Ashok Kumar alias Golu

Vs

Union of India and others

Criminal Writ Petn. No. 96 of 1989

(A. M. Ahmadi, P. B. Sawant, S. C. Agrawal JJ)

10.07.1991

JUDGEMENT

AHMADI, J.:-

Liberty is the life line of every human being. Life without liberty is liasting' but not 'living'. Liberty is, therefore, considered one of the most precious and cherished possessions of a human being. Any attempt to take liberties with the liberty of a human being is visited with resistance. Since no human being can tolerate fetters on his personal liberty it is not surprising that the petitioner Ashok Kumar alias Golu continues to struggle for his liberty, premature release not fully content with the enunciation of the ' law in this behalf by this Court in Maru Ram v. Union of India, (1981) 1 SCR 1196: (AIR 1980 SC 2147).

2. The questions of law which are raised in this petition brought under Art. 32 of the Constitution arise upon facts of which we give an abridged statement. On the basis of a FIR lodged on October 21, 1977, the petitioner was arrested on the next day and he along with others was charge-sheeted for the murder of one Prem Nagpal. The petitioner. was tried and convicted for murder on Decenibei 20, 1978 in Sessions Case No. 32 of 1978 by the learned Sessions Judge, Ganganagar, and was ordered to suffer imprisonmerit for life. His appeal, Criminal Appeal No. 40 of 1979, was dismissed by the High Court of Rajasthan. Since then he is serving time. It appears that he filed a Habeas Corpus Writ Petition No. 2963 of 1987 in the High Court of Rajasthan at Jodhpur for premature release on the plea that he was entitled to be considered for such release under the relevant rules of Rajasthan Prisons (Shortening Of Sentences) Rules, 1958, (hereinafter alluded to as 'the 1958 Rules') notwithstanding the insertion -of Section 433A in the Code of Criminal Procedure, 1973 (hereinafter called 'the Code') with effect from December 18 ' 1978, just two days before his conviction. His grievance was that he was being denied the benefit of early release under the 1958 Rules under the garb of the newly added Section 433A, on the ground that it places a statutory embargo against the release of such a convict 'unless he has 'served at least 14 years of imprisonment'. He contended that the said provision could not curtail the constitutional power vested in the Governor by virtue of Article 161 of the Constitution which had to be exercised on the advice of the Council of Ministers which advice could be based on a variety of considerations including the provisions of the 1958 Rules. The writ petition was, however, dismissed by the High Court on October 31, 1988, on the ground that it was premature inasmuch as the petitioner's two representations, one to the Governor and another to the State Home Minister, were pending consideration. The High Court directed that they should be disposed of within one month. In this view of the matter the High Court did not deem it necessary to consider the various questions of law raised in the petition on merits. After the rejection of his writ petition by the High Court, the petitioner through his counsel addressed a letter dated November 28, 1988 to the Governor inviting his attention to the earlier representation dated August 29, 1988 and requesting him to take a decision thereon within a month as observed by the High Court. Failing to secure his early release notwithstanding the above efforts, the petitioner has invoked the extraordinary jurisdiction of this Court under Article 32 of the Constitution.

3. The petitioner's case in a nutshell is that under the provisions of the 1958 Rules, a 'lifer' who has served an actual sentence of about 9 years and 3 months is entitled to be considered for premature release if the total sentence including remissions works out to 14 years and he is reported to be of good behaviour. However, the petitioner contends, his case for premature release is not considered by the concerned authorities in view of the newly added S. 433A of the Code on the interpretation that by virtue of the said provision the case of a 'lifer' cannot be considered for early release unless he has completed 14 years of actual incarceration, the provisions of Ss. 432 and 433 of the Code as well as the 1958 Rules notwithstanding. According to him, even if the provisions of Ss. 432 and 433 of the Code do not come into play unless a convict sentenced to life imprisonment has completed actual incarceration for 14 years as required by S. 433A, the authorities have failed to realise that S. 433A cannot override the constitutional power conferred by Arts. 72 and 161 of the Constitution on the President and the Governor, respectively, and the State Government i.e., the Council of Ministers could advise the Governor to exercise power under Article 161 treating the 1958 Rules as guidelines. Since the petitioner had already moved the G0vernor under Art. 161 of the Constitution it was incumbent on the State Government to consider his request for early release, notwithstanding S. 433A, and failure to do so entitled the petitioner to immediate release as his continued detention was wholly illegal and invalid. In support of this contention the petitioner has placed reliance on the ratio of Maru Ram's decision (AIR 1980 SC 2147).

