IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved on : 18.07.2019
Pronouncing orders on : 24.07.2019

CORAM

THE HONOURABLE MR.JUSTICE N.ANAND VENKATESH

W.P.Nos.2808, 245 and 2583 of 2019

Radhakrishnan ...Petitioner
in W.P.No.2808 of 2019

C.Selvam ...Petitioner
in W.P.No.245 of 2019

Sheik Meeran ...Petitioner
in W.P.No.2583 of 2019

vs.

1. Union of India
rep. by the Secretary to Government,
Ministry of Home Affairs,
New Delhi.

2. State of Tamil Nadu
rep. by the Principal Secretary to Government,
Home Department,
Secretariat,
Chennai – 600 009. Respondents in all W.Ps

3. The Superintendent of Prisons,
Central Prison,
Trichy-20. Respondent
in W.P.No.2808 of 2019

4. The Superintendent of Prisons,
   Central Prison,
   Cuddalore.

Respondent
in W.P.Nos.245 & 2583 of 2019

COMMON PRAYER : Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Declaration, declaring that expression "with the condition that the prisoners shall remain in prison for the whole of the remainder of their natural lives" contained in Letter No.58227/Cts.VIA/2008-14 dated 25.06.2012 of respondent No.2 is, so far as the petitioner is concerned, null and void, and directing respondent no.2-State of Tamil Nadu to consider the petitioner for premature release either under the 1994 Scheme of Premature Release of Life Convicts vide its Letter (FS) No.1358 Home, Dated 10.11.1994 or under G.O.(Ms)No.64 Home (Prison-IV) Department dated 01.02.2018.

For Petitioner : Mr.M.Radhakrishnan
in all W.Ps

For Respondent : Mr.G.Rajagopalan
Additional Solicitor General
Asst by Mr.T.L.Thirumalaisamy
for R1 in all W.Ps

Mr.M.Mohamed Riyaz
Additional Public Prosecutor
for R2 & R3 in all W.Ps

O R D E R

An interesting issue has been raised in the present writ petitions. The petitioners have questioned the condition imposed by the Hon'ble President of India while granting clemency to the petitioners, wherein the death sentence imposed against the petitioners was commuted in to one of life imprisonment with a condition that the petitioners should remain in prison for the whole of the remainder of their natural lives and without being entitled to be considered for remission of the term of imprisonment.

2. The petitioners were convicted and sentenced to death by judgment dated 05.10.1998 passed by the Principal Sessions Judge, Tirunelveli in SC No.392 of 1997. The said judgment was confirmed by this Court by judgment dated 30.04.1999 and the Hon'ble Supreme Court of India further confirmed the conviction and sentence by dismissing the special leave petitions filed by the petitioners by an order dated 21.06.1999 and the review petitions filed by the petitioners was also dismissed on 15.07.1999.

3. The petitioners submitted mercy petitions to His Excellency, Governor of the State of Tamil Nadu. The Governor rejected the mercy petitions. Thereafter, the petitioners submitted mercy petitions before the Hon'ble President of India praying for clemency under Article 72 of the Constitution of India. This mercy petition was examined by the Ministry of Home Affairs and it was recommended to the Hon'ble President that the sentence of death against the petitioners may be modified to one of life imprisonment, with a condition that the petitioners shall remain for the whole of the remainder of their natural lives and there shall be no remission of the term of imprisonment. The mercy petitions along with the recommendation of the Ministry was placed before the Hon'ble President of India.

4. The Hon'ble President of India on 10.02.2012 agreed with the recommendation made by the Ministry. The Ministry of Home Affairs vide their letter dated 17.02.2012, conveyed the decision of the Hon'ble President of India to the Government of Tamil Nadu. The Principal Secretary to Government of Tamil Nadu by letter dated

25.06.2012 conveyed to the Superintendent of Central Prison, Trichy about the clemency granted by the President of India.

5. It will be useful to extract the entire letter that was sent by the Principal Secretary to Government, hereunder:

Secret*, *Sealed Cover

Home (Cts-VIA) DEPARTMENT
SECRETARIAT, CHENNAI - 9.

Letter No.58227/Cts.VIA/2008-14
Dated:25.06.2012

From
Thiru.R.Rajagopal, I.A.S.,
Principal Secretaty to Government.

To
The Superintendent (by name),
Central Prison, Trichy.

Sir,

Sub: Mercy Petition - Mercy petition of condemned prisoners No.16808 Sheik Meeran, No.16884 Selvam and No.16807 Radhakrishnan under sentence of death and confined at Central Prison, Trichy - Order of the President of India - Communicated - Reg.

Ref: 1. Government Letter No.69032/Cts-1/1999 Dated: 16.10.2000.

2. From Joint Secretary (Judicial) to Government of India, Ministry of Home Affairs, New Delhi, Letter F.No.14/4/1999 - Judicial Cell Dated: 17.02.2012.

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I am directed to invite your attention to the Government Letter first cited wherein the Mercy petitions received from the condemned prisoners Sheik Meeran, Selvam and Radhakrishnan have been forwarded to Government of India for order of his Excellency The President of India.

