State Of Gujarat & Anr vs Lal Singh @ Manjit Singh & Ors on 29 June, 2016

Equivalent citations: AIR 2016 SUPREME COURT 3197, (2016) 2 ALLCRIR 2297, (2017) 1 GUJ LR 89, (2017) 1 MAD LJ(CRI) 28, (2016) 2 GUJ LH 745, (2016) 4 PAT LJR 20, (2016) 3 RECCRIR 505, (2016) 3 CURCRIR 100, (2016) 96 ALLCRIC 562, (2016) 3 BOMCR(CRI) 325, (2017) 1 MH LJ (CRI) 291, (2016) 2 ALD(CRL) 477, (2016) 2 UC 1371, (2016) 64 OCR 840, (2016) 164 ALLINDCAS 261 (SC), 2016 (8) SCC 370, (2016) 6 SCALE 105, (2016) 3 JLJR 344, (2016) 3 DLT(CRL) 200, (2016) 3 CRIMES 96, 2016 (3) SCC (CRI) 511

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Bench: Shiva Kirti Singh, Dipak Misra

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 171 OF 2016
(@ S.L.P. (Criminal) No. 7701 of 2012)

State of Gujarat & Anr. …Appellant(s)

Versus

Lal Singh @ Manjit Singh & Ors. …Respondent(s)

J U D G M E N T

Dipak Misra, J.

The present appeal, by special leave, is directed against the judgment and order dated August 23, 2012 passed by the High Court of Punjab and Haryana at Chandigarh in Criminal Writ Petition No. 1620 of 2011 whereby the High Court entertaining the Writ Petition had opined that the order dated 26.07.2011 passed by the Government of Gujarat declining to grant the benefit of premature release to the first respondent herein is illegal and further directed the State Government to reconsider his case and take a fresh decision in the light of the discussions made in the impugned order and further to release him on parole for a period of three months on furnishing personal bond/security bond for a sum of Rs. 50,000/- to the satisfaction of the concerned Jail Superintendent.

2. The facts which are essential to be stated are that the first respondent along with 20 other accused was tried in TADA Cases Nos. 2, 7 of 1993 and 2 of 1994. The Designated Judge, Ahmedabad (Rural) at Mirzapur, Ahmedabad convicted the first respondent and some others for the offences punishable under Section 3(3) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (for short, "the TADA Act") and sentenced to suffer life imprisonment and to pay a fine of Rs. 10,000/- each and in default to suffer RI for 6 months; under Section 120-B(1) IPC sentenced to suffer RI for 10 years and to pay a fine of Rs. 5,000/- each, in default to suffer RI for 3 months; under Section 5 of the TADA Act sentenced to suffer life imprisonment and to pay a fine of Rs. 10,000/- and in default to suffer RI for 6 months; under Section 5 of the Explosive Substances Act to pay a fine of Rs. 5,000/- and in default to undergo RI for 3 months; under Section 25(1-A) of the Arms Act sentenced to suffer RI for 7 years and to pay a fine of Rs. 5,000/- and, in default, to suffer RI for 3 months. Be it stated, he was also convicted for the offence punishable under Section 3(3) of the TADA Act read with Section 120-B IPC but no separate sentence was awarded. All the sentences were directed to run concurrently.

3. The first respondent preferred Criminal Appeal No. 219 of 1997 and the said appeal was heard along with the appeals preferred by other convicts. This Court in Lal Singh v. State of Gujarat and another[1] scrutinized the evidence in detail and ultimately dismissed the appeal preferred by the first respondent and confirmed the conviction and the sentence as imposed by the learned Judge, Designated Court.

4. During the pendency of the criminal appeal before this Court, the first respondent sought transfer from the Central Prison, Ahmedabad to the Central Prison, Jalandhar on the ground that his family is based in Punjab; his old parents were suffering from number of ailments; and further the financial condition of the family was precarious. Considering the reasons ascribed in the representation, the State Government vide order dated 11.11.1998 consented to transfer the first respondent from Central Prison, Ahmedabad to the Central Prison, Jalandhar. A condition was stipulated by the State of Gujarat that tight security and proper police escort arrangement was to be ensured.

