Union Of India vs V. Sriharan @ ,Murugan & Ors on 25 April, 2014

Equivalent citations: 2014 AIR SCW 2844, (2014) 139 ALLINDCAS 186 (SC), AIR 2014 SC (CRIMINAL) 1363, (2014) 86 ALLCRIC 658, 2014 (5) SCALE 600, 2014 (2) CRIMES 265, 2014 (3) SCC (CRI) 1, (2014) 4 KCCR 458, 2014 (11) SCC 1, (2014) 2 RECCRIR 678, (2014) 5 SCALE 600, (2014) 2 ALD(CRL) 729

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Bench: N.V. Ramana, Ranjan Gogoi, P. Sathasivam

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

1 WRIT PETITION (CRL.) NO. 48 OF 2014

Union of India .... Petitioner(s)

Versus

V. Sriharan @ Murugan & Ors. .... Respondent(s)

2

WITH

WRIT PETITION (CRL.) NO. 105 OF 2008

CRL. M.P. NO.4622 OF 2014 IN T.C. (CRL.) NO.1 OF 2012

CRL. M.P. NO. 4623 OF 2014 IN T.C. (CRL.) NO. 2 OF 2012

CRL. M.P. NO. 4624 OF 2014 IN T.C. (CRL.) NO. 3 OF 2012

J U D G M E N T

P. Sathasivam, CJI.

Writ Petition (Crl.) No. 48 of 2014

1) This writ petition, under Article 32 of the Constitution of India, has been filed by the Union of India praying for quashing of letter dated 19.02.2014, issued by the Chief Secretary, Government of Tamil Nadu to the Secretary, Government of India wherein the State of Tamil Nadu proposes to remit the sentence of life imprisonment and to release Respondent Nos. 1-7 herein who were convicted in the Rajiv Gandhi Assassination Case in pursuance of commutation of death sentence of Respondent Nos. 1-3 herein by this Court on 18.02.2014 in Transferred Case Nos. 1-3 of 2012 titled V. Sriharan @ Murugan & Ors. vs. Union of India & Ors. 2014 (2) SCALE 505.

Writ Petition (Crl.) No. 105 of 2008

2) In the above writ petition, the petitioner who has been arrayed as Respondent No. 6 in Writ Petition (Crl.) No. 48 of 2014 (filed by the Union of India) prays for quashing of G.O. No. 873 dated 14.09.2006, G.O. No. 671 dated 10.05.2007 and G.O. (D) No. 891 dated 18.07.2007 issued by the State of Tamil Nadu, Home Department as the same are unconstitutional. In effect, the petitioner prayed for remission of his sentence, which was rejected by the Advisory Board.

Criminal M.P. Nos. 4622-24 of 2014

3) When the State of Tamil Nadu, in their letter dated 19.02.2014, sought for views of the Union of India for the release of Respondent Nos. 1- 7 in Writ Petition (Criminal) No. 48 of 2014 within three days from the date of receipt of the same, the Union of India filed the above criminal misc. petitions before this Court praying for restraining the State Government from passing any order of remission and releasing them from prison.

Factual Background:

> 4) Pursuant to the judgment of this Court dated 18.02.2014 in V. Sriharan @ Murugan (supra), the Government of Tamil Nadu took a decision to grant remission to Respondent Nos. 1 to 7. Accordingly, the Government of Tamil Nadu sent a letter dated 19.02.2014 to the Secretary to the Government of India, Ministry of Home Affairs, stating that it proposes to remit the sentence of life imprisonment on V. Sriharan @ Murugan, T. Suthendraraja @ Santhan and A.G. Perarivalan @ Arivu and release them. In that letter, it was further stated that four other persons, namely, Jayakumar, Robert Payas, S. Nalini and P. Ravichandran, convicted in the same assassination would also procure similar remission. Besides, it was asserted in the letter that since the crime was investigated by the Central Bureau of Investigation (CBI) and as per Section 435 of the Code of Criminal Procedure, 1973 (in short "the Code"), the State Government, while exercising its power under Section 432 of the Code, must act after consultation with the Central Government, accordingly, it requested to indicate the views of the Union of India within three days on the proposal to release the seven persons mentioned above.

