

CASE NO.:
Appeal (crl.) 948 of 2003

PETITIONER:
State (Govt. of NCT of Delhi)

RESPONDENT:
Vs.
Prem Raj

DATE OF JUDGMENT: 05/08/2003

BENCH:
DORAISWAMY RAJU & ARIJIT PASAYAT.

JUDGMENT:

J U D G M E N T

(Arising Out of S.L.P. (Crl.) No.5659 of 2002

ARIJIT PASAYAT, J.

Leave granted.

The only question raised in this appeal is whether the High Court of Delhi acted within the framework of law in exercising power available under Section 433 (c) of the Code of Criminal Procedure, 1973 (for short 'Code').

Factual position giving rise to the appeal is as follows:

Respondent (also described as 'accused') was prosecuted for alleged commission of offence punishable under Section 7, and Section(13)(1)(d) punishable in terms of Section 13 (2) of the Prevention of Corruption Act, 1988 (for short 'the Act'). The respondent was found guilty by Additional Sessions Judge, Delhi and was sentenced to undergo rigorous imprisonment for two years relating to offence under Section 7 with fine of Rs.500/-. He was further sentenced under Section 13(2) to undergo imprisonment for 3 and $\frac{1}{2}$ years with fine of Rs.1,000/-. Both the sentences were directed to run concurrently. The matter was carried in appeal by the respondent-accused before the High Court. The order of conviction was not challenged at the time of hearing. What was pressed before the High Court related to the quantum of sentence. It was submitted that the appellant had faced ordeal of trial for 11 years and was on the verge of retirement as his date of superannuation was to be in March, 2002. He was not a previous convict and the ends of justice would be met if sentence of fine is enhanced in order to commute the sentence of imprisonment and consequentially recommend to the Government to consider the case under Section 433 of the Code. High Court noted that there was no serious opposition by the investigating agency, the Central Bureau of Investigation (for short 'CBI') for a recommendation.

The learned Single Judge who heard the criminal appeal

felt that no useful purpose would be served in requiring the appellant to undergo sentence at the belated stage and it would be appropriate if fine is enhanced to Rs.15,000/- in commutation of sentence of imprisonment. He further directed that the case of the accused was to be considered and regularized in accordance with Section 433 (c) of the Code. A further direction was given that on the deposit of Rs.15,000/- as fine in commutation of sentence of imprisonment within a stipulated period and intimation of deposit being given to the appropriate Government, the State Government may formalize the matter by passing an appropriate order under Section 433 (c) of the Code. The sentence of imprisonment was directed to be suspended on furnishing personal bond and furnishing surety to the satisfaction of the Trial Court.

In support of the appeal the State (Govt. of NCT of Delhi) submitted that the power of commutation is not available to a Court and it is the exclusive domain of the executive. It was, therefore, submitted that the course adopted by the High Court is unsustainable.

Learned counsel for the respondent-accused submitted that on the peculiar facts of this case no interference is called for. Though strictly speaking the High Court had no power of commutation, yet direction was given to the State Government to formalize the order of commutation on deposit of the enhanced fine and same cannot be faulted.

Section 432 of the Code corresponds to and reproduces almost word for word Section 401 and sub-section (3) of Section 402 of the Code of Criminal Procedure, 1889 (in short old Code). Sub-sections (1) to (4) of Section 432 reproduce word for word sub-sections (1) to (4) of Section 401 of the old Code. Sub-section (5) reproduces word for word sub-section (6) of the old Section. Sub-section (6) similarly reproduces sub-section (4-A) of the old Section. Sub-section (5) of old Section 401 had been omitted earlier in 1950. Sub-section (7) corresponds to sub-section (3) of Section 402 of the old Code. The main paragraph and Clause (a) reproduce the old provision word for word without any change. Clause (b) is slightly different, but without any change of substance. That clause reads:

"(b) in other cases, the State Government."

Article 72 of the Constitution of India, 1950 (in short the Constitution) confers upon the President 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. The power so conferred is without prejudice to the similar power conferred on Court Martial or the Governor of a State. Article 161 of the Constitution confers upon the Governor of a State similar powers in respect of any offence against any law relating to a matter to which the executive power of the State extends. The power under Articles 72 and 161 of the Constitution is absolute and cannot be fettered by any statutory provision such as, Sections 432, 433 or 433-A of the Code or by any Prison Rules. But the President or the Governor, as the case may be, must act on the advice of the Council of Ministers.

