

CASE NO.:
Appeal (crl.) 551-552 of 1997

PETITIONER:
Govt. of A.P. and Ors.

RESPONDENT:
M.T. Khan

DATE OF JUDGMENT: 05/12/2003

BENCH:
DORAISWAMY RAJU & ARIJIT PASAYAT.

JUDGMENT:
J U D G M E N T

ARIJIT PASAYAT, J

These two appeals raise an interesting question involving the scope and ambit of Article 161 of the Constitution of India, 1950 (in short the 'Constitution'). The question is whether the Governor of a particular State in exercise of clemency powers under Article 161 of the Constitution can grant remission to prisoners convicted by courts outside the concerned State, but undergoing sentences in jails in the State. Present appeals relate to the State of Andhra Pradesh. The Andhra Pradesh High Court in the two writ petitions (W.P. nos. 20018 and 21536 of 1995) held in the affirmative and hence these appeals.

One S. Appala Swamy was convicted for the offence punishable under Section 302 of the Indian Penal Code, 1860 (in short the 'IPC') and sentenced to imprisonment for life by the Sessions Judge, Bastar at Jagdalpur, Madhya Pradesh. While serving the said sentence at the District Jail, Jagdalpur he was transferred to the Visakhapatnam Jail in Andhra Pradesh. Writ petition No.20018 of 1995 related to him. The other writ petition No.21536/1995 related to convict Rajender who was convicted under Section 302 IPC and sentenced to imprisonment for life by the IV Additional Sessions Judge, Thane, Maharashtra. While serving the sentence in the Central Prison, Erawada, Maharashtra he was transferred to the Central Prison Warangal in the State of Andhra Pradesh.

Respondent M.T. Khan claiming to be the President of Andhra Pradesh Civil Liberties Committee filed writ petitions contending that their continued incarceration was illegal and arbitrary. At the time of filing the writ petitions the actual sentence undergone by S. Appala Swamy was about 11 years and 6 months, while that of Rajender was in excess of 14 years. As by 14.5.1995 Rajender had completed more than 14 years of actual sentence including the remand period, the Government of Andhra Pradesh forwarded his case for consideration of the State of Maharashtra on 12.9.1994 for taking the appropriate action. The Government of Maharashtra passed an order on 1.12.1995 under sub-section (1) of Section 432 of the Code of Criminal Procedure, 1973 (in short the 'Code') remitting "that portion of the sentence of imprisonment for life which is in excess of 14 years of total imprisonment including all remissions subject to completion of actual imprisonment of 14 years....subject to the condition of the (said) person's good behaviour and conduct in prison till the time of his release.."

The Government of Andhra Pradesh issued G.O.Ms. No.4, Home

(Prisons-C) Department dated 17.1.1995 by which the Governor of Andhra Pradesh in exercise of his powers conferred by Article 161 of the Constitution remitted the unexpired residue of the sentences of different categories of prisoners convicted by the courts in the State for offences against laws relating to matters to which the executive power of the State extends. The relevant portion reads as follows:

"(a) All convicted prisoners sentenced to imprisonment for life and governed by Section 433-A, Cr.P.C., who have completed 14 years of total sentence including 10 years of actual sentence as on 14.1.1995 shall be released.

(b) All convicted prisoners sentenced to imprisonment for life and governed by Section 433-A, Cr.P.C. aged more than 65 years and have undergone more than 5 years of actual sentence and a total sentence of 7 years as on 14.01.1995 shall be released".

Paragraph 3 of the G.O. indicated that all prisoners eligible for release as on 14.1.1995 falling under the afore-noted two categories were to be released. Paragraph 4 indicated that the above remissions and reductions in sentences shall also apply to prisoners who have been convicted by courts situated within the State of Andhra Pradesh and are undergoing the sentences in other States. Five categories of prisoners were excluded from the purview of the aforesaid benefit and one of the excluded categories to which this case relates was:

"Prisoners convicted and sentenced by courts situated outside the state of Andhra Pradesh".

