

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.2058 OF 2011

(Arising out of Special Leave Petition (C) No.11544/08

Narayan Dutt & others ...Appellant(s)

- Versus -

State of Punjab & another ...Respondent(s)

With

Civil Appeal No.2059 of 2011

[Arising out of SLP (C) No.5910/11 (CC No.3090/10)]

State of Punjab ...Appellant(s)

- Versus -

Rajinder Pal Singh & others ...Respondent(s)

J U D G M E N T

GANGULY, J.

1. Delay condoned.
2. Leave is granted in both the special leave petitions. They are heard together as common questions of facts and law are involved.

3. One Kiranjit Kaur, daughter of a handicapped school master, was abducted when she was returning from school on 29.07.1997, and then gang-raped and murdered by Gurprit Singh, Jagraj Singh, Desh Raj and Partap Singh. The Hon'ble Additional Sessions Judge, Barnala, after holding the trial convicted and sentenced them to undergo life imprisonment. In the area an Action Committee was formed to ensure that accused persons, involved in the gang-rape and murder of that girl, were brought to book. That committee consisted, inter-alia, of Manjit Singh, Prem Kumar and Narayan Dutt, accused in the present case, as its members. Ultimately, the accused persons in the case of gang-rape and murder of Kiranjit Kaur were punished, as aforesaid.

4. On 3.03.2001, Beant Singh (father of Jagraj Singh), Dalip Singh (grandfather of Jagraj Singh), Gurnam Singh and Rajinder Pal Singh

(nephew of Dalip Singh), while coming out of Court, after hearing a criminal case, were attacked by a mob consisting of 7 persons, namely- Sukhwinder Singh, Labh Singh and Avtar Singh (all armed with kirpans), Bakhtaur Singh (armed with a ghop), Manjit Singh (armed with a kirch), along with Prem Kumar and Narayan Dutt (both without any weapon in their hands). Apparently, Bakhtaur Singh gave a blow to the head of Dalip Singh, who was being allegedly held by Prem Kumar and Narayan Dutt, which resulted in his death.

5. Beant Singh lodged an FIR on the same day under Sections 307, 148, 149 and 120-B of IPC and investigation commenced in the matter. During the course of investigation Dalip Singh had passed away, and thus, the charge under Section 302 IPC was added. After investigation, the police, in its report under Section 173 Cr.P.C, found that Manjit Singh, Prem Kumar and Narayan

Dutt were innocent. Thus, charge sheet was filed by the police only against the remaining four accused under Sections 302/34, 326, 325, 324 and 323 IPC and the case was committed to the Court of Sessions for trial. At the stage of trial, Beant Singh moved an application on 11.9.2001 under Section 319 Cr.P.C., whereupon the Sessions Judge by an order dated 19.9.2001 summoned Manjit Singh, Prem Kumar and Narayan Dutt. The Sessions Judge found a prima-facie case against them and framed charges against all accused, including those three, under Sections 302, 148, 326, 325, 324 and 323 of IPC on 6.2.2002.

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6. However, the prosecution then filed an application dated 29.10.2002 under section 321 Cr.P.C., seeking to withdraw the case against Manjit Singh, Prem Kumar and Narayan Dutt and that was disallowed by the Trial Court vide order dated 7.11.2002.

7. Aggrieved, the accused filed criminal revision petitions (No. 2248/2002 and 2413/2002), which were dismissed by the High Court of Punjab and Haryana vide common order dated 14.10.2003. A Special leave petition filed by the State of Punjab against the order of the High Court dated 14.10.2003 was also dismissed by this Court.

8. Accordingly, the trial commenced against all the 7 accused.

9. The Additional Sessions Judge, Barnala, convicted all the accused by judgment and order dated 28.03.2005 and convicted them under Sections 148 IPC and Sections 302, 302/149, 323, 149, 324, 325 and 326 on various counts and passed an order of life sentence on 30.03.2005.