A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the

law inflicts for a crime he has committed. It affects both the punishment prescribed for the offence and the guilt of the offender; in other words, a full pardon may blot out the guilt itself. It does not amount to an acquittal unless the Court otherwise directs. Pardon is to be distinguished from "amnesty" which is defined as "general pardon of political prisoners; an act of oblivion." As understood in common parlance, the word "amnesty" is appropriate only where political prisoners are released and not in cases where those who have committed felonies and murders are pardoned.

Reprieve means a stay of execution of sentence, a postponement of capital sentence. Respite means awarding a lesser sentence instead of the penalty prescribed in view of the fact that the accused has had no previous conviction. It is some thing like a release on probation of good conduct under Section 360 of the Code. Remission is reduction of the amount of a sentence without changing its character. In the case of a remission, the guilt of the offender is not affected, nor is the sentence of the Court, except in the sense that the person concerned does not suffer incarceration for the entire period of the sentence, but is relieved from serving out a part of it. Commutation is a change of a sentence to a lighter sentence of a different kind (Section 433-A empowers the appropriate Government to suspend or remit sentences). The expression "appropriate Government" means the Central Government in cases where the sentences or order relates to matter to which the executive power of the Union extends, and the State Government in other cases. The release of prisoners condemned to death in exercise of powers conferred under Section 433-A of the Code and Article 161 of the Constitution does not amount to interference with the due and proper course of justice, as the power of the High Court to pronounce upon the validity, propriety and correctness of the conviction and sentence remains unaffected. Powers under Article 161 of the Constitution can be exercised before, during or after trial. By reducing the sentence, the authority concerned does not thereby modify the judicial sentence. The fact that the sentence was remitted by the appropriate Government or that on account of certain remissions which he earned under the Jail Rules or under some order of general amnesty, the person was released earlier, does not affect disqualifications incurred, if any. Section 432 confines the power of the Government to the suspension of the execution of the sentence of the remission of the whole or any part of the punishment. The conviction under which the sentence is imposed remains unaffected. The section gives no power to the Government to revise judgment of the Court. It only provides with the power to remitting the sentence. Remission of punishment assumes the correctness of the conviction and only reduces the punishment in part or in whole. The word "remit" as used in Section 432 is not a term of art. Some of the meanings of the word "remit" are "to pardon, to refrain from inflicting, to give up." A remission of sentence does not mean acquittal and an aggrieved party has every right to vindicate himself or herself.

Section 428 contemplates a conviction by the court and it operates at the time of the pronouncement of the sentence by the Court, whereas Section 433 deals with commutation by the State authority. Consequences that follow from the provisions of Section 433 do not affect Section 428. Sections 432 and 433 appear under the heading "Suspension,

Remission and Commutation of Sentences." Under Section 432(1) there is power in the appropriate Government in the case of any person, who has been sentenced to punishment for an offence, to suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced without conditions or upon any condition which the person sentenced accepts. Under sub-section (2) it is provided that whenever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government may require the Presiding Judge of the Court before or by which the conviction was made or confirmed to state his opinion as to whether the application should be granted or refused together with his reasons for such opinion and also to forward with the statement of such opinion, a certified copy of the record of the trial or of such record thereof as exists. Section 433 of the Code provides for a power of the State Government to commute the sentence and Clause (b) thereof provides that the appropriate Government may without the consent of the person sentenced commute a sentence of imprisonment for life, for imprisonment for a term not exceeding 14 years or for fine. It may be pointed out that this provision is similar to the provision in Section 55 of the Indian Penal Code, 1860 (in short the 'IPC'). The power to commute a sentence of death is independent of Section 433-A. The restriction under Section 433-A comes into operation only after the power under Section 433 is exercised. Clause (c) of Section 433 deals with commutation of a sentence of rigorous imprisonment to simple imprisonment for any term to which the person might have been sentenced, or to fine.

"Pardon is one of the many prerogatives which have been recognized since time immemorial as being vested in the sovereign, wherever the sovereignty might lie." This sovereign power to grant a pardon has been recognized in our Constitution in Articles 72 and 161, and also in Sections 432 and 433 of the Code. Grant of pardon to an accomplice under certain conditions as contemplated by Section 306 of the Code is a variation of this very power. The grant of pardon, whether it is under Article 161 or 72 of the Constitution or under Sections 306, 432 and 433 is the exercise of sovereign power.

