Supreme Court of India
Kehar Singh And Anr. Etc vs Union Of India And Anr on 16 December, 1988
Equivalent citations: 1989 AIR 653, 1988 SCR Supl. (3)1102
Author: R Pathak
Bench: Pathak, R.S. (Cj), Venkataramiah, E.S. (J), Misra Rangnath, Venkatachalliah, M.N. (J), Ojha, N.D. (J)

PETITIONER:
KEHAR SINGH AND ANR. ETC.

Vs.

RESPONDENT:
UNION OF INDIA and ANR.

DATE OF JUDGMENT16/12/1988

BENCH:
PATHAK, R.S. (CJ)
BENCH:
PATHAK, R.S. (CJ)
VENKATARAMIAH, E.S. (J)
MISRA RANGNATH
VENKATACHALLIAH, M.N. (J)
OJHA, N.D. (J)

CITATION:
1989 AIR 653 1988 SCR Supl. (3)1102
1989 SCC (1) 204 JT 1988 (4) 693
1988 SCALE (2)1565
CITATOR INFO :
D 1991 SC 345 (21)
E 1991 SC1792 (4,14)

ACT:
Constitution of India--Art. 72--President's power to go into the merits of case finally decided by the Courts--Defined--Exercise of power-Not open to judicial review on merits--No guidelines need be laid down-Convict seeking relief has no right to insist on oral hearing before the President.

HEADNOTE:
The Supreme Court dismissed an appeal by special leave filed by Kehar Singh, against his conviction and sentence of death awarded under section 120-B read with section 302 of the Indian Penal Code in connection with the assassination of the then Minister of India. Smt. Indira Gandhi. A Review Petition filed thereafter by Kehar Singh was dismissed on 7th September, 1988 and later a writ petition was also

dismissed by this Court.

On 14th October, 1988 Kehar Singh's son presented a petition to the President of lndia for the grant of pardon to Kehar Singh under Article 72 of the Constitution on the ground that the evidence on record of the criminal case established that Kehar Singh was innocent and the verdict of the courts that Kehar Singh was guilty, was erroneous. In the petition, he also urged that it was a fit case of clemency and prayed that Kehar Singh's representative may be allowed to see the President in person in order to explain the case concerning him. His request for hearing was not accepted on the ground that it was not in accordance with "the well established practice in respect of consideration of mercy petitions". Thereafter, in response to a further letter written by counsel for Kehar Singh to the President of India refuting the existence of any practice not to accord a hearing on a petition under Article 72, the Secretary to the President wrote to counsel that the President is of the opinion that he cannot go into the merits of a case finally decided by the highest Court of the land and that the petition for grant of pardon on behalf of Kehar Singh will be dealt with in accordance with the provisions of the Constitution of lndia. The President of India thereafter rejected the said petition. Hence these writ petitions and the special leave petition to this Court.

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The main issues involved in the writ petitions and the S.L.P. were: (a) whether there is justification for the view that when exercising his powers under Art. 72, the President is precluded from entering into the merits of a case decided finally by the Supreme Court; (b) to what areas does the power of the President to scrutinise extend; and (c) whether the petitioner is entitled to an oral hearing from the President in his petition invoking the powers under Art. 72.

Disposing of the petitions,

HELD: 1(i) The power to pardon is a part of the constitutional scheme and it should be so treated also in the Indian Republic. It has been reposed by the people through the Constitution in the Head of the State, and enjoys high status. It is a constitutional responsibility of great significance, to be exercised when occasion arises in accordance with the discretion contemplated by the context. [1109H; 1110A-B]

W. I. Biddle v. Vuco Perovich, 71 L. Ed. 1161 referred to.

1 (ii) The power to pardon rests on the advice tendered by the Executive to the President, who subject to the provisions of Art. 74(1) of the Constitution. must act in accordance with such advice. [1110B]

Maru Ram v. Union of lndia, [1981] 1 S.C.R. 1196 followed.