5) Accordingly, in these matters, we are called upon to decide the legitimacy of the proposal of the State Government to release Respondent Nos. 1 to 7, who are facing life sentence. For the purpose of disposal of the issue in question, we reiterate the relevant provisions. Sections 432 and 435 of the Code read as under:

"432 - Power to suspend or remit sentences (1) When any person has been sentenced to punishment for an offence, the appropriate Government may, at any lime, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

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

(3) If any condition on which a sentence has been suspended or remitted is, in the opinion of the appropriate Government, not fulfilled, the appropriate Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer, without warrant and remanded to undergo the unexpired portion of the sentence.

(4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.

(5) The appropriate Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with:

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

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

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

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

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

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

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

435 - State Government to act after consultation with Central Government in certain cases (1) The powers conferred by sections 432 and 433 upon the State Government to remit or commute a sentence, in any case where the sentence is for an offence—

(a) which was investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, or

(b) which involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or

(c) which was committed by a person in the service of the Central Government, while acting or purporting to act in the discharge of his official duty.

shall not be exercised by the State Government except after consultation with the Central Government.

(2) No order of suspension, remission or commutation of sentences passed by the State Government in relation to a person, who has been convicted of offences, some of which relate to matters to which the executive power of the Union extends, and who has been sentenced to separate terms of imprisonment which are to run concurrently, shall have effect unless an order for the suspension, remission or commutation, as the case may be, of such sentences has also been made by the Central Government in relation to the offences committed by such person with regard to matters to which the executive power of the Union extends."

6) In addition to the above provisions of the Code, we are concerned with certain provisions of the Constitution of India also. Article 73 speaks about the extent of executive power of the Union, which reads as under:

"73 - Extent of executive power of the Union (1) Subject to the provisions of this Constitution, the executive power of the Union shall extend--

(a) to the matters with respect to which Parliament has power to make laws; and

(b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty on agreement:

Provided that the executive power referred to in sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws...."

7) Article 162 of the Constitution deals with the extent of executive power of the State, which reads as follows:

"162 - Extent of executive power of State Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws:

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by the Constitution or by any law made by Parliament upon the Union or authorities thereof."

8) Heard Mr. Goolam E. Vahanvati, learned Attorney General of India for the petitioner-Union of India, Mr. Ram Jethmalani, learned senior counsel and Mr. Yug Mohit Choudhary, learned counsel for Respondent Nos. 1-5 and 7 in W.P. (Crl.) No. 48 of 2014 and Mr. Sanjay R. Hegde, learned counsel for the petitioner in W.P. (Crl.) No. 105 of 2008 and Respondent No. 6 in W.P. (Crl.) No. 48 of 2014 and Mr. Rakesh Dwivedi, learned senior counsel for the State of Tamil Nadu.

Contentions of the Petitioner:

9) At the outset, learned Attorney General appearing for the Union of India submitted that what is proposed to be done by the State of Tamil Nadu in exercise of power of remission in the present case is illegal and without jurisdiction for the following reasons:

a) The State Government is not the 'appropriate Government' in the present case.

b) The State Government had no role to play in the present case at any stage.

c) Alternatively, without prejudice, the proposal by the State Government is contrary to law, and does not follow the procedure set out under the Code.

10) Learned Attorney General pointed out that from a bare reading of the definition of "appropriate Government" under Section 432(7) of the Code reveals that in cases where the sentence is for an offence against any law relating to a matter to which the executive power of the Union extends, the "appropriate Government" in that respect would be the Central Government.

It is the stand of the Union of India that this provision clearly gives primacy to the executive power of the Union and excludes the executive power of the State where the power of the Union is co-extensive.

11) It is further pointed out that as per the proviso to Article 73, the executive power of the Union referred to in Article 73(1)(a) shall not, save as expressly provided in the Constitution or in any law made by the Parliament, extend in any State to matters with respect to which the Legislature of the State also has power to make laws. It is argued that the proviso to Article 73 is excluded by Section 432(7) of the Code as it is only applicable where there is no express provision to maintain the executive power of the Union. Similarly, proviso to Article 162 of the Constitution limits the executive power of the State with respect to any matter where both the Legislature of the State and the Parliament have power to make laws, where the Constitution or any law has expressly conferred executive power upon the Union. Thus, it was submitted that the proviso contemplates that the executive power of the State may be overcome by the executive power of the Union through the provisions of the Constitution or any other law made by the Parliament. The Code is, therefore, one avenue through which this may be done and has been exercised through Section 432(7) to give primacy to the executive power of the Union. Learned Attorney General further submitted that based on a reading of Articles 73 and 162 read with Section 432(7) of the Code, the "appropriate Government" in the present case would be the Central Government, as the Indian Penal Code falls under the concurrent List, to which the executive power of the Union also extends.