5. The first respondent on 19.01.2004 sought premature release under Section 432 of the Code of Criminal Procedure, 1973 (CrPC) on the ground that he would complete 14 years of actual sentence in jail. His prayer for premature release was considered by the competent authority of the State of Gujarat which vide order dated 26.10.2006 considering the over all aspects of the matter rejected the said application. The said order was assailed in Criminal Writ Petition No. 505 of 2007 before the High Court of Punjab and Haryana which vide order dated 25.08.2008 disposed of the Writ Petition with the direction to the State of Gujarat to reconsider the case of the first respondent for premature release considering the applicability of Section 433 CrPC, Section 3 of the Transfer of Prisoner Act and the decision in State of Haryana v. Mahender Singh[2].

6. Keeping in view the order passed by the High Court, the State Government considered the prayer of the first respondent for premature release on 06.03.2009 and considered all aspects that have to be taken note of as per the direction of the High Court along with all other factors and the decisions in U.T. Chandigarh v. Charanjit Kaur[3] and Laxman Naskar v. State of West Bengal[4] and eventually rejected the application. The grievance of rejection compelled the first respondent to

prefer a Misc. Criminal Application No. 6515 of 2009 before the Punjab and Haryana High Court which was eventually withdrawn vide order dated 16.03.2009 wherein it was observed that it was open to the said respondent to approach the concerned authority. The order dated 06.03.2009 was again challenged in Special Criminal Application No. 1274 of 2009 under Article 226 of the Constitution of India which was dismissed by the High Court.

7. Remaining indefatigable the first respondent preferred Writ Petition No. 677 of 2010 praying for a writ of habeas corpus on the ground that he had already suffered requisite period of sentence and hence, he was entitled to be released as per Sections 432, 433 and 433-A CrPC and para 431 of the New Punjab Jail Manual. A grievance was put forth that his representation had not been considered by the State Government. On 20.04.2010, the High Court disposed of the matter directing the State Government to pass a speaking order within a period of two months. Be it stated, when the High Court passed the said order, it had not issued notice to the State of Gujarat. However, regard being had to the direction issued by the High Court, the competent authority took up the matter for reconsideration and after obtaining the opinion from the appropriate quarters as required under the manual, the State Government declined to grant premature release to the first respondent vide order dated 30.12.2010. The said order was assailed before the High Court in Writ Petition No. 158 of 2011 and the High Court vide judgment and order dated 25.05.2011 directed the State to reconsider the premature release taking note of the actual sentence of 14 years and three months and more than 21 years including remission. The High Court had directed the first respondent to be released on parole subject to certain conditions. Pursuant to the order passed by the High Court, the State Government took up the case for reconsideration and keeping in view the statutory provisions of CrPC, Rule No. 1448 of the Bombay Jail Manual which governs the State of Gujarat, the opinion of the advisory board and keeping in view the number of cases the first respondent was really involved, the gravity and nature of the crime and its impact on the society, it rejected the proposal for release vide order dated 26.07.2011.

8. Being aggrieved by the aforesaid order, the first respondent invoked the jurisdiction of the High Court under Article 226 of the Constitution of India. It was contended on behalf of respondent No. 1 before the High Court that provisions of Punjab Jail Manual, 1996 are applicable to him since he had been transferred to the State of Punjab as per the Transfer of Prisoners Act, 1950 and as there had been a recommendation by the competent authority under the Punjab Jail Manual that he was entitled to the benefit of the premature release but the same has been declined by the State of Gujarat and hence, the whole action was arbitrary and illegal. It was also urged that as per the Bombay Jail Manual which is applicable in State of Gujarat, he was also entitled to premature release as he had already undergone more than 14 years of sentence. It was also argued that refusal to entertain the prayer for premature release was contrary to the concept of Article 21 of the Constitution and, therefore, the order passed by the State Government was non est in law.

