it has been alleged that since Dr. Abchal Singh is related to late Shri Gurnam Singh, Ex-Chief Minister, Punjab, therefore, he wielded great political influence.

(6) It may be pointed out that in the return filed on behalf of the State, it has been stated that section 401(1) of the Code of Criminal Procedure, is a power which is an executive power exercised by the Government in its discretion and the same is not liable to be interfered with by this Court. The *mala fiide* exercise of power in the present case has been denied. It has been pleaded that sub-section (2) of section 401 of the Code of Criminal Procedure, is not mandatory, but is directory and it is in the discretion of the State Government in a proper case to ask for the opinion of the trial Judge or that of the appellate Court in the matter of granting remission or suspension of sentence. Dr. Abchal Singh respondent has denied that he is in any way related to late Shri Gurnam Singh Ex-Chief Minister, Punjab. It has been pleaded that the impugned order has been passed keeping in view the justice and equity of the case in exercise of the sovereign power of the State Government.

(7) Though the impugned order has been assailed on the ground of violation of Article 14 of the Constitution of India, being discreminatory and arbitrary, but these grounds mentioned in the petition were not pressed before us by the learned counsel for the petitioner, he having realised that the said grounds would be of no assistance in the nature of things.

(8) The points referred to for decision, may now be dealt with.

I. Is the impugned order justiciable?

(9) The question of justiciability is in a way interconnected with point No. 4, as in order to find out whether the order passed under section 401 of the Code of Criminal Procedure, and so also order passed under Articles 72 and 161 of the Constitution of India is justiciable or not, the nature and extent of the powers of pardon, remission and suspension of sentence, have to be examined. The nature and extent of the mercy power as prevailing in this country, may briefly be stated.

(10) Before Constitution of India came into force, the sovereign prerogative of pardons and reprieves was exercised in India by the Governor General as delegated under section 295 of the Government of India Act, 1935. The other relevant provision was section 401 of the Code of Criminal Procedure. Sub-section (5) of section 401 of the Code of Criminal Procedure, as it stood then, provided that nothing contained in section 401 shall be deemed to interfere with the right of His Majesty or the Governor General when such right is delegated to him to grant pardons, reprieves, respites or remission of punishments. After the enforcement of the Constitution, the relevant provisions which vest the powers of clemency and pardon are Articles 72 and 161 of the Constitution of India.

(11) The provisions of Article 72(1) (a), (b) and (c) of the Constitution are in the following terms :

> "72. (1) The President shall have the power to grant pardons, reprieves, respites or remission of punishment or to suspend, remit or commute the sentence of any person convicted of any offence,—
>
> (a) in all cases where the punishment or sentence is by a Court Martial;
>
> (b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;
>
> (c) in all cases where the sentence is a sentence of death."

(12) The provisions of Article 161 of the Constitution are as follows:—

> "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."

(13) The provisions of section 401(1) of the Code of Criminal Procedure are in the following terms:—

> "401 (1) When any person has been sentenced to punishment for an offence, the appropriate Government may at

any time, without conditions or upon any conditions, which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced."

(14) The nature and scope of the powers of pardon and elemency came for consideration before a Full Bench of the Bombay High Court in a case reported in *State* v. *Kawas Manekshaw Nanavati* (1). In that case the accused Commander K. M. Nanavati was found to be guilty of an offence of murder and was sentenced to life imprisonment. Since he was in the naval custody, the High Court directed that warrants of his arrest should issue. Before the warrants of arrest could be executed the Governor of Bombay, in exercise of his powers under Article 161 of the Constitution of India, issued an order suspending the sentence awarded by the Bombay High Court to Commander K. M. Nanavati. He further directed that Commander Nanavati shall be detained in the naval custody in I.N.S. Kunjali. The order passed by the Governor was under attack. After considering the various contentions raised in the case, it was held by the Full Bench of the Bombay High Court that the High Court had the jurisdiction to examine the validity of the order passed under Article 161 of the Constitution in appropriate cases. The argument raised on behalf of the State that the Court had no jurisdiction to look into the legality of the order passed under Article 161 of the Constitution, was repelled as it was held that the Court was entitled to examine as to why the warrants issued by the Court could not be executed and for examining that aspect, the legality and constitutionality of the order issued by the Governor under Article 161 of the Constitution was necessarily to be determined because if the order issued was valid, the non-execution of the warrants issued by the High Court was properly explained and if the order was invalid, the warrants were to be executed. It was held that the powers of the Governor under Article 161 of the Constitution are wide and unfettered but at the same time the same were not entitled to be exercised arbitrarily except for good and sufficient reasons. It may be mentioned that in *Commander Nanavati's case* (1) (supra) the reasons which led the Governor to pass the impugned order were not disclosed to the Court. The Advocate-General was asked by the Court as to what led the Governor to pass the impugned order but he (Advocate-General) conceded that the order had been

(1) A.I.R. 1960 Bom. 502.