12) Learned Attorney General further pointed out that Articles 73 and 162 must also be read subject to Article 254 of the Constitution, which gives primacy to the law made by the Parliament. In this regard, reliance has been placed by learned Attorney General on the decision of this Court in S.R. Bommai vs. Union of India, (1994) 3 SCC 1 and he asserted that the above decision completely displaces the stand of the State Government with regard to the Concurrent List. Further, it was submitted that it is not possible to split up the Sections under which the conviction was made since it would lead to a completely absurd situation where for some offences the Central Government would be the appropriate Government, and in respect of others, the State Government would be the appropriate Government.

13) In any case, it is the stand of the Union of India that since the State Government had consented for the case to be investigated and prosecuted by the CBI via the consent order dated 22.05.1991 under Section 6 of the Delhi Special Police Establishment Act, 1946, which was followed by the Central Government Notification dated 23.05.1991, ensuing which the entire investigation of the

case was handed over to the CBI, at this stage, the State cannot claim that it is the appropriate Government. In this regard, the Union of India relied on the observations of this Court in the case of Lalu Prasad Yadav vs. State of Bihar, (2010) 5 SCC 1.

14) Besides, the Union of India further submitted that the State Government, without considering the merits and facts of the case, hastily took a decision to remit the sentence and release seven convicts which is contrary to the statutory provisions and also to the law laid down by this Court. It is pointed out that application of mind has been held to be necessary, which is entirely lacking in the present case. There are no cogent reasons given in the letter dated 19.02.2014, apart from the reliance on the judgment of this Court.

15) In addition, it is the stand of the Union of India that the State Government could not have suo motu, without an application, initiated the process of remitting the sentence and releasing the convicts. In this regard, the Union of India relied on the decision of this Court in Mohinder Singh vs. State of Punjab, (2013) 3 SCC 294 wherein this Court held that the exercise of power under Section 432(1) of the Code cannot be suo motu. It was further held as under:

> "27. ... . We are of the view that exercise of power by the appropriate Government under sub-section (1) of Section 432 of the Code cannot be suo motu for the simple reason that this is only an enabling provision and the same would be possible subject to fulfilment of certain conditions. Those conditions are mentioned either in the Jail Manual or in statutory rules. This Court in various decisions has held that the power of remission cannot be exercised arbitrarily. In other words, the decision to grant remission has to be well informed, reasonable and fair to all concerned..... " Thus, it was submitted that the law laid down in para 27 of Mohinder Singh (supra) cannot be sidelined by the State Government.
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> 16) Alternatively, it is submitted that assuming Section 435(2) of the Code is applicable, the use of the term 'consultation' under Section 435(1) of the Code should be interpreted to mean 'concurrence'. Reference in this regard is made to the judgment of this Court in State of Gujarat vs. R.A. Mehta, (2013) 3 SCC 1, wherein it was held as under:
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> "32. However, in a situation where one of the consultees has primacy of opinion under the statute, either specifically contained in a statutory provision, or by way of implication, consultation may mean concurrence."
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> 17) In addition to all the above submissions, learned Attorney General formulated an alternative contention and submitted that once the death sentence of a convict has been commuted into life imprisonment, the same has to be interpreted to mean the entire life of the convict and the executive cannot exercise the power of remission of sentence thereafter.

In this regard, reliance was placed on Swamy Shraddananda vs. State of Karnataka, (2008) 13 SCC 767.

Contentions of Respondents:

> 18) In reply to the above submissions, Mr. Rakesh Dwivedi, learned senior counsel for the State of Tamil Nadu submitted that "appropriate Government" as defined in Section 432(7) of the Code is the State Government in the present case.
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> 19) Learned senior counsel for the State submitted that the Central Government is the appropriate Government where sentence is for an offence against any law relating to a matter to which the executive power of the Union extends. Likewise, Article 73 of the Constitution of India makes executive power of the Union co-extensive with Parliament's law making power and power relating to treaties/agreement. However, it is the stand of the State that the proviso stipulates that power referred to in sub-

clause (a) would not extend in any State to matters relating to the Concurrent List of the seventh Schedule of the Constitution save where the Constitution or law of Parliament expressly provides. This interpretation of the proviso to Article 73 corresponds with the reading of the proviso to Article 162. It is the stand of the State of Tamil Nadu that Section 434 of the Code is one such provision but it makes the Central Government's power in cases of sentence of death concurrent and not dominant. There is no other provision in Section 'E' of Chapter XXXII or otherwise of the Code which subordinates the executive power of the State in the Concurrent field of legislation to the executive power of the Union in matters of remission, commutation, pardons etc.