2[i] It is open to the President in the exercise of the power vested in him by Art. 72 of the Constitution of 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. [111lC-D]

2(ii) The legal of a 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. [1111G]

Kuljit Singh v. Lt. Governor of Delhi, [1982] 3 S.C.R. 58; Nar A Singh v. State of Uttar Pradesh , [19S5] I S.C.R.

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238 and Sarat Chandra Rabha and Others v. Khagendranath Nath and Others, [1961] 2 S.C.R. 133, followed.

Ex Parte William Wells, 15 L. Ed. 421., Ex Parte Garland, 18 L.Ed. 366 at 370; Ex Parte Philip Grossman, 267 U.S. 87; 69 L.Ed. 527 B and U.S. v. Benz, 75 L.Ed. 354 at 358 referred to.

3(i) There is no right in the condemned person to insist on an oral hearing before the President. The proceeding before the President is of an executive character, and when the petitioner files his petition, it is for him to submit with it all the requisite information necessary for the disposal of the petition. He has no right to insist on presenting on oral argument. [1116A-B]

3(ii) 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. [1116B-C]

3(iii) As regards the considerations to he applied by the President to the petition, the law in this behalf has already been laid down by this Court in Maru Ram etc. v. Union of India [1981] I S.C.R. 1196. [1116D]

4. 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 for regulating the exercise of the power by the President. Indeed, it may not be possible to lay down any precise, clearly defined and sufficiently channelised guidelines, since 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. [1116F-F]

5. 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. However, the order of the President cannot be subjected to

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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 scope of the power is a matter for the court. [1115G; 1113B-C]

Special Reference No. I of 1964, [1965j I S.C.R. 413 at 446; State Rajasthan and Ors. v. Union of India, [1978] 1 S.C.R. 1 at 80-82; Minerva Mills Ltd. v. Union of India, [1981] 1 S.C.R. 206 at 286-287; S.P. Sampath Kumar v. Union of India, [1987] I S.C.C. 124; A.k. Roy, etc. v. Union of India and Anr., [1982] 2 S.C.R. 272 and K.M. Nanavati v. The State of Bombay, [1961] I S.C.R. 497, referred to.

Gopal Vinayak Godse v. The State of Maharashtra and Ors., [1961] 3 SCR 440; Mohinder Singh v. State of Punjab, A.I.R. 1976 SC 2299, Joseph Peter v. State of Goa, Daman and Diµ [1977] 3 SCR 771; Riley and Others v. Attorney General of Jamaica and Another, [1982] 3 ALL E.R. 469; Council of Civil Service Unions and Others v. Minister for the Civil Service, [1984] 3 ALL, E.R. 935; Attorney General v. Times Newspapers Ltd.. [1973] 3 All E.R. 54; Horwitz v. Connor Inspector General of Penal Establishments of Victoria, [1908] 6 C.I.R. 38; Michael De Feritas also called Michael Abdul Malik y. Ceorge Ramoutar and Ors., [1975] 3 W.I.R. 388, 394, Bandhua Mukti Morcha v. Union of India, [1984] 2 S. C. R. 67, 161 and Rai Sahib Ram Jawaya Kapur and Ors. v. The State of Punjab, [1955] 2 S. C. R. 225, 235-6, distinguished.

In the instant case, having regard to the view taken on the question concerning the area and scope of the President's power under Art. 72 of the Constitution, the Court directed that the petition invoking that power shall be deemed to be pending before the President to be dealt with and disposed of afresh. The sentence of death imposed on Kehar Singh shall remain in abeyance meanwhile. [1117C-D]

The Constitution of India, in keeping with modern constitutional practice, is a constitutive document, fundamental to the governance of the country, whereby,

according to accepted political theory, the people of India have provided a constitutional polity consisting of certain primary organs, institutions and functionaries to exercise the powers provided in the Constitution. [1108H; 1109A]

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All power belongs to the people, and it is entrusted by them to specified institutions and functionaries with the intention of working out, maintaining and operating a constitutional order. [1109B]

To any civilised society, there can be no attributes more important than the life and personal liberty of its members. That is evident from the paramount position given by the Courts to Art. 21 of the Constitution. [1109C]

The Courts are the constitutional instrumentalities to go into the scope of Article 72. [1115B]

JUDGMENT:

ORIGINAL JURISDICTION: Writ Petitions (Crl.) Nos. 526-27 of 1988.

