M. Jain

Before Paramjeet Singh, J.

LAL SINGH @ MANJIT SINGH—*Petitioner*

versus

STATE OF GUJRAT AND OTHERS—*Respondents*

CRWP No. 1620 of 2011

August 23, 2012

Constitution of India, 1950 - Art. 21, 72, 161 & 226 - Terrorist and Disruptive Activities (Prevention) Act, 1987 - Ss. 3(3) & 5 - Indian Penal Code, 1860 - Ss. 54, 55, 55A & 120-B - Code of Criminal Procedure, 1973 - Ss. 432 to 433A - Arms Act, 1959 - S. 25 - Punjab Jail Manual, 1996 - Bombay Jail Manual, 1945 - Bombay Jail Rules, - Rl. 1446 - Prison Rules,1999 - Transfer of Prisoners Act, 1882 - - Universal Declaration of Human Rights,1948 - Art. 5 - Pre-mature release of prisoners undergoing life imprisonment in prisons in the State of Punjab, on advice of Advisory Board constituted by the State under the Punjab Jail Manual - If Advisory Board advises Government to release the prisoners prematurely in the normal course the State accepts recommendations and release the prisoners pre-maturely - The question is whether that benefit would be available to the petitioners convicted by Courts outside the State but transferred to the State of Punjab - Held that if cause of action arises wholly or in part within territorial jurisdiction of a High Court, it may issue writ against a person or authority, resident within the jurisdiction

of another Court - Since petitioners are undergoing sentence in State of Punjab and orders of rejection of pre-mature release were also received within territorial jurisdiction of Punjab, this Court has jurisdiction to entertain petition - Petition disposed of with directions.

Held, that the reading of sub-section (7) of Section 432 CrPC and Section 55A of the Indian Penal Code makes it clear that "appropriate government" is the government of the State within which the offender is sentenced.

(Para 33)

Further held, that Article 161 of the Constitution of India is in the nature of residuary sovereign power which does not get extinguished on rejection of a petition. The provisions of the Constitution do not debar the Governor from reconsidering petition in view of changing circumstances. The premature release is dependent upon various factors like remissions granted under the provisions of the Code of Criminal Procedure by the State Government from time to time and remissions earned under the provisions of Jail Manuals of the concerned State/ States where one is undergoing sentence, any general orders of premature release passed by the Government on certain occasions and applicability of those orders to prisoners at appropriate time and the continuous good conduct of the convict while in prison.

(Para 38)

Further held, that every time a convict prisoner earns remission fresh cause of action arises to the prisoner. So the petitioner has right to judicial review of the orders passed by the State Government from time to time with respect to his right to premature release. Every time when the remissions are granted to the identically situated person cause of action accrues to the petitione. Further held, that principle of estoppel will not apply in the cases of premature release as from time to time pardons, reprieves, respites or remissions granted to the identically situated persons give rise to fresh cause of action. Dismissal of petition against earlier order does not operate as bar to file fresh petition nor operates as estoppel for filing fresh petition when fresh cause of action arise.

(Para 39)

Further held, that since the petitioners are confined in the Maximum Security Jail, Nabha within the State of Punjab and order of rejection has also been conveyed to the petitioner in Punjab, so, this Court has jurisdiction to hear the petition. Their right to liberty is involved which they can enforce in a Court of competent jurisdiction over the area of their residence. The earlier petitions filed in this case have been entertained and tried by this Court and the Government of Gujarat/Uttar Pradesh has accepted the jurisdiction, otherwise also the cause of action arose to the petitioner(s) within the territorial jurisdiction of State of Punjab as they are presently confined in Maximum Security Jail, Nabha.

(Para 43)

Further held, that reading of Article 226(2) makes it clear that if the cause of action arises, wholly or in part, within the territorial jurisdiction of that High Court, it may issue a writ against a person or authority, resident within the jurisdiction of another High Court. In the present case, the cause of action to the petitioner(s) have arisen partly within the State of Punjab as they are undergoing sentence in the State of Punjab and the orders of rejection of premature release were also received within the territorial jurisdiction of this Court. It is, therefore, held that this Court has jurisdiction to entertain this petition.

(Paras 44-45)

Further held, that to confine a prisoner without any hope of release is more barbaric. It is another form of death sentence. The sentence of remaining for entire life in prison cannot satisfy the principle of proportionality to the alleged crime against such person. Every life sentence must include possibility of release. Keeping alive human beings behind bars for the rest of natural life (life imprisonment) is worse sanction than death.

(Para 48)

Further held, that a prisoner retains all the rights enjoyed by a free citizen except only those necessarily lost as an incident of imprisonment.

(Para 72)

Further held, that a barbaric crime does not have to be met with a barbaric penalty which may upset the mental balance of a person who may realize that he will never be out of prison. The reasonable determination

period of imprisonment with regard to offences where life imprisonment is provided is a necessity and call for appropriate amendment for prescribing determinate punishment keeping in view the gravity of the offence. This Court feels that it is the primary obligation of the Legislature to carry out necessary amendments in the cases where imprisonment for life is provided to make aware the convict / prisoner how much period he has to undergo in prison.

(Para 82)

Further held, that it is well settled that the exercise or non-exercise of pardon power by the President or Governor is not immune from judicial review. Limited judicial review is available in certain cases.

(Para 84)

Further held, that judicial review of the order of the President or the Governor under Article 72 or Article 161, as the case may be, is available and their orders can be impugned on the following grounds:

(a) that the order has been passed without application of mind;

(b) that the order is mala fide;

(c) the order has been passed on extraneous or wholly irrelevant considerations;

(d) that the order suffers from arbitrariness

(Para 96)

Further held, that impugned order is apparently not in conformity with the provisions of the Constitution and International human right instruments to which India is a signatory. The Governments failed to give reasons or disclose the reason on the basis of which impugned orders have been passed. The power of the Court of judicial review which is a basic feature of the Constitution cannot be incapacitated by non-disclosing of the reason for coming to conclusion for rejecting the claim of the petitioners for premature release.

(Para 108)

Petition allowed.

Vijay K. Jindal, Advocate, *for the petitioner(s)*

Manisha Lavkumar Shah, Advocate, for respondent Nos. 1 and 2 (In Crl.W.P. No.1620 of 2011)

M.C. Berry, Advocate, for respondent Nos. 1 and 2. (In Crl.W.P. No.1586 of 2011

J.S. Bhullar, AAG, Punjab, for respondent Nos. 3 and 4.

PARAMJEET SINGH, J.

(1) This Court has been regularly receiving petitions from prisoners-convicts in various jails in the States of Punjab, Haryana and Union Territory, Chandigarh for premature release. In the instant petitions, questions raised are common; therefore, I propose to dispose of by a common judgment. The common issue is the claim of pre-mature release of petitioners, undergoing sentence of life imprisonment in prisons in the State of Punjab, on the strength of advice of the Advisory Board constituted by the State under the Punjab Jail Manual. If the Advisory Board of the State advises to the State Government to release the prisoners prematurely in the normal course the State accepts their recommendations and release the prisoners pre-maturely. The question in the present petitions is whether that benefit would be available to the petitioners convicted by Courts outside the State but transferred to the State of Punjab. This issue has been raised in both the petitions.

(2) In Crl. Writ Petition No. 1620 of 2011, petitioner-prisoner was convicted by a Court of Designated Judge, Mirzapur at Ahmedabad (Rural) under Sections 3(3) and 5 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as the "TADA Act") for life imprisonment, under Section 120-B IPC for ten years RI and under Section 25 of the Arms Act for 7 years RI and had been transferred to prison in State of Punjab under the Transfer of Prisoners Act, 1950.

(3) In Crl.W.P. No.1586 of 2011, petitioner-prisoner was convicted and sentenced by a Court of Sessions Judge at Pilibhit (Uttar Pradesh) under Section 3 of the TADA Act and sentenced to undergo rigorous imprisonment for life, under Section 4 of the TADA Act RI for 5 years and RI for life under Section 120-B IPC and had been transferred to the prison

in the State of Punjab under the Transfer of Prisoners Act, 1950. In both the cases, Advisory Board of the State of Punjab has recommended to the State Government of Gujarat and State Government of Uttar Pradesh respectively for premature release of the petitioners.

(4) For brevity, brief facts are being taken from Crl.W.P. No. 1620 of 2011 which are as under:-

(5) In the present case, 21 accused were tried jointly by the trial Court, that they along with 13 named absconding accused and some unknown Sikh militants hatched a conspiracy in India and abroad for subversive and terrorist activities in India and for facilitating creation of Khalistan and liberation of Jammu and Kashmir by violent means during the period between September 1990 to July 1992. The allegations against them were that they brought arms to India and indulged in unlawful subversive activities, created organization in Lahore for liberation of Kashmir and creation of Khalistan. They had conspired with some of the absconders to strike terror by violent means to eliminate BJP/Hindu Leaders/Police Officers and for that purpose procured fire-arms, ammunitions and explosives. There are number of other allegations which may not be relevant. The prosecution case was that petitioner was arrested in the morning of 16.07.1992 at Dadar Railway Station while he was alighting from a train. The only allegation is regarding conspiracy etc. and recovery of some arms. There no allegations against the petitioner -- Lal Singh @ Manjit Singh that he committed any murder or committed any other act.