made by the Governor after consultations with the Chief Minister and he had been instructed not to disclose the reasons. It is contended by Shri Mohinderjit Singh Sethi the learned counsel for the State that the Full Bench of the Bombay High Court in *Commander Nanavati's case* (supra) did not examine the reasons which led to the passing of the order by the Governor under Article 161 of the Constitution of India and, therefore, it be held that the said Court came to the conclusion that the order was not justiciable. This contention of the learned counsel for the State in my opinion is without any merit. No doubt the reasons which led to the passing of the order of suspension of sentence by the Governor were not disclosed to the Court; but it is to be kept in mind that the said order was not challenged before the Court on the grounds that the reasons, which led to the passing of the order, were not germane to the power to be exercised under Article 161 of the Constitution of India. The Court was in fact examining the question as to why the warrants issued by the Court could not be executed and that matter was gone into and findings recorded. It cannot, therefore, be held, that the Full Bench of the Bombay High Court held that the order passed under Article 161 of the Constitution of India, was not justiciable.

(15) The decision of the Full Bench of the Bombay High Court in *Commander K. M. Nanavati's case* (supra) to the effect that even during the course of the pendency of the petition for leave to appeal to the Supreme Court, the Governor had the jurisdiction to pass an order under Article 161 of the Constitution, was over-ruled by the Supreme Court when the matter came up for consideration before their Lordships of the Supreme Court in case reported in *K. M. Nanavati* v. *The State of Bombay (now Maharashtra)* (2). In their judgment, their Lordships of the Supreme Court briefly set out the history of the genesis and development of the Royal prerogative of Mercy and noted various provisions of the American Constitution and some other decisions relating to the Royal prerogative of Mercy as it existed in England. Their Lordships of the Supreme Court came to the conclusion that the powers of pardon and clemency under Articles 72 and 161 of the Constitution and so also under section 401 of the Code of Criminal Procedure, are to be exercised in a completely different field whereas the powers of the Supreme Court under Article 142 of the Constitution and that of the Court of Appeal under

(2) A.I.R. 1961 S.C. 112.

section 426 of the Code of Criminal Procedure, operate in a completely different field. Their Lordships also came to the conclusion that in order to give harmonious construction to the provisions of Article 142 of the Constitution on the one hand and Articles 72 and 161 of the Constitution on the other, and section 401 of the Code of Criminal Procedure on one side and section 426 of the Code of Criminal Procedure, on the other, it is to be construed that when the matter is subjudice before the Court either under Article 142 of the Constitution or under section 426 of the Code of Criminal Procedure, during that period the field of operation of the powers under Articles 72 and 161 of the Constitution and under section 401 of the Code of Criminal Procedure, will remain suspended and the Court will have the final say in the matter of remission of sentence. But where there is no matter pending before the Court in reference to the above mentioned provisions, the field of operation regarding the remission, etc., of the sentence appropriately vests in the authorities mentioned under Articles 72 and 161 of the Constitution and under section 401 of the Code of Criminal Procedure. It was in this manner that the harmonious interpretation was given by their Lordships of the Supreme Court to the provisions referred to above. It was observed by their Lordships of the Supreme Court that the power of pardon and clemency is essentially vested in the Heads of the Executive because the Judiciary had no such mercy jurisdiction. It was held that so long as the Judiciary has power to pass a particular order in a pending case, to that extent the power of the Executive is limited in view of the words either of section 401 and 426 of the Code of Criminal Procedure or Article 142, 72 and 161 of the Constitution. It would thus be clear from this authoritative pronouncement of the Supreme Court that the powers granted under Articles 72 and 161 of the Constitution and under section 401 of the Code of Criminal Procedure are subject to the other provisions of the Constitution and if a conflict takes place in the exercise of powers of clemency and pardon with the other provisions of the Constitution, the said conflict has to be resolved by giving harmonious construction and thus the power of pardon and clemency in our country is not an absolute power in that sense. The Supreme Court, after examining the whole question, held the order of the Governor passed under Article 161 of the Constitution of India, to be *ultra vires*.

(16) The nature and scope of the powers under section 401 of the Code of Criminal Procedure came up for consideration before their

Lordships of the Supreme Court in a case reported in *Gopal Vinayak Godse* v. *The State of Maharashtra and others* (3), wherein their Lordships observed as follows:—

> "The question of remission is exclusively within the province of the appropriate Government and in this case it is admitted that, though the appropriate Government made certain remissions under section 401 of the Code of Criminal Procedure, it did not remit the entire sentence."

In that case it was contended on behalf of the petitioner before their Lordships that the petitioner would be at the mercy of the appropriate Government and the said Government, out of spite, might not remit the balance of his sentence, with the result that he would be deprived of the fruits of remissions earned by him for sustained good conduct, useful service and even donation of blood. This contention was repelled by their Lordships holding that the Constitution as well as the Code of Criminal Procedure confer the power to remit a sentence on the executive Government and it is in its exclusive province. It was further held that their Lordships could not assume that the appropriate Government would not exercise its jurisdiction in a reasonable manner.