4. The petitioner brands Section 433A of the Code to be a 'legislative fraud' inasmuch as the said provision was got approved by the Parliament on the assurance that the said provision is complementary to the various amendments proposed in the Indian Penal Code. In the alternative it is contended that in any case this Court should by a process of interpretation limit the scope of S. 433A of the Code to those cases only to which it would have been limited had the legislation proposing amendments in the Indian Penal Code gone through. In any case after the decision of this Court in Maru Ram's case (AIR 1980 SC 2147), the efficacy of S. 433A is considerably reduced and the petitioner is entitled to early release by virtue of the power contained in Art. 161 read with the 1958 Rules even if guidelines are not formulated notwithstanding the subsequent decision of this Court in Kehar Singh v. Union of India, (1989) 1 SCC 204 : (AIR 1989 SC 653). Counsel submitted that after the decision of this Court in Bhagirath v. Delhi Administration, (1985) 3 SCR 743 : (AIR 1985 SC 1050) where under this Court extended the benefit of S. 428 of the Code even to life convicts, the ratio in Gopal Godse v. State of Maharashtra, (1961) 3 SCR 440: (AIR 1961 SC 600) had undergone a change. On this broad approach, counsel for the petitioner, formulated questions of law which may be stated, as under:

> 1. Whether the insertion of Section 433A in the Code was a legislative fraud inasmuch as the connected legislation, namely, the Indian Penal Code (Amendment) Bill XLII of 1972 did not become law although passed by the Rajya Sabha as the IPC (Amendment) Act, 1978, on November 23, 1978?
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> 2. Whether on the ratio of Maru Ram's decision, in the absence of any guidelines formulated by the State under Art. 72 or 161 of the Constitution, S. 433A of the Code would not apply to life convicts and the 1958 Rules will prevail for the purpose of exercise of power under Art. 72 or 161 of the Constitution?

Inter -connected with this question, the following questions were raised:

> a) Whether Maru Ram's decision is in conflict with Kehar Siigh's Judgment on the question of necessity or otherwise of guidelines for the exercise of power under Arts. 72 and 161 of the Constitution?
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> b) Whether the use of two expressions ‚remission" and "remit" in Arts. 72 and 161 convey two different meanings and if yes, whether the content of power in the two expressions is different?
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> c) Whether the persons sentenced to death by Courts, whose death sentence has been commuted to life imprisonment by executive clemency form a distinct and separate class for the purpose of application of S. 433A of the Code as well as for the purpose of necessity (or not) of guidelines for premature release in exercise of power under Arts. 72 and 161, from the persons who at the initial stage itself were sentenced to life imprisonment by Court verdict? and whether in the latter case guidelines are mandatory under Arts. 72 and 161 and a well designed scheme of remission must be formulated if the constitutional guarantee under Arts. 14 and 21 is to be preserved?
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> d) Whether the whole law of remission needs to be reviewed after Bhagirath's case wherein this Court held that imprisonment for life is also an imprisonment for a term and that a life convict is entitled to set off under S. 428, Cr. P.C.?

e) Whether it is permissible in law to grant conditional premature release to a life convict even before completion of 14 years of actual imprisonment notwithstanding S. 433A of the Code? If yes, whether the grant of such conditional release will be treated as the prisoner actually serving time for the purpose of Section 433A of the Code?

5. First the legislative history. The Law Commission had in its 42nd Report submitted in June, 1971 suggested numerous changes in the Indian Penal Code (IPC). Pursuant thereto an Amendment Bill No. XLII of 1972 was introduced in the Rajya Sabha on December 11, 1972 proposing wide ranging changes in the IPC. One change proposed was to bifurcate S. 302, IPC into two parts, the first part providing that except in cases specified in the second part, the punishment for murder will be imprisonment for life whereas for the more heinous crimes enumerated in clauses (a) to (c), of sub-sec. (2) the punishment may be death or imprisonment for life. A motion for reference of the Bill to the Joint Committee of both the Houses was moved in the Rajya Sabha on December 14,1972 by the then Minister of State in the Ministry of Home Affairs and was adopted on the same day. The Lok Sabha concurred in the motion of the Rajya Sabha on December 21, 1972. The Joint Parliamentary Committee presented its report to the Rajya Sabha on January 29, 1976 recommending changes in several clauses of the Bill. While retaining the amendment proposed in S. 302, IPC, it recommended inclusion of one more clause (d) after clause (c) in sub-see. (2) thereof and at the same time recommended deletion of S. 303, IPC. It also recommended substitution of the existing S. 57, IPC, by a totally new section, the proviso whereto has relevance. The proposed proviso was as under:

"Provided that where a sentence of imprisonment for life is imposed on conviction of a person for a capital offence, or where a sentence of death imposed on a person has been commuted into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment."

The reason which impelled the Committee to introduce the above proviso was "that sometimes due to grant of remission even murderers sentenced or commuted to life imprisonment were released at the end of 5 to 6 years." The Committee, therefore, felt that such a convict should not be released unless he has served at least 14 years of imprisonment. It is evident from the scheme of the aforesaid recommendations that the proviso was intended to apply' to only those convicts who were convicted for a capital offence (this expression was defined by clause 15 of the Bill recommending substitution of S. 40, IPC, as an offence for which death is one of the punishment provided by law) or whose ' sentence of death was commuted into one of imprisonment for life and not to those who were governed by the first part of the proposed S. 302, IPC. It was pointed out by counsel that similar benefit would have accrued to offenders convicted for offences covered u/ S. 305, 307 or 396 if the proposed Ss. 305, 307(b) and 396(b) had come into being. That, contends the petitioner's counsel, would have considerably narrowed down the scope of the proposed proviso to S. 57, IPC, and consequently the rigour of the said provision would have fallen on a tiny minority of offenders guilty of a capital offence. Pursuant to the recommendations made by the Committee, two bills., namely, the IPC (Amendment) Bill, 1978 and the Code of Criminal Procedure (Amendment) Bill, 1978, came to be introduced, the former was passed with changes by the Rajya Sabha on November 23, 1978 while the latter was introduced in the Lok Sabha on November 28, 1978, and in the Rajya Sabha on December 5, 1978. The pro- posal to add a proviso to the proposed S. 57, IPC did not find favour as it was thought that the