2. In the letter second cited, the Joint Secretary (Judicial) to Government of India, Ministry of Home Affairs, New Delhi has reported that the President of India has in exercise of the powers under Article 72 of the Constitution of India, has been pleased to commute the sentence of death awarded to condemned prisoners Sheik Meeran, Selavam and Radhakrishnan by the order dated 5th October, 1998 of Principal Sessions Judge, Tirunelveli, which was confirmed by the Madras High Court and the Supreme Court of India vide their order dated 30th April 1999 and 21st June, 1999 respectively, to life imprisonment with the condition that the prisoners shall remain in prison for the whole of the remainder of

their natural lives and there shall be no remission of the term of imprisonment. The prisoners may be informed of the orders of the President accordingly.

3. The receipt of the letter may kindly be acknowledged and a report of compliance may be sent to Government.

Yours faithfully,

sd/-
for Principal Secretary to Government

Copy to:-

The Additional Director General of Police,
Inspector General of Prisons,
Chennai - 8.
SF/SC

6. In view of the clemency granted by the Hon'ble President of India, the petitioners escaped from the gallows and continued to serve the life imprisonment.

7. The petitioners have served imprisonment for nearly 24 years. The petitioners wanted to take advantage of the remission G.Os

issued by the Government of Tamil Nadu and seek for a premature release. However, the petitioners were not able to take advantage of the remission G.Os passed by the Government of Tamil Nadu in view of the specific condition that was imposed while granting clemency to the petitioners. Aggrieved by the said condition imposed against the petitioners, the present writ petitions have been filed before this Court, challenging the condition and seeking for consequential reliefs.

8. Mr.M.Radhakrishnan, the learned counsel appearing on behalf of the petitioners made the following submissions:

- While exercising the power under Article 72 of the Constitution of India, a condition to the effect that the prisoners shall remain in prison for the whole of their remainder of their natural lives without being entitled for remission, cannot be imposed.

- Commutation of a death sentence to life imprisonment is effected only on the ground that the concerned prisoner is capable of being reformed and

rehabilitated. In the present case even if the petitioners stand reformed, they will never get a chance to come out of the prison and that goes against the very fundamental principles of criminal law, which always seeks to reform and rehabilitate an accused person.

- Once the State Government has a Scheme of Premature Release for Life Convicts, the benefit of such scheme should be made available to all the life convicts who have undergone a specific period of imprisonment. The petitioners cannot be discriminated and disentitled for the premature release, in view of the condition imposed against them at the time of grant of clemency.

- The condition imposed against the petitioners is arbitrary, unfair and unreasonable and it is violative of Articles 14 and 21 of the Constitution of India.

- The Condition imposed against the petitioners interferes with the State's powers to permit premature

release of life convicts and it goes against the basic structure of the Constitution on the aspect of federalism.

- The judiciary has struck a via media in ***Swamy Shraddananda vs. State of Karnataka*** case wherein a special category of sentence was evolved, for some very serious cases wherein the death sentence is substituted with life imprisonment for a fixed number of years which has to be necessarily undergone by the convict. This judicial power cannot be exercised by the Hon'ble President of India in exercise of Article 72 of the Constitution of India and therefore the condition imposed while granting clemency suffers from non application of mind and the assumed power of the judiciary, by the President of India.

- The learned counsel in order to substantiate his submissions relied up on the following judgments:

i. ***Maru Ram Etc. Etc vs Union Of India & Another*** reported in ***AIR 1980 SC 2147***.

ii. ***Kehar Singh And Anr. Etc vs Union Of India And Another*** reported in ***1989 SCC (1) 204***.

iii. ***Satpal & Another vs State Of Haryana & Ors*** reported in ***2000 5 SCC 170***.

iv. ***Union Of India vs V. Sriharan @ Murugan & Ors*** reported in ***(2016) 7 SCC 1***.

v. ***S.R.Bommai vs Union of India*** reported in ***1994 (3) SCC 1***.

9. Per contra, Mr.G.Rajagopalan, the learned Additional Solicitor General, appearing on behalf of the Union of India made the following submissions:

i. The power of the Hon'ble President to grant clemency is a constitutional power within the exclusive domain of the Hon'ble President and this power is a sovereign power and uninfluenced by the judicial verdict as regards the quantum of punishment.

ii. The power exercised under Article 72 is absolute and it cannot be fettered by any statutory provision such as Section 433 or 433 (A) of Cr.P.C. and this power cannot be altered, modified or interfered with by any of the statutory provisions or prison rules.

iii. The clemency power exercised by the Hon'ble President of India can be subjected to judicial review only on limited grounds like:

(a) Passed without application of mind

(b) The order is malafide

(c) The order was passed on extraneous or wholly irrelevant consideration.

(d) The relevant materials were kept out of consideration while passing the order and

(e) The order suffers from arbitrariness and,

this case does not fall under any of these grounds.

iv. The petitioners having taken advantage of the clemency granted by the President of India cannot be permitted to question the conditions since it is inseparable from the clemency order and the petitioners are estopped from questioning the conditions.

v. This Court cannot substitute its opinion in the place of the decision arrived at by the Hon'ble President of India, unless this Court finds any arbitrariness or unreasonableness in the decision making process.

vi. The petitioners who escaped from gallows by virtue of the clemency granted by the President of India in the year 2012, have chosen to challenge the condition after more than six years only on the

ground that they are not entitled for remission granted by the executive power of the State Government and the power of the Government under Section 433 and Section 433(A) of the Cr.P.C. cannot in any way fetter the absolute powers of the President of India under Article 72 of the Constitution of India.

vii. By relying upon judgment of the Constitution Bench in ***Union Of India vs V. Sriharan @ Murugan & Ors***, reported in ***(2016) 7 SCC 1***, the learned Senior Counsel submitted that the Constitution Bench has upheld the special category of sentence which can be imposed where the death penalty is substituted by punishment of imprisonment for life or imprisonment for a term in excess of 14 years and put that category beyond application of remission. In the same manner, the President of India in exercise of the power under Article 72 can substitute a special category of sentence and put

that category beyond the application of remission.

viii. The learned Senior Counsel also relied upon the judgment in ***Swamy Shraddananda vs. State of Karnataka*** reported in ***(2008) 13 SCC 767*** to substantiate his submissions.