[Under Article 32 of the Constitution of India). Ram Jethmalani. Shanti Bhushan, Ms. Rani Jethmalani, R.M. Tewari, P.K. Dey. Sanjay Karol. Ms. Lata Krishnamurthy, Dr. B.L. Wadhera. Ms. Nandita Jain and Mahesh Jethmalani for the Petitioners.

K. Parasaran, Attorney General, G. Ramaswamy, Additional Solocitor General, Ms. A Subhashini and Parmeshwaran for the Respondents.

The Judgment of the Court was delivered by PATHAK, CJ. On 22 January, 1986 Kehar Singh was convicted of an offence under section 120-B read with section 302 of the Indian Penal Code in connection with the assassination of Smt. Indira Gandhi, then Prime Minister of India, on 31 October, 1984 and was sentenced to death by the learned Additional Sessions Judge, New Delhi. His appeal was dismissed by the High Court of Delhi, and his subsequent appeal by special leave [Criminal Appeal No. 180 of 1987 to this Court was dismissed on 3 August, 1988. A Review Petition filed thereafter by Kehar Singh was dismissed on 7 September, 1988 and later a writ petition was also dismissed by this Court.

On 14 October, 1988 his son, Rajinder Singh, presented petition to the President of India for the grant of pardon to Kehar Singh under Art. 72 of the Constitution. In that petition reference was made to the evidence on the record of the criminal case and it was sought to be established that PG NO 1107 Kehar Singh was innocent, and that the verdict of the Courts that Kehar Singh was guilty was erroneous. It was urged that it was a case for the exercise of clemency. The petition included a prayer that Kehar Singh's representative may be allowed to see the President in person in order to explain the case concerning him. The petition was accompanied by extracts of the oral evidence recorded by the trial court. On 23 October. 1988 counsel for Kehar Singh wrote to the President requesting an opportunity to present the case before him and for the grant of a hearing in the

matter. A letter dated 31 October, 1988 was received from the secretary to the President referring to the 'mercy petition' and mentioning that in accordance with "the well established practice in respect of consideration of mercy petitions, it has not been possible to accept the request for a hearing". On 3 November. 1988 a further letter was addressed to the President counsel refuting the existence of any practice not to accord a hearing On a petition under Art. 72 and requesting him to re-consider his decision to deny a hearing. On 15 November, 1988 the Secretary to the President wrote to counsel is follows:

"Reference is invited to your letter dated November 3, 1988 on the subject mentioned above. The letter has been perused by the President and its contents carefully considered. The President is of the opinion that he cannot go into the merits of a case finally decided by the Highest Court of the Land.

Petition for grant of pardon on behalf of Shri Kehar Singh will be dealt with in accordance with the provisions of the Constitution of India".

Thereafter the President rejected the petition under Art. 72, and on 24 November, 1988 Kehar Singh was informed of the rejection of the petition. His son, Rajinder Singh, it is said, came to know on 30 November, 1988 from the newspaper media that the date of execution of Kehar Singh had been fixed for 2 December, 1988. The next day, 1 December, 1988 be filed a petition in the High Court of Delhi praying for an order restraining, the respondents from executing the sentence of death, and on the afternoon of the same day the High Court dismissed the petition. Immediately upon dismissal of the writ petition, counsel moved this Court and subsequently field Special Leave Petition [Crl. No. 3084 of 1988 in this Court along with Writ Petitions Nos. 526-27 of 19888 under Art. 32 of the Constitution. During the preliminary hearing late in the afternoon of the same day 1 December, 1988 this Court decided to entertain PG NO 1108 the writ petition and made an order directing that the execution of Kehar Singh should not be carried out meanwhile.