(17) From what has been stated above, it is clear that the powers vested in the President of India under Article 72, in the Governor under Article 161 of the Constitution and in the State Government under section 401 of the Code of Criminal Procedure are essentially executive powers of mercy which operate in a completely different field. The trial of Criminals and the passing of sentences is purely in the domain of the judiciary whereas the execution of sentences is purely with the Executive Government. Thus it is clear that the order passed by the State Government under section 401 of the Code of Criminal Procedure in this case is essentially and basically an executive order and the same has to operate in a completely different field.

(18) It is conceded before us by the learned counsel appearing for the State of Punjab, Shri Mohinderjit Singh Sethi, that the Courts have jurisdiction to determine the validity of an order of pardon on the ground whether the authority granting it had the power to do so. It is also conceded that the Court has the jurisdiction

(3) A.I.R. 1961 S.C. 600.

to examine the order of pardon on the ground of the same having been passed within the four corners of the power with which the authority competent to grant pardon, is clothed. However, it is contended by him that except on the above mentioned two grounds, there cannot be any third ground on which the order of pardon can be held to be justiciable. The learned counsel relies on some American Authorities, namely, (1) *Jamison* v. *Flanner Sheriff* (4), a decision of the Supreme Court of Kansas, (2) *Ex Parte* Crump (5), a decision of Criminal Court of Appeals of Oklahoma, and (3) *Ex Parte*: *In the matter of the Application of Phillip Grossman* (6) and contends that the Court has no power to examine the order of pardon or remission on the ground of it having been passed *mala fide* and further it is contended that the adequacy or inadequacy of the reasons for passing the order of pardon or remission cannot be gone into by the Court. It is no doubt true that the power in question is essentially executive in nature and is in the domain of the authorities who have been clothed with the powers and the Courts are not required to look into the adequacy or inadequacy of the reasons which led to the exercise of the said powers, but at the same time, it cannot be held that an order passed in exercise of the said powers cannot be looked into by the Court on any of the grounds other than the two mentioned earlier. The authorities referred to above nowhere lay down that if the power is *mala fide* exercised, the Courts have no jurisdiction to go into this question. On the other hand, there are decisions of the American Courts which clearly lay down that the Courts have jurisdiction to investigate the title of pardon alleged to have been procured by fraud on the Governor. Reference in this connection may be made to *Bathbun* v. *Baumel Warden* (7) a decision of the Supreme Court of Iowa, and *Bess* v. *Pearman* (8), a decision of the Supreme Court of South Carolina. In my opinion, the *mala fide* exercise of a power is species of fraud and a power which is *mala fide* exercised, so as to say that the same is exercised for extraneous considerations, which are not germane to the exercise of the power in question, is *ultra vires*. In fact it appears that the *mala fide* exercise of power, when alleged, is a question which would involve the consideration of extraneous factors having

(4) 228 Pacific Reporter 82.
(5) 135 Pacific Reporter 429.
(6) U.S.S.C.R. 69 Lawyers Edition 87.
(7) 191 N.W.R. 297.
(8) 150 S.E.R. 54.

resulted into the exercise of the power which again will be covered by the question as to whether the power exercised is within the extent of the power conferred which matter, even according to the learned counsel for the State, is justiciable. In my opinion, the question of the *mala fide* exercise of power is a question which Courts will always have jurisdiction to examine when a proper case is made out for examining the said question. It is of course true that before the Court can examine the question of *mala fide* exercise of the powers, the petitioner, who approaches the Court has to make out a *prima facie* case and he has to discharge the initial onus as laid down by ordinary rules of evidence before the State can be put to proof to justify the order. This aspect of the present case will be dealt with by me a little later.

(19) The power of pardon and clemency is certainly an executive power but it cannot be disputed that if the repository of the power fails to comply with the requirements of the purposes for which the said power is given and takes into consideration irrelevant and extraneous considerations, it acts *ultra vires*. S.A. De. Smith in his book Judicial Review of Administrative Action (1959 Edition) at page 61, while discussing the exercise of discretionary powers, opines that relevant considerations must be taken into account and irrelevant considerations disregarded; they must be exercised in good faith and not arbitrarily or capriciously. If the repository of the power fails to comply with these requirements it acts *ultra vires*.

(20) Lord Somervell in *Smith* v. *East Elloe Rural* District Council (9) held as under:—

> "*Mala fide* is a phrase often used in relation to the exercise of statutory powers. It has never been precisely defined as its effects have happily remained in the region of hypothetical cases. It covers fraud or corruption."

(21) From what has been stated above, it is clear that *mala fide* exercise of power is a species of fraud and the use of a power *mala fide* is a question which is always justiciable before the Courts of law. It is well settled that even the executive orders, if passed *mala fide*, are *ultra vires* and are vitiated. Reference in this connection

(9) (1956) A.C. 736.

may be made to a decision of the Supreme Court in *S. Partap Singh* v. *The State of Punjab* (10). In that case the order passed by the State Government revoking the leave of Dr. Partap Singh, which was essentially an executive order, was set aside by the Supreme Court on its having recorded a finding that the said order was passed *mala fide*. Similarly, in case *C. S. Rowjee and others* v. *The State of Andhra Pradesh and others* (11), the scheme framed under Chapter IV-A of Motor Vehicles Act, which was essentially an executive action, was quashed by the Supreme Court and a finding was recorded that the same was vitiated because of *mala fide* exercise of power.