10. This Court has carefully considered the submissions made on either side and the materials placed on record.

11. The power of the sovereign to grant remission is within its exclusive domain and it is for this reason that our Constitution makers went on to incorporate the provision of Article 72 and Article 161 of the Constitution of India. This power was never intended to be used or utilized by the executive as an unbridled power of reprieve. Power of clemency is to be exercised cautiously and in appropriate cases, which in effect, mitigates the sentence of punishment awarded and which does not, in any way wipe out the conviction. The Act of remission of the State does not undo what has been done judicially. The punishment awarded through a judgment is not over ruled but the

convict gets benefit of a liberalized policy of State pardon.

12. Article 72 of the Constitution of India empowers the Hon'ble President of India to grant pardons, reprieves, respites or remission of punishment or to suspend, remit or commute the sentence of any person convicted of any offence.

13. The power conferred on the President under Article 72 of the Constitution is of the widest amplitude. Courts have consistently reiterated that judicial review on the merits of the President's decision was ordinarily impermissible. Judicial deference to exercise of power under Article 72 stems from the quality and character of power that is exercised by a high constitutional functionary. To capture this, it is essential to notice the distinction between the judicial power to pass sentence and the executive power to grant a pardon. This distinction was succinctly explained by Justice Sutherland of the US Supreme Court in a classic passage in *United States v Benz (1930 282 US 304)*, which runs as under:

"*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 judgment. To reduce a sentence by amendment alters the terms of the judgment itself and is a judicial act as much as the imposition of the sentence in the first instance."

14. The ambit of the President's power to grant pardon etc., or suspension etc., of any sentence or punishment under Article 72, has already been dealt with by Hon'ble Supreme Court of India in various judgments. It will be important to rely upon some of the important judgments that have been cited by the learned counsel appearing on either side in this regard.

15. The Hon'ble Supreme Court of India in ***Maru Ram Etc. Etc vs Union Of India & Anr***, referred supra has held as follows:

62. An issue of deeper import demands our consideration at this stage of the discussion. Wide as the power of pardon, commutation and release (Arts. 72 and 161) is, it

cannot run riot; for no legal power can run unruly like John Gilpin on the horse but must keep sensibly to a steady course. Here, we come upon the second constitutional fundamental which underlies the submissions of counsel. It is that all public power, including constitutional power, shall never be exercisable arbitrarily or mala fide and, ordinarily, guidelines for fair and equal execution are guarantors of the valid play of power. We proceed on the basis that these axioms are valid in our constitutional order.

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72.

8. The power under Articles 72 and 161 of the Constitution can be exercised by the Central and State Governments, not by the President or Governor on their own. The advice of the appropriate Government binds the Head of the State. No separate order for each individual case is necessary but any general order made must be clear enough to identify the group of cases and indicate the application of mind to. the whole group.

9. Considerations for exercise of power under Articles 72/161 may be myriad and their occasions protean, and are left to the appropriate Government, but

no consideration nor occasion can be wholly irrelevant, irrational, discriminatory or mala fide. Only in these rare cases will the court examine the exercise.

16. The Hon'ble Supreme Court of India in ***Kehar Singh And Anr. Etc vs Union Of India And Anr***, referred supra has held as follows:

10. We are of the view that it is open to the President in the exercise of the power vested in him by Art. 72 of the Constitution to scrutinise the evidence on the record of the criminal case and come to a different conclusion from that recorded by the court in regard to the guilt of, and sentence imposed on, the accused. In doing so, the President does not amend or modify or supersede the judicial record. The judicial record remains intact, and undisturbed. The president acts 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. 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. In U.S.

v. Benz, 75 L. Ed. 354 at 358 Sutherland, J. observed:

> *"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. To reduce a sentence by amendment alters the terms of the judgment itself and is judicial act as much as the imposition of the sentence in the first instance."*

The legal effect of a pardon is wholly different from a judicial supersession of the original sentence. It is the nature of the power which is determinative. In Sarat Chandra Rabha and Others v. Khagendranath Nath and Others, [196] 2 S.C.R. 133 at 138-140, Wanchoo, J. speaking for the Court addressed himself to the question whether the order of remission by the Governor of Assam had the effect of reducing the sentence imposed on the apellant in the same way in which an order of an appellate or revisional criminal PG NO 1112 court has the

effect of reducing the sentence passed by a trial court, and after discussing the law relating to the power to grant pardon, he said: "

> *Though, therefore, the effect of an order of remission is to wipe out that part of the sentence of imprisonment which has not been served out and thus in practice to reduce the sentence to the period already undergone, in law the order of remission merely means that the rest of the sentence need not be undergone, leaving the order of conviction by the court and the sentence passed by it untouched. In this view of the matter the order of remission passed in this case though it had the effect that the appellant was released from jail before he had served the full sentence of three years' imprisonment and had actually served only about sixteen months' imprisonment, did not in any way affect the order of conviction and sentence passed by the Court which remained as it was .. "*

and again:

Now where the sentence imposed by a trial court is varied by way of reduction by the appellate or revisional court, the final sentence is again imposed by a court; but where a sentence imposed by .1 court is remitted in part under section 401 of the Code of Criminal Procedure that has not the effect in law of reducing the sentence imposed by the court, though in effect the result may be that the convicted person suffers less imprisonment that that imposed by the court. The order of remission affects the execution of the sentence imposed by the court but does not affect the sentence as such, which remains what it was in spite of the order of remission....."