said subject-matter appropriately related to Chap. XXXII of the Code and accordingly the said provision was introduced-as S. 433A in the Code. While the amendments to the Code became law with effect from December 18, 1978, the IPC amendments, though passed by the Rajya Sabha could not be got through the Lok Sabha and lapsed. It may here be mentioned that the IPC Bill as approved by the Rajya Sabha contained the proposal to divide S. 302 into two parts, in fact an additional clause was sought to be introduced in the second part thereof and Ss. 305, 307 and 396 were also sought to be amended as proposed by the Committee. This in brief is the legislative history.

In the backdrop of the said legislative history, counsel for the petitioner argued that a legislative fraud was practised bv enacting S. 433A of the Code and failing to carry out the corresponding changes in Ss. 302, 305, 307, 396, etc., assured by the passing of the Indian Penal Code (Amendment) Act, 1978, by the Rajya Sabha on November 23, 1978. According to him it is evident from the scheme of the twin Amendment Bills that the. legislative intent was to apply the rigour of S. 433A of the Code to a small number of heinous crimes which fell within the meaning of the expression capital offence. It was to achieve this objective that S. 302, IPC was proposed to be bifurcated so that a large number of murders would fall within the first part of the proposed provision which prescribed the punishment of life imprisonment only and thus fell beyond the mischiei or S. 433A of the Code. To buttress his submission our attention was invited to Annexure II to the petition which is a copy of the letter dated July 10, 1979, written by the Joint Secretary in the Ministry of Home Affairs to Home Secretaries of all the concerned State Governments explaining the purport of the newly added S. 433A. After explaining that S. 57, IPC, had a limited scope, namely calculating fractions of terms of imprisonment only, he proceeds to state in paragraph 3 of the letter as under:

"The restrictions imposed by Section 433A apply only to those life convicts who are convicted for offences for which death is one of the punishments prescribed by law. In the Indian Penal Code (Amendment) Bill, 1978 as passed by the Rajya Sabha and now pending in the 1,ok Sabha, S. 302 is proposed to be amended so as to provide that the normal punishment for murder shall be imprisonment for life and that only in certain cases of aggravating circumstances will the Court have discretion to award death sentences."

Then in paragraph 4 he proceeds to clarify as under :

"Even regarding these convicts the restriction imposed by S. 433A is not absolute for, the Constitutional power of the Governor under Article 161 to commute and remit sentences remains unaffected and can be exercised in each case in which the exercise of this power is considered suitable."

In paragraph 6 of the detailed note appended to the said letter, the legal position was explained thus:

"It may be pointed out that the restriction introduced by S. 433A does not apply to all life convicts. It applies only to those prisoners who are convicted of a capital offence i.e. an offence for which death is one of the punishments prescribed by law. Once the Indian Penal Code (Amendment) Bill becomes the law, offenders sentenced under

proposed S. 302(i) will not be covered by this provision as the offence will not be a capital offence. Thus in future the restriction introduced by S. 433A will not be applicable to them and will, in effect, cover only a very small number of cases. Even in this small number of cases the restriction will not in any way curb the Constitutional power to grant remission and commutation vested in the President or the Governor by virtue of Arts. 72 and 161."

There can be no doubt that by this letter it was clarified that S. 433A of the Code will apply to only those convicted of a capital offence and not to all life convicts. It is equally clear that the said provision was expected to apply to exceptionally heinous offences falling within the definition of 'capital offence' once the Indian Penal Code (Amendment) Bill became law. S. 433A was, therefore, expected to deny premature release before completion of actual 14 years of incarceration to only those limited convicts convicted of a capital offence, i.e., an exceptionally heinous crime specified in the second part of the proposed S. 302, IPC. Lastly it clarifies that S. 433A cannot and does not in any way affect the constitutional power conferred on the President/Governor under Art. 72,,'161 of the Constitution. It cannot, therefore, be denied that this letter and the accompanying note do give an impression that certain provisions of the Indian Penal Code (Amendment) Bill were interlinked with S. 433A of the Code.

Assuming the Criminal Procedure Code (Amendment) Bill and the Indian Penal Code (Amendment) Bill were intended to provide an integrated scheme of legislation can it be said that the failure on the part or the Lok Sabha to pass the latter renders the enactment of the former by which S. 433A was introduced in the Code, 'a legislative fraud' as counsel has liked to call it or to use a more familiar expression 'colourable exercise of legislative power? Counsel submitted that S. 433A was got introduced on the statute book by deception, in that, when the former Bill was made law an impression was given that the twin legislation which already been cleared by the Rajya Sabha on November 23, 1978 would in due course be cleared by the Lok Sabha also so that the application of S. 433A would be limited to capital offences only and would have no application to a large number of 'lifers'. It must be conceded that such would have been the impact if the Indian Penal Code (Amendment) Bill was passed by the Lok Sabha in the form in which the Rajya Sabha had approved it.