(6) The petitioner was convicted as aforesaid and his appeal failed before the Hon'ble Supreme Court, after conviction, the petitioner was transferred to the State of Punjab and is confined in the Maximum Security Jail, Nabha. The petitioner has undergone sentence as under:

	Y	M	D
Period spent as an under trial	4	2	30
Period spent in detention after conviction w.e.f. 8.1.1997 to 28.5.2011	14	4	20
Total actual sentence undergone	**18**	**7**	**20**

Remissions granted by the Jail Authorities on account of continuous good conduct and satisfactory performance of duties	2	11	7
Total sentence including remissions	21	6	27
Less on account of parole	1	9	0
Total sentence undergone for the purpose of premature release	**19**	**9**	**17**

(7) To the above period of sentence under gone period spent thereafter in prison is also to be added from 28.05.2011 till date.

(8) It is the case of the petitioner that he had been released on parole/furlough on 20/21 occasions. He has not committed any offence during parole. The petitioner maintained good conduct in jail throughout his imprisonment and never violated the parole and furlough duration. Presently, the petitioner is undergoing sentence in Maximum Security Jail, Nabha. The case of the petitioner for premature release was considered by the Punjab Government as per the Punjab Jail Manual, 1996 and recommended to the State of Gujarat. The Superintendent Central Jail, Ahmedabad wrote a letter dated 10.02.2004 (Annexure P/4), wherein the following directions were given to the Maximum Security Jail, Nabha:-

> *"In respect of the letter dated 19.1.2004 in the process of premature release of the above named convict, you have to send the proposal of premature release to District Superintendent of Police and District Magistrate of the concerned District for their opinions regarding the premature release of said convict after completion of 13 years of actual sentence excluding parole, furlough, leave and including set off period. Then, kindly send the complete jail report of the said convict along with judgment copy of the lower Court, original history ticket before 6 months prior to his probable date of release on which he will complete his 14 years of actual sentence in the jail to this Central Prison for necessary action."*

(9) The Superintendent Jail, Nabha forwarded a letter (Annexure P/5) to the District Magistrate and Senior Superintendent of Police, Kapurthala and sought the report. Thereafter, the Superintendent Jail, Nabha, submitted petitioner's roll for the purpose of premature release and recommended his release vide Annexure P/6. The Senior Superintendent of Police, Kapurthala specifically mentioned in the letter dated 28.07.2006 (Annexure P/7) as under:

> *"After verification, it was found that Lal Singh alias Manjit Singh son of Bhag Singh, Caste Saini, resident of Akalgarh, P.S. Sadar, Phagwara, who is presently undergoing imprisonment for life in Nabha Jail, enjoyed parole on six occasions, while undergoing the sentence and surrendered back without disturbance of any peace. No resident of the village has any objection with regard to his living in village after undergoing imprisonment for life."*

(10) The Superintendent of Jail, Central Prison, Ahmedabad sent a letter dated 26.10.2006 (Annexure P/8) and intimated that the premature release case of the petitioner was considered by the Government of Gujarat and has been rejected. Against that, the petitioner preferred Crl.W.P. No. 505 of 2007 before this Court which was disposed of on 25.08.2008 (Annexure P/9). The operative part of the judgment reads as under:-

> *"I have heard learned counsel for the parties. This petition is disposed of with a direction to respondent No.3 to reconsider the case of premature release of the petitioner, taking into consideration the following factors also:-*
>
> *a) rights of the petitioner under Section 3 of the Transfer of Prisoners Act.*
>
> *b) rights of the petitioner in the light of para 431 of the Punjab Jail Manual, 1996 in view of the judgment of State of Haryana Vs. Mahender Singh, 2007(4) RCR (Criminal) 909 (Copy Annexure P-8);*
>
> *c) applicability of Section 433A of the Code of Criminal Procedure;*

d) effect of the law laid down by Hon'ble Supreme Court in judgment in State of Haryana vs. Mahender Singh, 2007(4) RCR (Criminal) 909 and U.T. Chandigarh Vs. Charanjit Kaur, J.T., 1996 (3) SC 30 (copy of Annexure P-9)"

(11) The information was given to the Superintendent, Central Jail, Ahmedabad. The Gujarat Government has again considered the case of the petitioner and rejected on 30.12.2010 (Annexure P/11) and passed the following order:-

"Before the premature release of the life convict State Government has considered the following guidelines issued by the Hon. Supreme Court in case of Laxman Naskar v/s State of Bengal reported in AIR 2000 SC 2762:

(a) whether offence is an individual act of crime without affecting the society at large:- **In this case offences are not an individual acts of crime, but they affect the society at large.**

(b) whether there is any fruitful purpose of confining of this convict any more:- **Yes**

(c) Whether there is any chance of future reoccurrence of committing crime:- **Yes, the Government has received a negative police opinion from the Ahmedabad Police.**

(d) Socio-economic condition of the convict's family:- **Prisoner is involved in number of serious crimes.**"

(12) That order was again challenged in this Court by way of Crl. W.P. No. 158 of 2011 and in that petition, counsel representing the State of Gujarat had stated at bar that the petitioner had already undergone the sentence imposed upon him as per Bombay/Punjab Jail Manual. This Court vide order dated 25.05.2011 directed the Government of Gujarat to reconsider the case of the petitioner in the light of the Supreme Court judgment and further ordered that till the case for pre-mature release of the petitioner is decided by the Government of Gujarat, he shall be released on parole on his furnishing personal bond and a surety bond to the satisfaction of District Magistrate, Kapurthala-Punjab because he is permanent resident

of Tehsil Phagwara, District Kapurthala. The petitioner was directed to give undertaking that (i) he will not visit Gujarat; (ii) he will not leave the country without prior permission of the Court; and (iii) will keep peace and shall not indulge in any criminal activity while on parole.

(13) Thereafter, in pursuance of order dated 25.05.2011 (Annexure P/12) passed by this Court, Government of Gujarat again considered the case of the petitioner for pre-mature release and declined the same vide impugned order dated 26.07.2011 (Annexure P/13).

(14) Hence, present criminal writ petition.

(15) This Court issued notice of motion to the respective State Governments and they filed their respective replies. The State of Punjab filed reply on behalf of respondent Nos. 3 and 4 and substantially admitted the averments with regard to the recommendation of the case of the petitioner for premature release and also referred to the correspondence between the respective States.

(16) State of Gujarat filed reply by way of affidavit dated 22.12.2011. In the reply, it is stated that respondent No.1 is not accepting any allegations, averments and contentions raised in the petition and all the allegations are denied except which have specifically been admitted. Initial reply was with respect to the interim release, however, subsequently it filed another affidavit dated 28.02.2012 to the rejoinder submitted by the petitioner. In affidavit, it is submitted that Government of Gujarat is the appropriate Government who can take decision with regard to premature release of the convict-petitioner, who was sentenced by a Court situated within the territory of Government of Gujarat. Gujarat Government rules, regulations and Prisoners Rules are applicable for premature release of the convict-petitioner. Provisions of Punjab Jail Manual are not applicable. It is further submitted that earlier petitioner had filed a petition in the High Court of Gujarat, at Ahmedabad for premature release, which was dismissed on 29.10.2009. Hence, no subsequent petition can be filed. It is further submitted that there is no provision of judicial review of the order passed by the Government regarding premature release of convicts. It is the prerogative of the State Government which is exercisable under Article 161 of the Constitution of India and the order is passed by the Governor in consultation with the State Government. It is also pleaded that life imprisonment means natural life of the convict.

(17) The petitioner also submitted rejoinder to the affidavit.

(18) I have heard learned counsel for the parties and perused the record with their able assistance.

(19) Learned counsel for the petitioner contended that theprovisions of Punjab Jail Manual are applicable since petitioner has been transferred to the State of Punjab as per the Transfer of Prisoners Act, 1950. If the order of the Government of Gujarat is illegal, arbitrary and against the settled principles of law, then the convict can challenge that order and jurisdiction of this Court is not barred since the petitioner is undergoing imprisonment within the territory of State of Punjab and his case for premature release was recommended by the State of Punjab. The learned counsel for the petitioner further argued that admittedly as per the Prison Rules of both the States i.e. the Bombay Jail Manual as applicable in Gujarat and Punjab Jail Manual, petitioner has become entitled to premature release. Learned counsel for the petitioner made reference to the statement of the State counsel representing the Gujarat Government in Crl.W.P. No.158 of 2011 that petitioner has already undergone the sentence imposed upon him as per Bombay/Punjab Jail Manuals and the recommendation of the Government of Punjab recommending premature release is binding as his conduct is seen by the authorities in the State of Punjab specifically when the District Magistrate and the Senior Superintendent of Police, Kapurthala, to which area petitioner belongs have recommended for premature release and nothing adverse had been mentioned against the petitioner. Petitioner after completion of period of sentence cannot be detained for whole life. It would be worse sanction than the death. This is against the Article 21 of the Constitution of India. Learned counsel for the petitioner to support his contentions has relied upon various judgments which will be dealt with while dealing with the arguments.

(20) Learned counsel for the State of Gujarat vehemently opposed the contentions raised by the learned counsel for the petitioner. Learned counsel for respondent Nos. 1 and 2 submitted that it is the prerogative of Government of Gujarat to release the petitioner-convict. The recommendations of the Government of Punjab for premature release of the petitioner are not binding on respondent Nos. 1 and 2. Only respondent No.1 is the appropriate Government which can pass the order for premature

release. This Court has no jurisdiction to hear the matter and the jurisdiction vests in a court of competent jurisdiction within the State of Gujarat as petitioner has earlier filed petition which was dismissed by the High Court of Gujarat vide order dated 29.10.2009 (Annexure R-III). There is no provision for judicial review of the order of Governor passed under Article 161 of the Constitution of India.