(22) From the above discussion, I, therefore, conclude that an order passed under Articles 72 and 161 of the Constitution of India and under section 401 of the Code of Criminal Procedure, is justiciable on any of the following grounds:—

(1) That the authority, which purported to have exercised the power, had no jurisdiction to exercise the same.

(2) That the impugned order goes beyond the extent of the power conferred by the provisions of law under which it is purported to be exercised.

(3) That the order has been obtained on the ground of fraud or that the same having been passed taking into account the extraneous considerations not germane to the exercise of the power conferred or in other words, that the order is a result of *mala fide* exercise of power.

It may, however, be observed that the exercise of power in this regard cannot be questioned on the ground of adequacy or inadequacy of the reasons which resulted into the passing of the said order. The Court is not entitled to investigate the matter on merits but can certainly go into the question whether the power given has been exercised *mala fide* or not.

II. *Has the petitioner* locus standi *to file this petition?*

(23) From the discussion made above, it is clear that if an order can be challenged on any of the grounds referred to above, some

(10) A.I.R. 1964 S.C. 72.
(11) A.I.R. 1964 S.C. 962.

person must have a *locus standi* to challenge the same. It is completely a different matter that a petitioner may fail as he may fail to prove any of the grounds referred to above, but to say that no person has *locus standi* to challenge an order issued under Articles 72 and 161 of the Constitution of India and under section 401 of the Code of Criminal Procedure, will not be the correct position of law. The petitioner in this case is a person, who was injured and whose brother was murdered by respondent No. 3. This verdict was given by Court and respondent No. 3 stands convicted. No doubt in our criminal jurisprudence, in cognizable offences, the State steps in as the prosecutor, but at the same time, if the order of pardon and clemency can be challenged on any of the grounds, there must be some person, who will have *locus standi* to challenge the same and if there can be any such person, there cannot be any better person than the petitioner, who felt very much aggrieved because of the murder of his brother and also because he himself having been injured during the same occurrence. He may apprehend that the grant of remission to respondent No. 3 will endanger his life. Though he may not have any legal right as such to have been infringed by the grant of remission to respondent No. 3, but he certainly has got a personal or individual right as he is the real person, who felt aggrieved because of the criminal acts done by respondent No. 3. This personal right need not be in respect of a proprietary interest and it cannot be denied that the petitioner is the most aggrieved person, who considers himself to be prejudicially affected by the impugned order. In *Gadde Venkateswara Rao* v. *Government of Andhra Pradesh and others* (12), it was held by their Lordships as follows:—

> "A petitioner, who seeks to file an application under Article 226 of the Constitution should 'ordinarily' be one who has a personal or individual right in the subject-matter of the petition. A personal right need not be in respect of a proprietary interest; it can also relate to an interest of a trustee. *That apart in exceptional cases, as the expression 'ordinarily' indicates, a person, who has been prejudicially affected by an act or omission of an authority can file a writ even though he has no proprietary or even fiduciary interest in the subject-matter thereof.*"

(12) A.I.R. S.C. 828.

(24) As I have already observed, since the petitioner is prejudicially affected, he has got a *locus standi* to file this petition.

III. *Was the Government bound to disclose the reasons for remitting the unexpired portion of the sentence passed on Dr. Abchal Singh and directing his release in the impugned order? If not, is it obliged to disclose the said reasons in the return filed by it in answer to the writ petition or produce in Court the relevant file of the case, in which the said reason might have been incorporated?*

(25) As regards this question it was straightway conceded by the learned counsel for the petitioner that the law does not enjoin upon the State Government to give reasons for remitting the unexpired portion of the sentence in the order of remission. As regards the later portion of this question, it is to be observed that if there is no requirement of law to give reasons in the impugned order itself as a corollary it will follow that it will not be the legal duty of the respondents to give reasons which lead to the passing of the order in the return to be filed if petitioner has not given grounds supported by *prima facie* evidence to prove that the power has been exercised *mala fide*. Of course if certain allegations are made in the petition, the State Government is duty bound to give a reply to the said allegations and if it fails to do so, presumption may be drawn against it that it has failed to rebut the allegations made in the petition. But in a case where no concrete grounds of attack are given in the petition it cannot be expected from the Government to justify its order by giving reasons which led to the passing of the impugned order, in the return, when no legal duty is enjoined upon it to do so. It cannot be presumed that the highest authority, which is vested with this wide and unfettered powers, will misuse the said power until and unless the misuse of the power is proved. On the other hand, the presumption of correctness is attached to the acts done in the official discharge of the duties until and unless it is proved otherwise.

(26) As regards the production of the relevant records of the case in the Court, suffice it to say, that the prayer made in the petition for issuing a writ of certiorari in this case is misconceived. The impugned order is an executive order and has been passed by an executive authority and not by a judicial or a quasi-judicial authority. A writ of certiorari would only lie in cases where the authorities below are enjoined upon by law to act judicially or quasi-judicially. That

being so, it is to be held that the State Government is not bound to produce the records as a matter of duty. No doubt in writ petitions other than the writs of certiorari, the Court can in appropriate cases, order the State Government to produce the records, but that can only be done if the petitioner succeeds in making out a *prima facie* case for passing such orders or where the Court itself requires the file for arriving at correct conclusions. The question whether the petitioner has succeeded in discharging his initial onus, will be considered when point No. 5 is to be answered. This point is, therefore, answered accordngly.