10. All the accused appealed before the High Court of Punjab and Haryana. During the pendency of the appeals, Narayan Dutt, Manjit Singh and Prem Kumar also filed petitions under Article 161 of the Constitution of India before the Governor of Punjab.

11. The Governor of Punjab, vide order dated 24.07.2007, in exercise of his powers under Article 161, granted pardon to Narayan Dutt, Prem Kumar and Manjit Singh and they were directed to be released immediately.

12. Challenging that order Rajinder Pal Singh filed a writ petition before the High Court of Punjab and Haryana.

13. The criminal appeals of the accused and the writ petition of Rajinder Pal Singh were heard together by the High Court of Punjab and Haryana. The High Court framed two questions for consideration:

a. Whether case of the prosecution is proved against all the appellants by evidence on record?

b. Whether the order of pardon is sustainable in law?

14. Vide the impugned common judgment dated 11.03.2008, the High Court allowed the writ petition and set aside the order of pardon of the Governor of Punjab. It gave the benefit of doubt to Prem Kumar and Narayan Dutt, and allowed their appeals by acquitting them. However, the conviction and sentence of Sukhwinder Singh, Labh Singh, Bakhtaur Singh, Avtar Singh and Manjit Singh was upheld by the High Court and it was of the opinion that the prosecution had successfully established the offences against them.

15. Against the said impugned judgment dated 11.03.2008, the State of Punjab filed Special Leave Petition (CC No.3090/2010) before this Court. Accused Narayan Dutt, Prem Kumar and

Manjit Singh also filed another Special Leave Petition (No.11544/2008) before this Court. Both the Special Leave Petitions were directed against the order of the High Court whereby the order of pardon by the Governor of Punjab was set aside.

16. In the background of these facts, questions of law arising before us are:

- a. Whether the power under Article 161 is subject to judicial review and if yes, to what extent?
- b. Whether the Governor had rightly exercised his power to pardon under Article 161?

17. The order of the Governor dated 6.8.2007, which is relevant in the present context, reads as follows:

"I have considered the matter carefully. Ever since the lodging of FIR, there has been a widespread public belief that Sarvshri Narain Dutt, Prem Kumar and Manjit Singh had been falsely implicated in the murder of Dalip Singh, because of their role as leaders of the Action Committee set up to secure justice for the

late Kiranjit Kaur's family. This has been corroborated by the investigation into the case, during the course of which, the above three persons were found to be innocent. The Intelligence Wing has also supported the innocence of these persons.

It is also noteworthy that out of the 7 persons accused and convicted for the murder of Dalip Singh, pardon has been sought only for the three persons that have been found to be innocent. This benefit has not been proposed for the other 4 accused. Further, the recommendation for pardon had initially been moved by the previous government, and has also been endorsed by the present one. Hence, the recommendation for pardon seems to be objective and bona fide.

The courts have held that the power under Article 72 and 161 is a wide power, conferred inter alia with the purpose of doing justice in cases even where the courts might have convicted a person.

In view of the above, I exercise my powers under Article 161 and grant "pardon" to Sarvshri Narain Dutt, Prem Kumar and Manjit Singh in FIR No. 56 dated 03.03.2001 P.S- Kotwali Barnala."

18. Article 161 of the Constitution of India confers on the Governor of a State the right to grant pardons, remissions, reprieves or commute the sentence of any person convicted of any

offence against any law relating to a matter to which the executive power of the State extends.

19. The nature and scope of the power of pardon and the extent of judicial review over such power has come up for consideration in a catena of cases and has now virtually crystallised into a rule of law.

