Before Jawahar Lal Gupta and K. S. Garewal, JJ

SUKHWANT KAUR,—*Petitioner*

versus

STATE OF PUNJAB and ANOTHER —*Respondents*

CRL. W. P. No. 641 of 1996

31st July, 2000

Code of Criminal Procedure, 1973—Ss. 432 and 433—Constitution of India, 1950—Arts. 72, 161 and 226—State Government issuing instructions for pre-mature release of the prisoners after laying down the minimum period of imprisonment to be undergone for a convict before consideration of application—Ss. 432 and 433 provide for the power to commute, reduce suspend the sentence—Executive has power to commute, suspend or remit the sentence or to grant complete pardon under Articles 72 and 161—Instructions for pre-mature release are intended to lay down uniform guidelines to regulate the exercise of power under Article 161—whether violative to S. 433-A Cr. P.C.—Held, no—S. 433-A does not affect the constitutional power embodying the clemency jurisdiction under Arts. 72 and 161 of the Constitution.

Held that Section 432 empowers the appropriate Government to suspend or remit the sentence awarded to any person. The Government can remit the sentence either wholly or in part. The power can be exercised at any time. Similarly, u/s 433 the Government can commute the sentence of death to that of imprisonment for life. Under Clause (b), the competent authority can commute "a sentence of imprisonment for life, for imprisonment for a term not exceeding 14 years or for fine". Thus, even though a sentence of imprisonment for life should normally last for lifetime, yet the provision empowers the Government to commute it for a lesser term. The provision of Section 433-A begins with a non obstante clause. It clearly provides that in cases where death sentence is one of the punishments and a person is required to undergo a sentence of imprisonment for life, he shall "not be released from prison unless he had served at least 14 years of imprisonment". In other words, the statute has laid down a

minimum. The prisoner cannot be released from the prison till he has spent a minimum of 14 years behind the prison walls.

(Paras 18 & 20)

Further held, that the executive has been empowered under Articles 72 & 161 of the Constitution to commute, reduce, suspened the sentence or to grant complete pardon. It is undoubtedly correct that in one sense, the power conferred by the Constitution is similar to that postulated in the statute. However, there is a basic and essential difference. The Constitution is the primary law of the land. Every statute runs subservient to this primary law. It has to conform to the Constitutional provisions. Otherwise, it would be ultra vires the Constitution. Articles 72 & 161 contain a Constitutional mandate. These stand at a much higher pedestal. The Constitution recognizes the clemency jurisdiction. It has been exercised through the civilised world for centuries. This constitutional mandate cannot be cabined or cribbed by any process of interpretation.

(Para 22)

Further held, that the instructions/the order are intended to regulate the exercise of power under Article 161. These instructions are not intended to by-pass or subvert the mandate of Section 433-A. These are intended to lay down uniform guidelines to regulate the exercise of powers under Article 161 of the Constitution. Thus, we are not persuaded to accept the contention that the instructions are violative of the mandate contained in section 433-A.

Rajiv Raina, *Advocate for the petitioner*

M. C. *Berry,* DAG, Punjab *for respondent No. 1*

V. K. Jindal, *Advocate for respondent No. 2*

JUDGEMENT

Jawahar Lal Gupta, J.

(1) Are the Instructions issued by the State Government regarding the premature release of the prisoners sentenced to imprisonment for life violative of Section 433-A of the Code of Criminal Procedure ? This is the short question that arises for

consideration in these two petitions under Article 226 of the Constitution of India which have been referred by the learned Single Judge to a larger Bench. The order of reference has been passed in Criminal Writ Petition No. 641 of 1996. The facts as appearing from the record of this case may be briefly noticed.

(2) The petitioner is a widow. She was married to Harbhajan Singh on 12th December, 1984. Her husband was murdered by Ajaib Singh, the second respondent, on 18th May, 1986. The said respondent was tried and convicted,—*vide* judgment dated 20th November, 1987, he was sentenced to undergo imprisonment for life and to pay a fine of Rs. 2000. The appeal was dismissed by the High Court,—*vide* its judgment dated 1st March, 1990. The Special Leave Petition was dismissed,—*vide* order, dated 6th August, 1990.

