

CASE NO.:
Writ Petition (crl.) 284-285 of 2005

PETITIONER:
Epuru Sudhakar & Anr.

RESPONDENT:
Govt. of A.P. & Ors.

DATE OF JUDGMENT: 11/10/2006

BENCH:
S. H. KAPADIA

JUDGMENT:
J U D G M E N T

KAPADIA, J.

Although, I respectfully agree with the conclusion containing the opinion of brother, Arijit Pasayat, the importance and intricacies of the subject matter, namely, judicial review of the manner of exercise of prerogative power has impelled me to elucidate and clarify certain crucial aspects. Hence this separate opinion.

Pardons, reprieves and remissions are manifestation of the exercise of prerogative power. These are not acts of grace. They are a part of Constitutional scheme. When a pardon is granted, it is the determination of the ultimate authority that public welfare will be better served by inflicting less than what the judgment has fixed.

The power to grant pardons and reprieves was traditionally a Royal prerogative and was regarded as an absolute power. At the same time, even in the earlier days, there was a general rule that if the King is deceived, the pardon is void, therefore, any separation of truth or suggestion of falsehood vitiated the pardon. Over the years, the manifestation of this power got diluted.

The power to grant pardons and reprieves in India is vested in the President and the Governor of a State by virtue of Articles 72 and 161 of the Constitution respectively.

Exercise of Executive clemency is a matter of discretion and yet subject to certain standards. It is not a matter of privilege. It is a matter of performance of official duty. It is vested in the President or the Governor, as the case may be, not for the benefit of the convict only, but for the welfare of the people who may insist on the performance of the duty. This discretion, therefore, has to be exercised on public consideration alone. The President and the Governor are the sole judges of the sufficiency of facts and of the appropriating of granting the pardons and reprieves. However, this power is an enumerated power in the Constitution and its limitations, if any, must be found in the Constitution itself. Therefore, the principle of Exclusive Cognizance would not apply when and if the decision impugned is in derogation of a Constitutional provision. This is the basic working test to be applied while granting pardons, reprieves, remissions and commutation.

Granting of pardon is in no sense an overturning of a judgment of conviction, but rather it is an Executive action that mitigates or set aside the punishment for a crime. It eliminates the effect of conviction without addressing the defendants guilt or innocence. The controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter. It can no longer be said that prerogative power is ipso facto immune from judicial review. An undue exercise of this power is to be deplored. Considerations of religion, caste or

political loyalty are irrelevant and fraught with discrimination. These are prohibited grounds. Rule of Law is the basis for evaluation of all decisions. The supreme quality of the Rule of Law is fairness and legal certainty. The principle of legality occupies a central plan in the Rule of Law. Every prerogative has to be the subject to the Rule of Law. That rule cannot be compromised on the grounds of political expediency. To go by such considerations would be subversive of the fundamental principles of the Rule of Law and it would amount to setting a dangerous precedent. The Rule of Law principle comprises a requirement of "Government according to law". The ethos of "Government according to law" requires the prerogative to be exercised in a manner which is consistent with the basic principle of fairness and certainty. Therefore, the power of executive clemency is not only for the benefit of the convict, but while exercising such a power the President or the Governor, as the case may be, has to keep in mind the effect of his decision on the family of the victims, the society as a whole and the precedent it sets for the future.

The power under Article 72 as also under Article 161 of the Constitution is of the widest amplitude and envisages myriad kinds and categories of cases with facts and situations varying from case to case. The exercise of power depends upon the facts and circumstances of each case and the necessity or justification for exercise of that power has to be judged from case to case. It is important to bear in mind that every aspect of the exercise of the power under Article 72 as also under Article 161 does not fall in the judicial domain. In certain cases, a particular aspect may not be justiciable. However, even in such cases there has to exist requisite material on the basis of which the power is exercised under Article 72 or under Article 161 of the Constitution, as the case may be. In the circumstances, one cannot draw the guidelines for regulating the exercise of the power.

As stated above, exercise or non-exercise of the power of pardon by the President or the Governor is not immune from judicial review. Though, the circumstances and the criteria to guide exercise of this power may be infinite, one principle is definite and admits of no doubt, namely, that the impugned decision must indicate exercise of the power by application of manageable standards and in such cases courts will not interfere in its supervisory jurisdiction. By manageable standards we mean standards expected in functioning democracy. A pardon obtained by fraud or granted by mistake or granted for improper reasons would invite judicial review. The prerogative power is the flexible power and its exercise can and should be adapted to meet the circumstances of the particular case. The Constitutional justification for judicial review, and the vindication of the Rule of Law remain constant in all areas, but the mechanism for giving effect to that justification varies.

In conclusion, it may be stated that, there is a clear symmetry between the Constitutional rationale for review of statutory and prerogative power. In each case, the courts have to ensure that the authority is used in a manner which is consistent with the Rule of Law, which is the fundamental principle of good administration. In each case, the Rule of Law should be the overarching constitutional justification for judicial review. The exercise of prerogative power cannot be placed in straight jacket formulae and the perceptions regarding the extent and amplitude of this power are bound to vary. However, when the impugned decision does not indicate any data or manageable standards, the decision amounts to derogation of an important Constitutional principle of Rule of Law.

We appreciate the assistance rendered by Mr. Soli J. Sorabjee as amicus curiae in this matter.

With these words, I agree with the conclusions in the opinion of brother, Arijit Pasayat.