6. This is not a case of legislative incompetence to enact S. 433A. No such submission was made. Besides the question of vires of S. 433A of the Code has been determined by the Constitution Bench of this Court in Maru Ram's case (AIR 1980 SC 2147). This Court repelled all the thrusts aimed at challenging the constitutional validitv of S. 433A. But counsel submitted that the question was not examined from the historical perspective of the twin legislations. Counsel for the State submitted that it was not permissible for us to reopen the challenge closed by the Constitution Bench on the specious plea that a particular argument or plea was not canvassed or made before that Bench. The objection raised by counsel for the State Government is perhaps not without substance but we do not propose to deal with it because even otherwise we see no merit in the submission of the petitioner's counsel. It is only when a legislature which has no power to legislate frames a legislation so camouflaging it as to appear to be within its competence when it knows it is not, it can be said that the legislation so enacted is colourable legislation. In K. C. Gajapati Narayan Deo v. State f Orissa, (1954) 1 SCR 1: (AIR 1953 SC 375) the Orissa Agricultural Income-tax (Amendment) Act, 1950, was challenged on the ground of colourable legislation or a fraud on the Constitution as its real

purpose was to effect a drastic reduction in the amount of compensation payable under the Orissa Estates Abolition Act, 1952. The facts were that a Bill relating to the Orissa Estates Abolition Act, 1952 was published in the Gazette on January 3, 1950. It provided that any sum payable for agricultural income-tax for the previous year should be deducted from the gross asset of an estate for working out the net income on the basis whereof compensation pavable to the estate owner could be determined. Thereafter on January 8, 1950, a Bill to amend the Orissa Agricultural Incometax Act, 1947, was introduced to enhance the highest rate of tax from 3 annas to 4 annas in a rupee and to reduce the highest slab from Rs. 30,000/- to Rs. 20,000/ -. The next Chief Minister, however, dropped this Bill and introduced a fresh Bill enhancing the highest rate to 12 annas 6 pies in a rupee and reducing the highest slab to Rs. 15,000/- only. On the same becoming law it was challenged on the ground that the real purpose of the legislation was to drastically reduce the compensation payable to the estate owners. Mukherjea, J., who spoke for the Court observed as under (at p.379 of AIR):

> "It may be made clear at the outset that the doctrine of colourable legislation does not involve any question of bona fides or mala fides on the part of the legislature. The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand,. if the legislature lacks competency, the question of motive does not arise at all. Whether a statute is constitutional or not is thus always a question of power."

Thus the whole doctrine resolves itself into a question of competency of the concerned legislature to enact the impugned legislation. If the legislature has transgressed the limits of its powers and if such transgression is indirect, covert or disguised, such a legislation is described as colourable in legal parlance. The idea conveyed by the use of the said expression is that although apparently a legislature in passing the statute purported to act within the limits of its powers, it had in susbstance and reality transgressed its powers, the transgression being veiled by what appears on close scrutiny to be a mere pretence or disguise. In other words if in pith and substance the legislation does not belong to the subject falling within the limits of its power but is outside it, the mere form of the legislation will not be determinate of the legislative competence. In Sonapur Tea Co. Ltd. v. Must. Mazirunnessa, (1962) 1 SCR 724: (AIR 1962 SC 137), it was reiterated relying on Gajapati's case (AIR 1953 SC 375) that the doctrine of colourable legislation really postulates that legislation attempts to do indirectly what it cannot do directly. Such is not the case before us. It is nobody's contention that Parliament was not competent to amend the Criminal Procedure Code by which S. 433A was inserted. Whether or not the connecting Indian Penal Code (Amendment) Bill ought to have been cleared or not was a matter left to the wisdom of the Lok Sabha. Merely because the Criminal Procedure Bill was made law and the Indian Penal Code (Amendment) Bill was passed by the Rajya Sabha did not obligate the Lok Sabha to clear it. The Lok Sabha could have its own views on the proposed Indian' Penal. Code amendments. It may agree with the executive's policy reflected in the Bill, with or without modifications or not at all. Merely because in the subsequent instructions issued by the letter of July 10, 1979 and the accompanying note (Annex. 11) the Joint-Secretary had interlinked the two Bills, the Lok Sabha was under no obligation to adopt the measure as such representation could not operate as estoppel against it. Even the indirect attempt on the part of the High Court of Himachal Pradesh in the ragging case to force the State Government to legislate, State of Himachal Pradesh v. A Parent of a student of Medical College, Simla, (1985) 3 SCC 169: (AIR 1985 SC 910), was disapproved by this Court as a matter falling outside the functions and duties of the judiciary. It is, therefore, obvious that no question of mala fides on the part of the legislature was involved in the enactment of one legislation and failure to enact another. There is no

question of 'legislative fraud' or colourable legislation involved in the back drop of the legislative history of Section 433A of the Code as argued on behalf of the petitioner.