(3) The petitioner asserts that a sentence of imprisonment for life should be treated as "imprisonment for the whole of the remaining period of the convict prisoner's natural life". However, the State Government has been periodically considering the question of the grant of remission and premature release of the prisoners. The instructions as initially issued were embodied in paragraph 516-B of the Punjab Jail Manual. The provision laid down the "guidelines and procedure for premature release of convicts". Subsequently, the State Government has issued instructions through different letters. These permit premature release. Reference shall be made at the appropriate stage. The petitioner maintains that the instructions violate the mandate of law.

(4) The Code of Criminal Procedure was amended,—*vide* the Criminal Procedure (Amendment) Act, 1978. Section 433-A was added to the Code. The petitioner maintains that "a constraint" was placed on "the conditional and unlimited power of remission conferred by Section 432 on the State..." The prisoner is required to undergo imprisonment for a minimum period of 14 years. The remisson earned by a life convict cannot be "set off against the actual period of 14 years..." It is alleged that the State Government has made attempts to "circumvent and by-pass the provisions of Section 433-A...by resorting to the powers conferred on the State by virtue of Article 161 of the Constitution". The power under Articles 72 and 161 of the Constitution cannot be applied to "circumvent and short circuit the express provisions of Section 433-A...with a view to derive political mileage and advantage".

(5) The petitioner also alleges that after the year 1978, the State Government has been issuing instructions from time to time for premature release of the prisoners. By instructions issued,— *vide* letter dated 12th December, 1985, it was *inter alia* provided that the "adult male life convicts are required to undergo seven and a half years actual sentence" when their cases can be taken up for premature release. In particular, the petitioner refers to paragraph 6 of the instructions to contend that the provision contained in Section 433-A has been violated. The petitioner also refers to the instructions issued,— *vide* letters dated 8th July, 1991 and 6th March, 1995. The validity of even these instructions has been challenged on identical grounds. The petitioner submits that the second respondent had committed a heinous offence. The grant of remission to such a person before the expiry of an actual imprisonment of 14 years is wholly illegal and arbitrary.

(6) On the above premises, the petitioner prays that the instructions issued by the Government,— *vide* letters dated 12th December, 1985, 8th July, 1991 and 6th March, 1995, copies of which have been produced as Annexures P. 4 to P.6 be quashed.

(7) The second petition is directed against the instructions issued by the State of Haryana,— *vide* letters dated 28th September, 1988 and 4th February, 1993. The factual position in this case is almost similar to that in the Criminal Writ Petition No. 641 of 1996. In a nutshell, the petitioner alleges that respondent Nos. 2 and 3 (his nephews) had murdered his wife. They were tried and sentenced to undergo imprisonment for life. Fine was also imposed. The petitioner alleges that by virtue of the instructions issued by the Government, a person who has committed a heinous crime, is eligible for premature discharge on undergoing actual imprisonment for 12 years or on completion of 18 years with remissions. If the act is not found to be heinous, the period of actual imprisonment is 10 years or 14 years with remissions. The petitioner maintains that the instructions are contrary to the provision contained in Section 433-A.

(8) The respondents contest the claim made by the petitioners in these cases. On behalf of the State of Punjab, the Joint Secretary, Department of Home Affairs, has filed a written statement. It has been averred that the powers of President of India and the Governors of States under Articles 72 and 161 of the Constitution are "independent of Section 433-A of the Code of Criminal Procedure". It has been further averred that the State

Government has issued guidelines for the exercise of power under Article 161 of the Constitution. Reference in support of the plea has been made to the decision of their Lordships of the Supreme Court in *Maru Ram* vs *Union of India and others* (1). It has been further stated that the State Governments are "required to frame a policy for the exercise of powers under Article 161 of the Constitution". The guidelines issued by the State Government are in conformity with law and not meant to derive any political advantage. The allegations of the petitioner with regard to the validity of the instructions have been controverted. The second respondent has not filed any reply.