9. The stand of the first respondent was controverted by the State of Gujarat contending, inter alia, that the recommendations of the competent authority under the Punjab Jail Manual are not binding on it which is the sole authority to decide the matter relating to premature release; that the High Court of Punjab and Haryana had no jurisdiction to issue a writ of habeas corpus; that the factual background as depicted by the State do not make out a case for premature release and, therefore,

the Court should not exercise its extra ordinary jurisdiction on the said score. It was also contended that the first respondent having acceded to the earlier orders of rejection by the High Court, was debarred from approaching the Court in subsequent petitions.

10. The learned single Judge posed five questions for consideration. They read as under:-

> "i) Which is the appropriate Government empowered to consider the case of premature release of the petitioner?
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> ii) Whether earlier dismissal of the petition for premature release by a High Court operates as bar and estoppels 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 is subject to judicial review and is arbitrary, whimsical and against the provisions of Article 21 of the Constitution of India?"

11. Answering the first question, the High Court held that it is the Government of Gujarat which is the appropriate Government for passing the order with regard to premature release to the first respondent. Answering the question No. 2, the High Court opined that dismissal of the earlier petitions did not operate as a bar to file fresh petition nor do they operate as estoppel when fresh cause of action arises. Dealing with the third facet, the High Court opined that it had the jurisdiction to entertain the Writ Petition keeping in view the ambit and scope under Article 226 of the Constitution. While dealing with question No. 4, the High Court referred to Universal Declaration of Human Rights, Article 21 of the Constitution, the view expressed by this Court in Santa Singh v. State of Punjab[5], Kuljeet Singh v. Lt. Governor of Delhi[6], Kehar Singh v. Union of India[7], Mahender Singh (supra), Mohd. Munna v. Union of India and others[8] and certain other authorities and came to hold thus:-

> "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. 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."

12. While adverting to the fifth issue, the High Court referred to the decisions in Kehar Singh (supra), the Constitution Bench decision in Maru Ram v. Union of India and others[9] and Swaran Singh v. State of U.P. and others[10] and came to hold that the power of judicial review of the order passed by the President or the Governor under Article 72 or Article 161 is available on limited grounds. Thereafter the High Court opined that the State of Gujarat while considering the representation of the first respondent seeking premature release had 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 first respondent was undergoing the sentence and no reason for discarding such reports had been ascribed. The High Court further opined that it is not recorded in the order how the Advisory Committee of Gujarat has come to a conclusion for not recommending the case of premature release of the first respondent. That apart, it has been observed that no evidence or material had been placed before the Court to reject the recommendations of the transferee State, that is, the Government of Punjab. Thereafter, the learned single Judge proceeded to state thus:-

> "... 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 apprise the Court about the reason for the action when the same is challenged in Court..."

13. Eventually, the High Court directed to reconsider the first respondent's representation in the light of the discussion made in that order and further to release him forthwith on parole for a period of three months. The said order is the subject matter of assail in this appeal by special leave.

14. We have heard Mr. D.N. Ray and Ms. Hemantika Wahi, learned counsel for the State of Gujarat, Ms. Sunita Sharma, learned counsel for the first respondent and Mr. V. Madhukar, learned Additional Advocate General for the State of Punjab.

15. To appreciate the controversy specially in the backdrop of the judgment delivered by the High Court, it is necessary to restate the law pertaining to sentence of imprisonment for life and the concept of remission as envisaged under CrPC.