7. Counsel for the petitioner, however, tried to seek support from the Privy Council decision in W. R. Moram v. Deputy Commissioner of Taxation for N.S.W., 1940 AC 838 wherein the question to be considered was whether the legislative scheme was alcolourable one forbidden by S. 5(ii) of the Australian Constitution. There was no attempt to disguise the scheme as it was fully disclosed. The Privy Council while holding that the scheme was not a colourable legislation, observed that 'where there. is admittedly a scheme of proposed legislation, it seems to be necessary when the 'pith and substance' or 'scope and effect' of any one of the Acts is under consideration, to treat them together and to see how they interact. But that was a case where the scheme was carried out through enactments passed by the concerned legislatures. It is in that context that the above observations must be read and understood. In the present case also if both the Bills had become law, counsel would perhaps have been justified in demanding that in understanding or construing one legislation or the other, the scheme common to both must be kept in view and be permitted to interact. But where the linkage does not exist on account of the Indian Penal Code (Amendment) Bill not having become law we are unable to appreciate how Section 433A can be read down to. apply to only those classes of capital offences to which it would have applied had the said Bill been passed by the Lok Sabha in the terms in which it was approved by the Rajya Sabha. The language of Section 433A is clear and unambiguous and does not call for extrinsic aid for its interpretation. To accept the counsel's submission to read down or interpret Section 433A of the Code with the aid of the changes proposed by the Indian Penal Code (Amendment) Bill would tantamount to treating the provisions of the said Bill as forming part of the Indian Penal Code which is clearly impermissible. To put such an interpretation with the aid of such extrinsic material would result in violence to the plain language of Section 433A of the Code. We are, therefore, unable to accept even this second limb of the contention.

8. The law governing suspension, remission and commutation of sentence is both statutory and constitutional. The stage for the exercise of this power generally speaking is post-judicial, i.e., after the judicial process has come to an end. The duty to judge and to award the appropriate punishment to the guilty is a judicial function which culminates by a judgment pronounced in accordance with law. After the judicial function thus ends the executive function of giving effect to the judicial verdict commences. We first refer to the statutory provisions. Chapter III of IPC deals with punishments. The punishments to which the offenders can be liable are enumerated in Section 53, namely, (i) death (ii) imprisonment for life (iii) imprisonment of either description, namely, rigorous or simple (iv) forfeiture of property, and (v) fine. Section 54 empowers the appropriate Government to commute the puniqlment of death for any other punishment. Similarly Section 55 empowers the appropriate Government to commute the sentence of imprisonment for life for imprisonment of either description for a term not exceeding 14 years. Chapter XXXII of the Code, to which Section 433A was added, entitled "Execution, Suspension, Remission and Commutation of Sentences' contains Sections 432 and 433 which have relevance; the former confers power on the appropriate Government to suspend the execution of an offender's sentence or to remit the whole or any part of the punishment to which he has been sentenced while the latter confers power on such Government to commute (a) a sentence of death for any other punishment (b) a sentence of imprisonment for life, for imprisonment for a term not exceeding 14 years or for fine (c) a sentence of rigorous imprisonment for, simple imprisonment or for fine, and (d) a sentence of simple imprisonment or fine. It is in the context of the aforesaid provisions that we must read Section 433A which runs as under:

> "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 of hence for which death is one of the punishmerits provided by law, or where a sentence of death imposed on a person has been cornmuted 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."
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> The section begins with a non obstante clause - notwithstanding anything contained in Section 432 and proceeds to say that where a person is convicted for an offence for which death is one of the punishments and has been visited with the lesser sentence of imprisonment for life or where the punishment of an offender sentenced to death has been commuted under Section 433 into one of imprisonment for life, such offender will not be released unless he has served at least 14 years of imprisonment. The reason which impelled the legislature to insert this provision has been stated earlier. Therefore, one who could have been visited with the extreme punishment of death but on account of the sentencing Court's generosity was sentenced to the lesser punishment of imprisonment for life and another who actually was sentenced to death but on account of executive generosity his sentence was commuted under Section 433(a) for imprisonment for life have been treated under Section 433A as belonging to that class of prisoners who do not deserve to be released unless they have completed 14 years of actual incarceration. Thus the effect of Section 433A is to restrict the exercise of power under Sections 432 and 433 by the stipulation that the power will not be so exercised as would enable the two categories of convicts referred to in Section 433A to freedom before they have completed 14 years of actual imprisonment. This is the legislative policy which is clearly discernible from the plain language of Section 433A of the Code. Such prisoners constitute a single class and have, therefore., been subjected to the uniform requirement of suffering at least 14 years of internment.

9. Counsel for the petitioner next submitted that after this Court's decision in Bhagirath's case (AIR 1985 SC 1050) permitting the benefit of set off under Section 428 in respect of the detention period as an under-trial, the ratio of the decision in Godse's case (AIR 1961 SC 600).must be taken as impliedly disapproved. We see no basis for this submission. In Godse's case the convict who was sentenced to transportation for life had earned remission for 2963 days during his internment. He claimed that in view of Section 57 read with Section 53A, IPC, the total period of his incarceration could not exceed 20 years which he had completed, inclusive of remission, and, therefore, his continued detention was illegal. Section 57, IPC reads as follows:

> "57. Fractions of terms of punishment - In calculating fractions of terms of punishment imprisonment for life shall be reckoned as' equivalent to imprisonment for twenty years."