(21) In view of the line of arguments of both the counsel for the parties, the following substantial questions of law arise for consideration:

i). Which is the appropriate Government empowered to consider the case of premature release of the petitioner?

ii). Whether earlier dismissal of petition for premature release by a High Court operates as bar and estoppel to the filing of subsequent petitions?

iii) Whether the High Court where prisoner is transferred has jurisdiction to entertain the criminal writ petition?

iv). Whether non-release of a convict is worse sanction than the death sentence, resultant encroachment upon the life and personal liberty by the executive?

v). Whether order dated 26.07.2011 (Annexure P/13) is subject to judicial review and is arbitrary, whimsical and against the provisions of Article 21 of the Constitution of India?

(22) ***Re: Question No.(i): Which is the appropriate Government empowered to consider the case of premature release the petitioner?***

(23) It is a matter of great concern to a prisoner as to when he will regain his freedom from jail specifically when the sentence imposed is indeterminate punishment (life imprisonment). The date of release in ordinary course depends upon various factors such as remissions granted under the provisions of the Code of Criminal Procedure by the State Government from time to time and remissions earned under the provisions of Jail Manuals of the concerned State/States where one is undergoing sentence, general orders of premature release passed by the Government on certain occasions

and applicability of those orders to prisoners at appropriate time. Admittedly, the prisoners have very little access to the rules. Certainly, they feel aggrieved. They calculate their time of release in their own manner after hearing from the prisoners similarly situated, who are expecting release orders. The other inmates start calculating their time for release and feel that their time has arrived, but they are not being released. It is more prevalent in the cases of prisoners undergoing life imprisonment, those have been convicted and sentenced by Courts outside the State but, had been transferred to the other State for undergoing imprisonment.

(24) This question I have to examine in both these petitions. The issue in these petitions relates to release of prisoners who were convicted and sentenced by the Courts in other States (Gujarat and Uttar Pradesh) but were later on transferred to the State of Punjab for undergoing remaining imprisonment mentioned above.

(25) The State of Punjab has framed a Punjab Jail Manual with regard to the administration of prisoners and under-trials. As per Jail Manual, certain remissions are awarded for good conduct which is in addition to the other remissions granted by the State Government. There is also a State Advisory Board which investigates and reports on sentences of prisoners in the jails. Rule 1446 of Bombay Jail Rules provides that cases of all prisoners whose aggregate sentence is more than 20 years shall be submitted for orders of the Government as to their premature release on completion of 14 years of sentence. The Advisory Board decides the fitness for release based on full and accurate details of the prisoner's previous history, his prison record and the reports of the District Magistrate and the Senior Superintendent of Police of the district to which the prisoner belongs. After considering all this, on the advice of Advisory Board prisoner is prematurely released on probation for a certain period and on receipt of report of his conduct being satisfactory, he is deemed to be finally discharged only on the expiry of period mentioned in the bond as period of supervision. This is the broad outline of the scheme of the Rules. Each State has slight variation in their rules regarding premature release.

(26) In the present cases, the State of Punjab being a transferee State recommended the case of the petitioners for premature release taking into consideration the various broad outlines referred above to the government

of Gujarat/ Uttar Pradesh from where they have been transferred being convicted and sentenced by the Court of that State. The respective Government of the State where the petitioner was convicted and sentenced has declined the claim of premature release vide order dated 26.07.2011 (Annexure P/13) by respondent no.1 and has not accepted the recommendations of the transferee State with regard to premature release of the petitioner, but rejected the claim on the basis of reports of Gujarat authorities. The contention of the petitioner is that petitioner is entitled to be released by the State of Punjab and reliance has been placed upon the judgment titled as ***State of Haryana*** versus ***Mahender Singh and others (1).***

(27) Admittedly, the petitioner has been transferred from the State of Gujarat to State of Punjab under the Transfer of Prisoners Act, 1950. To answer the question as to which is the appropriate Government, it would be appropriate to refer to the Constitutional provision relating to the territorial extent of the executive powers of the State with regard to powers of remissions of sentence. As per the scheme of the Constitution for this purpose Article 72 of the Constitution provides that President of India shall have the powers to grant remissions of punishment or sentence in all cases where the power of Union of India extends. Under Article 161 of the Constitution, the power to grant pardons, to suspend, remit or commute sentences in certain cases vests in the Governor of a State. Article 161 of the Constitution reads as under:

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

(28) The Hon'ble Supreme Court in ***G.V. Ramanaiah*** versus ***Supdt. Of Central Jail (2),*** has held that the executive power of the Union or of the State broadly speaking is co-extensive and co-terminus with its respective legislative power.

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(1) 2007 (4) R.C.R. (Crl.) 909
(2) (1974) 3 SCC 531

(29) It would also be appropriate to refer to Section 432 to 433A of the Code of Criminal Procedure, 1973(in short Cr.P.C) which reads as under:

> ***432. Power to suspend or remit sentences.*** *- (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.*
>
> *(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.*
>
> *(3) If any condition on which a sentence has been suspended or remitted is, in the opinion of the appropriate Government, not fulfilled, the appropriate Government may cancel the suspension or remission, and thereupon, the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer, without warrant and remanded to undergo the unexpired portion of the sentence.*
>
> *(4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.*
>
> *(5) The appropriate Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with :*

Provided that in the case of any sentence (other than a sentence of fine) passed on a male person above the age of eighteen years, no such petition by the person sentenced or by any other person on his behalf shall be entertained, unless the person sentenced is in jail, and -

(a) where such petition is made by the person sentenced, it is presented through the officer in charge of the jail; or

(b) where such petition is made by any other person, it contains a declaration that the person sentenced is in jail.

(6) The provisions of the above sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law which restricts the liberty of any person or imposes any liability upon him or his property.

(7) In this section and in Section 433, the expression "appropriate Government" means -

(a) in cases where the sentence is for an offence against, or the order referred to in sub-section (6) is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government;

(b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed.

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

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

(b) a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;

(c) a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced, or for fine;

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

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

When a person has been sentenced to punishment for an offence, the appropriate Government may at any time remit the whole or any part of the punishment. According to clause (b) of sub-section 7 of Section 432 appropriate Government means -

"(b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed."

(30) A bare reading of this provision makes it clear that the government where a person has been convicted and sentenced is the 'appropriate government'. The matter was considered by the Hon'ble Supreme Court in ***State of M.P.*** versus ***Rattan Singh (3),*** and ***State of M.P.*** versus ***Ajit Singh (4).*** Relevant part from the judgment of ***Rattan Singh's case*** (supra) is reproduced below:

"6. Furthermore, the position is made absolutely clear by sub-section (3) to Section 402 of the Code of Criminal Procedure which runs thus :

"In this section and in Section 401, the expression 'appropriate Government' shall mean—

(a) in cases where the sentence is for an offence against, or the order referred to in sub-section (4A) of Section 401 is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government; and

(3) (1976)3 SCC 470
(4) (1976)3 SCC 617

(b) in other cases, the State Government."

A perusal of this provision clearly reveals that the test to determine the appropriate Government is to locate the State where the accused was convicted and sentenced and the Government of that State would be the appropriate Government within the meaning of Section 401 of the Code of Criminal Procedure. Thus since the prisoner in the instant case was tried, convicted and sentenced in the State of Madhya Pradesh, the State of Madhya Pradesh would be the appropriate Government to exercise the discretion for remission of the sentence under Section 401(1) of the Code of Criminal Procedure. Although the present case is governed by the old Code, yet we may mention that the new Code of Criminal Procedure, 1973 has put the matter completely beyond any controversy and has reiterated the provisions of Section 402(3) in sub-section (7) of Section 432 which provides thus:

"(7) In this section and in Section 433, the expression 'appropriate Government' means,—

(a) In cases where the sentence is for an offence against, or the order referred to in sub-section (6) is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government;

(b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed."

Actually this clause has been bodily lifted from the provisions of Section 402(3) and has made the position absolutely clear.

7. In ***Surjit Singh v. State of Punjab*** *a Division Bench of the Punjab and Haryana High Court has also taken the view that the appropriate Government would be the Government of the State where the prisoner has been convicted and sentenced. The Division Bench of the court after an exhaustive discussion of the various provisions of the Code of Criminal Procedure and the Rules observed as follows:*

"There is, however, nothing to indicate that for the purposes of remission and suspension of sentences under Section 401 of the Criminal Procedure Code, the legislature intended to adopt a different definition of 'appropriate Government'. In short, under Section 401 of the Criminal Procedure Code, the Government of the State of conviction and not the Punjab Government was competent to remit the balance of the sentence of these life convicts. All that the Punjab Government could do was to forward the cases of these life convicts to the appropriate Government for remitting the remaining term of their life imprisonment, in exercise of the power under Section 401 of the Criminal Procedure Code. The Punjab Government has already made such a reference in favour of the petitioners to the Governments of the States of conviction. Neither the Punjab Government nor the Superintendent of Jail concerned can release the prisoners under any of the statutory rules contained in Punjab Jail Manual without receiving the necessary orders of the appropriate Government under Section 401. Pending the receipt of orders of the appropriate Government, therefore, the detention of the petitioners could not by any reasoning, be called illegal.