16. In State of Madhya Pradesh v. Ratan Singh and others[11] a two-Judge Bench speaking through Fazal Ali, J., after adverting to the decision in Gopal Vinayak Godse v. State of Maharashtra[12] and other decisions and the provisions of CrPC, has opined that that a sentence of imprisonment for life does not automatically expire at the end of 20 years including the remissions, because the administrative rules framed under the various Jail Manuals or under the Prisons Act cannot supersede the statutory provisions of the Indian Penal Code. A sentence of imprisonment for life means a sentence for the entire life of the prisoner unless the appropriate Government chooses to exercise its discretion to remit either the whole or a part of the sentence under Section 401 of the Code of Criminal Procedure.

17. In Naib Singh s/o Makhan Singh v. State of Punjab and others[13] the Court was dealing with a writ petition preferred under Article 32 of the Constitution challenging the continued detention of the convict petitioner in jail and seeking an order in the nature of habeas corpus claiming that he had served more than the maximum sentence of imprisonment prescribed under law and therefore he should be released. The petitioner therein was convicted under Section 302 IPC and sentenced to death but on a mercy petition preferred by him, his death sentence was commuted by the Governor of Punjab to imprisonment for life. After serving rigorous imprisonment of more than 22 years, a petition was filed seeking the release. The Court referred to Sections 53 and 55 IPC and Section 433 CrPC., various decisions of the High Court and then concept of transportation for life and eventually held that it is well settled position in law that the sentence of imprisonment for life has to be equated to rigorous imprisonment for life and ultimately the claim of the petitioner to immediate release was declined in the absence of any order of commutation being passed either under Section 55 IPC or Section 433(b) CrPC.

18. In this regard, we may fruitfully refer to a two-Judge Bench decision in Laxman Naskar (supra). In the said case, after referring to the earlier decisions, the Court opined that though under the relevant Rules a sentence for imprisonment for life is equated with the definite period of 20 years, that is no indefeasible right of such prisoner to be unconditionally released on the expiry of such a particular terms, including remissions and that is only for the purpose of working out the remissions that the said sentence is equated with definite period and not for any other purpose. The Court proceeded to state thus:-

> "... In view of this legal position explained by this Court it may not help the petitioner even on the construction placed by the learned counsel for the petitioner on Section 61(1) of the West Bengal Correctional Services Act 32 of 1992 with reference to explanation thereto that for the purpose of calculation of the total period of imprisonment under this section the period of imprisonment for life shall be taken to be equivalent to the period of imprisonment for 20 years. Therefore, solely on the basis of completion of a term in jail serving imprisonment and remissions earned under the relevant Rules or law will not entitle an automatic release, but the

> appropriate Government must pass a separate order remitting the unexpired portion of the sentence."

19. It is essential to state here that while so stating the Court adverted to the issue whether there had been due consideration of the case of the petitioner by the Government. The Court took note of the fact that earlier on the Court had directed the Government to reconsider the cases for premature release of all life convicts who had approached the Court. The Court took note of the fact that the Government had constituted a Review Committee consisting of certain members, and enumerated the guidelines issued earlier to form the basis on which a convict can be released prematurely. The said guidelines read as under:-

> "This Court also issued certain guidelines as to the basis on which a convict can be released prematurely and they are as under:
>
> "(i) Whether the offence is an individual act of crime without affecting the society at large.
>
> (ii) Whether there is any chance of future recurrence of committing crime.
>
> (iii) Whether the convict has lost his potentiality in committing crime.
>
> (iv) Whether there is any fruitful purpose of confining this convict any more.
>
> (v) Socio-economic condition of the convict's family."

20. The Court analysed the reasons given by the Review Committee and opined that the reasons given by the Government are palpably irrelevant or devoid of substance and accordingly remitted the matter to the Government again for examination in the light of what has been stated by the Court.