IV. *In case it is held that the reasons for which the Government made the impugned order are to be scrutinised what is the nature and extent of the powers of remission or pardon ?*

(27) As regards this point, it is to be held in view of our answer to point No. 5, that the reasons which led the State Government to pass the impugned order have not to be scrutinised by us as we find that the petitioner has failed to discharge initial onus of proof. As regards the nature and extent of the powers of remission or pardon, I have already made reference to the same while deciding question No. 1. However, during the course of arguments, the learned counsel for the State Government was directed to produce the file, which was produced before us and the same was returned after going through the same. Since I have come to the conclusion that the petition has to be dismissed in view of my answer to point No. 5, the reasons which led to the passing of the impugned order may not be stated. However, I do not find anything wrong with the impugned order.

V. *Is the initial onus on the petitioner to give* prima facie *evidence to show that the power had been abused by the Government in a particular case, or the impugned order itself must on the face of it show that the power had not been exercised arbitrarily, but in accordance with the policy and object of the enactment and on grounds which were not extraneous to the purpose for which the said order was conferred ?*

(28) As regards this point, it is to be held that the initial onus is on the petitioner to give *prima facie* evidence to show that the

power had been exercised *mala fide*. There is nothing in the order to show that it had been exercised *mala fide*. The impugned order itself at the face of it does not show that the power had been exercised arbitrarily or for any extraneous reasons not germane to the purpose for which the said power was conferred. The initial onus to prove *prima facie* the exercise of power *mala fide* always lies on the petitioner. In the present case the learned counsel for the petitioner frankly admitted that the petitioner is not in the know of the facts and circumstances under which the impugned order was passed nor he is aware of the reasons which prevailed with the State Government which resulted in passing the impugned order. It is also frankly conceded by Shri Anand Swaroop, the learned counsel for the petitioner, that the law does not enjoin upon the State Government, in view of the wide powers given to it under section 401 of the Code of Criminal Procedure, that the reasons for exercising the powers should be disclosed in the order. But his contention is that though the law does not enjoin upon the State Government to disclose the reasons in the impugned order, but still if the said order is questioned before Court even though the petitioner fails to allege concrete grounds of attack, the State Government is bound to disclose the reasons before the Court in order to justify the order. I am unable to agree with this contention. Any person who approaches the Court either in a civil suit or by way of a writ petition, has to discharge the initial onus of proof and has to show *prima facie* that he has made out a case for calling upon the opposite party to rebut the *prima facie* proof of illegality. The ordinary rule of evidence of onus of proof equally applies to the writ petitions. The learned counsel for the petitioner relies on a case reported in *P. J. Irani* v. *State of Madras and another* (13). But in my opinion the said decision is of no assistance to the learned counsel for the petitioner. The said decision is based on peculiar facts and circumstances of that case. The learned Judges of the Madras High Court held that while section 13 of the Madras Buildings (Lease and Rent Control) Act (25 of 1949) was constitutionally valid but any individual order of exemption passed by the Government can be the subject of judicial review by the Courts for finding out whether (a) it was discriminatory so as to offend Article 14 of the Constitution, (b) the order was made on grounds which were germane or relevant to the policy and purpose of the Act, and (c) it was not otherwise *mala fide*. The provisions of section 13 of the Madras Buildings (Lease and Rent Control) Act referred to above, were challenged before the Madras High Court on the ground that the said

(13) A.I.R. 1961 S.C. 1731.

provisions being arbitrary in nature, offend Article 14 of the Constitution. The High Court of Madras came to the conclusion that section 13 *ibid* is a valid piece of legislation but on the facts of that case, that Court came to the conclusion that the order was illegal as it was not germane or relevant to the policy and purpose of the Act. This decision was approved by the Supreme Court. The impugned order in that case was also challenged on the ground that the same violated the provisions of Article 14 of the Constitution. In view of the fact that the provisions of Article 14 of the Constitution were brought into play, the High Court came to the conclusion that the order on the face of it did not show that the same was passed in favour of a class of persons. Since the impugned order at the face of it showed the violation of Article 14 of the Constitution, therefore, the contents of the impugned order were gone into and it was found that the order was made on the grounds which were not germane or relevant to the policy and purpose of the Act. In appeal the majority judgment of the Supreme Court agreed with the finding of the High Court that the impugned order passed under section 13 of the Act was not germane or relevant to the policy and purpose of the Act. The contents of the order having been seen by the High Court and the finding having been recorded that the said order was *ultra vires* of the Act and the same finding having been confirmed by the Supreme Court by the majority judgment, the importance of the question of onus of proof was of no consequence when the matter went to the Supreme Court. This case is a decision on its own facts and circumstances and especially when the provisions of Article 14 of the Constitution were invoked to challenge the Constitutionality of section 13 of the Act and also the order passed under the said section, the order was struck down. In the present case, the impugned order is not being challenged that it has in any manner violated the provisions of Article 14 of the Constitution or any other provisions of the Constitution. The same can be quashed if the petitioner is able to discharge his onus of proof by proving, though *prima facie*, to begin with, that the order violates any provision of the Constitution, any law for the time being in force or is against the policy for which the power of pardon is given. For this, he has to allege and prove certain facts, which has not been done in this case. The provisions of section 401 of the Code of Criminal Procedure visualise the passing of the orders even in case of a single prisoner. It is conceded by the learned counsel for the petitioner that it is not necessary for the State Government to give reasons in the order passed under section 401 of the Code of Criminal Procedure.