20) Learned senior counsel for the State pointed out that Article 72(3) of the Constitution expressly saves the power of the States under Article 161 and other laws to grant remission or commutation of sentence of death from the impact of Article 72(1)(c) which confers power on the President qua all sentences of death. On a plain reading of the executive power of the State under Article 162, the same being co-extensive with the legislative power would extend to the concurrent field under List III.

21) Alternatively, Mr. Dwivedi submitted that Entry 1 of List III of the Seventh Schedule of the Constitution excludes offences against law with respect to matters in List I and List II. Indian Penal Code is mentioned in Entry 1 of List III. IPC involves offences which relate to different subject matters, some of which fall in List I and List II. Mr. Dwivedi submitted that in G.V. Ramanaiah vs. Supt. Of Central Jail, (1974) 3 SCC 531, since the subject matter was related to List I, the Central Government was held to be appropriate Government. However, he highlighted that in State of M.P. vs. Ratan Singh, (1976) 3 SCC 470 (paras 5 & 6), State of M.P. vs. Ajit Singh, (1976) 3 SCC 616 (para 2) and Government of A.P. vs. M.T. Khan, (2004) 1 SCC 616 (para 10), it was held that the appropriate Government is the Government of that State alone where the conviction took place and not where the convict is detained.

22) Learned senior counsel for the State also pointed out that while Section 55A(b) of IPC makes the State Government the appropriate Government relating to matter to which executive power of the State extends, it is the Government of that State within which the offender is sentenced and under Section 432(7)(b) of the Code in cases other than those mentioned in clause (a), the State Government is the appropriate Government. However, Section 432(7)(b) of the Code is wider than Section 55A(b) of IPC. It would cover matters in List III of the Seventh Schedule of the Constitution too. Section 435(2) of the Code also is indicative of the above. In a case like the present one, some offences may relate to matters to which the executive power of the Union extends, while other offences may, in the same case and qua same person, relate to matters to which the executive power of the State extends. If in such cases, a person has been sentenced to separate terms of imprisonment which are to run concurrently, then unless an order has been made by the Central Government in relation to offences to which its executive power extends, the order of the State Government would not be given effect to. The Union could have referred to this provision if the separate terms of sentences under the other Central Acts like Passport Act, Foreigners Act, Explosives Act etc. were still operating and the sentences had not been already served out. Learned senior counsel for the State submitted that in the present case, all other sentences of 2-3 years have been fully served out.

23) It is further submitted by Mr. Dwivedi that public safety is part of public order generally unless it has the dimension of Defence of India or National Security or War. It is followed from the decision in Romesh Thapar vs. State of Madras AIR 1950 SC 124 (para 5) that the State Government of Tamil Nadu is the appropriate Government to consider remission/commutation of sentence under Section 302 read with Section 120B of IPC.

24) As regards the violation of procedural requirements under Section 432(2), learned senior counsel for the State submitted that it involves a procedure which applies only to remission and suspension of sentence and not to cases of commutation as under Section 433. Besides, he asserted that Section 432(2) is applicable only when an application is moved on behalf of the convict for obtaining remission or suspension of sentence. It does not apply when the appropriate Government exercises suo motu power. It was further submitted that the Parliament has thought it fit to confine application of Section 432(2) to cases where an application is made because in such cases the State has not applied its mind and it may like to obtain the opinion of the Presiding Judge of the Court which convicted and sentenced or the confirming court. Hence, it is the stand of the State that the power under Section 432(1) is very wide and it can be exercised suo motu by the appropriate Government. When the power is exercised suo motu then Section 432(2) is not applicable.

25) Alternatively, Mr. Dwivedi submitted that Section 432(2) is not mandatory. He elaborated that it uses the expression “may require”. Ordinarily, this expression involves conferment of discretion and makes the provision directory. This procedure, therefore, would apply where the Government feels the necessity to require an opinion from the Presiding Judge of the Court.

26) As far as the compliance of Section 435 is concerned, it is the stand of the State of Tamil Nadu that it initiated the process of consultation with the Central Government through the impugned letter as the investigation of the given case was done by the CBI. It is further submitted that it is

consultation between two plenary Governments constituted under a Federal structure and the State of Tamil Nadu intends to engage in meaningful and effective consultation wherein the views expressed by the Central Government during the consultation process will certainly be given due consideration. However, it is the stand of the State that consultation does not mean concurrence since the power of the State is a plenary power and States are not subordinate to the Central Government.

