

Swaran Singh

Vs

State of U.P

(CJI M. M. Punchhi, K. T. Thomas, M. Srinivasan JJ)

05.0.1998

JUDGMENT

THOMAS J

1. Shri Doodh Nath, third respondent in this appeal, was found guilty of murdering one Joginder Singh. He was convicted and sentenced to imprisonment for life along with some other persons who too were involved in the same offence. His appeal to the High Court and Special Leave Petition to this Court did not give any help to extricate himself from the penal clutches of the offence. But within a period of less than two years, he succeeded in escaping from prison as the Governor of Uttar Pradesh granted remission of the remaining long period of his life sentence. That step of the Constitutional functionary was far beyond the tolerance capacity of the bereaved members of the family of deceased Joginder Singh and hence his son (the present appellant) moved the Allahabad High Court challenging the aforesaid action of the Governor. A division bench of the High Court, which heard his writ petition dismissed it on the premise that a decision of the Governor under Article 161 of the Constitution of India is not justiciable. That necessitated the appellant to reach this Court with this appeal by special leave.

2. Shri Doodh Nath was an M.L.A. of the U.P. Assembly when he was convicted of the offence of murder. He was unseated as a sequel to the said conviction and his wife succeeded in becoming his successor in the same constituency. Appellant alleged that when Governor passed the order granting remission of sentence Shri Doodh Nath was already accused in five other criminal cases involving serious offences. That and many other relevant materials were not posted before the Governor when he considered the question of granting reprieve to the convict, according to the appellant.

3. In fact, the same Governor had, on an earlier occasion (on 7.6.1990) dismissed a petition filed by Shri Doodh Nath for grant of reprieve and remission of the sentence passed on him by the Court in the very same case of murder of Joginder Singh. Undaunted by the rejection of his earlier clemency motion, Shri Doodh Nath ventured to present a second petition for the same purpose within a period of about five months, that too on almost the same grounds which were not found favour with the Governor on the earlier occasion. When he moved for remission on the second occasion, he was out on parole. It is the case of the appellant that Doodh Nath did not even mention in his second petition for pardon that an earlier petition for the same purpose was rejected by the Governor.

4. The police officials whose report was called for in connection with the consideration of the second application for grant of remission sent up a report which was unfavourable to Doodh Nath. But the

same police officials after one week, forwarded another report containing recommendation for remitting for the sentence as prayed for by Doodh Nath on "humanitarian grounds."

5. On 4.1.1991, the widow of Joginder Singh (mother of the present appellant) made a representation to the Governor pointing out facts which she considered relevant for rejecting the clemency petition. On 9.2.1991, the Governor passed the impugned order under Article 161 of the Constitution in the following terms:

"The Governor of Uttar Pradesh under the special circumstances by exercising the power under Article 161 of the Constitution of India remits the remaining sentence of the convict Doodh Nath, son of Shri Deoraj, resident of Khairuddinpur, P.S. Mariahun, District Jaunpur, who is undergoing punishment under sections 302/148/149 IPC in S.T.No.102 of 1980 passed by Third Additional Sessions Judges, Jaunpur, sentencing life imprisonment on 9.2.1982, and directs that the aforesaid convict accused be released from jail on furnishing two sureties and personal bond in the same amount to the satisfaction of the District Magistrate, Jaunpur."

6. In the High Court, when challenge was made against the said order, an affidavit was filed by Shri Brij Bhushan Chaturvedi who was then the Joint Secretary of Home (Jail) in the State of U.P. in which he admitted that a petition filed by Doodh Nath in April, 1990 was dismissed on 5.6.1990 and that next application was filed in November, 1990. The Joint Secretary conceded that Shri Doodh Nath had undergone only a very small portion of the life term, i.e., two years and three months when he secured the remission.