21. In Mohd. Munna (supra) a two-Judge Bench was dealing with a Writ Petition wherein the prayer was made for issuance of a writ of habeas corpus to set the petitioner at liberty on the ground that he had remained in detention for more than 21 years. It was contended that the length of the duration of imprisonment for life is equivalent to 20 years' imprisonment and that too subject to further remission admissible under law. The two-Judge Bench referred to various provisions of IPC, earlier decisions in the field including K.M. Nanavati v. State of Maharashtra[14] and Kishori Lal v. Emperor[15] and the law laid down in Gopal Vinayak Godse (supra) and held that:-

> "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. ..." The Court further observed that the petitioner was not entitled to be released on any of the grounds urged in the writ petition so long as there was no order of remission passed by the appropriate Government in his favour.

22. In Maru Ram (supra) the constitutional validity of Section 433-A CrPC which had been brought in the statute book in the year 1978 was called in question. Section 433-A CrPC imposed restrictions on powers of remission or commutation in certain cases. It stipulates that 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 laws, 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 has served at least fourteen years of imprisonment. The majority in Maru Ram (supra) upheld the constitutional validity of the provision. The Court distinguished the statutory exercise of power of remission and exercise of power by the constitutional authorities under the Constitution, that is, Articles 72 and 161. In that context, the Court observed that the power which is the creature of the Code cannot be equated with a high prerogative vested by the Constitution in the highest functionaries of the Union and the States, for the source is different and the substance is different. The Court observed that Section 433-A CrPC cannot be invalidated as indirectly violative of Articles 72 and 161 of the Constitution. Elaborating further, the majority spoke to the following effect:-

> "... 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. ..."

23. In Kehar Singh (supra) the Constitution Bench opined that the power to pardon is a part of the constitutional scheme and it should be so treated in the Indian Republic. The Court further observed that it is a constitutional responsibility of great significance, to be exercised when occasion arises in accordance with the discretion contemplated by the context. It has also been held that the power to pardon rests on the advice tendered by the Executive to the President who, subject to the provisions of Article 74(1), must act in accordance with the advice. Dealing with the justiciability of exercise of power under Article 72, the Court after due deliberation ruled 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. In this context, the larger Bench ruled thus:-

> "... The manner of consideration of the petition lies within the discretion of the President, and it is for him to decide how best he can acquaint himself with all the information that is necessary for its proper and effective disposal. The President may consider sufficient the information furnished before him in the first instance or he may send for further material relevant to the issues which he considers pertinent, and he may, if he considers it will assist him in treating with the petition, give an oral hearing to the parties. The matter lies entirely within his discretion. 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

(supra)."

24. In Swaran Singh (supra) a three-Judge Bench was called upon to deal with the non-justiciability of an order passed by the President of India under Article 72 of the Constitution or by the Governor of the State under Article 161 thereof. The Court referred to the Constitution Bench decision in Kehar Singh (supra) where the principles stated in Maru Ram (supra) were followed and culled out the principles that in Kehar Singh (supra) a point has been stressed to the effect that the power being of the greatest moment, cannot be a law unto itself but it must be informed by the finer canons of constitutionalism. The Court adverted to the facts of the case and held thus:-

> "In the present case, when the Governor was not posted with material facts such as those indicated above, the Governor was apparently deprived of the opportunity to exercise the powers in a fair and just manner. Conversely, the order now impugned fringes on arbitrariness. What the Governor would have ordered if he were apprised of the above facts and materials is not for us to consider now because the Court cannot then go into the merits of the grounds which persuaded the Governor in taking a decision in exercise of the said power. Thus, when the order of the Governor impugned in these proceedings 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."