We find ourselves in complete agreement with the view taken by the Punjab and Haryana High Court."

(31) In both the abovementioned cases, the Hon'ble Supreme Court has held that government of the transferor State would be the "appropriate government" within the meaning of sub-section (7) of Section 432 of the Cr.P.C. for the purpose of remitting the sentence of transferred prisoner on the reasoning that the transferor State was the State within which he was sentenced. The Apex Court also examined identical issue in ***Hanumant Dass*** versus ***Vinay Kumar (5),*** and adopted the view in ***Rattan Singh's case (supra)*** on the basis of construction of clause (b) of subsection 7 of the Section 432 Cr.P.C.

(5) (1982) 2 SCC 177

(32) Section 55-A of the IPC defines appropriate Government as under:-

*"55-A. **Definition of "apropriate Government".** - In section 55 the expression "appropriate Government" means, -*

(a) in cases where the sentence is a sentence of death or is for an offence against any law relating to a matter to which the executive power of the Union extends, the Central Government; and

(b) in cases where the sentence (whether of death or not) is for an offence against any law relating to a matter to which the executive power of the State extends, the Government of the State within which the offender is sentenced."

(33) The reading of sub-section (7) of Section 432 Cr.P.C. and Section 55A of the Indian Penal Code makes it clear that "appropriate government" is the government of the State within which the offender is sentenced.

(34) In view of above, it is held that Government of Gujarat / Uttar Pradesh respectively are the 'appropriate government' for passing the order with regard to premature release of the petitioners.

(35) This question stands answered accordingly.

Re: Question No.(ii) : Whether earlier dismissal of petition for premature release by a High Court operate as bar and estoppel to the filing of subsequent petitions?

(36) The star argument of the learned counsel for respondent nos. 1 and 2 is that since the writ petition filed by the petitioner before the Gujarat High Court has been dismissed vide order dated 29.10.2009 (Annexure R-III), petitioner is estopped from filing the present petition in this Court. The earlier successive petitions for premature release filed in this court by the petitioner were also without jurisdiction.

(37) The learned counsel for the petitioner vehemently opposed the said contention.

(38) I have considered the contention of the learned counsel for respondent Nos. 1 and 2. Article 161 of the Constitution of India is in the nature of residuary sovereign power which does not get extinguished on rejection of a petition. The Supreme Court in ***G Krishta Goud and J Bhoomaiah*** versus ***State of Andhra Pradesh (6),*** held that the rejection of one clemency petition does not exhaust the power of the President or the Governor. The provisions of the Constitution do not debar the Governor from reconsidering petition in view of changing circumstances. The premature release is dependent upon various factors like remissions granted under the provisions of the Code of Criminal Procedure by the State Government from time to time and remissions earned under the provisions of Jail Manuals of the concerned State/States where one is undergoing sentence, any general orders of premature release passed by the Government on certain occasions and applicability of those orders to prisoners at appropriate time and the continuous good conduct of the convict while in prison. This power has been recognized in our Constitution in Article 161. It has been hold in ***State of Punjab*** versus ***Joginder Singh (7),*** that this power is absolute, unfettered and cannot be curtailed by statute.

(39) Every time a convict prisoner earns remission fresh cause of action arises to the prisoner. So the petitioner has right to judicial review of the orders passed by the State Government from time to time with respect to his right to premature release. Every time when the remissions are granted to the identically situated person cause of action accrues to the petitioner. One of the grounds is of discrimination in not considering his case in the light of instructions/rules prevalent at that time with regard to premature release. The government of Gujarat has not provided any data that persons similarly situated as the petitioner have not been released by the State Government. The learned counsel for the State, however admitted that prisoners those have been sentenced to life imprisonment are being released prematurely by the Government of Gujarat from time to time, but had tried to distinguish this case on the ground that this is a case under TADA, Hon'ble Apex Court in such cases has held that life imprisonment means natural life of the person.

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(6) (1976)1 SCC 157
(7) (1990)2 SCC 661

(40) In view of the discussion above, I hold that principle of estoppel will not apply in the cases of premature release as from time to time pardons, reprieves, respites or remissions granted to the identically situated persons give rise to fresh cause of action. Dismissal of petition against earlier order does not operate as bar to file fresh petition nor operates as estoppel for filing fresh petition when fresh cause of action arise.

(41) This question stands answered accordingly.

Re: Question No.(iii): Whether the High Court where prisoner is transferred has jurisdiction to entertain the criminal writ petition?

(42) Learned counsel for the State of Gujarat has contended the present petition is not maintainable as this High Court has no jurisdiction because the petitioner(s) were tried, convicted and sentenced by a Court of competent jurisdiction within the territory of Gujarat/Uttar Pradesh States. They have been subsequently transferred to Nabha Jail only to serve the sentence. It is further submitted that earlier similar petition was filed before the Gujarat High Court.

(43) This contention of the learned State counsel cannot be accepted. The petitioners have been transferred to Nabha Jail where they have been undergoing sentence since long. They are also residents of State of Punjab and after release, they are likely to stay within the State of Punjab. Since the petitioners are confined in the Maximum Security Jail, Nabha within the State of Punjab and order of rejection has also been conveyed to the petitioner in Punjab, so, this Court has jurisdiction to hear the petition. Their right to liberty is involved which they can enforce in a Court of competent jurisdiction over the area of their residence. The earlier petitions filed in this case have been entertained and tried by this Court and the Government of Gujarat/Uttar Pradesh has accepted the jurisdiction, otherwise also the cause of action arose to the petitioner(s) within the territorial jurisdiction of State of Punjab as they are presently confined in Maximum Security Jail, Nabha. Article 226 of the Constitution of India reads as under:-

> "**226. Power of High Courts to issue certain writs.-** (1) Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercises

jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose

(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories

(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without

(a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and

(b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the aid next day, stand vacated.

(4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme court by clause (2) of Article 32."

(44) Reading of Article 226(2) makes it clear that if the cause of action arises, wholly or in part, within the territorial jurisdiction of that High Court, it may issue a writ against a person or authority, resident within the jurisdiction of another High Court. In the present case, the cause of action to the petitioner(s) have arisen partly within the State of Punjab as they are undergoing sentence in the State of Punjab and the orders of rejection of premature release were also received within the territorial jurisdiction of this Court.

(45) It is, therefore, held that this Court has jurisdiction to entertain this petition.

(46) This question stands answered accordingly.

Re: Question No.(iv): Whether non-release of a convict is worse sanction than the death sentence, resultant encroachment upon the life and personal liberty by the executive?

(47) The Constitution of India is a guiding star in interpretation of any law enacted by the Legislature. Statutes can be held as void if they are against the principles of natural justice and affect the fundamental right to life and right to live a dignified life. It is the basic spirit of Article 21 of the Constitution of India. Lord Chancellor Sankey once said 'amidst the cross currents and shifting sands of public life, the law is like a great ark upon which a man may set his foot and be safe'. In this remark, he has emphasized on the importance of law.

(48) Now the question arises how the society should respond to the most serious crime. It is needless to say that life of an individual in a society would become a continuing disaster, if not regulated. Human beings are not commodities to which price can be attached; they are creatures with inherent and infinite worth. They must be treated as ends in themselves, never merely as means to an end. To confine a prisoner without any hope of release is more barbaric. It is another form of death sentence. The sentence of remaining for entire life in prison cannot satisfy the principle of proportionality to the alleged crime against such person. Every life sentence must include possibility of release. Reading of catena of the judgments of the Apex court, where the punishment for heinous crime has been provided as life imprisonment, reveals that imprisonment is in a range of 14 to 35

years. Such a determinate imprisonment can be considered sufficient and proportional for most of the serious offences. Keeping alive human beings behind bars for the rest of natural life (life imprisonment) is worse sanction than death.

(49) The learned counsel for the State of Gujarat failed to point out even an iota of evidence that punishment imposed on the convicted offender has any deterrent impact on the behaviour of potential offenders and there is considerable reduction in the commission of crime of such nature. The lifelong imprisonment pays a little regard to human right and human dignity. Life imprisonment must be reviewed after certain intervals say 14 years as per the Bombay Jail Rules as applicable in the State of Gujarat, otherwise indeterminate imprisonment will be cruel and unusual punishment. Irreducible life sentence raises an issue under the *UNIVERSAL DECLARATION OF HUMAN RIGHTS:* Article 5 whereof says that "*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*". The essential core of the humanity is that everyone is redeemable. Indeterminate imprisonment removes any prospect of reward for change and is therefore, fundamentally inhumane. In real sense to my mind, never going to be released is equivalent to worse sanction than death sentence. So, it can be termed as cruel, barbaric, inhumane and against the human dignity. Whole of the natural life imprisonment means nothing in life to a prisoner. It means he will die in prison. Such a punishment is untenable in a civilised society. To make the prisoner realise that world no longer exists for him, he is no longer a part of it, will certainly lead to inhumane living and against the principles of Article 21 of the Constitution, such action is not sustainable to my mind.

(50) In the light of the facts of the cases in hand, the following points also need consideration:

Does the life of prisoner deserve to have all hopes of redemption taken away? Does he need second chance?