(9) It appears that during the pendency of the petition, instructions were issued by the State Government,—*vide* letter dated 18th December, 1996. The petitioner placed a copy of these instructions on the record. However, no argument was raised to challenge the instructions.

(10) The second case was listed for hearing before the learned Single Judge on 2nd April, 1998. It was ordered to be listed for hearing alongwith the first case. No notice having been issued to the respondents, no reply has been filed. However, Mr. D.P. Singh, the learned Deputy Advocate General has put in appearance on behalf of the State of Haryana.

(11) Learned counsel for the parties have been heard.

(12) On behalf of the petitioners, Mr. Rajiv Raina addressed the arguments. Learned counsel contended that the power to grant pardon, remission or reprieve is vested in a high authority. No guidelines are necessary. None can be laid down. The authority has to consider each case on its own merits. On the other hand, Mr. M.C. Berry, learned Deputy Advocate General, appearing on behalf of the State of Punjab submitted that the powers under Article 161 are very wide. The instructions merely regulate the exercise of power. These do not violate any law. Mr. D.P. Singh, learned Deputy Advocate General, Haryana, submitted that the instructions do not enlarge the power. In fact, the instructions place an embargo on the exercise of power. The State is entitled to issue guidelines and its action does not suffer from any illegality.

(13) It is in the background of these pleas that the issue regarding the validity of the impugned instructions has to be examined.

(1) AIR 1980 SC 2147

(14) Article 161 of the Constitution of India provides as under :—

> "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."

(15) A perusal of the above provision shows that the power is very wide. There is no limitation on the exercise of power by the authority. The executive can exercise this power in respect of any offence under any law "to which the executive power of the State extends". This power is like the clemency jurisdiction exercised by the British Crown or the American Sovereign.

(16) First of all, a word about the necessity and nature of the power. The power to grant pardon has been recognized since the hoary past. In the words of Chief Justice Marshall "this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours' bear a close resemblance...." In the words of Chief Justice Taft in *Philip Grossman's case* (2) :—

> "Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or 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. It is a check entrusted to the executive for special cases. To exercise it to the extent of destroying the deterrent effect of judicial punishment would be to pervert it; but whoever is to make it useful must have full discretion to exercise it. Our Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it".

(2) (69 L.E.D. 5)

(17) The provision contained in Articles 72 and 161 of the Constitution embodies an identical power. It is vested in the highest authority. The exercise of the power is not subject to the provision contained in any other law. It is not dependent upon a provision in any other statute. In fact, the provisions contained in every other law including those in the Code of Criminal Procedure, have to be read in a way that these conform to the constitutional mandate. Not the other way. It appears absolutely clear to us that the provisions of every statute whether framed by the Parliament or by a State Legislature have to be in consonance with the Constitution. Otherwise, the provision may be liable to be struck down as being unconstitutional.

(18) It deserves notice that Chapter XXXII of the Code deals with matters relating to the execution, suspension, remission and commutation of sentences awarded by the courts. In particular sections 432 and 433 provide for the power to commute, suspend or remit the sentence. To illustrate: Section 432 empowers the appropriate government to suspend or remit the sentence awarded to any person. The government can permit the sentence either wholly or in part. The power can be exercised at any time. Similarly, under Section 433, the Government can commute the sentence of death to that of imprisonment for life. Under Clause (b), the competent authority can commute "a sentence of imprisonment for life, for imprisonment for a term not exceeding 14 years or for fine". Thus, even though a sentence of imprisonment for life should normally last for a lifetime, yet the provision empowers the Government to commute it for a lesser term.

(19) Despite the existence of the power to commute sentence of imprisonment for life to a lesser period, the Parliament considered it necessary to lay down a minimum period of 14 years for which a person shall undergo imprisonment in certain cases. Section 433-A was enacted for this purpose. It provides as under :—

> "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."