Therefore, at the face of it, the order cannot be held to be illegal so as to call upon the State Government to justify the same. As has been observed in the earlier part of the judgment, the order of pardon and clemency is essentially an executive order and the power of pardon and clemency can be exercised on a number of grounds which cover very wide and unrestricted field. If the contention of the learned counsel for the petitioner is to prevail, in that case, against every order passed for remission and pardon, the petition may be filed without disclosing the grounds of challenge and in every case the State Government will be called upon to justify the order even if the petitioner failed to discharge the initial onus of proof. It would be laying down a wrong law in utter disregard of the ordinary rules of evidence. The official acts performed by the competent authority in due discharge of its duties, cannot be presumed to be *mala fide.* On the other hand, presumption of correctness is to be raised regarding such acts. The presumption so raised is of course rebuttable by alleging and proving certain facts. Since the petitioner has failed to discharge the onus of proof as it is frankly admitted by the learned counsel for the petitioner that the petitioner is not in the know as to what ground prevailed with the State Government in passing the impugned order, therefore, no case is made out to call upon the State Government to justify this order.

(29) The question of onus of proof came up for consideration before their Lordships of the Supreme Court in *The Union of India* v. *Pandurang Kashinath More* (14). In that case the order of termination of the services of the respodent, an employee of the State Government, was impugned by the respondent on the ground that the said order violated the provisions of Articles 14 and 16 of the Constitution. The trial Court dismissed the suit. On appeal before the Bombay High Court, it was held that the plaintiff's plea that he was arbitrarily picked out and sacked, remained unanswered in the written statement of the defendant and the allegations must be taken to be admitted. Therefore, it was held that Article 16 of the Constitution was violated and the appeal was allowed by the High Court. This decision of the High Court was reversed by the Supreme Court on an appeal filed by the Union of India. It was held by their Lordships of the Supreme Court that the plaint in that case did not contain sufficient allegations of discrimination. It was held that *it is well known that when an improper conduct is alleged, it must be set out*

(14) A.I.R. 1962 S.C. 630.

with all particulars. Their Lordships approved the decision in *Wallingford* v. *Mutual Society* (15), wherein Lord Selborne observed as follows:—

> "With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice."

(30) Their Lordships concluded that what was said about the fraud would equally apply to any improper conduct and observed as follows:—

> "The principle behind this rule is clear. To take the present case, if a pleading is considered sufficient where it is merely stated that there has been arbitrary discrimination, it is impossible for the other side to meet it adequately unless he knows in what manner the discrimination is said to have been made. Thus if the discrimination had been *because* between A and B who were similarly situated, and A had been preferred, then that should have been stated. It would then be possible for the other side to say either that A and B were not similarly situated or that the act complained of did not amount to a discrimination for any other reason. In the absence of the particulars all that the opposite side could do would be simply to deny that there had been discrimination and this is what the appellant had done in its written statement in this case. We think that when the appellant in its written statement said that there had been no violation of Articles 14 and 16, it meant that there had been no arbitrary or hostile discrimination as alleged in the plaint, otherwise of course the written statement would be meaningless. In such a state of the pleadings it could not be said that the appellant had admitted that there had been discrimination."

(31) It was thus found by their Lordships, on the pleadings of that case, that it was not proper to hold that there had been admission by the respondent of any hostile discrimination. *It was*

(15) (1880) 5 A.C. 685 (697).

further held that a plaintiff cannot complain if general allegations made by him in the plaint are answered by equally general allegations in the written statement. These observations of their Lordships of the Supreme Court would aptly apply to the facts of the present case. By merely saying that the petitioner could not have access to the government record, therefore, he is not in a position to know the reasons which prevailed with the State Government, it cannot be successfully contended that without any allegation of malice and much less the proof of malice, the State Government is enjoined upon to justify the order. In order to succeed and in order to shift the onus of justifying the passing of the impugned order on the State Government, the petitioner is bound to discharge his responsibility regarding the initial onus of proof.