Some of the issues involved in these writ petitions and appeal were, it seems, raised in earlier cases but this Court did not find it necessary to enter into those questions in those cases. Having regard to the seriousness of the controversy we have considered it appropriate to pronounce the opinion of this Court on those questions. The first question is whether there is justification for the view that when exercising his powers under Art. 72 the President is precluded from entering into the merits of a case decided finally by this Court. It is clear from the record before us that the petition presented under Art. 72 was specifically based on the assertion that Kehar Singh was innocent of the crime for which he was convicted. That case put forward before the President is apparent from the contents of the petition and the copies of the oral evidence on the record or the criminal case. An attempt was made by the learned Attorney General to show that the President had not declined to consider the evidence led in the criminal case, but on a plain reading of the documents we are unable to agree with him.

Clause (I) of Art 72 of the Constitution with which we are concerned, provides.

"The President shall have the power to grant pardon, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence:--

(a) in all cases where the punishment or sentence is by Court Martial:

(b) in all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;

(c) in all cases where the sentence is a sentence of death."

The Constitution of India, in keeping with modern constitutional practice, is a constitutive document, fundamental to the governance of the country, whereby, according to accepted political theory, the people of India PG NO 1109 have provided a constitutional polity consisting of certain primary organs, institutions and functionaries to exercise the powers provided in the Constitution. All power belongs to the people, and it is entrusted by them to specified institutions and functionaries with the intention of working cut, maintaining and operating a constitutional order. The Preambular statement of the Constitution begins with the significant recital:

"We, the people of India, having solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic .. do hereby adopt, enact and give to ourselves this Constitution."

To any civilised society, there can be no attributes more important than the life and personal liberty of its members. That is evident from the paramount position given by the Courts to Art. 21 of the Constitution. These twin attributes enjoy a fundamental ascendancy over all other attributes of the political and social order, and consequently, the Legislature, the Executive and the Judiciary are more sensitive to them than to the other attributes of daily existence. The deprivation of personal liberty and the threat of the deprivation of life by the action of the State is in most civilised societies regarded seriously and recourse, either under express constitutional provision or through legislative enactment, is provided to the judicial organ. But, the fallibility of human judgment being undeniable even in the most trained mind, a mind resourced by a harvest of experience, it has been considered appropriate that in the matter of life and personal liberty, the protection should be extended by entrusting power further to some high authority to scrutinise the validity of the threatened denial of life or the threatened or continued denial of personal liberty. The power so entrusted is a power belonging to the people and reposed in the highest dignitary of the State. In England, the power is regarded as the royal prerogative of pardon exercised by the Sovereign, generally through the Home Secretary. It is a power which is capable of exercise on a variety of grounds, for reasons of State as well as the desire to safeguard against judicial error. It is an act of grace issuing from the Sovereign. In the United States, however, after the founding of the Republic, a pardon by the President has been regarded not as a private act of grace but as a part of the constitutional scheme. In an opinion, remarkable for its erudition and clarity, Mr. Justice Holmes, speaking for the Court in W.I. Biddle v. Vuco Perovich, 71 L. Ed. 1161 enunciated this view and it has since been, affirmed in other decisions. The power to pardon is a part of the constitutional scheme, and we have no doubt, in our mind, that it should be so treated PG NO 1110 also in the Indian Republic. It has been reposed by the people through the Constitution in the Head of the State, and enjoys high status. It is a constitutional

responsibility of great significance, to be exercised when occasion arises in accordance with the discretion contemplated by the context. It is not denied, and indeed it has been repeatedly affirmed in the course of argument by learned counsel, Shri Ram Jethmalani and Shri Shanti Bhushan, appearing for the petitioners that the power to pardon rests on the advice tendered by the Executive to the President, who subject to the provisions of Art. 74(1) of the Constitution, must act in accordance with such advice. We may point out that the Constitution Bench of this Court held in Maru Ram v. Union of India? [1981] 1 S.C.R. 1196 that the power under Art. 72 is to be exercised on the advice of the Central Government and not by the President on his own, and that the advice of the Government binds the Head of the State .