(51) There is categorical evidence on record that petitioner is a reformed man and recommendation for his premature release has been made by the concerned District Magistrate, Senior Superintendent of Police

and Superintendent of Jail. The Supreme Court in the case of ***Santa Singh*** versus ***State of Punjab (8),*** highlighted some issues to be considered before deciding on nature of sentence. These issues are equally relevant for consideration of premature release. Following are the main issues highlighted:

> *"...the prior criminal record, if any, the age of the offender, the record of the offender as to employment, the background of the offender with reference to education, home life, sobriety, and social adjustment, the emotional and mental condition of the offender, the prospects for the rehabilitation of the offender, the possibility of return of the offender to normal life in the community, the possibility of treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by the offender or others and the current community need if any, for such a deterrent in respect of the particular type of offence."*

(52) The conduct of the petitioner has remained exemplary in prison, pre and post conviction. The jail authorities as well as District Magistrate and the Senior Superintendent of Police, Kapurthala, in whose jurisdiction the area of residence of the petitioner falls, have recommended for his premature release and forwarded these recommendations to the Government of Gujarat, these are required to be taken into consideration. The petitioner appears to have turned socially useful and has been very helpful to all other inmates in the jail. He has assisted the inmates in many ways. Otherwise also, apparently there appears to be no intention of the petitioner to commit terrorist acts and disruptive activities.

(53) Another important aspect of his behaviour in prison as well as outside the prison is that he has availed 20/21 paroles / furloughs and had been returning to the prison as per the directions. The petitioner has utilized the time in prison fruitfully to turn into socially responsible and economically useful person. The behaviour of the petitioner for the last more than 20 years shows there is no scope of recidivism. There is always glamour of life at the end of the tunnel, where before there was darkness. Petitioner may be emotionally immature at that point of time because of which he may have indulged in such acts. Violence is a learnt disease, it

(8) AIR 1976 SC 2386

can be unlearnt. Petitioner appears to be sensing his past and is working his way towards a manageable future. Reformative and rehabilitative approach of the government towards prisoners will be largely wastage of time, when the prisoner will never go out. Petitioners-prisoners deserve to have all hopes of redemption and they need second chance to come to mainstream. Therefore, what is the point of such reforms and rehabilitation programme ? Otherwise, it would mean forfeiting his liberty to the State forever. The approach should always be like that lifer should be released on probation when he is deemed safe. If he committed another crime he would be recalled to the prison to continue for life. When a prisoner senses that he will be never out, he may untimely die in prison. It is not a living, it just existence. When such thinking comes to the mind of a person, he becomes dead inside, except for a burning fire of anger and hate. He starts ranting. Such prisoner feels and faces hell on earth in which he neither lives nor parish. Can this be the meaning of life imprisonment which is termed as imprisonment for natural life? Certainly not, in my opinion.

(54) Article 161 of the Constitution of India confers upon the Governor a "pardoning, remissions of punishment power" which is of the same nature as enjoyed by the British Crown or the American Sovereign. The words of Article 161 are very wide and do not contain any limitation as to time at which, the occasion on which, or circumstances in which the power conferred by the Article may be exercised.

(55) In addition to the above constitutional provisions, the Code of Criminal Procedure, 1973 provides for power to suspend or remit sentences– Section 432 and the power to commute sentence Section 433. Section 433A lays down restrictions on provisions of remission or commutation in certain cases mentioned therein. Section 434 confers concurrent power on the Central government in case of death sentence. Section 435 provides that the power of the State government to remit or commute a sentence, where the sentence is in respect of certain offences specified therein will be exercised by the State government only after consultation with the Central government.

(56) Sections 54 and 55 of the IPC confer power on the appropriate government to commute sentence of death or sentence of imprisonment for life as provided therein.

(57) The philosophy underlying the pardon power is that "every civilized country recognizes, and has therefore provided for, the pardoning power to be exercised as an act of grace and humanity in proper cases. Without such a power of clemency, to be exercised by some department or functionary of a government, a country would be most imperfect and deficient in its political morality, and in that attribute of Deity whose judgments are always tampered with mercy." [see 59 American Jurisprudence 2Ed].

(58) The rationale of the pardon power has been felicitously enunciated by the celebrated **Justice Holmes** of the United States Supreme Court in the case of ***Biddle v. Perovich (9)*** in these words.

> *"A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed" [emphasis added].*

(59) In the case of ***Kehar Singh*** versus ***Union of India (10)*** these observations of Justice Holmes have been approved by our Hon'ble Supreme Court.

(60) The classic exposition of the law relating to pardon is given in ***Ex parte Philip Grossman (11),*** where Chief Justice Taft stated:

> *"Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or the enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments."*

(9) 71 L. Ed. 1161 at 1163
(10) 1989 (1) SCC 204
(11) 69 L. Ed. 527

(61) The dicta in ***Ex parte Philip Grossman*** were approved and adopted by the Hon'ble Apex Court in ***Kuljit Singh*** versus ***Lt. Governor of Delhi (12).*** In actual practice, a sentence has been remitted in the exercise of this power on the discovery of a mistake committed by the High Court in disposing of a criminal appeal. ***[see Nar Singh*** versus ***State of Uttar Pradesh (13).***

(62) From the foregoing it emerges that power of pardon; remission can be exercised upon discovery of an element of undue harshness in the punishment imposed.

(63) However the legal effect of a pardon is wholly different from a judicial supersession of the original sentence. In ***Kehar Singh's case*** (supra) Hon'ble Apex Court observed that

> *"in exercising the power under Article 72 "the President does not amend or modify or supersede the judicial record. ..."*
>
> *And this is so, notwithstanding that the practical effect of the Presidential act is to remove the stigma of guilt from the accused or to remit the sentence imposed on him" [see Kehar Singh, supra at 213]. The President "acts in a wholly different plane from that in which the Court acted. He acts under a constitutional power, the nature of which is entirely different from the judicial power and cannot be regarded as an extension of it".*

(63A) This ostensible incongruity is explained by Sutherland J. in ***United States*** v. ***Benz (14)*** in these words:

> *"The judicial power and the executive power over sentences are readily distinguishable. To render judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment, but does not alter it qua a judgment" [emphasis added] [see page 358].*

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(12) (1982) 1 SCC 417
(13) AIR 1954 SC 457
(14) 75 L. Ed. 354

(64) According to the Report of the U.K. Royal Commission pardon can be granted where the Home Secretary feels that despite the verdict of the jury there is a "scintilla of doubt" about the prisoner's guilt.

(65) Judicial decisions, legal text books, reports of Law Commission, academic writings and statements of administrators and people in public life reveal that the following considerations have been regarded as relevant and legitimate for the exercise of the power of pardon.

Some of the illustrative considerations are:

(a) interest of society and the convict;

(b) the period of imprisonment undergone and the remaining period;

(c) seriousness and relative recentness of the offence;

(d) the age of the prisoner and the reasonable expectation of his longevity;

(e) the health of the prisoner especially any serious illness from which he may be suffering;

(f) good prison record;

(g) post conviction conduct, character and reputation;

(h) remorse and atonement;

(i) deference to public opinion.

(66) It has occasionally been felt right to commute the sentence in deference to a widely spread or strong local expression of public opinion, on the ground that it would do more harm than good to carry out the sentence if the result was to arouse sympathy for the offender and hostility to the law.

(67) It is necessary to keep in mind the salutary principle *as quoted in Burghess, J.C. in (1897), U.B.R. 330 (334)* that:

> *"To shut up a man in prison longer than really necessary is not only bad for the man himself, but also it is a useless piece of cruelty, economically wasteful and a source of loss to the community."*

(68) 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 facts and circumstances of each case and the necessity of justification for exercising that power has therefore to be judged from case to case. The Law Commission in its report stated that it would not be desirable to attempt to lay down any rigid and exhaustive principles on which the sentence of death may be commuted.

(69) Hon'ble Apex Court in ***Kehar Singh's case*** (supra) did not accept the petitioner's contention that in order to prevent an arbitrary exercise of power under Article 72 the Apex Court should draw up a set of guidelines for regulating the exercise of the power. The Court opined that specific guidelines need not be spelled out and it may not be possible to lay down any precise, clearly defined and sufficiently channelised guidelines.

(70) In ***State of Haryana*** versus ***Mehender Singh (15),*** Hon'ble Apex Court considered various judgments. The extract from the judgment is as under:

> *"28. Validity or otherwise of Section 433A of the Code of Criminal Procedure came up for consideration before a Constitution Bench of this Court in* ***Maru Ram v. Union of India and Others [(1981)1 SCC 107]*** *wherein Hon'ble Court inter alia held :*
>
> > *"54. The major submissions which deserve high consideration may now be taken up. They are three and important in their outcome in the prisoners' freedom from behind bars. The first turns on the "prospectivity" (loosely so called) or otherwise of Section 433-A. We have already held that Article 20(1) is not violated but the present point is whether, on a correct construction, those who have been convicted prior to the coming into force of Section 433-A are bound by the mandatory limit. If such convicts are out of its coils their cases must be considered under the remission schemes and "short-sentencing" laws. The second*

(15) 2007 (4) RCR (Crl.) 909

plea, revolves round "pardon jurisprudence", if we may coarsely call it that way, enshrined impregnably in Articles 72 and 161 and the effect of Section 433-A thereon. The power to remit is a constitutional power and any legislation must fail which seeks to curtail its scope and emasculate its mechanics. Thirdly, the exercise of this plenary power cannot be left to the fancy, frolic or frown of Government, State or Central, but must embrace reason, relevance and reformation, as all public power in a republic must. On this basis, we will have to scrutinise and screen the survival value of the various remission schemes and short-sentencing projects, not to test their supremacy over Section 433-A, but to train the wide and beneficent power to remit life sentences without the hardship of fourteen fettered years."