It is apparent that the power under Art. 72 entitles the President to examine the record of evidence of the criminal case and to determine for himself whether the case is one deserving the grant of the relief falling within that power. We are of opinion that the President is entitled to go into the merits of the case notwithstanding that it has been judicially concluded by the consideration given to it by this Court.

11. In the course of argument, the further question raised was whether judicial review extends to an examination of the PG NO 1113 order passed by the President under Art. 72 of the Constitution. At the outset we think it should be clearly understood that we are confined to the question as to the area and scope of the President's power and not with the question whether it has been truly exercised on the merits. Indeed, we think that the order of the President cannot be subjected to judicial review on its merits except within the strict limitations defined in Maru Ram, etc. v. Union of India. [1981] 1 S.C.R. 1196 at 1249. 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. In Special Reference No. 1 of 1964, [1965] 1 S.C.R. 413 at 446, Gajendragadkar, C.J., speaking for the majority of this Court, observed:

> *".....Whether or not there is distinct and rigid separation of powers under the Indian Constitution, there is no doubt that the Constitution has entrusted to the Judicature in this country the task of construing the provisions of the Constitution ....."*

This Court in fact proceeded in State of Rajasthan and Others v. Union of India, [1978] I S.C. R. 1 at 80-81 to hold:

> *".....So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed it would be its Constitutional obligation to do so .....this Court is the ultimate interpreter of the Constitution and to this Court is assigned the delicate task of determining what is the power conferred on each branch of Government, whether it is limited, and if so. what are the limits and whether any action of that branch transgresses such limits. It is for this Court to uphold the Constitutional values and to enforce the Constitutional limitations. That is the essence of the Rule of Law.*

and in Minerva Mills Ltd. v. Union of India. [1981] 1 S. C. R. 206 at 286-287, Bhagwati, J. said:

> *....the question arises as to which authority must decide what are the limits on the power*

conferred upon each organ or instrumentality of the State and whether such PG NO 1114 limits are transgressed or exceeded ..The Constitution has, therefore, created an independent machinery for resolving these disputes and this independent Machinery is the judiciary which is vested with the power of judicial review.....

It Will be noted that the learned Judge observed in S.P. Sampath Kumar v. Union of India, [1987] 1 S.C.C. 124 that this was also the view of the majority Judges in Minerva Mills Ltd. v. Union of India, (supra).

12. The learned Attorney General of India contends that the power exercised under Art. 72 is not justiciable, and that Art. 72 is an enabling provision and confers no right on any individual to invoke its protection. The power, he says, can be exercised for political considerations, which are not amenable to judicially manageable standards. In this connection, he has placed A.K. Roy, etc. v. Union of India and Anr., [1982] 2 SCR 272 before us. Reference has also been made to D K.M. Nanavati v. The State of Bombay, [i961] 1 SCR 497 to show that when there is an apparent conflict between the power to pardon vested in the President or the

Governor and the judicial power of the Courts and attempt must be made to harmonise the provisions conferring the two different powers. On the basis of Gopal Vinayak Godse v. The State of Maharashtra and Ors., [1961] 3 SCR 440 he urges that the power to grant remissions is exclusively within the province of the President. He points out that the power given to the President is untrammelled and as the power proceeds on the advice tendered by the Executive to the President, the advice likewise must be free from limitations, and that if the President gives no reasons for his order, the Court cannot ask for the reasons, all of which, the learned Attorney General says, establishes the non-justiciable nature of the order. Then he refers to the appointment of Judges by the President as proceeding from a sovereign power, and we are referred to Mohinder Singh v. State of Punjab, A.I.R. 1976 SC 2299; Joseph Peter v. State of Goa, Daman and Diu, [1977] 3 SCR 771 as well as Riley and Others v. Attorney General of Jamaica and Another, [1982] 3 All E.R. 469 and Council of Civil Service Unions and Others v. Minister for the Civil Service, [1984] 3 All E.R. 935 besides Attorney-General v. Times Newspapers Ltd., [1973] 3 All E.R. 54. Our attention has been invited to paragraphs 949 to 951 in 8 Halsbury's Laws of England to indicate the nature of the power of pardon and that it is not open to the Courts to

question the manner of its exercise. Reference to a passage in 104 Law Quarterly Review was followed by Horwitz v. Connor, Inspector General of Penal Establishments PG NO 1115 of Victoria, [1908] 6 C.L.R. 38. Reliance was placed on the doctrine of the division of powers in support of the contention that it was not open to the judiciary to scrutinise the exercise of the "mercy" power, and much stress was laid on the observations in Michael De Freitas also called Michael Abdul Malik v. George Ramoutar and Ors., [1975] 3 W.L.R. 388, 394., in Bandhua Mukti Morcha v. Union of India, [1984] 2 S.C.R. 67, 161 and in Rai Sahib Ram Jawaya Kapur and Ors. v. The State of Punjab, 11955] 2 S.C.R. 225, 235-6.