(20) The provision begins with a *non obstante* clause. It clearly provides that in cases where death sentence is one of the punishments and a person is required to undergo a sentence of imprisonment for life, he shall "not be released from prison unless he had served at least 14 years of imprisonment". In other words, the statute has laid down a minimum. The prisoner cannot be released from the prison till he has spent a minimum of 14 years behind the prison walls.

(21) It is one of the Cardinal rules of interpretation that the provisions of a statute have to be harmoniously construted. While doing so, the text and the context have to be kept in view. When the three provisions are so construed, it undoubtedly appears that a person who has been awarded a sentence of imprisonment for life by the court or on account of commutation by the executive for an offences for which death is one of the penalties, he has to undergo imprisonment for a minimum period of a 14 years. Without anything more, this period cannot be reduced without doing violence to the plain language of the statute. It is undoubtedly so.

(22) However, Section 432 or 433 are not the only provisions providing for the exercise of mercy jurisdiction. We have unequivocal declaration in Articles 72 and 161 of the Constitution of India. The Executive has been empowered to commute, reduce, suspend the sentence or to grant complete pardon. It is undoubtedly correct that in one sense, the power conferred by the Constitution is similar to that postulated in the statute. However, there is a basic and essential difference. The Constitution is the primary law of the land. Every statute runs subservient to this primary law. It has to conform to the Constitutional provisions. Otherwise, it would be *ultra vires* the Constitution. Articles 72 and 161 contain a Constitutional mandate. These stand at a much higher pedestal. The Constitution recognizes the clemency jurisdiction. It has been exercised throughout the civilised world. For centuries, this constitutional mandate cannot be cabined or cribbed by any process of interpretation.

(23) The question as raised in this case has already been considered by Hon'ble The Supreme Court in the case of *Maru Ram* v. *Union of India and others (supra).* Their Lordships have been

pleased to take the view that the constitutional power shall override the statutory provision contained in Section 433-A of the Code of Criminal Procedure. The case law on the subject was reviewed by the Constitution Bench. In the words of Krishna Iyer, J., their Lordships were pleased to observe as under :—

> "It is apparent that superficially viewed, the two powers, one constitutional and the other statutory, are co-extensive. But two things may be similar but not the same. That is precisely the difference. We cannot agree that the power which is the creature of the Code can be equated with a high prerogative vested by the Constitution in the highest functionaries of the Union and the States. The source is different, the substance is different, the strength is different, although the stream may be flowing along the same bed. We see the two powers as far from being identical, and, obliviously, the constitutional power is 'untouchable' and unapproachable and cannot suffer the vicissitudes of simple legislative processes. Therefore, Section 433A cannot be invalidated as indirectly violative of Arts 72 and 161. What the Code gives, it can take, and so, an embargo on Sections 432 and 433 (a) is within the legislative power of Parliament.
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> Even so, we must remember the constitutional status of Articles 72 and 161 and it is common ground that Section 433-A does not and cannot affect even a wee-bit the pardon power of the Governor or the President. The necessary sequal to this logic is that notwithstanding Section 433-A the President and the Governor continue to exercise the power of commutation and release under the aforesaid Articles."

(24) Again, another Constitution Bench of the Apex Court considered the matter in *Kehar Singh and another* v. *Union of India and another (3).* It was held that :—

> "Learned counsel for the petitioners next urged that in order to prevent an arbitraty exercise of power under Article 72 this Court should draw up a set of guidelines for regulating the exercise of the power. It seems to us that there is sufficient indication in terms of Article 72 and in the history of the power enshrined in that provision

(3) AIR 1989 SC 653

as well as existing case law, and specific guidelines need not be spelled out. Indeed, it may not be possible to lay down any precise, clearly defined and sufficiently channelised guidelines, for we must remember that the power under Article 72 is of the widest amplitude".

(25) The rule is, thus, clear. Despite the unequivocal declaration, Mr. Rajiv Raina, learned counsel for the petitioners contended that the impugned executive instructions run against the mandate of Section 433-A. These are, thus untenable in law. Is it so ?