25. In Bikas Chatterjee v. Union of India and others[16] the Constitution Bench while dealing with the power of judicial review in respect of order passed under Article 72 of the Constitution held that the powers are very very limited. Relying on Maru Ram (supra), the Court observed that it is only a case of no consideration or consideration based on wholly irrelevant grounds or an irrational, discriminatory or mala fide decision of the President which can provide ground for judicial review. Dealing with the powers of the Governor, the Court referred to the authority in Satpal v. State of Haryana[17] and opined that:-

> "In a Division Bench decision of this Court in Satpal v. State of Haryana (supra) these very grounds have been restated as: (i) the Governor exercising the power under Article 161 himself without being advised by the Government; or (ii) the Governor transgressing his jurisdiction; or (iii) the Governor passing the order without application of mind; or (iv) the Governor's decision is based on some extraneous consideration; or (v) mala fides. It is on these grounds that the Court may exercise its power of judicial review in relation to an order of the Governor under Article 161, or an order of the President under Article 72 of the Constitution, as the case may be." Be it stated, the Court declined to entertain the writ petition on the ground that there was no justification to assume that the President of India had not applied his mind to all the relevant facts and accordingly rejected the petition.

26. At this juncture, reference to a two-Judge Bench decision in Epuru Sudhakar and another v. Govt. of A.P. and others[18] would be apposite. In the said case, the convict was granted remission

of the unexpired period of sentence under Article 161 of the Constitution. The convict was granted remission of unexpired period of about seven years imprisonment. The same was challenged by the son of the deceased. The question of interference by the Court arose for consideration. Arijit Pasayat, J. placed reliance on the authority in Swaran Singh (supra) wherein Maru Ram (supra) and Kehar Singh (supra) were referred to and dealt with and reiterated the view that if the power is exercised in an arbitrary or malafide manner or in absolute disregard of finer canons of constitutionalism, the order can be scrutinized in exercise of power of judicial review and the judicial hands can be stretched to it.

27. In the concurring opinion, S.H. Kapadia, J. (as His Lordship then was) opined thus:-

> "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." And, again:-
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> "... The Rule of Law is the basis for evaluation of all decisions. The supreme quality of the Rule of Law is fairness and legal certainty. The principle of legality occupies a central plan in the Rule of Law. Every prerogative has to be subject to the Rule of Law. That rule cannot be compromised on the grounds of political expediency. To go by such considerations would be subversive of the fundamental principles of the Rule of Law and it would amount to setting a dangerous precedent. The Rule of Law principle comprises a requirement of "Government according to law". The ethos of "Government according to law" requires the prerogative to be exercised in a manner which is consistent with the basic principle of fairness and certainty. Therefore, the power of executive clemency is not only for the benefit of the convict, but while exercising such a power the President or the Governor, as the case may be, has to keep in mind the effect of his decision on the family of the victims, the society as a whole and the precedent it sets for the future." We respectfully concur with the aforesaid expression pertaining to the constitutional norm and the concept of rule of law.

28. In this context, reference to Union of India v. V. Sriharan @ Murugan & Ors[19] is quite seemly. The majority in the Constitution Bench referred to the authority in Maru Ram (supra) and opined that constitutional power of remission provided under Articles 72 and 161 of the Constitution will always remain untouched, inasmuch as, though the statutory power of remission, etc., as compared

to constitutional power under Articles 72 and 161 looks similar, yet they are not the same. Be it stated, the Court was dealing with imposition of sentence of life by fixing a period of 25 or 30 years without remission. The Court after analyzing various aspects held that it is permissible and the law laid down in Swamy Shraddananda (2) alias Murali Manohar Mishra v. State of Karnataka[20] deserved acceptance. The Court referred to the decision in V. Sriharan alias Murugan v. Union of India and others[21] wherein commuting the sentence of death into one of life clearly laid down that such commutation was independent of the power of remission under the Constitution as well as the statute. Elaborating the proposition the Court while dealing with the power of remission in the context of Article 21 of the Constitution, the majority said:-

> "... It may also arise while considering wrongful exercise or perverted exercise of power of remission by the Statutory or Constitutional authority. Certainly there would have been no scope for this Court to consider a case of claim for remission to be ordered under Article 32 of the Constitution. In other words, it has been consistently held by this Court that when it comes to the question of reviewing order of remission passed which is patently illegal or fraught with stark illegality on Constitutional violation or rejection of a claim for remission, without any justification or colourful exercise of power, in either case by the Executive Authority of the State, there may be scope for reviewing such orders passed by adducing adequate reasons. Barring such exceptional circumstances, this Court has noted in numerous occasions, the power of remission always vests with the State Executive and this Court at best can only give a direction to consider any claim for remission and cannot grant any remission and provide for premature release. It was time and again reiterated that the power of commutation exclusively rest with the Appropriate Government. ..."