The expression 'imprisonment for life' must be read in the context of Section 45, IPC. Under that provision the word 'life' denotes the life of a human being unless the Coritrary appears from the context. We have seen that the punishments are set out in Section 53, imprisonment for life being one of them. Read in the light of Section 45 it would ordinarily mean imprisonment for the full or complete span of life. Does Section 57 convey to the contrary? Dealing with this contention based on the language of Section 57, this Court observed in Godsc's case at pages 44445 (of 1961 (3) SCR

440: at pp. 602-03 of AIR 1961 SC 600) as under:

> "Section 57 of the Indian Penal Code has no real bearing on the question raised before us. For calculating fractions of terms of punishment the section provides that transportation for life shall be regarded as equivalent to imprisonment for twenty years. It does not say that transportation for life shall be deemed to be transportation for twenty years for all purposes; nor does the amended section which substitutes the words "imprisonment for life" for "transportation for life" enable the drawing of any such allembracing fiction. A sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or imprisonment for the whole of the remaining period of the convicted person's natural life."

This interpretation of S. 57 gets strengthened if we refer to Ss. 65, 116, 119, 120 and 511, of the Indian Penal Code which fix the term of imprisonment thereunder as a fraction of the 'maximum fixed for the principal offence. It is for the purpose of working out this fraction that it became necessary to provide that imprisonment, for life shall be reckoned as equivalent to imprisonment for 20 years. If such a provision had not been made it would have been impossible to work out the fraction of an indefinite term. In order to work out the fraction of punishment provided in Sections such as those enumerated above, it was imperative to lay down the equivalent term for life imprisonment.

10. The second contention urged before the Court in Godse's case was based on the Bombay Rules governing 'the remission system framed in virtue of the provisions contained in the Prisons Act, 1894. This Court pointed out that the Prisons Act did not confer on any authority a power to commute or remit sentences. The Remission Rules made thereunder had, therefore, to be confined to the scope and ambit of that statute and could not be extended to other statutes. Under the Bombay Rules three types of remissions for good conduct were allowed and for working them out transportation for life was equated to 15 years of actual imprisonment. Dealing with Godse's plea for premature release on the strength of these rules this Court observed at page 447 (of SCR) : (at p. 604 of AIR) as under:

> "The rules framed under the Prisons Act enable such a person to remission - ordinary, special and State - and the said remissions will be given credit towards his term of imprisonment. For the purpose of working out the remissions the sentence of transportation for life is ordinarily equated with a definite period, but it is only for that particular purpose and not for any other purpose. As the sentence of transportation for life or its prison equivalent the life imprisonment is one of indefinite duration, the remissions so earned do not in practice help such a convict as it is not possible to predicate the time of his death. That is why the rules provide for a procedure to enable an appropriate Government to remit the sentence under Section 401 (now Section 432) of the Code of Criminal Procedure on a consideration of the relevant factors including the period of remissions earned. The question of remission is exclusively within province of the appropriate Government; and in this case it is admitted that though the appropriate Government made certain remissions under Section 401 of the Code of Criminal Procedure, it did not remit the entire sentence."
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> On this line of reasoning the submission of counsel that if the Court were to take the view that transportation for life or imprisonment for life ensures till the last breath of the convict passes out, the entire scheme of remissions framed under Prisons Act or

> any like statute and the whole exercise of crediting remissions to the account of the convict would collapse was spurned. This Court came to the conclusion that the Remission Rules have a limited scope and in the case of a convict undergoing sentence of transportation for life or imprisonment for life it acquires significance only if the sentence. is commuted or remitted, subject to Section 433A of the Code or in exercise of constitutional power under Art. 72/ 161.

11. In Maru Ram's case (1981 (1) SCR 1196 : AIR 1980 SC 2147) the Constitution Bench reaffirmed the ratio of Godse's case (AIR 1961 SC 600) and held that the nature of a life sentence is incarceration until death; judicial sentence for imprisonment for life cannot be in jeopardy merely because of long accumulation of remissions. Release would follow only upon an order under Section 401 of the Criminal Procedure Code, 1898 by the appropriate Government or on a clemency order in exercise of power under Art. 72 / 161 of the Constitution. At page 1220 (of SCR) (at p. 2158 of AIR) the Constitution Bench expressed itself thus :

> "Ordinarily, where a sentence is for a definite term, the calculus of remissions may benefit the prisoner to instant release at that point where the subtraction result is zero. Here, we are concerned with life imprisonment and so we come upon another concept bearing on the nature of sentence which has been highlighted in Godse's case. Where the sentence is indeterminate or of uncertain duration, the result of subtraction from an uncertain quantity is still an uncertain quantity and release of the prisoner cannot follow except on some fiction of quantification of a sentence of uncertain duration."
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> Referring to the facts of Godse's case and affirming the view that the sentence of imprisonment for life enures up to the last breath of the convict, this Court proceeded to state as under (at p. 2159, para 25 of AIR):
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> "Since death was uncertain, deduction by way of remission did not yield any tangible date for release and so the prayer of Godse was refused. The nature of a life sentence is incarceration until death, judicial sentence of imprisonment for life cannot be in jeopardy merely because of the long accumulation of remissions."
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> It is, therefore, clear from the aforesaid observations that unless the sentence for life imprisonment is commuted or remitted as stated earlier by the appropriate authority under the provisions of the relevant law, a convict is bound in law to serve the entire life term in prison; the rules framed under the Prisons Act or like statute may enable such a convict to earn remissions but such remissions will not entitle him to release before he has completed 14 years of incarceration in view of S. 433A of the Code unless of course power has been exercised under Art. 72/161 of the Constitution.