27) Thus, Mr. Dwivedi concluded by stating that the expression used in Section 435(1) is "except after consultation". The Parliament has deliberately not chosen the word "concurrence" as such interpretation would amount to depriving the State Government of its discretion. He pointed out the following cases wherein it has been held that consultation does not mean concurrence:

1. State of U.P. vs. Rakesh Kumar Keshari, (2011) 5 SCC 341 (para 33)

2. L & T McNeil Ltd. vs. Government of Tamil Nadu 2001(3) SCC 170 (paras 41, 61)

3. State of U.P. & Anr. vs. Johri Mal, 2003(4) SCC 714 (para 55)

4. Justice Chandrashekaraiah vs. Janekere C. Krishna, (2013) 3 SCC 117 (paras 134-138, 144, 153-155).

28) With regard to the contention of the Union of India that once the power of commutation/remission has been exercised in a particular case of a convict by a Constitutional forum particularly, this Court, then there cannot be a further exercise of the Executive Power for the purpose of commuting/remitting the sentence of the said convict in the same case, Mr. Dwivedi submitted that the said contention is unacceptable since in this case this Court had exercised the judicial power of commuting the death sentence into life imprisonment by judgment dated 18.02.2014. This Court was not exercising any executive power under the Constitution or under the Code. It was exercising its judicial power in the context of breach of Article 21. There is no principle of law put forward to support this submission and the contention has been floated as if it is an axiom. The submission of the Union of India, if accepted, would have horrendous consequences. A convict whose death sentence has been commuted to life imprisonment by this Court on account of breach of Article 21 would have to remain imprisoned necessarily till the end of his life even if he has served out 30-50 years of sentence and has become old beyond 75 years or may be terminally ill yet there would be no power to remit/commute.

29) Besides, it is the stand of the State that when this Court commuted the death sentence into life imprisonment, it did not bar and bolt any further exercise of commutation/remission power by the Executive under the Constitution or under the Code. In fact, it expressly envisaged subsequent exercise of remission power by the appropriate Government under Section 432 subject to procedural checks and Section 433A of the Code.

30) Mr. Dwivedi, further pointed out that even in the absence of such an observation in para 31 of the decision of this Court in V. Sriharan @ Murugan (supra) the legal position would remain the

same as this Court does not prevent the exercise of any available power under the Constitution and the statute. In fact it has been laid down in Supreme Court Bar Association vs. UOI, (1998) 4 SCC 409 and Manohar Lal Sharma vs. Principal Secretary, (2014) 2 SCC 532 that even the power under Article 142 cannot be exercised against the statute much less the Constitution. Hence, according to him, the State Government is the appropriate Government.

31) Mr. Ram Jethmalani, learned senior counsel for Respondent Nos. 1 to 5 and 7 adopted similar arguments and emphasized on the meaning of consultation. He extensively referred to First Judges' case, viz., S.P. Gupta vs. Union of India, (1981) Supp SCC 87 (a seven-judge bench judgment) and heavily relied on para 30 of the judgment:

> "30. ... . But, while giving the fullest meaning and effect to "consultation", it must be borne in mind that it is only consultation which is provided by way of fetter upon the power of appointment vested in the Central Government and consultation cannot be equated with concurrence. We agree with what Krishna Iyer, J. said in Sankalchand Sheth case (Union of India vs. Sankalchand Himmatlal Sheth, (1977) 4 SCC 193 : 1977 SCC (L&S) 435; (1978) 1 SCR 423 : AIR 1977 C 2328) that "consultation is different from consentaneity." According to him, consultation does not mean concurrence though the process of consultation involves consideration of both - the entity seeking consultation and the consultee of the same. He further pointed out that the dominant object of the statute coupled with use of compelling words may in some cases involve a different meaning. As, for example, it happened in the Supreme Court Advocates-on-Record Association vs. Union of India, (1993) 4 SCC 441, also known as the 2nd Judges' Case. In this judgment, on the facts and the language used as well as on consideration of the controlling Article 50 of the Constitution mandating the separation of the judiciary from the executive, this Court held that in the process of consultation, the opinion of the Chief Justice has primacy. No such compelling context leading to departure from the natural meaning of the word 'consultation' exists in Section 435(1) of the Code. In the above-

mentioned case, the following may be considered as the ratio:

> "438. The debate on primacy is intended to determine who amongst the constitutional functionaries involved in the integrated process of appointments is best equipped to discharge the greater burden attached to the role of primacy, of making the proper choice; and this debate is not to determine who between them is entitled to greater importance or is to take the winner's prize at the end of the debate. The task before us has to be performed with this perception.
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> 441. For this reason, it must be seen who is best equipped and likely to be more correct in his view for achieving the purpose and performing the task satisfactorily. In other words, primacy should be in him who qualifies to be treated as the 'expert' in the field.