(26) It would be appropriate to briefly notice the next and the context of the impugned instructions. The first of these were issued by the Department of Home Affairs and Justice by its memorandum of 12th December, 1985. It was addressed to the Inspector General of Prisons. It opened with the following statement :—

"As the provisions of Section 433-A of Crl. P. C. are mandatory in nature, no executive instructions to deal with premature release covered under the said Section of Crl. P. C. can be issued by the State Government. However, the mercy petitions submitted to the Governor of Punjab are to be examined by the State Level Committee and recommendations made to the Government on the following considerations...."

(27) It is, thus, clear that the State Government was fully aware and conscious of the provisions of Section 433-A. It was not issuing the impugned instructions with the object of curtailing the period of imprisonment as envisaged under the provision. The instructions were intended to lay down the guidelines for the consideration of mercy petitions that are presented to the Governor under Article 161 of the Constitution. It is further clear that a State Level Committee has been constituted for examination of the mercy petitions before the matter is placed before the Government. Still further, the grounds which have to be kept in view have also been delineated. These are —serious illness; the level of responsibility in case of a gang murder; the age etc. of the person who makes the petition and compassionate grounds like the provision of support to the family of the convict. It is clear that these guidelines regulate the exercise of clemency

jurisdiction. To allay any doubt, the instructions clearly postulate that —"after introduction of Section 433-A of Cr. P. C. w.e.f. 18th December, 1978, since every premature release case of a lifer convict will be taken up after he has completed 14 years actual sentence in a jail, a minimum period of 5/6 years for juvenile and woman prisoners and 7-1/2 and 8-1/2 years for adult male prisoners can be taken as one of the guidelines for release on mercy petition". The above passage clearly shows that the instructions are intended to regulate the exercise of mercy jurisdiction only under Article 161.

(28) The second set of instructions were issued,— *vide* letter dated 8th July, 1991. These were also issued by the Department of Home Affairs to the various authorities. The instructions embody a policy " for grant of remissions of sentences of life imprisonment under Sections 432, 433 and 433-A of the Code of Criminal Procedure and Article 161 of the Constitution of India..." By these instructions, the Government has laid down the "minimum periods of imprisonment to be undergone for a convict before consideration of application for exercise of powers of the Government under Article 161 of the Constitution". It has been emphasised that "the Government reserves the right to exercise its powers under Article 161 of the Constitution in any way it deems fit".

(29) Lastly, there is the order issued by the Government on 1st March, 1995. It was in exercise of the powers conferred by Section 432 read with Article 161 of the Constitution that the Governor had remitted the "portion of unexpired sentence of imprisonment for life" in case of persons who fulfilled certain conditions.

(30) On a perusal of the above, it is clear that the instructions/the order are intended to regulate the exercise of power under Article 161. These instructions are not intended to by-pass or subvert the mandate of Section 433-A. These are intended to lay down uniform guidelines to regulate the exercise of power under Article 161 of the Constitution. Thus, we are not persuaded to accept the contention that the instructions are violative of the mandate contained in Section 433-A.

(31) Mr. Raina then contended that the power under Article 161 is vested in a high authority. It is not necessary to lay down any guidelines.

(32) The contention is misconceived. It is true that the Constitution vests the power in the head of the State. However, the power has to be exercised in accordance with the Constitution. The role of the Governor has been considered in various cases. In *Shamsher Singh* vs. *State of Punjab and another* (4), it was held as under :—

> "The President as well as the Governor is the Constitutional or formal head. The President as well as the Governor exercises his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers, save in spheres where the Governor is required by or under Constitution to exercise his functions in his discretion. Wherever the Constitution requires the satisfaction of the President or the Governor for the exercise by the President or the Governor, of any power or function, the satisfaction required by the Constitution is not the personal satisfaction of the President or Governor but the satisfaction of the President or Governor in the Constitutional sense in the Cabinet system of Government, that is, satisfaction of his Council of Ministers on whose aid and advice the President or the Governor generally exercise all his powers and functions. The decision of any Minister or officer under rules of business made under any of these two Articles 77 (3) and 166 (3) is the decision of the President or the Governor respectively. These articles did not provide for any delegation. Therefore the decision of Minister or officer under the rules of business is the decision of the President or the Governor".