To what areas does the power to scrutinise extend? In Ex parte William Wells, 15 L.Ed. 421 the United States Supreme Court pointed out that it was to be used "particularly when the circumstances of any case disclosed such uncertainties as made it doubtful it there should have been a conviction of the criminal, or when they are such as to show that there might be a mitigation of the punishment without lessening the obligation of vindicatory justice". And in Ex parte Garland, 18 L Ed. 366 at 370 decided shortly after the Civil War, Mr. Justice Field observed: "The inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blets out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence.....if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights .. " The classic exposition of the law is to be found in Exparte Philip Grossman, 267 U.S. 87; 69 L. Ed. 527 where Chief Justice Taft explained:

"Executive clemency exists to afford relief from under harshness or evident mistake in the operation or the enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in PG NO 1111 monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments The dicta in Ex parte Philip Grossman (supra) was approved and adopted by this Court in Kuljit Singh v. Ll. Governor of Delhi., [1982] 3 S.C.R. 58. In actual practice, a sentence has been remitted in the exercise of this power on the discovery of a mistake committed by the High Court in disposing of a criminal appeal. See Nar Singh v. State of Uttar Pradesh, [1955] l S.C.R.238.

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 scction 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.

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).

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.

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. Upon the considerations to which we have adverted, it appears to us clear 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.

The next question is whether the petitioner is entitled to an oral hearing from the President on his petition PG NO 1116 invoking the powers under Article 72. It seems to us that there is no right in the condemned person to insist on an oral hearing before the President. The proceeding before the

President is of an executive character, and when the petitioner files his petition it is for him to submit with it all the requisite information necessary for the disposal of the petition. He has no right to insist on presenting an oral argument. 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's case (supra).

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.

Finally, an appeal was made by Shri Shanti Bhushan to us to reconsider the constitutional validity of the statutory provisions in the Indian Penal Code providing for the sentence of death. The learned Attorney General, with his usual fairness did not dispute Shri Shanti Bhushan's right to raise the question in this proceeding. Shri Shanti Bhushan has laid great emphasis on the dissenting judgment in Bachan Singh v. State of Punjab, [1983] 1 SCR 145. We have considered the matter, and we feel bound by the law laid down by this Court in that matter. The learned Attorney General has drawn our attention to the circumstance that PG NO 1117 only six sections, 120B, 121, 132, 302, 307 and 396, of the Indian Penal Code enable the imposition of the sentence of death, that besides the doctrine continues to hold the field that the benefit of reasonable doubt should be given to the accused, and that under the present criminal law the imposition of a death sentence is an exception (for which special reasons must be given) rather than the rule, that the statistics disclose that a mere 29 persons were hanged when 85,000 murders were committed during the period 1974 to 1978 and therefore, the learned Attorney General says, there is no case for reconsideration of the question. Besides, he points out, Articles 21 and 134 of the Constitution specifically contemplate the existence of a death penalty. In the circumstances, we think the matter may lie where it does.

In the result, having regard to the view taken by us on the question concerning the area and scope of the President's power under Article 72 of the Constitution, we hold that the petition invoking that power shall be deemed to be pending before the President to be dealt with and disposed of afresh. The sentence of death imposed on Kehar Singh shall remain in abeyance meanwhile. These Writ Petitions and the Special Leave Petition are concluded accordingly.

M.L.A. Petitions disposed of