Comparatively greater weight to his opinion may then be attached."

32) It is the submission of learned senior counsel that even from this perspective, the view of the State Government on a question of remission which involves knowledge of the prisoner's conduct whilst in jail, his usefulness to co-prisoners needing his help and assistance, the manner in which he has employed his time in jail, his psychiatric condition, and family connections are more known to the State Government rather than the Union Government. These circumstances conclusively call for primacy to the finding and decision/opinion of the State Government.

33) In support of his claim that grant of remission is a State subject, Mr. Jethmalani relied on Entry 4 of List II, State List, which reads as under:

> "Prisons, reformatories, borstal institutions and other institutions of a like nature, and persons detained therein; arrangements with other states for the use of prisons and other institutions." Section 59 of the Prisons Act, 1894 specifically empowers the State Government to make rules on the following:
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> "(5) For the award of marks and shortening of sentences;
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> (21) For rewards for good conduct; ... (27) In regard to the admission, custody, employment, dieting, treatment and release of prisoners." This clearly shows that granting of remission for good conduct and determination of premature release is exclusively within the domain of the State Government and falls squarely within Entry 4, List II.
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> 34) Mr. Jethmalani further elaborated that the correctness of the closing paragraph of judgment dated 18.02.2014 is further evidenced by the fact that a Constitution Bench of this Court in Bhagirath vs. Delhi Administration, (1985) 2 SCC 580 para 17 had employed the same formulation in its closing paragraph while disposing of the petition seeking the benefit of Section 428 of the Code for life convicts. The Court had stated as follows:-
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> "17. For these reasons, we allow the appeal and the writ petition and direct that the period of detention undergone by the two accused before us as undertrial prisoners shall be set off against the sentence of life imprisonment imposed upon them subject to the provision contained in Section 433A and provided that orders have been passed by the appropriate authority under Section 432 or 433 of the Cr.P.C (emphasis added)
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> 35) Mr. Jethmalani has also pressed into service the revised Guidelines on Remission by the National Human Rights Commission which reads as under:-
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> "4. Inability for Premature Release Deleted in view of new para 3." New para 3 in the revised guidelines is as follows:

> "3. ...Section 433(A) enacted to deny pre-mature release before completion of 14 years of actual incarceration to such convicts as stand convicted of a capital offence. The commission is of the view that within this category a reasonable classification can be made on the basis of the magnitude, brutality and the gravity of offence for which the convict was sentenced to life imprisonment. Certain categories of convicted prisoners undergoing life sentence would be entitled to be considered for pre-mature release only after undergoing imprisonment for 20 years including remissions. The period of incarceration inclusive of remissions in such cases should not exceed 25 years. Following categories are mentioned in this connection by way of illustration and are not to be taken as an exhaustive list of such categories.

a. Convicts who have been imprisoned for life for murder in heinous cases such as murder with rape, murder with dacoity, murder involving an offence under the Protection of Civil Rights Act, 1955, murder for dowry, murder of a child below 14 years of age, multiple murders, murder committed after conviction while inside the jail, murder during parole, murder in a terrorist incident, murder in smuggling operation, murder of a public servant on duty.

b. Gangsters, contract killers, smugglers, drug traffickers, racketeers awarded life imprisonment for committing murders as also the perpetrators of murder committed with pre-meditation and with exceptional violence or perversity.

c. Convicts whose death sentence has been commuted to life imprisonment." Finally, he concluded by asserting that the State Government is the appropriate Government for granting of remission. Consequently, the proposal for release of Respondent Nos. 1 to 7 had been duly considered in accordance with law.

