Kehar Singh and Another

Vs

Union of India and Another

Writ Petitions (Criminal) Nos. 526-27 of 1988

(CJI R. S. Pathak, E. S. Venkataramiah, Ranganath Misra, N. D. Djha, M. N. Venkatachaliah JJ)

16.12.1988

JUDGMENT

PATHAK C.J. –

1. On January 22, 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 October 31, 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 August 3, 1988. A review petition filed thereafter by Kehar Singh was dismissed September 7, 1988 and later a writ petition was also dismissed by this Court.

2. On October 14, 1988 his son, Rajinder Singh, presented a petition to the President of India for the grant of pardon to Kehar Singh under Article 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 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 October 23, 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 October 31, 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 November 3, 1988 a further letter was addressed to the President by counsel refuting the existence of any practice not a accord a hearing on a petition under Article 72 and requesting him to reconsider his decision to deny a hearing. On November 15, 1988 the Secretary to the President wrote to counsel as 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 is 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 provisions of the Constitution of India.

3. Thereafter the President rejected the petition under Article 72, and no November 24, 1988 Kehar Singh was informed of the rejection of the petition. His son, Rajinder Singh, it is said, came to know on November 30, 1988 from the newspaper media that the date of execution of Kehar Singh had been fixed for December 2, 1988. The next day, December 1, 1988, he 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 filed Special Leave Petition (Cri.) No. 3084 of 1988 in this Court along with writ petitions Nos. 526-27 of 1988 under Article 32 of the Constitution. During the preliminary hearing late in the afternoon of the same day, December 1, 1988 this Court decided to entertain the writ petition and made an order directing that the execution of Kehar Singh should not be carried out meanwhile.

4. 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 case. Having regard to the seriousness of the controversy we have considered it appropriate to pronounce to opinion of this Court on those questions.

5. The first question is whether there is justification for the view that when exercising his power under Article 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 petitions 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 of 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.

6. Clause (1) of Article 72 of the Constitution, with which we are concerned, provides :

> The President shall have the power to grant pardons, 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 a Court Martial;
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> (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.

7. 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. 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. 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 Article 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 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 Article 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 SCC 107 : 1981 SCC (Cri) 112 : (1981) 1 SCR 1196), that the power under Article 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.

8. To what areas does the power to scrutinise extend ? In Ex parte William Wells (15 L ED 421) the United State Supreme Court pointed out that it was to be used "particularly when the circumstances of any case disclosed such uncertainties as made it doubtful if 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, 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 blots 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 Ex parte Philip Grossman (267 US 87 : 69 L ED 527) where Chief Justice Taft explained :

> Executive clemency exist to afford relief from undue 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 litigate guilt. To afford a remedy, it has always been though essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments.

9. The dicta in Ex parte Philip Grossman (267 US 87 : 69 L ED 527) was approved and adopted by this Court in Kuljit Singh v. Lt. Governor of Delhi ((1982) 1 SCC 417 : 1982 SCC (Cri) 234 : (1982) 3 SCR 58). In actual practice, a sentence has been remitted in the exercise of this power on the discovery of mistake committed by the High Court in disposing of a criminal appeal. See Nar Singh v. State of Uttar Pradesh ((1955) 1 SCR 238 : AIR 1954 SC 457 : 1954 Cri LJ 1167).

10. We are of the view that it is open to the President in the exercise of the power vested in him by Article 72 of the Constitution to scrutinise the evidence on the record of the criminal case and come to a different conclusion from the recovered 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 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, 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 a judicial act as much as the imposition of the sentence in the first instance.

The legal effect of 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 v. Khagendranath Nath ((1961) 2 SCR 133, 138-140 : AIR 1961 SC 334), Wanchoo, J. speaking for the Court addressed himself to the question whether the order of remission by the Governor of Assam had the effect reducing the sentence imposed on the appellant in the same way in which an order of an appellate or revisional criminal court has the effect 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 or 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 a court is remitted in part under Section 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 than 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 is was in spite of the order of remission.

It is apparent that the power under Article 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 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.

