

A.F.R.

Judgement reserved on 03.02.2021

Judgement delivered on 26.02.2021

Court No.13

Case :- MISC. BENCH No. - 22682 of 2017

Petitioner :- Prakashvati Singh

Respondent :- State Of U.P. Thru. Secy. Home And Others

Counsel for Petitioner :- Ishan Baghel, Parikshit Singh

Counsel for Respondent :- Govt. Advocate, Nandita Bharti, Vivek Raj Singh

Hon'ble Ramesh Sinha, J.

Hon'ble Rajeev Singh, J.

(Per: Rajeev Singh, J.)

1. Heard Sri Ishan Baghel, learned counsel for the petitioner, Sri Vivek Raj Singh, learned Senior Advocate assisted by Ms. Anamika Singh, learned counsel for private respondent No.5 and Sri S.P. Singh, learned A.G.A. appearing for the State.

2. The petitioner Prakashvati Singh wife of Late Karan Singh has filed this petition for issuance of writ in the nature of certiorari quashing the impugned Order dated 15.03.2017 passed by State Government, placed on record as Annexure-1.

The petition also seeks issuance of a writ in the nature of mandamus directing official respondents to arrest respondent No.5 (Jaini Singh) prisoner No.534 of 2011 convicted in Sessions Trial No.983 of 1995, under Sections 302, 149, 147, 148 I.P.C. vide judgment dated 02.12.2012 rendered by Sessions Judge, Bulandshahar.

3. Learned counsel for the petitioner submits that vide order and judgment dated 02.12.2011, the learned Sessions Judge, Bulandshahar has convicted the respondent No.5 (Jaini Singh) and five others, under Sections 302/149, 147, 148 I.P.C. in Sessions Trial No.983 of 1995 for life imprisonment on the charge of killing of three persons. Against the aforesaid judgment and order of conviction, the appeal No.7008 of 2011 was filed in which the bail application of respondent No.5 was rejected twice as on vide order dated 10.07.2012 and 03.03.2014 and the appeal is still pending for final disposal. Learned counsel for the petitioner

submits that the respondent No.5 moved an application in the form of mercy petition, dated 17.10.2016 for premature release and report was sought on his application from the Senior Superintendent of Police and District Probation Officer, Bulandshahar and they submitted their report dated 13.06.2016 and 23.09.2016 respectively and recommended to reject the mercy petition of the respondent No.5 and Senior Superintendent of Police, Bulandshahar in his report has categorically mentioned that if the respondent No.5 was to be released, he could act as motivator for future crimes. He further submitted that a report was also asked from the District Magistrate, Bulandshahar as well as Authority of the District Jail, Bulandshahar, the District Magistrate in his report, has given approval to consider the mercy petition of the respondent No.5 without giving any reason. As per the Notification No.V-17013/2/2013-PR, Government of India, Ministry of Home Affairs (CS Division), dated 01.02.2013 which clearly provides that where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishment, such person shall not be released from prison unless he had served at-least fourteen years of imprisonment. Ignoring the directions of aforesaid circular, the District Magistrate, Bulandshahar recommended for consideration of the mercy petition of respondent No.5, though he had served only a period of five years of imprisonment for life.

4. Learned counsel for the petitioner has relied on the decisions of Hon'ble Supreme Court in the case of Maru Ram Vs. Union of India & others reported in (1981) 1 SCC 107, Satpal and another Vs. State of Haryana reported in (2000) 5 SCC 170, Epuru Sudhakar Vs. Government of Andhra Pradesh & Ors. reported in (2006) 8 SCC 161.

5. Learned counsel for the petitioner submits that the release of respondent no.5 is in total violation of provisions of Sections 432, 433 and 433A of the Cr.P.C. The provisions are extracted hereunder for ready reference:-

"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 time, 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 property.

(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.

433. Power to commute sentence. The appropriate Government may, without the consent of the person sentenced, commute-

(a) sentence of death, for any other punishment provided by the Indian Penal Code;

(b) sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;

(c) sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced, or for fine;

(d) sentence of simple imprisonment, for fine.

433A. Restriction on powers of remission or Commutation in certain cases. Notwithstanding anything contained in section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commuted under section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment."