Discussion:

> 36) We have carefully considered the rival contentions, examined the relevant Constitutional provisions alongside the apposite provisions in the Code. The issues raised in this case revolve around the exercise of power of remission by the appropriate Government. The commutation of death penalty to life imprisonment can befall at two stages: firstly, when the appellate Court deems it fit to commute the death sentence to life imprisonment; and secondly, when the executive exercises its remission power under Article 72 by the President or under Article 161 by the Governor or under Article 32 by this Court in its judicial review jurisdiction.
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> 37) The primary question that arises for consideration at this juncture is whether in the first scenario specified above, the Court has the power to substitute the death penalty for imprisonment for life (meaning until end of life) and put this category beyond the application of remission.

Learned counsel for both the petitioner and the respondents submitted divergent views on this subject relying on judicial precedents of this Court.

38) Learned Attorney General referred to the three-Judges Bench decision of this Court in Swamy Shraddananda (supra) to state that life imprisonment imposed on commutation of death penalty will mean till end of life and, thus, beyond the exercise of power of remission. Accordingly, it is the stand of the Union of India that Respondent Nos. 4 to 7 cannot be granted remission as it is done in the given case.

39) In Swamy Shraddananda (supra), the conviction of the appellant – Swamy Shraddananda under Sections 302 and 201 IPC had attained finality. The Trial Court sentenced him to death for the offence of murder. The appellant's appeal and the reference made by the Sessions Judge were heard together by the Karnataka High Court. The High Court confirmed the conviction and the death sentence awarded to the appellant and by judgment and order dated 19.09.2005 dismissed the appellant's appeal and accepted the reference made by the Trial Court without any modification in the conviction or sentence. Against the High Court's judgment, the appellant had come to this Court. In view of conflicting views by two Judges of this Court, the matter was referred to three-Judges' Bench. After considering all factual details and various earlier decisions, this Court held that there is a good and strong basis for the Court to substitute the death sentence by life imprisonment and directed that the convict shall not be released from prison for the rest of his life. While considering the said issue, this Court adverted to various decisions granting remission reducing the period of sentence in those cases in which life sentence was awarded in lieu of death sentence. This Court in paras 91 to 93 held as under:

> "91. The legal position as enunciated in Pandit Kishori Lal, Gopal Vinayak Godse, Maru Ram, Ratan Singh and Shri Bhagwan and the unsound way in which remission is actually allowed in cases of life imprisonment make out a very strong case to make a special category 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 the application of remission.
>
> 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 subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court 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 emphasised 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 rare cases. This would only be a reassertion of the Constitution Bench decision in Bachan Singh besides being in accord with the modern trends in penology."

40) Relying on the aforesaid decision of the larger Bench, learned Attorney General submitted that it is perfectly legal to commute the death penalty into imprisonment for life (to mean the entire life of the convict) and deprive of remission in certain cases. As a consequence, the exercise of power of remission under Section 432 of the Code by the State of Tamil Nadu in the case of Respondent Nos. 4 to 7 is impermissible.

41) Whereas it is the stand of learned senior counsel for the State that the authority to exercise the power of remission even in such special category of cases still vests with the appropriate Government, relying on the Constitution Bench decision in Bhagirath (supra), Mohinder Singh (supra) and various other case-laws. Moreover, it was asserted by learned senior counsel appearing for the State of Tamil Nadu that the statutory power of remission granted to the appropriate Government under Section 432 of the Code cannot be taken away only in certain cases by way of judicial pronouncement.

42) Having given our most anxious consideration, we are of the opinion that it will not be appropriate for a three Judges' Bench to examine and decide the correctness of the verdict of another three-Judges' Bench in Swamy Shraddananda (supra). Besides, inevitability the decision of the Constitution Bench in Bhagirath (supra) would also be required to be examined. Thus, we deem it fit to refer this matter to a five Judges' Bench to reconcile the dispute emerged.

43) The second stage is when the executive exercises its remission power under Article 72 by the President or under Article 161 by the Governor or under Article 32 by this Court in its judicial review jurisdiction and the commutation of death penalty into life imprisonment is permitted. It is the stand of the petitioner, i.e., Union of India that once death penalty is commuted into life imprisonment by exercise of executive power under Article 72/161 of the Constitution or by the judicial power vested by the Constitution in Article 32, the categories are beyond the power of remission and parallel exercise of the similar power by the executive under the Code is impermissible. Therefore, on this ground, the learned Attorney General for the Union of India contended that granting of remission to Respondent Nos. 1 to 3 & 7 is untenable in law. Although, the Attorney General heavily relied on this proposition to put forth his case but did not place any substantial material for examination by this Court.