13. It seems to us that none of the submissions outlined above meets the case set up on behalf of the petitioner. We are concerned here with the question whether the President is precluded from examining the merits of the criminal case concluded by the dismissal of the appeal by this Court or it is open to him to consider the merits and decide whether he should grant relief under Art. 72. We are not concerned with the merits of the decision taken by the President, nor do we see any conflict between the powers of the President and the finality attaching to the judicial record, a matter to which we have adverted earlier. Nor do we dispute that

the power to pardon belongs exclusively to the President and the Governor under the Constitution. There is also no question involved in this case of asking for the reasons for the President's order. And none of the cases cited for the respondents beginning with Mohinder Singh (supra) advance the case of the respondents any further. The point is a simple one, and needs no elaborate exposition. We have already pointed out that the Courts are the constitutional instrumentalities to go into the scope of Art. 72 and no attempt is being made to analyse the exercise of the power under Art. 72 on the merits. As regards Michael de Freitas, (supra), that was, case from the Court of Appeal of Trinidad and Tobago, and in disposing it of the Privy Council observed that the prerogative of mercy lay solely in the discretion of the Sovereign and it was not open to the condemned person or his legal representatives to ascertain the information desired by them from the Home Secretary dealing with the case. None of these observations deals with the point before us, and therefore they need not detain us.

17. The Hon'ble Supreme Court of India in ***Satpal & Another vs State Of Haryana & Ors***, referred supra has held as follows:

4. There cannot be any dispute with the

proposition of law that the power of granting pardon under Article 161 is very wide and do not contain any limitation as to the time on which and the occasion on which and the circumstances in which the said powers could be exercised. But the said power being a constitutional power conferred upon the Governor by the Constitution is amenable to judicial review on certain limited grounds. The Court, therefore, would be justified in interfering with an order passed by the Governor in exercise of power under Article 161 of the Constitution if the Governor is found to have exercised the power himself without being advised by the Government or if the Governor transgresses the jurisdiction in exercising the same or it is established that the Governor has passed the order without application of mind or the order in question is a mala fide one or the Governor has passed the order on some extraneous consideration. The extent of judicial review in relation to an order of the President under Article 72 of the Constitution of India was subject matter of consideration before this Court in Kehar Singhs case 1989 (1) Supreme Court Cases 204 , where the Constitution Bench had observed:

> *"[I]It appears to us clear that the question as to the area of the Presidents power under Article 72 of the Constitution*

> *falls squarely within the judicial domain and can be examined by the Court by way of judicial review.*

The Court had further indicated that

> *[A]s regards the considerations to be applied by the President to the Petition we need say nothing more as the law in this behalf have already been laid down by this Court in Maru Rams case.*

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

exercise. In paragraph 62 of the judgment in Maru Rams case (supra) the Court had observed :-

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

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

18. In ***Epuru Sudhakar v. Govt. of A.P., (2006) 8 SCC 161***, the Hon'ble Supreme Court enumerated the heads of review as under:

> ***34.*** *The position, therefore, is undeniable 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) that the order has been passed on extraneous or wholly irrelevant considerations;*
> *(d) that relevant materials have been kept out of consideration;*
> *(e) that the order suffers from arbitrariness.*

19. It will also be relevant to extract from Seervai Constitutional Law of India, wherein the eminent Jurist deals with the ambit and scope of the power of the President under Article 72 of the Constitution of India as follows:

"The administration of justice through courts of law, is a part of the constitutional scheme to secure law and order and the protection of life, liberty and property. Under that scheme, it is for the judge to pronounce judgment and sentence, and it is for the executive to enforce them. Normally such enforcements present no difficulty; but circumstances may arise where carrying out a sentence, or setting the machinery of justice in motion, might imperil the safety of the realm. Thus, if the enforcement of a sentence is likely to lead to bloodshed and revolution, the executive might well pause before exposing the State to such peril....

Again, judges must enforce the laws, whatever they may be, and decide cases according to the best of their lights; but the laws are not always just, and the lights are not always luminous. Nor, again are judicial methods always adequate to secure justice, as is strikingly demonstrated by Zachariah v Republic of Cyprus. The power of pardon exists to prevent injustice whether from harsh or unjust laws or from judgments which result in injustice; hence the necessity of vesting that power in an authority other than the judiciary has always been recognized."

20. It is clear from the above judgments that the President while granting clemency in exercise of the power conferred under Article 72 of the Constitution of India, does not amend or modify or supersede the judicial record. The President acts at a different plane under Constitutional power which is independent. While exercising this power, the President of India is entitled to go into the merits of the case, not withstanding that it has been judicially concluded by the consideration given to it by the Court.

21. The scope of judicial review upon the power exercised by the President of India under Article 72 of the Constitution of India is very limited and narrow. It has been circumscribed by the Hon'ble Supreme Court of India in ***Maru Ram Etc. Etc vs Union Of India*** case, ***Satpal & Another vs State of Haryana*** case and ***Epuru Sudhakar v. Govt. of A.P.,*** case, referred supra. The Hon'ble Supreme Court of India in ***Kehar Singh And Anr. Etc vs Union Of India***, referred supra has categorically held that Courts will not make an attempt to analyze the exercise of the power under Article 72 on the merits. What falls within the judicial review is only the decision making process in a given case and not the decision per se. If the Courts finds that the

decision making process is not arbitrary or unreasonable, the decision taken by the President of India under Article 72 of the Constitution of India cannot be interfered.