The two convicts involved in the writ petitions were covered by the aforesaid exclusion which was challenged to be arbitrary, without any basis and not proper exercise of power conferred under Article 161 of the Constitution. It was contended that the power of clemency under Article 161 was unfettered and extended to all prisoners serving sentences in the jails of State of Andhra Pradesh and there was no rational basis to exclude one category of prisoners on the ground that they were convicted by courts situate outside the State of Andhra Pradesh. The exclusion was characterized as arbitrary, discriminatory and in violation of Article 14 of the Constitution. There was no impediment in this regard either in the Transfer of Prisoners Act, 1950 (in short the 'Prisoners Act') or any other enactment. The prayer for release of the two convicts was opposed by the State on the ground that the State of Andhra Pradesh has no power to grant remissions to prisoners undergoing sentences in the State pursuant to convictions given by courts of competent jurisdiction located in other States. It was further submitted that the exclusion was not because the State did not want to extend the benefit, but because of the reason that it had no power to deal with the concerned prisoners. The High Court referred to Section 432 of the Code and Article 161 of the Constitution; and came to hold that the State's view was wrong and power to direct such release was available under Article 161. Though the State had the power to do it, erroneous view was taken that it did not have the power to do it. Since power was available and State was under mistaken impression that it did not have the power, therefore, non-exercise was arbitrary. Distinction tried to be made between prisoners of one category who were convicted and are undergoing sentences inside the State and those convicted outside the State serving sentences inside the State is without any rational basis and impugned G.O. so far as it relates to the exclusion, inflicted impermissible and unjustifiable hardship on the transferred prisoners and violated the equality clause enshrined in

Article 14 of the Constitution. Therefore, sub-paragraph (1) of paragraph 4 of the G.O. was held to be inconsequential and inseverable from the rest of the G.O. In essence, direction was given to consider the case of the two convicts in accordance with the provisions of the G.O. without reference to sub-para (1) of paragraph 4.

In support of the appeals, learned counsel for the State of Andhra Pradesh submitted that the High Court has clearly mis-interpreted Article 161 which clearly refers to "appropriate Government". The appropriate Government so far as the convicts are concerned is the Government within whose territorial jurisdiction the said convicts were convicted. The fortuitous circumstance of a convict serving the sentence inside the State would not empower the Government to exercise powers under Article 161 of the Constitution so far as that convict is concerned. Otherwise, it would lead to a very anomalous situation. Supposing a convict has served sentence in more than one States, can it be said that Government of different States can exercise power of remission in respect of an accused who at some anterior point of time or in present time has served or is serving the sentence in a jail located within that State. In the G.O. the contra situation has been taken note of. A prisoner convicted by a Court inside the State and serving sentence outside is covered by the G.O. Furthermore, at this juncture, it is appropriate to take note of a decision of this Court in State of Madhya Pradesh v. Ratan Singh and Ors. (1976 (3) SCC 470). That case related to Section 401 of the Code of Criminal Procedure, 1898 (in short the 'Old Code') corresponding to Section 433 of the new Code. In that case the decision of Punjab and Haryana High Court in Surjit Singh v. State of Punjab (ILR (1975) 1 Pb. And Har. 201) was referred to and the view expressed by the High Court was approved in the following terms:

"There is, however, nothing to indicate that for the purposes of remission and suspension of sentences under Section 401, Criminal Procedure Code, the Legislature intended to adopt a different definition of 'appropriate Government'. In short, under Section 401, Criminal Procedure Code, the Government of the State of conviction and not the Punjab Government was competent to remit the balance of the sentence of these life convicts. All that the Punjab Government could do was to forward the cases of these life convicts to the appropriate Government for remitting the remaining term of their life imprisonment, in exercise of the power under Section 401, Criminal Procedure Code. The Punjab Government has already made such a reference in favour of the petitioners to the Governments of the States of conviction. Neither the Punjab Government nor the Superintendent of Jail concerned can release the prisoners under any of the statutory rules contained in Punjab Jail Manual without receiving the necessary orders of the appropriate Government under Section 401. Pending the receipt of orders of the appropriate Government, therefore, the detention of the petitioners could not by any reasoning be called illegal".

Though Ratan Singh's case (supra) was noticed by the High Court in the impugned judgment a distinction was sought to be made on the ground that the interpretation given to the expression 'appropriate government' has no application when the power of Governor under Article 161 of the Constitution is invoked.

In our considered opinion, the High Court went wrong in putting such restrictive interpretation or understanding of the ratio of the

decision. The High Court came to the conclusion that the decision of the Government not to extend remission was not because it did not want to do so but because it was under the belief that it had no such power. The High Court thought that it had. The question is not so much of what the Government wanted to do, but whether it had the power of clemency in a matter like the one under consideration. It was considered expedient that the power is to be exercised in respect to a particular category of prisoners. The Government had full freedom in doing that and even excluding category of persons which it thinks expedient to exclude. To extend the benefit of clemency to a given case or class of cases is a matter of policy and to do it for one or some they need not do it for all, as long as there is no insidious discrimination involved. In the case at hand it was not only due to lack of power, but also because of conscious decision to exclude in the background of what it considered to be lack of authority, and in our view no exception could be taken to the same, legitimately.