11. In the course of argument, the further question raised was whether judicial review extent to an examination of the order passed by the President under Article 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 v. Union of India ((1981) 1 SCC 107, 154 : 1981 SCC (Cri) 112, 159 : (1981) 1 SCR 1196, 1249). The function of determining whether 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 matter for the court. In Special Reference No. 1 of 1964 ((1965) 1 SCR 413, 446 : AIR 1965 SC 745), 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 v. Union of India ((1977) 3 SCC 592 : (1978) 1 SCR 1, 80-81 : AIR 1977 SC 1361) to hold : (SCC p. 661, para 149)

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 ((1980) 3 SCC 625 : (1981) 1 SCR 206, 286-287 : AIR 1980 SC 1789) Bhagwati, J. said : (SCC p. 677, para 87)

... 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 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 SCC 124 : (1987) 2 ATC 82) that this was also the view of the majority Judges in Minerva Mills Ltd. v. Union of India ((1980) 3 SCC 625 : (1981) 1 SCR 206, 286-287 : AIR 1980 SC 1789).

12. The learned Attorney General of India contends that the power exercised under Article 72 is not justiciable, and that Article 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 had placed A. K. Roy v. Union of India ((1982) 1 SCC 271 : 1982 SCC (Cri) 152 : (1982) 2 SCR 272) before us. Reference has also been made to K. M. Nanavati v. State of Bombay ((1961) 1 SCR 497 : AIR 1961 SC 112 : (1961) 1 Cri LJ 173) 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 an attempt must be made to harmonise the provisions conferring the two different powers. On the basis of Gopal Vinayak Godse v. State of Maharashtra ((1961) 3 SCR 440 : AIR 1961 SC 600 : (1961) 1 Cri LJ 736), he urges that the power to grant remission is exclusively within the province of the President. He points out that the power given to the President is untrammeled 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 Gill v. State of Punjab ((1977) 3 SCC 346 : 1977 SCC (Cri) 515 : AIR 1976 SC 2299), Joseph Peter v. State of Goa, Daman and Diu ((1977) 3 SCC 380 : 1977 SCC (Cri) 486 : (1977) 3 SCR 771) as well as Riley v. Attorney General of Jamaica ((1982) 3 All ER 469) and Council of Civil Service Unions v. Minister for the Civil Service ((1984) 3 All ER 935), besides Attorney-General v. Times Newspapers Ltd. ((1973) 3 All ER 54) Our attention had 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 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 follows by Horwitz v. Connor, Inspector General of Penal Establishments Victoria ((1908) 6 CLR 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 scrutinize 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 ((1975) 3 WLR 388, 394), in Bandhua Mukti Morcha v. Union of India ((1984) 3 SCC 161 : 1984 SCC (L&S) 389 : (1984) 2 SCR 67, 161) and Rai Sahib Ram Jawaya Kapur v. State of Punjab ((1955) 2 SCR 225, 235-6 : AIR 1955 SC 549).

13. It seems to us that one 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 Article 72. We are not concerned with merits of the decisions 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 Gill ((1977 3 SCC 346 : 1977 SCC (Cri) 515 : AIR 1976 SC 2299) advance the case of the respondent 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 Article 72 and no attempt is being made to analyse the exercise of the power under Article 72 on the merits. As regards Michael de Freitas ((1975) 3 WLR 388, 394), that was a case from the Court of Appeal of Tribunal 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 representative 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.

14. 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.

15. The next question is whether the petitioner is entitled to an oral hearing from the President on his petition 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 filed 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 ((1981) 1 SCC 107 : 1981 SCC (Cri) 112 : (1981) 1 SCR 1196).

16. Learned counsel for the petitioners next urged that in order to prevent an arbitrary exercise of power under Article 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 Article 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.

17. 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 ((1982) 3 SCC 24 : 1982 SCC (Cri) 535 : (1983) 1 SCR 145). We have considered the matter, and we feel bound by the law laid down by this Court in that case. The learned Attorney General has drawn our attention to the circumstances that only six sections, Sections 120-B, 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 filed that the benefit or 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.

18. 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 Kehar Singh shall remain in abeyance meanwhile.

19. These writ petitions and the special leave petition are concluded accordingly.

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