29. In regard to the first point, it was held that a person convicted before coming into force of Section 433A of the Code of Criminal Procedure goes out of the pale thereof and will enjoy the benefits as had accrued to him.

In regard to the second point, it was held that Articles 72 and 161 of the Constitution of India must yield to Section 433A of the Code of Criminal Procedure.

The Constitution Bench was of the opinion that remission schemes offer healthy motivation for better behaviour, inner improvement and development of social fibre. It was observed that remission and short sentencing scheme provides for good guidelines for exercise of pardon power, a jurisdiction meant to be used as often and as systematically as possible and not to be abused, much as the temptation so to do may press upon the men of power.

It was also opined :

"(10) Although the remission rules or short-sentencing provisions proprio vigore may not apply as against Section 433-A, they will override Section 433-A if the Government, Central or State,

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

30. However, in ***Sadhu Singh and Others v. State of Punjab, 1984(2) RCR(Criminal) 83 : [(1984)2 SCC 310]****, although this Court noticed the aforementioned binding precedent in Maru Ram (supra) without dwelling upon the question in depth, while interpreting the provisions of paragraph 516-B of the Jail Manual, opined that the same does not have the force of a statutory rule and, thus, it would be open to the State Government to alter or amend or even withdraw such executive instruction stating :*

> *"6...In other words any existing executive instructions could be substituted by issuing fresh executive instructions for processing the cases of lifers for premature release but once issued these must be uniformly and invariably applied to all cases of lifers so as to avoid the charge of discrimination under Article 14."*

The contention that those convicts who had been sentenced to death but whose sentence on mercy petitions has been commuted to life imprisonment will be governed by the 1976 instructions was negatived.

This Court, however, upheld the right of two convicts whose cases were entitled to be considered for pre-mature release immediately in view of 1976 instructions. Unfortunately, the

attention of this court was not drawn to the relevant paragraphs of the decision in Maru Ram (supra).

31. We may notice that the question has been considered by this Court in ***State of Punjab and Others v. Joginder Singh*** *and Others, 1991(1) RCR(Criminal) 282 : [(1990)2 SCC* ***661]*** *wherein it was held :*

"9....Even in such cases Section 433-A of the Code or the executive instruction of 1976 does not insist that the convict pass the remainder of his life in prison but merely insists that he shall have served time for at least 14 years. In the case of other 'lifers' the insistence under the 1971 amendment is that he should have a period of at least 8-1/2 years of incarceration before release. The 1976 amendment was possibly introduced to make the remission scheme consistent with Section 433-A of the Code. Since Section 433-A is prospective, so also would be the 1971 and 1976 amendments.

*** *** *** *** *** ***

11. We, therefore, find it difficult to uphold the view taken by the High Court in this behalf. We may make it clear that paragraph 516-B insofar as it stands amended or modified by the 1971 and 1976 executive orders is prospective in character...."[Emphasis supplied]

[See also ***State of Haryana and Another v. Ram Diya, 1990 (2) RCR(Criminal) 245 : [(1990)2 SCC 701*** *and* ***Rajender and Others v. State of Haryana, 1995(3) RCR(Criminal) 66 : [(1995)5 SCC 187].***

32. A right to be considered for remission, keeping in view the constitutional safeguards of a convict under Articles 20 and 21 of the Constitution of India, must be held to be a legal one. Such a legal right emanates from not only the Prisons Act but also from the Rules framed thereunder. Although no convict can be said to have any constitutional right for obtaining remission in his sentence, he in view of the policy decision itself must be held to have a right to be considered therefor. Whether by reason of a

*statutory rule or otherwise if a policy decision has been laid down, the persons who come within the purview thereof are entitled to be treated equally. [**State of Mysore and Another v. H. Srinivasmurthy, (1976)1 SCC 817**]*

*It is now well-settled that any guidelines which do not have any statutory flavour are merely advisory in nature. They cannot have the force of a statute. They are subservient to the legislative act and the statutory rules. [See **Maharao Sahib Shri Bhim Singhji v. Union of India and Others (1981)1 SCC 166, J.R. Raghupathy and Others v. State of A.P. and Others, (1988)4 SCC 364** and **Narendra Kumar Maheshwari v. Union of India, 1990 (Supp) SCC 440**]*

*33. Whenever, thus, a policy decision is made, persons must be treated equally in terms thereof. A' fortiori the policy decision applicable in such cases would be which was prevailing at the time of his conviction. [See **Commissioner of Municipal Corporation, Shimla v. Prem Lata Sood and Ors., 2007(3) RCR(Civil) 249 : 2007(3) R.A.J. 253 : 2007 (7) SCALE 737**]*

34. Furthermore, if the Punjab Rules are applicable in the State of Haryana in view of the State Reorganisation Act, no executive instruction would prevail over the Statutory Rules. The Rules having defined 'convicts' in terms whereof a 'life convict' was entitled to have his case considered within the parameters laid down therein, the same cannot be taken away by reason of an executive instruction by redefining the term 'life convict'. It is one thing to say that the 'life convict' has no right to obtain remission but it is another thing to say that they do not have any right to be considered at all. Right to be considered emanates from the State's own executive instructions as also the Statutory Rules.

*Strong reliance, however, has been placed by Mr. Misra on **Mohd. Munna v. Union of India and Others [(2005)7 SCC 417]**. In that case, a writ petition was filed under Article 32 of the Constitution of India by the appellant therein stating that as he had undergone 21 years of imprisonment he should be set at*

liberty forthwith having regard to the provisions of Clause 751(c) of the West Bengal Jail Code and Section 6 of the West Bengal Correctional Services Act, 1992. Claim for damages was also advanced. It was in that factual backdrop, this Court held :

> *"14. The Prisons Rules are made under the Prisons Act and the Prisons Act by itself does not confer any authority or power to commute or remit sentence. It only provides for the regulation of the prisons and for the terms of the prisoners confined therein. Therefore, the West Bengal Correctional Services Act or the West Bengal Jail Code do not confer any special right on the petitioner herein."*

In the said decision, unfortunately, again Maru Ram (supra) was not considered. In any event, the respondents had inter alia prayed for payment of damages.

35. Reliance was also placed by Mr. Misra on ***Epuru*** *Sudhakar and Another v. Govt. of A.P. and Others, (2006)8* ***SCC 161.*** *Therein, the Court has opined as follows:*

> *"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."*

There may not be any dispute with regard to the said proposition of law. But herein we are concerned with the right of the respondents to be considered for remission and not what should be the criteria when the matter is taken up for grant thereof.

36. We are, therefore, of the opinion that the High Court might not be correct in holding that the State has no power to make any classification at all. A classification validly made would not offend Article 14 of the Constitution of India. We, thus, although do not agree with all the reasoning of the High Court, sustain the judgment for the reasons stated hereinbefore.

It appears that during pendency of the Special Leave, Respondent Nos. 6 and 11 have already been directed to be released. No order, therefore, is required to be passed in their case. So far as the cases of other respondents are concerned, the same may be considered by the appropriate authority in the light of the observations made hereinabove."

(71) Article 21 of the Indian Constitution is a saviour of mankind. Right to life and personal liberty is the most cherished and pivotal fundamental human right around which other rights of the individual revolves. The Supreme court and High Courts as a guardian of fundamental human rights have interpreted that Article 21 is the celebrity provision of the Indian Constitution and occupies a unique place amongst the fundamental rights. It guarantees right to life and personal liberty to citizens and aliens. The interpretation of Article 21 in ***Mrs. Maneka Gandhi*** versus ***Union of India and another (16),*** case has ushered a new era of expansion of the horizons of right to life and personal liberty. Article 21, Article 32 and Directive Principles of the State Policy and International Human Rights Instruments are more relevant for considering the liberty of prisoner even from prison. In ***Francis Coralie Mullin*** versus ***Administrator, Union Territory of Delhi and others (17),*** the Hon'ble Supreme Court in para no.7 has stated as under:

"....We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter

(16) (1978) 1 SCC 248
(17) (1981) 1 SCC 608

over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings."

(72) Thus, the Supreme Court interpreted Article 21 in a widest possible manner and included within its ambit the right to live with human dignity. The Hon'ble Supreme Court has said that even lawful imprisonment does not spell farewell to all fundamental rights. A prisoner retains all the rights enjoyed by a free citizen except only those necessarily lost as an incident of imprisonment. In ***Maneka Gandhi's case*** *(supra)*, the Hon'ble Apex Court has held that the procedure prescribed by law for depriving a person of his life and personal liberty must be right, just and fair and not arbitrary, fanciful and oppressive, otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied.

(73) In ***Confederation of Ex-servicemen Association and others*** versus ***Union of India (18),*** the Hon'ble Apex court has held that apart from fundamental rights guaranteed by Part III of the Constitution, it is the duty of the respondents -- Government of India to implement Directive Principles of State Policy under Part IV of the Constitution. While interpreting Article 21, the Apex Court in ***Francis Mullen's case*** (supra) has held that right to life includes right to live with human dignity, free from exploitation. This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly Clauses (e) and (f) of the Article 39 and Articles 41 and 42 and at least, therefore, it must include protection of the health and strength of workers, men and women, and the children of the tender age against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work etc.