20. In Maru Ram & Ors. v. Union of India & Ors. [AIR 1980 SC 2147] Krishna Iyer J, speaking for the Constitution Bench, held that although the power under Articles 72 and 161 were very wide, it could not "run riot". His Lordship held that no legal power can run unruly like John Gilpin on the horse, but "must keep sensibly to a steady course". According to His Lordship, "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 the valid play of power.” (para 62 at p. 2170)

21. The Court further observed that “Article 14 is an expression of the egalitarian spirit of the Constitution and is a clear pointer that arbitrariness is anathema under our system. It necessarily follows that the power to pardon, grant of remission and commutation, being of the greatest moment for the liberty of the citizen, cannot be a law unto itself but must be informed by the finer canons of constitutionalism.” The Constitution Bench also observed “the Government is not and should not be as free as an individual in selecting the recipients for its largesse. Whatever its activity, the Government is still the Government and will be subject to restraints, inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the

choice of persons with whom alone it will deal... Every action of the Executive Government must be informed with reason and should be free from arbitrariness... it makes no difference whether the exercise of the power involves affectation of some right or denial of some privilege... From this angle, even the power to pardon, commute or remit is subject to the wholesome creed that guidelines should govern the exercise even of Presidential power." (para 63 at p. 2170-71)

22. The Bench cautioned that political vendetta or party favoritism should not be the basis of exercising such power. It also advised that the government should make rules for its own guidance in the exercise of the pardon power to exclude the vice of discrimination.

23. In conclusion, the Bench observed that considerations for exercise of power under Articles 72/161 "may be myriad and their

occasions protean, and are left to the appropriate Government, but no consideration nor occasion can be wholly irrelevant, irrational, discriminatory or mala fide. Only in these rare cases will the court examine the exercise." (para 72 at p. 2175)

24. In the subsequent Constitution Bench decision in **Kehar Singh & Anr. v. Union of India & Anr.** [AIR 1989 SC 653] on the same question, this Court quoted the United States Supreme Court in **Ex Parte Williams Wells**, (1854-57) 15 Law Ed 421, on its power to scrutinize the exercise of this power and 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." The

Bench also quoted Chief Justice Taft in **Ex parte Philip Grossman**, (1924) 267 US 87),

wherein the learned Chief Justice opined:

"Executive clemency exists 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 mitigate guilt. To afford a remedy, it has always been thought 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..." (para 8 at p. 658)

25. The Bench having regard to the nature of the power of the President under Article 72, stated that the President under Article 72 could scrutinize the evidence on record of a criminal case and come to a different conclusion from that of the court. 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 in 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." The Bench quoted with approval the formulations of Sutherland, J. in U.S. v. Benz, (1930) 75 Law Ed 354, wherein the learned Judge held:

"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."

26. In **Kehar Singh** (supra) this Court observed that the order of the President under Article 72 could not be subjected to judicial review on merits except within the strict limitations defined in **Maru Ram** (supra). Therefore, on the ambit of judicial review, **Kehar Singh** (supra) concurred with **Maru Ram** (supra).

27. In **Swaran Singh v. State of U.P. & Ors.** [AIR 1998 SC 2026], a three-Judge Bench held 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." (para 12 at p. 2028)
28. Again in **Satpal & Anr. v. State of Haryana & Ors.** [AIR 2000 SC 1702], this Court held that the power of granting pardon under Article 161 was very wide and did not contain any limitation as to the time and occasion on which and the circumstances under which it was to be exercised. Since the power is a constitutional power, it is amenable to judicial review on the following grounds:

- a.If the Governor had been found to have exercised the power himself without being advised by the government,
- b.If the Governor transgressed his jurisdiction in exercising the said power,
- c.If the Governor had passed the order without applying his mind,
- d.The order of the Governor was mala fide, or
- e.The order of the Governor was passed on some extraneous considerations.

29. Further, if the Governor was not aware of general considerations such as period of sentence undergone by the convict, his conduct and behaviour while undergoing sentence and other such material considerations, it would make the order of the Governor under Article 161 arbitrary and irrational.

30. The Constitution Bench in **Bikas Chatterjee v. Union of India & Ors.** [(2004) 7 SCC 634] reiterated the same principles on the extent of judicial review as laid down in **Maru Ram** (supra) and **Satpal** (supra).