29. After so stating the Court referred to series of judgments, analysed the scope of constitutional provisions and the statutory provisions and opined thus:-

> "Therefore, it must be held that there is every scope and ambit for the Appropriate Government to consider and grant remission under Sections 432 and 433 of the Code of Criminal Procedure even if such consideration was earlier made and exercised under Article 72 by the President and under Article 161 by the Governor. As far as the implication of Article 32 of the Constitution by this Court is concerned, we have already held that the power under Sections 432 and 433 is to be exercised by the Appropriate Government statutorily, it is not for this Court to exercise the said power and it is always left to be decided by the Appropriate Government, even if someone approaches this Court under Article 32 of the Constitution. ..."

30. In the said case, the question arose with regard to appropriate Government in the context of Section 432(7) CrPC. The majority referred to the authorities in Ratan Singh (supra), State of Madhya Pradesh v. Ajit Singh and others[22], Hanumant Dass v. Vinay Kumar and others[23], Govt. of A.P. and others v. M.T. Khan[24] and G.V. Ramanaiah v. The Superintendent of Central Jail, Rajahmundry and others[25] and eventually held thus:-

"The status of Appropriate Government whether Union Government or the State Government will depend upon the order of sentence passed by the Criminal Court as has been stipulated in Section 432(6) and in the event of specific Executive Power conferred on the Centre under a law made by the Parliament or under the Constitution itself then in the event of the conviction and sentence covered by the said law of the Parliament or the provisions of the Constitution even if the Legislature of the State is also empowered to make a law on the same subject and coextensive, the Appropriate Government will be the Union Government having regard to the prescription contained in the proviso to Article 73(1)(a) of the Constitution. The principle stated in the decision in G.V. Ramanaiah (supra) should be applied. In other words, cases which fall within the four corners of Section 432(7)(a) by virtue of specific Executive Power conferred on the Centre, the same will clothe the Union Government the primacy with the status of Appropriate Government. Barring cases falling under Section 432(7)(a), in all other cases where the offender is sentenced or the sentence order is passed within the territorial jurisdiction of the concerned State, the State Government would be the Appropriate Government."

31. Be it stated, the aforesaid part forms a part of the conclusion. In course of analysis, the Court has opined that when it comes to the question of primacy to the Executive Power of the Union to the exclusion of the Executive Power of the State, where the power is co-extensive, in the first instance, it will have to be seen again whether, the sentence ordered by the Criminal Court is found under any law relating to which the Executive Power of the Union extends. In that context, the Court stated thus:-

"... In that respect, in our considered view, the first test should be whether the offence for which the sentence was imposed was under a law with respect to which the Executive Power of the Union extends. For instance, if the sentence was imposed under TADA Act, as the said law pertains to the Union Government, the Executive Power of the Union alone will apply to the exclusion of the State Executive Power, in which case, there will be no question of considering the application of the Executive Power of the State."

32. In the instant case, the High Court has opined that the State of Gujarat is the appropriate Government. It is because it has been guided by the principle that the first respondent was convicted and sentenced in the State of Gujarat. As we find from the discussion, there has been no reference to the authority in G.V. Ramanaiah (supra). That apart, the issue was not raised before the High Court. The most important thing is that the High Court has referred to, as has been indicated earlier, many aspects of human rights and individual liberty and, if we allow ourselves to say so, the whole discussion is in the realm of abstractions. The Court has not found that the order passed by the State of Gujarat was bereft of appropriate consideration of necessary facts or there has been violation of principles of equality. The High Court has not noticed that the order is bereft of reason. It has been clearly stated in the

impugned order that the convict was involved in disruptive activities, criminal conspiracy, smuggling of arms, ammunitions and explosives and further he had also been involved in various other activities. It has also been mentioned that the prisoner under disguise of common name used to purchase vehicles for transportation and his conduct showed that he had wide spread network to cause harm and create disturbance to National Security. Because of the aforesaid reasons remission was declined. In such a fact situation, the view expressed by the High Court to consider the case on the basis of the observations made by it in the judgment is not correct.