(74) The core principle found in Article 5 of the Universal Declaration of Human Rights, 1948 is: '*No one shall be subjected to* torture or to cruel, inhuman or degrading treatment or punishment'.

(75) In ***Hussainara Khatoon and others*** versus ***Home Secretary, Bihar and others (19),*** and other cases of Hussainara Khatoon the

(18) (2006) 8 SCC 399
(19) (1995) 5 SCC 326

Hon'ble Supreme Court not only advanced the prison reform in favour of under-trials but also declared the right to speedy trial as an essential ingredient of Article 21. Reaffirming as well as paving way for the implementation of Article 14, clause (3) (c) of the International Covenant on Civil and Political Rights which lay down that everyone is entitled "to be tried without delay" and Article 16 of the Draft Principles on Equality in the Administration of Justice which provides that everyone shall be guaranteed the right to prompt and speedy hearing, the Court directed the release of all those under-trials against whom the police had not filed charge sheets within the prescribed period of limitation. Such persons were directed to be released forthwith as any further detention of such under-trials would be according to the court, a clear violation of Article 21.

(76) In ***Sunil Batra*** versus ***Delhi Administration (19),*** the Supreme Court took note of Article 10 of the ICCPR which states that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. The Court then opined thus:

> *"The State shall take steps to keep up to the Standard Minimum Rules for Treatment of Prisoners recommended by the United Nations, especially those relating to work and wages, treatment with dignity, community contact and correctional strategies. In this latter aspect, the observations we have made of holistic development of personality shall be kept in view."*
>
> And further emphasized that
>
> *"The Declaration of the Protection of All Persons from Torture and other Cruel, Inhuman or Degrading Treatment or Punishment adopted by U.N. General Assembly has relevance to our decision."*

(77) It is, no doubt, true that the judge has to interpret the law according to the words used by the legislature. But, as pointed out by ***Mr. Justice Holmes***: *"A word is not a crystal, transparent and unchanged; it is the skein of a living thought and may vary greatly in colour and content according to the circumstances and the time in*

(20) (1980) 3 SCC 488

which it is used." The Court gives meaning to what the legislature has said. It is this process of interpretation which constitutes the most creative and thrilling function of the Court. The Constitutional Court is required to constantly invent new rules to more justly handle recurrent situations that the law has not fully anticipated. In doing so, the Court participate in the process of lawmaking- what ***Mr. Justice Holmes*** called *"interstitial legislation."*

(78) The Court is required to reach at the doorstep of the 'lowly and lost' to provide them justice. ***Lord Hewart*** has asserted as under:

> *"It ... is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."*

(79) The function of the Constitutional Court is not merely to interpret the law but to make it imaginatively sharing the passion of the Constitution for social justice in the form of "creative constitutional development."

(80) The Courts while interpreting law or the Constitution does not merely giving effect to the literal meaning of the words, but by trying to interpret its provisions consistent with the spirit of that statute or constitution.

(81) In the case ***Rajendra Prasad*** versus ***State of U.P. (21), Justice Krishna Iyer*** observed as under:-

> *"When the legislative text is too bald to be self-acting or suffers zigzag distortion in action, the primary obligation is on Parliament to enact necessary clauses by appropriate amendments to S. 302 I.P.C. But if legislative under taking is not in sight, judges who have to implement the Code cannot fold up their professional hands but must make the provision viable by evolution of supplementary principles, even if it may appear to posses the flavour of law-making. Lord Dennings' observations are apposite: "Many of the Judges of England have said that they do not make law. They only interpret it. This is an illusion which they have fostered. But it is a notion which is now*

(21) (1979) 3 SCC 646

being discarded everywhere. Every new decision - on every new situation - is a development of the law. Law does not stand still. It moves continually. Once this is recognised, then the task of the Judge is put on a higher plane. He must consciously seek to mould the law so as to serve the needs of the time. He must not be a mere mechanic, a mere working mason, laying brick on brick, without thought to the overall design. He must be an architect - thinking of the structure as a whole, building for society a system of law which is strong, durable and just. It is on his work that civilised society itself depends."

(81A) The Supreme Court of India in ***Charles Sobraj*** versus ***Supdt. Central Jail, Tihar, New Delhi (22),*** has observed:

"....Article 21, read with Article 19(1)(d) and (5) is capable of wider application than the imperial mischief which give it birth and must draw its meaning from the evolving standards of decency and dignity that mark the progress of a mature society..."

(82) In the light of the above discussions, facts and circumstances of the cases in hand, the arguments of the counsel for the Government of Gujarat that life imprisonment means natural life of the prisoner is against the provisions of the Constitution and the International Human Rights Documents and will amount to arbitrary exercise of power rejecting the premature release of petitioners. I have no doubt that indeterminate life imprisonment and non-release of a convict - prisoner is worse sanction than the death sentence, resultant encroachment upon the life and personal liberty by the executive. A barbaric crime does not have to be met with a barbaric penalty which may upset the mental balance of a person who may realize that he will never be out of prison. The reasonable determination period of imprisonment with regard to offences where life imprisonment is provided is a necessity and call for appropriate amendment for prescribing determinate punishment keeping in view the gravity of the offence. This Court feels that it is the primary obligation of the Legislature to carry out necessary amendments in the cases where imprisonment for life is provided to make aware the convict / prisoner how much period he has to undergo in prison.

(22) (1978) 4 SCC 104

Otherwise, the approach of reformative, rehabilitative and corrective system will be only a futile exercise. Otherwise also, to keep a prisoner behind bars is a financial burden on the State exchequer and for that reason it is imperative to fix some determinate punishment by making amendments.

(83) This question is answered accordingly.

Re: Question No. (v): Whether order dated 26.07.2011 (Annexure P/13) is subject to judicial review and is arbitrary, whimsical and against the provisions of Article 21 of the Constitution of India?

(84) It is well settled that the exercise or non-exercise of pardon power by the President or Governor is not immune from judicial review. Limited judicial review is available in certain cases.

(85) Hon'ble Apex Court in the case of ***Maru Ram*** (supra), held that all public power, including constitutional power, shall never be exercisable arbitrarily or mala fide and, ordinarily, guide-lines for fair and equal execution are guarantors of the valid play of power. [see page 147, para 62]

(86) It is noteworthy that Hon'ble Apex Court has in ***Kehar Singh's case*** (supra) unequivocally rejected the contention of the Attorney General that the power of pardon can be exercised for political consideration (see Kehar Singh, para 12). Hon'ble Apex Court in ***Maru Ram's case*** (supra) ruled that consideration of religion, caste, colour or political loyalty are totally irrelevant and fraught with discrimination [see **Maru Ram Supra**, para 65].

(87) Hon'ble Apex Court in ***Kehar Singh's case*** ruled that the order of the President cannot be subjected to judicial review on its merits except within the strict limitations defined in ***Maru Ram v. Union of India*** (supra). The function of determining whether the act of a constitutional or statutory functionary falls within the constitutional or legislative conferment of power, or is vitiated by self-denial on an erroneous appreciation of the full amplitude of the power is a matter for the court to be considered. [see page 214, para 11]

(88) The Union of India, in ***Kehar Singh's case***, placing reliance on the doctrine of the division (separation) of powers contended that it was not open to the judiciary to scrutinize the exercise of the "mercy" power [see page 216]. Hon'ble Supreme Court held 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 [see para 14, page 217].

(89) As regards the considerations to be applied to a petition for pardon/remission in ***Kehar Singh's case*** Hon'ble Apex Court observed as follows :

> *"As 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." [see page 217]*

(90) In the case of ***Swaran Singh*** versus ***State of U.P. (23),*** after referring to the judgments in the cases of Maru Ram and Kehar Singh, Hon'ble Apex Court held as follows :

> *"We cannot accept the rigid contention of the learned counsel for the third respondent that this Court has no power to touch the order passed by the Governor under Article 161 of the Constitution. If such power was exercised arbitrarily, mala fide or in absolute disregard of the finer canons of the constitutionalism, the by-product order cannot get the approval of law and in such cases, the judicial hand must be stretched to it." [see page 79, para 12]*

(91) In ***Swaran Singh's*** case (supra) one Doodh Nath was found guilty of murdering one Joginder Singh and was convicted to imprisonment for life. His appeals to the High Court and Special Leave Petition to the Supreme Court were unsuccessful. However, within a period of less than 2 years the Governor of Uttar Pradesh granted remission of the remaining long period of his life sentence. Hon'ble Apex Court quashed the said order of the Governor on the ground that when the Governor was not posted with material facts, the Governor was apparently deprived of the opportunity

(23) (1998) 4 SCC 75

to exercise the powers in a fair and just manner. Conversely, the impugned order "fringes on arbitrariness" [see page 79, para 13].

(92) The Court held that if the pardon power "was exercised arbitrarily, mala fide or in absolute disregard of the finer canons of the constitutionalism, the by-product order cannot get the approval of law and in such cases, the judicial hand must be stretched to it" [see Swaran Singh, page 79].