7. It is interesting to note that another affidavit was filed by Shri Sunil Agarwal who held the same office of Joint Secretary, Home (Jail), in the same High Court, when the writ petition filed by the appellant was under consideration. (perhaps, Shri Sunil Agarwal would have been the successor in office of the other deponent Shri Brij Bhushan Chaturvedi). In the second affidavit the Joint Secretary conceded that the five criminal cases mentioned by the appellant involving serious offences against Doodh Nath were still pending at the time of grant of remission and that Governor was not apprised of that fact. He also pointed out that the fact of the rejection of the earlier mercy petition was not brought to the notice of the Governor. The deponent of that affidavit has further stated that:

"In fact the Governor's acceptance was obtained on the basis of false and misleading recommendation, wherein it had not been stated that the request of the petitioner was rejected only six months ago and it did not meet the various guidelines given for the purpose were not taken into consideration. It has been wrongly stated that there was no adult member in the family of the convict while his wife is a sitting member of Legislative Assembly. The recommendation also stated that the district magistrate and the police have requested sympathetic consideration but they did not categorically recommend acceptance of the mercy petition. It is a fact that the recommendation itself mentions that the case may not be treated as precedent for others. It has shown that it was not recommended on merits. The recommendation in the case was made on extraneous and political consideration which is evident from the mercy petition (filed as annexure 'C' to the petition). The fact that the matter was recommended be reconsidered on the basis of a letter addressed to the Chief Minister by several MLAs."

8. On our direction, the Standing Counsel for the State of U.P. has produced the files concerning the grant of remission of sentence to Doodh Nath. We have noted therefrom that the Governor was not told of certain vital facts concerning the prisoner such as his involvement in five other criminal cases of serious offences, the rejection of his earlier clemency petition which was filed on the same grounds, the report of the jail authorities that his conduct inside the jail was far from satisfactory, and out of two years and five months he was supposed to have been in jail, he was in fact on parole during the substantial part thereof.

9. Learned counsel for the third respondent Doodh Nath resisted this appeal on the main plank that any order issued by the President of India under Article 72 of the Constitution of India or by the Governor of a State under Article 161 thereof is non-justiciable and hence the Court cannot look into the reasons which persuaded the Constitutional functionary to grant reprieve or remission to a prisoner.

10. A Constitution Bench of this Court has considered the scope of judicial review of exercise of powers under Articles 72 and 161 of the Constitution of India in *Kehar Singh & Anr. Vs. Union of India* and another (1989) 1 SCC 204. The bench after observing that the Constitution of India is a constitutive document which is fundamental to the governance of the country under which people of India have provided a constitutional polity consisting of certain primary organs, institutions and functionaries to exercise the powers provided in the Constitution, proceeded to add thus:

"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 Constitution Bench laid down that judicial review of the Presidential order cannot be exercised on the merits except within the strict limitations defined in *Maru Ram Vs. Union of India & Ors.* (1981) 1 SCC 107. The limitations of judicial review over exercise of powers under Articles 72 and 161 of the Constitution have been delineated in the said decision by the Constitution Bench. It has been observed that "all public power, including constitutional power, shall never be exercisable arbitrarily or mala fide, and ordinarily guidelines for fair and equal execution are guarantors of valid play of power". The bench stressed the point that the power being of the greatest moment, cannot be a law unto itself but it must be informed by the finer canons of constitutionalism.

11. It was therefore, suggested by the bench to make rules for its own guidance in the exercise of the pardon power keeping a large residuary power to meet special situations or sudden developments.

12. In view of the aforesaid settled legal position, we cannot accept the rigid contention of the learned counsel for the third respondent that this Court has no power to touch the order passed by the Governor under Article 161 of the Constitution. If such power was exercised arbitrarily, mala fide or in absolute disregard of the finer canons of the constitutionalism, the by-product order cannot get the approval of law and in such cases, the judicial hand must be stretched to it.

13. In the present case, when the Governor was not posted with material facts such as those indicated above, the Governor was apparently deprived of the opportunity to exercise the powers in a fair and just manner. Conversely, the order now impugned fringes on arbitrariness. What the Governor would have ordered if he were apprised of the above facts and materials is not for us to consider now because the Court cannot then go into the merits of the grounds which persuaded the Governor in taking a decision in exercise of the said power. Thus, when the order of the Governor impugned in

these proceedings is subject to judicial review within the strict parameters laid down in Maru Ram Case (supra) and reiterated in Kehar Singh Case (supra), we feel that the Governor shall reconsider the petition of Doodh Nath in the light of those materials which he had no occasion to know earlier.

14. We, therefore, quash the impugned order to enable the Governor of U.P. to pass a fresh order in the petition filed by the third respondent Doodh Nath for remission of the sentence in the light of the observations made above.