(33) It is, thus, clear that the Governor acts on the aid and advice of the Council of Ministers. Not in his own discretion. The matter has to be considered by the Government. The orders are only issued in the name of the head of the State. It is to regulate the exercise of this power by the Government that the guidelines have been laid down. These violate no law. If at all, the instructions curtail the power. Certain restrictions are placed on the exercise of power. For example, the instructions postulate that the mercy petition shall be taken up only after the applicant has undergone the specified period of sentence and not earlier.

(4) AIR 1974 SC 2192

(34) Mr. Raina referred to certain decisions. The first of these was the case of *K. M. Nanavati* vs. *the State of Bombay* (5). In this case, the issue was whether the order of the Governor of Bombay impinged on the judicial powers of the court. Their Lordships were pleased to consider the "content of the power conferred on the Governor of a State under Article 161 of the Constitution". It was ultimately held that "the order of the Governor granting suspension of the sentence could only operate until the matter became *sub judice* in this court on the filing of the petition for special leave to appeal. After the filing of such a petition this court was seized of the case which would be dealt with by it in accordance with law. It would then be for this court when moved in that behalf, either to apply R. 5 of O. XXI or to exempt the petitioner from the operation of that rule. It would be for this Court to pass such orders as it thought fit as to whether the petitioner should be granted bail or should surrender to his sentence or to pass such order or further orders as this Court might deem fit in all the circumstances of the case".

(35) Really speaking, we find no relevance of this decision to the facts of the present case.

(36) The counsel then referred to the decision in *Ashok Kumar* vs. *Union of India and others* (6), In para 17, their Lordships were pleased to observe as under :—

> "These observations do indicate that the Constitution Bench which decided Kehar Singh's case was of the view that the language of Article 72 itself provided sufficient guidelines for the exercise of power and having regard to its wide amplitude and the status of the function to be discharged thereunder, it was perhaps unnecessary to spell out specific guidelines since such guidelines may not be able conceive of all myriad kinds and categories of cases which may come up for the exercise of such power. No doubt in Maru Ram's case the Constitution Bench did recommend the framing of guidelines for the exercise of power under Articles 72/161 of the Constitution. But that was a mere recommendation and not a ratio *decidendi* having a binding effect on the

(5) AIR 1961 SC 112
(6) JT 1991 (3) SC 46

Constitution Bench which decided Kehar Singh's case. Therefore, the observation made by the Constitution Bench in Kehar Singh's case does not upturn any ratio laid down in Maru Ram's case. Nor has the Bench in Kehar Singh's case said anything with regard to using the provisions of extant Remission Rules as guidelines for the exercise of the clemency powers"

(37) A perusal of the above shows that in *Maru Ram's case* (supra), the Constitution Bench had recommended the framing of guidelines. In *Kehar Singh's case* (supra), it was observed that "specific guidelines need not be spelled out". However, the Bench did not' lay down that guidelines could never be issued.

(38) The position that emerges is that by the mandate of Section 433-A, a person who is found to be guilty of an offence for which death is one of the punishment or in whose case a sentence of death has been commuted into one of imprisonment for life, the person has to serve atleast 14 years of imprisonment. However, the provision of Section 433-A does not affect the constitutional power embodying the mercy jurisdiction under Articles 72 and 161. The instructions impugned in the petitions before the Bench are clearly intended to regulate the exercise of clemency jurisdiction. These have been modified/clarified from time to time. These do not violate the mandate of Section 433-A.

(39) In view of the above, we find no merit in these petitions. Resultantly, both the petitions are dismissed. However, there will be no order as to costs.

R.N.R.

Before R. S. Mongia & K. C. Gupta, JJ

GUNEETA CHADHA & OTHERS—*Petitioners*

Versus

UNION OF INDIA & OTHERS—*Respondents*

C.W.P. No. 5758 of 1998

11th December, 2000

Constitution of India, 1950—Art. 226—Punjab Subordinate Education Service Rules, 1937 (as replaced by 1976 Rules)—