(32) Similar view was taken by the Andhra Pradesh High Court in a case reported in *Kosaraju Venkata Subbayya* v. *The Government of Andhra Pradesh* (16), wherein it was held as follows:—

> "In cases in which Government's action is challenged on ground of *mala fides*, to make general and broad allegations of lack of *bona fides* or of being influenced by extraneous considerations or other reasons is not sufficient. Something more specific, more direct and more precise is necessary to sustain a plea of this nature.
>
> If on a vague and broad allegation devoid of any detail and which do not even specify the individual who was subjected to the alleged vice, the Government are to enter on their defence and affirmatively establish that what they did was perfectly *bona fide* and unconnected with any improper motives or extraneous considerations, it will indeed be putting the Government in a most difficult and least enviable position."

(33) It may be pointed out that the only grounds alleged in the petition which are being pressed before us are that Dr. Abchal Singh is related to late Shri Gurnam Singh, Ex. Chief Minister, Punjab. This allegation has been denied by Dr. Abchal Singh, in his return. This is a vague allegation. No details of relationship are given. When the impugned order was passed in July, 1970, Shri Gurnam

(16) A.I.R. 1965 A.P. 425.

Singh was no more the Chief Minister of Punjab, as we can take judicial notice of the fact, that his Government went out of office in March, 1970, and a Government headed by Shri Parkash Singh Badal, who was his (Shri Gurnam Singh's) political opponent, was in power when the impugned order was passed. In the petition itself, Shri Gurnam Singh has been mentioned as the Ex. Chief Minister of Punjab. The allegations, as we have already pointed out, are vague as no details of relationship are given, nor any allegation has been made that the influence of late Shri Gurnam Singh was used in getting the impugned order passed. This is only a vague fact of relationship stated in the petition, which fact stands denied. In this connection it may be pointed out that it is well settled by now that the grounds of *mala fide* and fraud are to be precisely raised in the petition so that the respondent is able to answer the same. The vague allegations of *mala fide* will never be gone into by the Courts.

(34) Another ground pressed is that the impugned order was passed within a few months of the confirmation of conviction by the High Court. This again is no ground to spell out that the impugned order is *mala fide*, on the other hand, the power of pardon and clemency can be exercised any moment after the Court ceases to hold jurisdiction in the matter. Reference in this connection be made to *Commander Nanavati's case* (supra).

(35) The next ground pressed is that the State Government did not send the application of respondent No. 3 for the opinion of the trial Judge or that of this Court in accordance with the provisions of sub-section (2) of section 401 of the Code of Criminal Procedure. Therefore, the order is vitiated. Since I have come to the conclusion while answering point No. 6 that reference under sub-section (2) of section 401 of the Code of Criminal Procedure is not mandatory, this ground also becomes meaningless and there is no other ground pressed into service by the learned counsel for the petitioner. I, therefore, hold that the initial onus was on the petitioner to allege and give a *prima facie* evidence to show that the power had been abused by the Government and the petitioner in this case having failed to discharge the initial onus, this petition is liable to be dismissed.

VI. *Are the provisions of section* 401(2), *Code of Criminal Procedure, mandatory in character, the non-compliance of which vitiates the impugned order?*

(36) My answer to this point is that the provisions of sub-section (2) of section 401 of the Code of Criminal Procedure, are not mandatory. The provisions of sub-section (2) of section 401 of the Code of Criminal Procedure are as follows:—

> "401(2) Whenever an application is made to the appropriate Government for the suspension or remission of a sentence the appropriate Government may require the Presiding Judge of the Court before or by which the conviction was had or confirmed to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists."

(37) It would be noticed from the said provisions that the word used in sub-section (2) of section 401 of the Code of Criminal Procedure is 'may' and not 'shall'. Though the use of the word 'may' or 'shall' may not be conclusive to infer whether the provision is mandatory or directory, but in order to see whether the nature of the provision is mandatory or directory, the other relevant provisions which can throw light on the interpretation of a particular provision in which the word 'may' or 'shall' is used, have to be looked into in order to find out whether the character of the said provisions is mandatory or directory.

(38) It was held by their Lordships of the Supreme Court in a case reported in *State of U.P.* v. *Manbodhan Lal Srivastava* (17), as follows:—

> "The use of the word 'shall' in a statute though generally taken in a mandatory sense, does not necessarily mean that in every case it shall have that effect that is to say, that unless the words of the Statute are punctiliously followed, the proceeding or the outcome of the proceeding, would be invalid. On the other hand, it is not always correct to say that where the word 'may' has been used, the statute is only permissible or directory in the sense that non-compliance with those provisions will not render the proceeding invalid."

(17) A.I.R. 1957 S.C. 912.

(39) It is in this background that the provisions of sub-section (2) of section 401 of the Code of Criminal Procedure have to be analysed.

(40) Firstly, it is to be seen that the legislature in enacting sub-section (2) of section 401 of the Code of Criminal Procedure, used the word 'may' and not 'shall'. Since no other provision of the Code of Criminal Procedure is being invoked which may enable us to read the word 'may' as 'shall', therefore, the word 'may' has to be taken in ordinary sense of the word which shows that the provision is of directory nature and not of mandatory nature.

(41) Secondly, it is to be noted that the provisions of sub-section (2) of section 401 of the Code of Criminal Procedure are only made applicable whenever an application is made to the appropriate Government under sub-section (1) of section 401 of the Code of Criminal Procedure. Thus cases where the matter is taken in hand *suo motu* by the State Government for suspending or granting remission of the punishment, the provisions of sub-section (2) of section 401 of the Code of Criminal Procedure, are not applicable.