12. It will thus be seen from the ratio laid down in the aforesaid two cases that where a person has been sentenced to imprisonment for life the remissions earned by him during his internment in prison under the relevant remission rules have a limited scope and must be confined to the scope and ambit of the said rules and do not acquire significance until the sentence is remitted under Section 432, in which case the remission would be subject to limitation of Section 433A of the Code, or constitutional power has been exercised under Art. 72/161 of the Constitution. In Bhagirath's case (AIR 1985 SC 1050) the question which the Constitution Bench was required to consider was whether a person sentenced to imprisonment for life can claim the benefit of S. 428 of

the Code which, inter alia, provides for setting off the period of detention undergone by the accused as an under-trial against the sentence of imprisonment ultimately awarded to him. Referring to Section 57, I.P.C. the Constitution Bench reiterated the legal position as under (at p. 1053, Para 9 of AIR):

> "The provision contained in S. 57 that imprisonment for life has' to be reckoned as equivalent to imprisonment for 20 years is for the purpose of calculating fractions of terms of punishment. We cannot press that provision into service for a wider purpose."
>
> These observations are consistent with the ratio laid down in Godse (AIR 1961 SC 600) and Maru Ram's cases (AIR 1980 SC 2147). Coming next to the question of set off under S. 428 of the Code, this Court held (at p. 1053, Para 1 1 of AIR):
>
> "The question of setting off the period of detention undergone by an accused as an under-trial prisoner against the sentence of life imprisonment can arise only if an order is passed be the appropriate authority under S. 432 or S. 433 of the Code. In the absence of such order, passed generally or specially, and apart from the provisions, if any, of the relevant Jail Manual, imprisonment for life would mean, according to the rule in Gopal Vinayak Godse, imprisonment for the remainder of life."
>
> We fail to see any departure from the ratio of Godse's case; on the contrary the aforequoted passage clearly shows approval of that ratio and this becomes further clear from the final order passed by the Court while allowing the appeal/ writ petition. The Court directed that the period of detention undergone by the two accused as under-trial prisoners would be set off against the sentence of life imprisonment imposed upon them, subject to the provisions contained in S. 433A and, 'provided that orders have been passed by the appropriate authority under Section433 of the Code of Criminal Procedure.' These directions make it clear beyond any manner of doubt that just as in the case of remissions so also in the case of set off the period of detention as under-trial would ensure to the benefit of the convict provided the appropriate Government has chosen to pass an order under S. 432/433 of the Code. The ratio of Bhagirath's case, therefore, does not run counter to the ratio of this Court in the case of Godse or Maru Ram.

13. Under the Constitutional Scheme the President is the Chief Executive of the Union of India in whom the executive power of the Union vests. Similarly, the Governor is the Chief Executive of the concerned State and in him vests the executive power of that State, Arts. 72 and 161 confer the clemency power of pardon, etc., on the President and the State Governors, respectively. Needless to say that this constitutional power would override the statutory power contained in Ss. 432 and 433 and the limitation of S. 433A of the Code as well as the power conferred by Ss. 54 and 55, I.P.C. No doubt, this power has to be exercised by the President/ Governor on SC1803 the advice of his Council of Ministers, How this power can be exercised consistently with Art. 14 of the Constitution was one of the questions which this Court was invited to decide in Maru Ram's case (1981 (1) SCR: AIR 1980 SC 2147). In order that there may not be allegations of arbitrary exercise of this power this Court observed at pages 124344 (of SCR) : (at p. 2172 of AIR) as under:.

> "The proper thing to do, if Government is to keep faith with the founding fathers, is

> to make rules for its own guidance in the exercise of the pardon power keeping, of corse, a large residuary power to meet special situations or sudden developments. This will exclude the vice of discrimination such as may arise where two persons have been convicted and sentenced in the same case for the same degree of guilt but one is released and the other refused, for such irrelevant reasons as religion, caste, colour or political loyalty."

Till such rules are framed this Court thought that extant remission rules framed under the Prisons Act or under any other similar legislation by the State Government may provide effective guidelines of a recommendatory nature helpful to the Government to release the prisoner by remitting the remaining term, It was, therefore, suggested that the said rules and remission schemes be continued and benefit thereof be extended to all those who come within their purview. At the same time the Court was aware that special cases may require different considerations and 'the wide power of executive clemency cannot be bound down even by selfcreated rules.' Summing up its finding in paragraph 10 at page 1249 (of SCR) : (at p. 2175, para 10 of AIR), this Court observed :

> "We regard it as fair that until fresh rules are made in keeping with the experience gathered, current social conditions and accepted penological thinking - a desirable step, in our view - the present remissions and release schemes may usefully be taken as guidelines under Arts. 72 and 161 and orders for release passed. We cannot fault the Government, if in some intractably savage delinquents, S. 433A is itself treated as a guideline for exercise of Articles 72 and 161. These observations of ours are recommandatory to avoid a hiatus, but it is for Government, Central or State, to decide whether and why the current Remission Rules should not survive until replaced by a more wholesome scheme."