(Emphasized by us)

6. Learned counsel for the petitioner submits that the original record was summoned by this Court vide order dated 20.09.2017 and on 06.11.2017, the record was perused by the coordinate Bench and observed in its order dated 06.11.2017 that a letter was written by one Col. Satyaveer Yadav, Advocate, State President Samajwadi Sainik Prakostha to Mr. Balwant Singh Ramoowalia Minister of the Department of Jails U.P. vide the communication, it has been requested that respondent No.5 be released on account of his old age and ailing health and it is also observed that the release order of respondent No.5 has been passed only taking into account the fact that respondent No.5 had attained the age of 70 years and it was also noted by the Court that a report furnished by S.S.P. Bulandshahar, District Magistrate, District Probation Officer were available on the record for consideration by the State Government and Hon'ble Governor, but none has been referred to or dealt with while passing release order of respondent No.5. He further submits that the Court also observed in the above order that Minister

Prisons Department, U.P. passed final order as the age of convict is more than 70 years as per the report furnished by District Magistrate, he is old and infirm therefore, it is recommended that he be released and the said note of the Minister Jail Department was approved by the Chief Minister and Hon'ble Governor of U.P. which is in clear violation of the provisions of Section 433A Cr.P.C. which restricts that where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishment provided by law, such person shall not be released from prison unless he has served at least 14 years of imprisonment.

7. Learned counsel for the respondent No.5 submits that the District Magistrate has recommended for releasing the respondent No.5 and he also submits that under Article 161 of the Constitution of India, the Hon'ble Governor can pass an order of remission. The Constitutional Power of remission is a high prerogative vested with the functionaries of the State and such power is unfettered in comparison to the subordinate statutory powers as provided in the Criminal Procedure Code. He further submits that the powers mentioned under the provisions of Criminal Procedure Code are to be exercised by the appropriate Government and these powers are entirely different and do not restrict the power of the Governor which is exercised under Article 161 of the Constitution of India or the President which is exercised under Article 72 of the constitution of India.

8. Learned counsel for the respondent No.5 has relied the decisions of Hon'ble Supreme Court in the case of Maru Ram Vs. Union of India reported in (1981) 1 SCC 107, paragraph 60 of the judgment is reproduced as under:-

"Even so, we must remember the constitutional status of Articles 72 and 161 and it is common ground that Section 433-A does not and cannot affect even a wee bit the pardon power of the Governor or the President. The necessary sequel to this logic is that notwithstanding Section 433-A the President and the Governor continue to exercise the power of commutation and release under the aforesaid articles "

Similarly, he has also relied on the decisions of Hon'ble Supreme Court in the case of *Shamsher Singh Vs. State of Punjab* reported in (1974) 2 SCC 831, *Kehar Singh & Anr. Vs. Union of India and Ors* reported in (1989) 1 SCC 204, *State of Punjab & Ors. Vs. Joginder Singh & Ors* reported in (1990) 2 SCC 661, *Satpal & Ors Vs. State of Haryana & Ors* reported in (2000) 5 SCC 170, *P.U. Myllai Hlychho and Ors. Vs. State of Mizoram & Ors.* reported in (2005) 2 SCC 92 and *Devendra Singh Bhullar Vs. State (NCT of Delhi)* reported in 2013 (6) SCC 195. He has given emphasis on the judgment of Hon'ble Supreme Court in the case of *Devendra Singh Bhullar Vs. State of NCT of Delhi* (supra) on Question 40.4 (d) that what is the scope of Court's power of judicial review of the decision taken by the President under Article 72 and the Governor under Article 161 of the Constitution of India ? And submitted that the Court's power of judicial review of such decision is very limited and the court can neither sit in Appeal nor exercise the power of review, but can interfere if it is found that the decision has been taken without application of mind to the relevant factors or the same is founded on the extraneous or irrelevant consideration is vitiated due to malafides or patent arbitrariness.

9. Learned counsel for the respondent No.5 submits that petitioner have not alleged any malafides against the Governor or have averred that it was a case of non-application of mind and founded on extraneous or irrelevant considerations with the result the Governor's order cannot be reviewed on the points given under the judgment of *Devendra Singh Bhullar Vs. State (NCT of Delhi)* (supra).

10. Learned A.G.A. also opposes the prayer of the petitioners and submits that there is no illegality in the order passed by the State Government, but he does not dispute the statutory provisions mentioned in Sections 433 and 433-A of Cr.P.C.