In *State of Punjab and Ors. v. Joginder Singh and Ors.* (AIR 1990 SC 1396) this Court held as follows:

"In *Gopal Vinayak Godse v. State of Maharashtra* (1961 (3) SCR 440), this Court held that a sentence of transportation for life or imprisonment for life must be treated as transportation or imprisonment for the whole of the remaining period of the convict's normal life, unless the said sentence is commuted or remitted by the appropriate Government. Dealing with the Rules framed under the Prisons Act, 1894, this Court held that even though they were statutory in character they did not confer an indefeasible right on a prisoner sentenced to transportation for life to an unconditional release on the expiry of a particular term including remissions. It held that the rules framed under the Prisons Act enabled a prisoner to earn remissions \026 ordinary, special and State \026 the said remissions were to be given credit towards his term of imprisonment and for the purpose of working out the remissions the sentence of transportation for life was equated with a definite period, but it is only for that particular purpose and not for any other purpose. Lastly it observed that the question of remission was exclusively within the province of the appropriate Government.

In *Maru Ram v. Union of India* (1981 (1) SCR 1196), this Court repelled the challenge to Section 433A both on the question of competence of Parliament to enact the provision and its constitutional validity. While interpreting Sections 432, 433 and 433A of the Code, this Court pointed out that wide powers of remission and commutation of sentences were conferred on the appropriate government but an exception was carved out for the extreme category of convicts who were sentenced to death but whose sentence had been commuted under Section 433 into one of imprisonment for life. Such a prisoner is not to be released unless he has served at least 14 years of imprisonment. The Court refused to read down Section 433A to give overriding effect to the Remission rules of the State. It categorically ruled that Remission Rules and like provisions stand excluded so far as 'lifeters' punished for capital offences are concerned. Remissions by way of reward or otherwise cannot cut down the sentence awarded by the Court except under Section 432 of the Code or in exercise of

constitutional power under Articles 72/161 of the Constitution. Remission cannot detract from the quantum and quality of the judicial sentence except to the extent permitted by Section 432 of the Code, subject of course to Section 433A, or where the clemency power under the Constitution is invoked. But while exercising the constitutional power under Articles 72/161, the President or the Governor, as the case may be, must act on the advice of the Council of Ministers. The power under Articles 72 and 161 of the Constitution is absolute and cannot be fettered by any statutory provision such as Sections 432, 433 and 433A of the Code. This power cannot be altered, modified or interfered with in any manner whatsoever by any statutory provisions or Prison Rules".

(Underlined for emphasis)

The Governor, in terms of the dicta laid in the last noted case has to act on the advice of the Council of Ministers. It is inconceivable that a Council of Ministers of the State of Andhra Pradesh can render any appropriate advice in respect of accused persons convicted by Courts of Madhya Pradesh and Maharashtra or that it would be competent to do so. The Prisoners Act does not throw any light on the controversy as wrongly held by the High Court. It only enables transfer of prisoners from one State to another. It does not purport to confer jurisdiction on the transferee State the power of remission in respect of transferred prisoners. In *Sanaboina Satyanarayan v. Government of Andhra Pradesh and Ors.* (2003 (5) Supreme 343), it was held that the grant of remission as well as the conditions formed a compendious single common pattern or scheme of concession by way of remission, pregnant with a policy designed in public interest and safety and interests of the society. There is no scope for judicial modification or modulating the same so as to extend the concession in excess of the very objective of the maker of the order which seems to have been guided by considerations of State policy. The scheme of remission cannot be modified or extended to the category of prisoners to which it was specifically excluded.

Section 432 of the Code corresponds to and reproduces almost word for word Section 401 and sub-section (3) of Section 402 of the old Code. Sub-sections (1) to (4) of Section 432 of the Code reproduce word for word sub-sections (1) to (4) of Section 401 of the old Code. Sub-section (5) reproduces word for word sub-section (6) of the old Section. Sub-section (6) similarly reproduces sub-section (4-A) of the old Section. Sub-section (5) of old Section 401 had been omitted earlier in 1950. Sub-section (7) corresponds to sub-section (3) of Section 402 of the old Code. The main paragraph and Clause (a) reproduce the old provision word for word without any change. Clause (b) is slightly different, but without any change of substance. That clause reads:

"(b) in other cases, the State Government."

According to us, in view of the legal position delineated by the ratio in *Ratan Singh's* case (supra) which has full application to the case on hand, the High Court was not justified in obliterating a part of the G.O. and extending the benefits to the concerned prisoners. It amounts to the Court re-making the policy and redoing the G.O. itself. The High Court's judgment to that extent is erroneous and needs to be set aside which we direct. But after serving the requisite sentence, the appropriate Government which according to us in the present case are

States of Madhya Pradesh and Maharashtra respectively, their cases shall be considered by those two State Governments who shall take necessary decision as to whether their release is permissible and desirable. The appeals are allowed to the aforesaid extent.

JUDIS