22. It is very interesting to note that a very similar issue came up before the Supreme Court of United States way back in 1856 in Ex Parte Wells (59 US 307:1856). In this case the petitioner was convicted of murder in the District of Colombia and was sentenced to death. The President Fillmore granted the accused a conditional pardon which is very similar to the present case. The order of the President reads as follows:

> *"For divers good and sufficient reasons I have granted, and do hereby grant unto him, the said William Wells, a pardon of the offence of which he was convicted — upon condition that he be imprisoned during his natural life; that is, the sentence of death is hereby commuted to imprisonment for life in the penitentiary of Washington." On the same day the pardon was accepted in these words: "I hereby accept the above and within pardon, with condition annexed."*

The issue before the Supreme Court was as under

"This case raises the question, whether the President can constitutionally grant a conditional pardon to a convicted murderer, sentenced to be hung, offering to change that punishment to imprisonment for life; and if he does, and it be accepted by the convict, whether it is not binding upon him, to justify a court to refuse him a writ of habeas corpus, applied for upon the ground that the pardon is absolute, and the condition of it void."

Justice Wayne discussed the nature of conditional pardons in the English Common Law and opined as under

"A pardon is said by Lord Coke to be a work of mercy, whereby the king, either before attainder, sentence, or conviction, or after, forgiveth any crime, offence, punishment, execution, right, title, debt, or duty, temporal or ecclesiastical, (3 Inst. 233.) And the king's coronation oath is, "that he will cause justice to be executed in mercy." It is frequently conditional, as he may extend his mercy upon what terms he pleases, and annex to his bounty a condition precedent or subsequent, on the performance of which the validity of the pardon will depend, (Co. Litt. 274, 276; 2 Hawkins Ch. 37, § 45; 4 Black. Com. 401.) And if the felon does not perform the

*condition of the pardon, it will be altogether void; and he may be brought to the bar and remanded, to suffer the punishment to which he was originally sentenced. Cole's case, Moore, 466; Bac. Abr., Pardon, E. In the case of Packer and others — Canadian prisoners — 5 Meeson & Welsby, 32, Lord Abinger decided for the court, if the condition upon which alone the pardon was granted be void, the pardon *312 must also be void. If the condition were lawful, but the prisoner did not assent to it, nor submit to be transported, he cannot have the benefit of the pardon — or if, having assented to it, his assent be revocable, we must consider him to have retracted it by the application to be set at liberty, in which case he is equally unable to avail himself of the pardon."*

Eventually the Court upheld the Presidential order and said

"As to the suggestion that conditional pardons cannot be considered as being voluntarily accepted by convicts so as to be binding upon them, because they are made whilst under duress per minas and duress of imprisonment, it is only necessary to remark, that neither applies to this case, as the petitioner was legally in prison. "If a man be legally imprisoned, and either to procure his discharge, or on any other fair account, seal a bond or deed, this is

*not duress or imprisonment, and he is not at liberty to avoid it. **And a man condemned to be hung cannot be permitted to escape the punishment altogether, by pleading that he had accepted his life by duress per minas."** And if it be further urged, as it was in the argument of this case, that no man can make himself a slave for life by convention, the answer is, that the petitioner had forfeited his life for crime, and had no liberty to part with.*

23. The issue came up once again in the year 1974 in the case of Schick vs. J Reed as follows:

Schick v. J Reed, 1974 SCC OnLine US SC 220 : 419 US 256 (1974). *In 1960, the President JFK, acting under the authority of Art. II, § 2, cl. 1, of the Constitution, commuted petitioner Maurice L. Schick's sentence from death to life imprisonment, subject to the condition that he would not thereafter be eligible for parole. The petitioner challenged the validity of the condition. Chief Justice Warren Burger rejected the challenge and held as under*

*"**31.** A fair reading of the history of the English pardoning power, from which our Art. II, § 2, cl. 1,*

derives, of the language of that clause itself, and of the unbroken practice since 1790 compels the conclusion that the power flows from the Constitution alone, not from any legislative enactments, and that it cannot be modified, abridged, or diminished by the Congress. Additionally, considerations of public policy and humanitarian impulses support an interpretation of that power so as to permit the attachment of any condition which does not otherwise offend the Constitution. The plain purpose of the broad power conferred by § 2, cl. 1, was to allow plenary authority in the President to 'forgive' the convicted person in part or entirely, to reduce a penalty in terms of a specified number of years, or to alter it with conditions which are in themselves constitutionally unobjectionable. If we were to accept petitioner's contentions, a commutation of his death sentence to 25 or 30 years would be subject to the same challenge as is now made, i.e., that parole must be available to petitioner because it is to others. That such an interpretation of § 2, cl. 1, would in all probability tend to inhibit the exercise of the pardoning power and reduce the frequency of commutations is hardly open to doubt. We therefore hold that the pardoning power is an enumerated power of the Constitution and that its limitations, if any, must be found in the Constitution itself. It would be a curious logic to allow a convicted

person who petitions for mercy to retain the full benefit of a lesser punishment with conditions, yet escape burdens readily assumed in accepting the commutation which he sought.