(93) The Court further observed that when the order of the Governor is impugned in these proceedings, it is subject to judicial review within the strict parameters laid down in "Maru Ram case" and reiterated in "Kehar Singh case": "we feel that the Governor shall reconsider the petition of Doodh Nath in the light of those materials which he had no occasion to know earlier.", [see page 79] and left it open to the Governor of Uttar Pradesh to pass a fresh order in the light of the observations made by Hon'ble Apex Court. [see page 80]

(94) In the case of ***Satpal*** versus ***State of Haryana (24),*** Hon'ble Supreme Court observed 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. [see page 174]. Thereafter the Court held as follows :

> *"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 mala fide one or the Governor has passed the order on some extraneous consideration." [see page 174]*

(24) 2000 (5) SCC 170

(95) The principles of judicial review on the pardon power have been restated in the case of ***Bikas Chatterjee*** versus ***Union of India (25).***

(96) From the reading of the above referred judgments of the Hon'ble Supreme Court, it is crystal clear that judicial review of the order of the President or the Governor under Article 72 or Article 161, as the case may be, is available and their orders can be impugned on the following grounds:

(a) that the order has been passed without application of mind;

(b) that the order is mala fide;

(c) the order has been passed on extraneous or wholly irrelevant considerations;

(d) that the order suffers from arbitrariness

(97) The Hon'ble Supreme Court in its decision in ***Government of A.P.*** versus ***M.T. Khan (26),*** held that if the government considers it expedient that the power of clemency be exercised in respect of a particular category of prisoners the government have full freedom to do so and also for excluding certain category of prisoners which it thought expedient to exclude. The Court further observed that "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" [emphasis added] [see page 622, para 6].

(98) Now in the light of aforesaid discussion it would be appropriate to consider the scope of judicial review regarding power of remission.

(99) It has been authoritatively laid down in ***Maru Ram Vs. Union of India*** (supra) and ***Kehar Singh vs. Union of India*** (supra) that an executive decision under Article 161 can be challenged. In view of this settled legal position administrative law principles are applicable to exercise of powers under Article 161. The exercise of power of remissions

(25) 2004 (7) SCC 634 at 637
(26) 2004 (1) SCC 616

is subject to judicial review to the same extent and manner as exercise of the power of pardon. The considerations for remissions are not different from pardon. Therefore, the contention of the learned State counsel that different considerations ought to be applied, is fallacious and would lead to an inconsistent application of constitutional provisions. Article 161 confers a power or discretion coupled with duty and obligation. The public welfare and the welfare of the convict are guiding principles for the exercise of both the grant and non – grant of remissions. In some cases public welfare and the welfare of the convict require, rather necessitate, that remissions be given, non –grant of remissions would tantamount to failure to perform duty and obligation as enshrined in Article 161 of the Constitution of India. For example, suppose if a prisoner has substantially served term of imprisonment, is of advanced age and is suffering from a critical illness and there is no material whatsoever, that if this prisoner is released, he will be a menace to society, then in such a case, the non – grant of remissions would amount to a failure to perform duty and obligation under Article 161. It is well settled principle of law that when a capacity or power is given to a public authority, the said authority is duty bound to exercise power in a manner consistent with the basic principles of justice, fairness and certainty.

(100) In a given case, the Government may not grant remissions, though it is eminently required for certain reasons. Non – exercise of power of remissions and improper exercise of power is not immune from judicial review.

(101) Now, it is to be seen whether the impugned order dated 26.07.2011 (Annexure P/13) fulfils the requirements settled by various judgments of the Apex Court and the law settled by the Apex Court. The provisions of the Bombay Jail Rules and the Punjab Jail Manual with regard to the review of sentences are almost identical. According to Rule 1446 of Bombay Jail Rules, all the cases of prisoners sentenced to more than 14 years imprisonment or transportation are to be reported to the Inspector General of Prisons. Under Rule 1448 Advisory Committee is to be set up. Identical is the situation under the Punjab Jail Manual.

(102) In view of the rules of the Bombay Jail Rule as well as the Punjab Jail Manual, the case of the petitioner is required to be considered. Virtually there is no difference between the sum and substance of both the

Rule and Manual with regard to consideration of the premature release case. The State of Gujarat has considered the case of the petitioner but has not taken into consideration the reports of the District Magistrate and the Senior Superintendent of Police, Kapurthala, as well as, the Superintendent Maximum Security Jail, Nabha, where the petitioner is undergoing sentence. No reason for discarding such reports has been given. It is also not recorded in the order that how the Advisory Committee of Gujarat has come to a conclusion for not recommending the case of premature release of the petitioner. No evidence or material has been placed before this Court to reject the recommendations of the transferee State i.e. the Government of Punjab. The reasons are required to be recorded for rejection of the case and recommendations of transferee State. Reasons are also required to be recorded in the order whether he is a reformed person. The petitioner more than 20 years had never been in the jurisdiction of District Magistrate and District Superintendent of Police of the concerned District of Gujarat, how their reports can outweigh the reports of the transferee State. The absence of obligation to convey reason to the petitioner for rejecting the recommendations of the State of Punjab where the petitioner permanently resides does not mean that there should not be legitimate and relevant reasons for passing order of rejection. Furthermore, no such material has been placed on the paper book nor any record has been shown to the Court which had formed the basis for rejecting the claim of the petitioner. The obligation to supply reasons is entirely different to appraise the Court about the reason for the action when the same is challenged in Court. This aspect has been considered by the Hon'ble Apex Court in the case of ***S.R. Bommai*** versus ***Union of India (27),*** in the context of exercise of power under Article 356 of the Constitution, at page 109, para (g) and (h) and at page 110, para (a) of the judgment reads as follows:

> *"When the Proclamation is challenged by making out a prima facie case with regard to its invalidity, the burden would be on the Union Government to satisfy that there exists material which showed that the government could not be carried on in accordance with the provision of the Constitution. Since such material would be exclusively within the knowledge of the Union Government, in view of the provision of Section 106 of the*

(27) (1994) 3 SCC 1

Evidence Act, the burden on proving the existence of such material would be on the Union Government." [emphasis supplied.]

(103) The position if the Government chooses not to disclose the reasons or the material for the impugned action was stated in the words of Lord Upjohn in the landmark decision in ***Padfield and Others*** versus ***Minister of Agriculture, Fisheries and Food and Others (28).***

".. if he does not give any reason for his decision it may be, if circumstances warrant it, that a court may be at liberty to come to the conclusion that he had no good reason for reaching that conclusion.."

(104) The same approach was adopted by Justice Rustam S. Sidhwa of the Lahore High Court in ***Muhammad Sharif*** versus ***Federation of Pakistan PLD (29)*** where the learned judge observed as follows at page 775, para 13:

"I have no doubt that both the Governments are not compelled to disclose all the reasons they may have when dissolving the Assemblies under Articles 58 (2)(b) and 112(2) (b). If they do not choose to disclose all the material, but only some, it is their pigeon, for the case will be decided on a judicial scrutiny of the limited material placed before the Court and if it happens to be totally irrelevant or extraneous, they must suffer." [emphasis supplied].

(105) Justice Sidhwa's aforesaid observations have been referred to in the Supreme Court decision in ***S.R. Bommai, supra,*** at page 98, paras (f) – (g).

(106) The Gauhati High Court in the case of ***Vamuzzo*** versus ***Union of India (30),*** adopted the approach of Justice Sidhwa, at page. 517. The learned judge gave time to the Government of India to inform the Court about the materials upon which the President's Proclamation

(28) (1968) 1 All E.R. 694 at page 719

(29) 1988 Lah 725

(30) 1988 Gauhati Law Journal 468

under Article 356 was passed in the case of the State of Nagaland. The relevant portion of para 47 at page 517 reads as under:

> *"For this purpose we grant 10 days' time. If the (sic) within this period they would fail to produce the material we shall have to render our opinion on the basis of the materials made available to us. If they would fail to do so, this Court would have no other alternative but to decide the matter on the basis of the materials placed before it. In this connection reference may be made to what was stated by Rustam Sidhwa J. in the aforesaid case of Lahore High Court [Muhammad Sharif v. Federation of Pakistan PLD 1988 Lah 725].*

(107) The above view of the Gauhati High Court has been approved by the Hon'ble Apex Court in ***S.R. Bommai, supra***.

(108) Keeping in view the surrounding facts and circumstances of the present cases, and the fact that alleged so called Khalistan movement is nowhere visible in the country, I am prima facie satisfied that impugned order is apparently not in conformity with the provisions of the Constitution and International human right instruments to which India is a signatory. The Governments failed to give reasons or disclose the reason on the basis of which impugned orders have been passed. The power of the Court of judicial review which is a basic feature of the Constitution cannot be incapacitated by non-disclosing of the reason for coming to conclusion for rejecting the claim of the petitioners for premature release.

(109) This question is answered accordingly.

(110) In view of the aforesaid discussion, I allow both the petitions. Respondent Nos. 1 and 2 (in both the Criminal Writ Petitions) are directed to reconsider the case of each of the petitioner latest by 1st of October, 2012 and take up fresh decision in the light of aforesaid discussions in accordance with law. Meanwhile, the petitioner(s) in both the Criminal Writ Petitions shall be released forthwith on parole for a period of three months on furnishing personal bond/surety bond for a sum of Rs.50,000/- to the satisfaction of concerned Jail Superintendent and compliance report be sent to this Court.

M. Jain