(42) Thirdly, it is clear that in case where the opinion is to be sought by the State Government from the trial Court or the appellate Court, as the case may be, the said opinion is not binding on the Government. It was so held by a Division Bench of this Court in a case reported in *Jaswant Rai* v. *State of Punjab and another* (18).

(43) Fourthly, according to the decision of their Lordships of the Supreme Court in *Commander K. M. Nanavati's case* (2) (supra), the field in which the State Government exercises its power under section 401 of the Code of Criminal Procedure, is essentially and basically an executive field and the Courts have no say in the matter. If the provisions of sub-section (2) of section 401 of the Code of Criminal Procedure are interpreted in the manner that the same are mandatory, then in each and every case, the State Government would be required to seek the opinion of the Court concerned which will to that extent fetter the executive power of the State Government. This interpretation, if put, would run counter to the decision of the Supreme Court referred to above which would mean that even in the executive field of pardon and clemency, the Courts shall have the say to be consulted which is not the intention of the framers of the Constitution.

(18) A.I.R. 1967 Pb. 155.

(44) Fifthly, it may be pointed out that the powers vested in the President of India under Article 72 of the Constitution, and in the Governor under Article 161 of the Constitution are much wider powers of pardon and clemency whereas the powers under section 401 of the Code of Criminal Procedure are only limited powers for suspending the execution of the sentence or remitting the whole or any part thereof. If the framers of the Constitution intended to curb the powers of pardon and clemency given to the Heads of the respective Governments, analogous provisions of sub-section (2) of section 401 of the Code of Criminal Procedure would have been introduced in the Constitution, but we find that there is no such provision in the Constitution which would require the President of India or the Governor to send for the opinion of the Presiding Judge of the Court which convicted the accused person or of the Judge of the Court which confirmed conviction in appeal. If the interpretation as sought by the learned counsel for the petitioner is given, it would mean that if th eorder is passed under Article 161 of the Constitution, it would not be required to ask for the opinion of the Presiding Judges, who recorded conviction of the accused person or of the Judge who confirmed conviction in appeal. But if the action is taken under section 401(1) of the Code of Criminal Procedure, it should be necessary to seek the opinion of the Presiding Judge. The powers under section 401(1) of the Code of Criminal Procedure may be narrower, but they are the same powers in nature as are contained under Article 161 of the Constitution of India. Therefore, it would not be possible to put the interpretation on the provisions of sub-section (2) of section 401 of the Code of Criminal Procedure that the same are mandatory. Similar view was taken by the Federal Court of Pakistan in a case reported in *Muhammad Sarwar* v. *The Crown* (19).

(45) Sixthly, keeping in view the nature and scope of the powers, a number of cases can be visualised where it may not be necessary at all to refer to the opinion of the Presiding Judge of the Court if the sentence has to be suspended or remitted. There may be cases in which the grounds on which remission is claimed, have no relevancy with the evidence or the decision of the case in which the prisoner stands convicted. In such cases it may not be necessary to seek the opinion of the Presiding Judge because his opinion can only be relevant and useful if the grounds on which the remission is claimed, have any relevancy with the material on the judicial file of the case in connection with which the prisoner stands convicted.

(19) 1951 (52) Cr. L.J. 357.

(46) In a case reported in re: *Maddela Yerra Channugadu and others* (20) the State Government in exercise of its powers of clemency granted general amnesty to all the prisoners in the jail in the State to celebrate the inauguration of Andhra Pradesh. The said order was upheld by a Division Bench of the Madras High Court. If the provisions of sub-section (2) of section 401 of the Code of Criminal Procedure are held to be mandatory, in each case, the opinion of the Presiding Judge of the Court shall have to be sought which may be quite irrelevant in view of the reasons on which the prisoners in question are being given remission of the sentence. Cases can be visualised where this extraordinary executive power of clemency is exercised keeping in view the multiple reasons which may have no relevancy with the facts as emerged in the trial of a particular case in which the prisoner was convicted.

(47) Lastly, one of the tests for holding a provision to be of mandatory character, is, whether there is any penalty provided for the non-observance of such a provision or not. It is to be found that no penalty has been provided in the Code of Criminal Procedure for non-observance of the provisions of sub-section (2) of section 401 of the Code of Criminal Procedure.

(48) All these reasons enumerated above clearly go to show that the provisions of sub-section (2) of section 401 of the Code of Criminal Proceedure cannot be held to be mandatory in nature and, therefore, non-compliance of the said provisions in any manner would not make the impugned order without jurisdiction. I answer this point accordingly.

(49) In view of my answers to points Nos. 3, 4, 5 and 6, this writ petition fails and is hereby dismissed. However, keeping in view the intricate question of law involved in the case, there will be no order as to costs.

R. S. NARULA, C. J.—I concur entirely and have nothing to add.

Koshal, J.—I agree.

K.S.K.

(20) A.I.R. 1954 Mad. 911.

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