33. So far as direction for grant of parole is concerned, we find that the learned Judge has directed parole to be granted for three months forthwith. In Sunil Fulchand Shah v. Union of India and others[26] the Constitution Bench while dealing with the grant of temporary release or parole under Section 12(1) and Section 12(1-A) of the Conversation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA Act) had observed that the exercise of the said power is administrative in character but it does not affect the power of the High Court under Article 226 of the Constitution. However, the constitutional court before directing the temporary release where the request is made to be released on parole for a specified reason and for a specified period should form an opinion that request has been unjustifiably refused or where the interest of justice warranted for issue of such order of temporary release. The Court further ruled that jurisdiction has to be sparingly exercised by the Court and even when it is exercised, it is appropriate that the Court should leave it to the administrative or jail authorities to prescribe the conditions and terms on which parole is to be availed of by the detenu.

34. We have referred to the aforesaid authority only to highlight the view expressed by the Constitution Bench with regard to grant of parole. The impugned order, as we notice, is gloriously silent and, in fact, an abrupt direction has been issued to release the first respondent on parole for a period of three months. It is well settled in law that a Judge is expected to act in consonance and accord with the legal principles. He cannot assume the power on the basis of his individual perception or notion. He may consider himself as a candle of hope but application of the said principle in all circumstances is not correct because it may have the effect potentiality to affect the society. While using the power he has to bear in mind that “discipline” and “restriction” are the two basic golden virtues within which a Judge functions. He may be one who would like to sing the song of liberty and glorify the same abandoning passivity, but his solemn pledge has to remain embedded to constitution and the laws. There can be deviation.

35. Consequently, the appeal is allowed and the impugned judgment and order of the High Court is set aside and liberty is granted to the first respondent to submit a representation/application before the competent authority of the Union of India within a period of eight weeks and the authority shall consider the same as expeditiously as possible in accordance with law and the guidelines framed for premature release.

.....J.

[Dipak Misra]

.....J.

New Delhi; [Shiva Kirti Singh]
June 29, 2016

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[2] (2001) 3 SCC 221

[4] 2007 (4) RCR (Criminal) 909 : (2007) 13 SCC 606

[6] JT 1996 (3) SC 30 : 1996 (7) SCC 492

[8] AIR 2000 SC 2762 : (2000) 7 SCC 626

[10] AIR 1976 SC 2386 : (1976) 4 SCC 190

[12] 1982 (1) SCC 417

[14] 1989 (1) SCC 204

[16] (2005) 7 SCC 417

[18] 1981 (1) SCC 107

[20] 1998 (4) SCC 75

[22] (1976) 3 SCC 470

[24] (1961) 3 SCR 440 : AIR 1961 SC 600

[26] (1983) 2 SCC 454

[28] 1962 Supp (1) SCR 567 : AIR 1962 SC 605

[30] AIR 1945 PC 64

[32] (2004) 7 SCC 634

[34] (2000) 5 SCC 170

[36] (2006) 8 SCC 161

[38] 2015 (13) SCALE 165

[40] (2008) 13 SCC 767

[42] (2014) 4 SCC 242

[44] (1976) 3 SCC 616

[46] (1982) 2 SCC 177

[48] (2004) 1 SCC 616

[50] AIR 1974 SC 31 : (1974) 3 SCC 531

[52] (2000) 3 SCC 409