44) Learned counsel for the State countered this proposition of the petitioner by stating that there is no material on record to validate the same, hence, remission granted to Respondent No. 7 is valid in

law. It was further contended that the commutation of death sentence into life imprisonment in case of Respondent Nos. 1 to 3 by this Court was not by exercising any executive power under the Constitution or under the Code, but it was in exercise of its judicial power in the context of breach of Article 21. In other words, according to him, even after this Court commuted the death sentence to life imprisonment, it did not bar and bolt any further exercise of commutation/remission power by the executive under the Constitution or under the Code.

45) The issue of such a nature has been raised for the first time in this Court, which has wide ramification in determining the scope of application of power of remission by the executives both the Centre and the State. Accordingly, we refer this matter to the Constitution Bench to decide the issue pertaining to whether once power of remission under Article 72 or 161 or by this Court exercising Constitutional power under Article 32 is exercised, is there any scope for further consideration for remission by the executive.

46) Inasmuch as the issue vis-à-vis who is the 'appropriate Government' under Section 432(7) of the Code to exercise the power of remission is concerned, elaborate arguments had been advanced by both sides in the course of the proceedings and the parties raised more than one ancillary questions to the main issue like which Government - the State or the Centre will have primacy over the subject matter enlisted in List III of the Seventh Schedule of the Constitution of India for exercise of power of remission. Another question was also raised whether there can be two appropriate Governments in one case. In addition, whether the term "consultation" means "concurrence" under Section 435(1) of the Code. Since the questions in the given case are contingent on the final decision to be arrived at in the first issue, we unanimously deem it appropriate that these issues be decided by the Constitution Bench. Moreover, considering the wider interpretation of the provisions of the Constitution and the Code involved in the matter, we consider it fit to refer the matter to the Constitution Bench for an authoritative interpretation on the same. In fact, such a course of action is mandated by the provisions of Article 145(3) of the Constitution.

47) Before framing the questions to be decided by the Constitution Bench in Writ Petition (Crl.) No. 48 of 2014, we intend to dispose of other matters. Since in Writ Petition (Crl.) No. 105 of 2008, the petitioner is one of the respondents (Respondent No. 6) in Writ Petition (Crl.) No. 48 of 2014 and Mr. Sanjay R. Hegde, learned counsel for the petitioner is not pressing the same, the Writ Petition (Crl.) No. 105 of 2008 is dismissed as not pressed. Likewise, there is no need to keep the Criminal Misc. Petitions pending, as the Union of India filed the substantive petition in the form of Writ Petition (Crl.) No. 48 of 2014 giving all the details. Accordingly, Crl. M.P. Nos. 4622, 4623 and 4624 of 2014 in T.C.(Crl.) Nos. 1, 2 and 3 of 2012 respectively are dismissed.

48) The following questions are framed for the consideration of the Constitution Bench:

> (i) Whether imprisonment for life in terms of Section 53 read with Section 45 of the Indian 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 (supra), 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?

(ii) Whether the "appropriate Government" is permitted to exercise the power of remission under Section 432/433 of the Code after the parallel power has been exercised by the President under Article 72 or the Governor under Article 161 or by this Court in its Constitutional power under Article 32 as in this case?

(iii) Whether Section 432(7) of the Code clearly gives primacy to the executive power of the Union and excludes the executive power of the State where the power of Union is co-extensive?

(iv) Whether the Union or the State has primacy over the subject matter enlisted in List III of Seventh Schedule of the Constitution of India for exercise of power of remission?

(v) Whether there can be two appropriate Governments in a given case under Section 432(7) of the Code?

(vi) Whether suo motu exercise of power of remission under Section 432(1) is permissible in the scheme of the section if, yes whether the procedure prescribed in sub-clause (2) of the same Section is mandatory or not?

(vii) Whether the term "consultation" stipulated in Section 435(1) of the Code implies "concurrence"?

49) All the issues raised in the given case are of utmost critical concern for the whole of the country, as the decision on these issues will determine the procedure for awarding sentences in the criminal justice system. Accordingly, we direct to list Writ Petition (Crl.) No. 48 of 2014 before the Constitution Bench as early as possible preferably within a period of three months.

50) All the interim orders granted earlier will continue till final decision being taking by the Constitution Bench in Writ Petition (Crl.) No.48 of 2014.

.....CJI.

(P. SATHASIVAM) .....J. (RANJAN GOGOI) .....J. (N.V. RAMANA) NEW DELHI;

APRIL 25, 2014