31. In **Epuru Sudhakar & Anr. v. Government of A.P. & Ors.** [AIR 2006 SC 3385] this Court observed that it was well settled that the exercise or non-exercise of the power of pardon by the President or Governor was not immune from judicial review and limited judicial review was available in certain cases.

32. Justice Pasayat, delivering the judgment, summed up the ground on which judicial review of an order passed under Articles 72 and 161 could be undertaken. Those grounds are:

- (a) that the order has been passed without application of mind;
- (b) that the order is malafide;

- (c) that the order has been passed on extraneous or wholly irrelevant considerations;
- (d) that relevant materials have been kept out of consideration;
- (e) that the order suffers from arbitrariness.

33. Justice Kapadia (as His Lordship then was) in his concurring opinion, observed that "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 defendant's 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." (para 64 at p. 3402)

34. His Lordship further added that "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... Rule of law should be the overarching constitutional justification for judicial review." (para 65, 67 at p. 3402)

35. In that case, an order of remission had been passed, inter alia, on an inference that the accused was not involved in the murder, was falsely implicated and false witnesses had been produced. This Court held such reasons to be irrelevant and held that the order of remission was bad.

36. From the abovementioned judicial decisions it is clear that there is limited scope of judicial review on the exercise of power by the Governor under Article 161.

37. Keeping the aforesaid principles in our mind if we look at the order of the Governor it appears

that there has been consideration of various aspects of the matter by the Governor in granting pardon. The Governor's order also contains some reasons.

38. The Governor's order does not contain any reference to the order of conviction and sentence imposed on the accused persons. It is axiomatic that before the power of the Governor under Article 161 of the Constitution is invoked by any person, the condition precedent is that such person or persons must be convicted of any offence against any law and will be subjected to undergo a sentence. Therefore, an omission of any reference to an order of conviction or sentence in the Governor's order in respect of the accused is really of no consequence.

39. However, in this case before the Governor could pass the aforesaid order of pardon, the accused

persons filed appeals against the order of conviction and sentence and the same were pending before the Hon'ble High Court. This is a relevant fact for the Governor to take into consideration before granting his power of pardon. But, in the instant order of the Governor there is no reference to this fact. This court, therefore, is inclined to infer that all relevant facts were possibly not placed before the Governor.

40. Apart from this, there is another vital aspect in the order of the Governor which requires serious consideration, in as much as, in the order of the Governor, there are some observations about the guilt or innocence of the accused persons who prayed for pardon under Article 161 of the Constitution.

41. It is well settled that to decide on the innocence or otherwise of an accused person in

a criminal trial is within the exclusive domain of a Court of competent jurisdiction as this is essentially a judicial function. A Governor's power of granting pardon under Article 161 being an exercise of executive function, is independent of the Court's power to pronounce on the innocence or guilt of the accused. The powers of a Court of law in a criminal trial and subsequent appeal right upto this Court and that of the President/Governor under Article 72/161 operate in totally different arenas and the nature of these two powers are also totally different from each other. One should not trench upon the other. The instant order of the Governor, by pronouncing upon the innocence of the accused, has therefore, if we may say so with respect, exceeded the permissible constitutional limits under Article 161 of the Constitution.

42. For these reasons, we are constrained to hold that we cannot approve the order of the Governor. We therefore, set aside the order and remand it to the Hon'ble Governor for re-consideration of the matter in accordance with law.

43. It may be mentioned in this connection, that of those three accused persons, two persons namely, Prem Kumar and Narayan Dutt, had been acquitted by the High Court by judgment and order dated 11.3.2008 in connection with the criminal appeals filed by them.

44. The appeals are thus disposed of. No orders as to costs.

.....J.
(G.S. SINGHVI)

.....J.

New Delhi
February 24, 2011

(ASOK KUMAR GANGULY)