It will be obvious from the above that the observations were purely recommendatory in nature.

14. In Kehar Singh's case (AIR 1989 SC 653) on the question of laying down guidelines for the exercise of power under Art. 72 of the Constitution this Court observed in paragraph 16 as under:

> "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 Art. 72 is of the widest amplitude, can contemplate a myriad kinds of 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."

These observations do indicate that the Constitution Bench which decided Kehar Singh's case was of the view that the language of Art. 72 itself provided sufficient guidelines for the exercise of power and having regard to its wide amplitude and the status of the function to be discharged thereunder, it was perhaps unnecessary to spell out specific guidelines since such guidelines may not be able to conceive of all myriad kinds and categories of cases which may come up for the exercise of such power. No doubt in Maru Ram's case (AIR 1980 SC 2147) the Constitution Bench did recommend the framing of guidelines for the exercise of power under Arts. 72 and 161 of the Constitution. But that was a mere recommendation and not a ratio decidendi having a binding effect on the

Constitution Bench which decided Kehar Singh's case. Therefore, the observation made by the Constitution Bench in Kehar Singh's case does not upturn any ratio laid down in Maru Ram's case. Nor has the Bench in Kehar Singh's case said anything with regard to using the provisions of extant Remission Rules as guidelines for the exercise of the clemency powers.

15. It is true that Arts. 72 and 161 make use of two expressions 'remissions' with regard to punishment and 'remit' in relation to sentence but we do not think it proper to express any opinion as to the content and amplitude of these two expressions in the abstract in the absence of a fact-situation. We, therefore, express no opinion on this question formulated by the learned counsel for the petitioner.

16. Lastly the learned counsel for the petitioner raised a hypothetical question whether it was permissible in law to grant conditional premature release to a life convict even before completion of 14 years of actual imprisonment, which release would tantamount to the prisoner serving time for the purpose of S. 433A of the Code? It is difficult and indeed not advisable to answer such a hypothetical question without being fully aware of the nature of conditions imposed for release. We can do no better than quote the following observations made in Maru Ram's case at page 1247 (of 1981 (1) SCR 1196) : (at p. 2174 of AIR 1980 SC 2147):

> "..... the expressions 'prison' and 'imprisonment' must receive a wider connotation and include any place notified as such for detention purposes. 'Stone-walls and iron bars do not a prison make'; nor are 'stone walls and iron bars'a sine qua non to make a jail. Open jails are capital instances. Any life under the control of the State whether within high-walled or not may be a prison if the law regards it as such. House detentions, for example, Palaces, where Gandhiji was detained were prisons. Restraint on freedom under the prison law is the test. Licensed releases where instant recapture is sanctioned by the law and likewise parole, where the parole is no free agent, and other categories under the invisible fetters of the prison law may legitimately be regarded as imprisonment. This point is necessary to be cleared even for computation of 14 years under S. 433A.

Therefore, in each case, the question whether the grant of conditional premature release answers the test laid down by this Court in the aforequoted passage would depend on the nature of the conditions imposed and the circumstances in which the order is passed and is to be executed. No general observation can be made and we make none.

17. In paragraph 10 of the memorandum of the writ petition, three reasons have been assigned for invoking this Court's jurisdiction under Art. 32 of the Constitution, viz., (i) the questions involved in this petition will affect the right of a large body of life convicts seeking premature release; (ii) this Court's judgment in Bhagirath's case (AIR 1985 SC 1050) deviated from the ratio laid down in Godse's case (AIR 1961 SC 600) and, therefore, the entire law of remissions needed a review; and (iii) the High Court of Rajasthan had refused to examine the merits of the various important questions of law raised before it. It is on account of the fact that this petition was in the nature of a representative petition touching the rights of a large number of convicts of the categories referred to in S. 433A of the Code, that we have dealt with the various questions of law in extenso. Otherwise the petition could have been disposed of on the narrow ground that even though in view of S. 433A of the Code, premature release could not be ordered under Ss. 432 and 433 of the Code read with 1958 Rules until the petitioner had completed 14 years of actual imprisonment, his release could be considered in exercise of powers under Arts. 72 and 161 of the Constitution treating the 1958 Rules

guidelines, if necessary.

18. The relief claimed in the petition is two-fold, namely, (a) to grant a mandamus to the appropriate Government for the premature release of the petitioner by exercising constitutional power with the aid of 1958 Rules and (b) to declare the petitioner's continued detention as illegal and void. The petitioner has not completed 14 years of actual incarceration and as such he cannot invoke Ss. 432 and 433 of the Code. His continued detention is consistent. with Section 433A of the Code and there is nothing on record to show that it is otherwise illegal and void. The outcome of his clemency application under the Constitution is not put in issue in the present proceedings if it has been rejected and if the same is pending despite the directive of the High Court it would be open to the petitioner to approach the High Court for the compliance of its order. Under the circumstance no mandamus can issue. The writ petition must, therefore, fail. It is hereby dismissed. Rule discharged.

Petition dismissed.

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