11. Considering the arguments of learned counsel for the parties and going through the pleadings as well as enclosures and the decision relied upon by the counsel for the parties, as the counsel for the respondent No.5 does not dispute the fact that respondent No.5 was

convicted in a triple murder case on 02.12.2011 and he filed an appeal in which his bail application was rejected twice and the appeal is pending and the respondent No.5 served only five years of sentence and after rejection of the bail application, he moved petition for premature release under Article 161 of the Constitution of India. As it is evident that Government order dated 13.04.2005 was issued (Annexure No.4) prescribing the procedure for entertaining the mercy petition and para-1 of the aforesaid Government order provides that a committee consisting of four members shall consider the case of premature release towards the considerations/conditions which are required to be taken into account viz.,

- "(i) undergone period by a convict;*
- (ii) jail conduct of the convict;*
- (iii) parole availed by the convict;*
- (iv) the medical condition of the convict;*
- (v) the nature of offence committed by the convict;*
- (vi) judgment of conviction and order of sentence passed by the convicting court;*
- (v) social and financial standing of the family;*
- (vi) whether there are chances of the convict indulging in conducting similar offences etc.*

The Government order further provides the conditions under which application for remission will not be entertained viz.,

- (i) cases of rape,*
- (ii) dacoity,*
- (iii) terrorism,*
- (iv) organized and well planned murder,*
- (v) habitual offender etc. "*

On the point of illness and old age, the report of medical board is necessary and para-6 of the Government Order clearly provides that the report shall be called from the District Magistrate and Superintendent of Police on six points i.e. (i) circumstances, when the offence was committed (ii) criminal antecedent and behavior of the convict (iii)

social reputation of the convict and his family along with the financial status (iv) chance of indulging in the similar offence (v) objection if any on premature release (vi) behaviour during the course home leave, parole and bail.

12. As it is evident that on the application of respondent No.5, the Senior Superintendent of Police, Bulandshahar has submitted a report dated 13.06.2016 in which he refused to recommend premature release of the respondent No.5 mentioning that in case he (convict) is released, then he may act as motivator for future crimes and it is also evident that case of respondent No.5 was also placed before the mercy committee under the Chairmanship of Principal Secretary Home and Prisons, the committee categorically observed that the appeal of respondent No.5 is pending and he had undergone only 5 years, 1 month 23 days of imprisonment and Senior Superintendent of Police, Bulandshahar has not recommended his premature release, looking into the gravity of the offence of tripal murder, therefore, the mercy committee also denied the recommendation for premature release. As it is well settled by the Hon'ble Supreme Court in the case of Narayan Dutt & Others Vs. State of Punjab & Another reported in (2011) 4 SCC 353 that the judicial review is permissible against the order of Hon'ble Governor in case the Governor has exercised power by himself without being advised by the Government, transgressed his jurisdiction, passed the order without applying his mind, order was malafide, or some extraneous considerations. Also, Section 433-A Cr.P.C. provides that where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishment provided by law, such person shall not be released from prison unless he has served at least 14 years of imprisonment. In the present case, the respondent No.5 had only undergone five years and his appeal is pending and despite the committee refused for his release. As the original record was summoned by the Court and in which a recommendation letter of Col. Satyaveer Yadav, Advocate, was found who requested to the Minister of Jail Department for the release of the

respondent No.5 on account of his old age, therefore the Minister recommended and same was approved by the Chief Minister and Hon'ble Governor of U.P.

13. We are unable to comprehend as to what prompted the Hon'ble Governor to exercise indulgence in favour of the respondent No.5 despite he had committed a heinous offence wherein three members of a family were done to death by the respondent No.5 and other co-accused who are in Jail, which apparent from the record and the Mercy Committee also denied to consider his application for premature release. Even appeal is pending against the conviction judgment and twice his bail is rejected by this Court in appeal. Thus, the impugned order passed by Hon'ble Governor does not reflect application of mind. Moreover, the Governor has transgressed his jurisdiction in exercising the power under Articles 161 of the Constitution of India which is against the dictum of the judgment of the Apex Court referred above.

14. Accordingly, the impugned order dated 15.03.2017 is hereby set aside. The Chief Judicial Magistrate, Bulandshahar is directed to take respondent No.5, Jaini Singh into custody forthwith and send him to jail to serve out the remaining sentence as awarded by the trial court.

15. The petition stands allowed.

16. The Senior Registrar of this Court is directed to send the certified copy of this order to the District Judge, Bulandshahar for its necessary information and compliance.

(Rajeev Singh, J.) (Ramesh Sinha, J.)

Order Date :- 26.02.2021

Amit/-