32. Petitioner's claim must therefore fail. The no-parole condition attached to the commutation of his death sentence is similar to sanctions imposed by legislatures such as mandatory minimum sentences or statutes otherwise precluding parole; [*See, e.g., 21 U.S.C. § 848(c); Mass.Gen.Laws Ann., c. 265, § 2 (1970); Nev.Rev.Stat., Tit. 16, c. 200.030, § 6, c. 200.363, § 1(a) (1973).] it does not offend the Constitution. Similarly, the President's action derived solely from his Art. II powers; it did not depend upon Art. 118 of the UCMJ or any other statute fixing a death penalty for murder. It is not correct to say that the condition upon petitioner's commutation was 'made possible only through court-martial's imposition of the death sentence.' Post, at 269 270. Of course, the President may not aggravate punishment; the sentence imposed by statute is therefore relevant to a limited extent. But, as shown, the President has constitutional power to attach conditions to his commutation of any sentence. Thus, even if Furman v. Georgia applies to the military, a matter which we need not and do not decide it could not effect a*

conditional commutation which was granted 12 years earlier."

24. The judgment of Wayne, J., in Ex parte Wells was quoted with approval in ***K.M.Nanavathi vs. State of Bombay***, reported in ***1961 (1) SCR 497*** in the following words:

"46. According to the American as also Indian Constitution the power as given to the President is not to reprieve and pardon but that he shall have power to grant reprieves and pardons for offenses against the United States except in cases of impeachment. Wayne, J., in Ex parte Wells [15 L Ed 421, 425] at p. 425 has explained the difference between the meaning of these two expressions. "The first conveys only the idea of an absolute power as to the purpose or object for which it is given. The real language of the constitution is general, that is, common to the class of pardons known in the law as such whatever they may be by their denomination. We have shown that conditional pardon is one of them. A single remark from the power to grant reprieves will illustrate the point. That is not only to be used to delay a judicial sentence when the President shall think the merits of the case or some cause connected with the offender may require it, but it also extends to cases ex

necessitate legis.... Though the reprieve in either case produces delay in the execution of a sentence", the reprieves in the two cases are different in their legal character and different as to the causes which may induce the exercise of the power to reprieve."

"47. In India also the makers of the Constitution were familiar with English institutions and the powers of English Kings and the exercise of their power both by the Governor-General and the Governors of British India and of its provinces. It will be legitimate to draw on English law for guidance in the construction of the articles dealing with the power of the President and of the Governor in regard to pardons including the other forms of clemency comprised in the two articles. It will not be inappropriate to say that the framers of the Indian Constitution were not only familiar and trained in British Jurisprudence but were familiar with the American Constitution and they were drafting their Constitution in English language and therefore to draw upon the American parallel would be wholly legitimate."

25. The above judgments also gives a very fair idea regarding grant of pardon with conditions. As rightly argued by the learned

Additional Solicitor General, the pardon and the condition imposed in this case comes as a package. It has to be either taken as a whole or it must be dropped as a whole. The accused person cannot be permitted to take the beneficial portion of the pardon in his favour and at a later point of time, turn around and question the condition that comes with the pardon. The accused person is infact estopped from questioning the condition attached with the grant of pardon. It must not be forgotten that the petitioners would have gone to gallows, if not for a clemency granted by the President of India wherein the sentence was commuted to one of life imprisonment without the benefit of remission.

26. In the considered view of this Court, the President of India has the constitutional power to attach conditions while granting pardon/clemency. The President of India by imposing such a condition would have taken into consideration the merits of the case and the recommendation given by the Ministry of Home Affairs, independently. It will be relevant to extract the words of the Hon'ble Supreme Court in ***Kehar Singh And Anr. Etc vs Union Of India***, referred supra wherein the Hon'ble Supreme Court of India at Paragraph No.16 held

as follows:

> *16. Learned counsel for the petitioners next urged that in order to prevent an arbitrary exercise of power under Art. 72 this Court should draw up a set of guidelines for regulating the exercise of the power. It seems to us that there is sufficient indication in the terms of Art. 72 and in the history of the power enshrined in that provision as well as existing case law, and specific guidelines need not be spelled out. Indeed, it may not be possible to lay down any precise, clearly defined and sufficiently channelised guidelines, for we must remember that the power under Article 72 is of the widest amplitude, can contemplate a myriad kinds and categories of cases with facts and situations varying from case to case. in which the merits and reasons of State may be profoundly assisted by prevailing occasion and passing time. And it is of great significance that the function itself enjoys high status in the constitutional scheme.*

27. The Hon'ble Supreme Court by virtue of the judgement in ***Swamy Shraddananda vs. State of Karnataka***, referred supra came

up with formalization of a special category of sentence. It became necessary for the Hon'ble Supreme Court to carve out this special category of sentence since a life sentence, prescribed as a punishment under Section 302 of IPC, normally comes to an end at the expiry of 14 years since power to commute sentence by the appropriate Government can be exercised under Section 433 of Cr.P.C. after 14 years in cases of sentence of imprisonment for life. The Hon'ble Supreme Court felt that in many cases where the offence is heinous, the sentence of 14 years imprisonment would amount to no punishment at all and at the same time, death penalty can be given only in the rarest of rare cases and the case on hand may not fall in that category. In order to handle such cases, it became necessary for the Hon'ble Supreme Court of India to come up with a special category of sentence.

28. It will be relevant to extract the portions of the judgment hereunder for proper appreciation:

92. The matter may be looked at from a slightly

different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant comes to this court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment that subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then the Court should do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the court, i.e., the vast hiatus between 14 years' imprisonment and death. It needs to be emphasized that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years imprisonment would amount to no

punishment at all.

93. Further, the formalisation of a special category of sentence, though for an extremely few number of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of the rare cases. This would only be a reassertion of the Constitution Bench decision in Bachan Singh (supra) besides being in accord with the modern trends in penology.

94. In light of the discussions made above we are clearly of the view that there is a good and strong basis for the Court to substitute a death sentence by life imprisonment or by a term in excess of fourteen years and further to direct that the convict must not be released from the prison for the rest of his life or for the actual term as specified in the order, as the case may be.

29. The subsequent judgment of the Constitution Bench of the Hon'ble Supreme Court in ***Union Of India vs V. Sriharan @ Murugan & Ors***, referred supra again went into this special category of sentence, formulated in Swamy Shraddananda case at Paragraph 90 of the judgment and it was held as follows:

90. In such context when we consider the views expressed in Shraddananda (supra) in paragraphs 91 and 92, the same is fully justified and needs to be upheld. By stating so, we do not find any violation of the statutory provisions prescribing the extent of punishment provided in the Penal Code. It cannot also be said that by stating so, the Court has carved out a new punishment. What all it seeks to declare by stating so was that within the prescribed limit of the punishment of life imprisonment, having regard to the nature of offence committed by imposing the life imprisonment for a specified period would be proportionate to the crime as well as the interest of the victim, whose interest is also to be taken care of by the Court, when considering the nature of punishment to be imposed.

At Paragraph 93 of the judgment it was held as follows:

93. As far as the apprehension that by declaring such a sentencing process, in regard to the offences falling under Section 302 and other offences for which capital punishment or in the alternate life imprisonment is prescribed, such powers would also be available to the trial Court, namely, the Sessions Court is concerned, the

said apprehension can be sufficiently safeguarded by making a detailed reference to the provisions contained in Chapter XXVIII of Code of Criminal Procedure which we shall make in the subsequent paragraphs of this judgment. As far as the other apprehension that by prohibiting the consideration of any remission the executive power under Sections 432 and 433 are concerned, it will have to be held that such prohibition will lose its force the moment, the specified period is undergone and the Appropriate Governments power to consider grant of remission will automatically get revived. Here again, it can be stated at the risk of repetition that the higher executive power provided under the Constitution will always remain and can be exercised without any restriction.

30. At Paragraph 176, the following question was formulated by the Constitution Bench:

176.

Answers to the questions referred in seriatim

Question 52.1 Whether imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code meant imprisonment for rest of the life of the prisoner

or a convict undergoing life imprisonment has a right to claim remission and whether as per the principles enunciated in paras 91 to 93 of Swamy Shraddananda (2), a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission?

The answer for this question is given at Para 177 and 178 as follows:

177. Imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code only means imprisonment for rest of life of the convict. The right to claim remission, commutation, reprieve etc. as provided under Article 72 or Article 161 of the Constitution will always be available being Constitutional Remedies untouchable by the Court.

178. We hold that the ratio laid down in Swamy Shraddananda (supra) that a special category of sentence; instead of death can be substituted by the punishment of imprisonment for life or for a term

exceeding 14 years and put that category beyond application of remission is well-founded and we answer the said question in the affirmative.

31. It is clear from the above judgments that the Hon'ble Supreme Court of India found a good and strong basis for the Court to substitute a death sentence by life imprisonment and direct that the convict must not be released from the prison for the rest of his life or for a particular term, as specified in the order.

32. This Court does not find anything wrong in the President of India coming to a similar conclusion considering the merits of the case. That does not in any way tantamount to the executive arrogating to itself a judicial power.

33. As already observed by this Court, *supra* the constitutional power of the President of India under Article 72 is absolute and wide in amplitude and it is not possible to lay down any precise and clearly defined guidelines. If while exercising that power, the Hon'ble

President of India had infact taken cue from the judgment of the Hon'ble Supreme Court of India in Swamy Shraddananda case, that does not in any way affect the decision taken by the President, since it is well within the authority of the President to come to such a conclusion, on the merits of the case. This Court does not find any arbitrariness or unreasonableness in the decision making process adopted by the Hon'ble President of India. The President of India was well within his powers to impose conditions while granting pardon. As already held by this Court, the condition formed part and parcel of the clemency granted by the President of India and it came as a total package in favour of the petitioners while commuting their death sentence. The petitioners are estopped from questioning the condition and at the same time take advantage of the commutation of death sentence to life imprisonment.

34. In view of the above discussion, this Court does not find any ground to interfere with the power exercised by the Hon'ble President of India in imposing conditions, while granting clemency to the petitioners.

35. In the result, all these writ petitions are dismissed. No Costs.

24.07.2019

Speaking Order/Non-Speaking Order
Index: Yes
Internet: Yes
ssr

To

1. The Secretary to Government,
   Ministry of Home Affairs, New Delhi.

2. The Principal Secretary to Government,
   Home Department,
   Secretariat, Chennai – 600 009.

3. The Superintendent of Prisons,
   Central Prison, Trichy-20.

4. The Superintendent of Prisons,
   Central Prison,
   Cuddalore.

5. The Public Prosecutor
   High Court, Madras.

N.ANAND VENKATESH.J.,

ssr

W.P.Nos.2808, 245 and 2583 of 2019

24.07.2019