An identical question regarding exercise of power in terms of Section 433 of the Code was considered in *Delhi Administration (Now NCT of Delhi) vs. Madan Lal* (2002 (6) Supreme 77). The bench speaking through one of us (Doraiswamy Raju, J) was of the view that exercise of power under Section 433 was an executive discretion. The High Court in exercise of its revisional jurisdiction had no power conferred on it to commute the sentence imposed where a minimum sentence was provided for offence. In *State of Punjab v. Kesar Singh* (1996 (5) SCC 495) this Court observed as follows (though it was in the context of Section 433 (b)):

"The mandate of Section 433 Cr.PC enables the Government in an appropriate case to commute the sentence of a convict and to prematurely order his release before expiry of the sentence as imposed by the courts.

That apart, even if the High Court could give such a direction, it could only direct consideration of the case of premature release by the Government and could not have ordered the premature release of the respondent itself. The right to exercise the power under Section 433 Cr.PC vests in the Government and has to be exercised by the Government in accordance with the rules and established principles. The impugned order of the High Court cannot, therefore, be sustained and is hereby set aside."

The powers conferred upon the appropriate Government under Section 433 have to be exercised reasonably and rationally keeping in view reasons germane and relevant for the purpose of law, mitigating circumstances and/or commiserative facts necessitating the commutation and factors like interest of the society and public interest. "Commutation" is in essence the alteration of a sentence of one kind into a sentence of less severe kind. The powers of commutation exclusively vest with the appropriate Government. The 41st report of the Law Commission throws beacon light on the exercise of such power. The report was in respect of Sections 401 and 402 of the old Code which reads as follows:

"The provisions of this Chapter are ancillary to the powers conferred on the President of India and the Governors of the States by article 72 and article 161, respectively, of the Constitution. Both these articles first refer to the power to grant pardons, reprieves, respites or remissions of punishment, and then, to the power to suspend, remit or commute the sentence of any person convicted of any offence. Section 401 contains detailed provisions in regard to the suspensions and remissions of sentences, while Section 402 deals with the commutation of sentences. Following article 72 (1) (c) of the Constitution, Section 402A makes the powers conferred by Sections 401 and 402 on the State Governments in respect of State field of offence exercisable also by the Central Government.

It is noteworthy that these sections do not circumscribe in any way the power of the President and Governors to grant pardons, reprieves and respites, which is analogous to sovereign's prerogative of mercy in England.

As mentioned earlier, articles 72 and 161 of the Constitution first refer to the power to grant pardons, reprieves, respites or remissions of punishments, and then to the power to suspend, remit or commute, of any person convicted of any offence. "Reprieve" means to take back or withdraw a sentence for a time, the effect being simply to suspend the sentence. It is no more than a temporary

postponement and, in England, is used as the first step in commuting a death sentence. The term "respite" means delaying the punishment, specially in the case of a death sentence, and means much the same as reprieve. It would seem that granting a respite or reprieve of punishment is practically indistinguishable from suspending the execution of the sentence awarded by a Court for a temporary period. "Remission" originally meant a pardon under the great seal and release but latterly it came to mean the same as a reduction of the quantum of punishment (e.g. amount of the fine imposed or term of imprisonment awarded) without changing its character. "Commutation" means the alteration of a sentence of one kind into a sentence of a less severe kind, as indicated in Section 402 of the Code.

The Constitution has lumped together both these powers (i.e. those under Section 295 (1) and (2) of the Government of India Act, 1935) and placed them on the same footing. The overlap that obviously exists does not harm. There is, however, no need to enlarge the scope of Section 401 of the Code so as to cover expressly pardons, reprieves and respites besides suspension and remissions.

The question of inserting in the Code a provision on the lines of S.69 of the Criminal Justice Act, 1948, was raised during the discussion before us. It was suggested for example that if a person who was sentenced to imprisonment for a term by the Court and a part of this sentence was remitted by the State Government or the sentence was commuted to one of fine, the convicted person should be deemed to have been sentenced to the shorter term of imprisonment, or, as the case may be, to fine only by the Court. This could be of practical importance because many Acts provide for collateral disqualification in the case of a person convicted for an offence and sentenced to imprisonment for a specified minimum term. We have, however, come to the conclusion that the gravity of the offence for which the law provides for such disqualification should depend on the sentence awarded by the Court and not on the view which the State Government may take while remitting or commuting the sentence. In any event, this is essentially a question of policy and if such an amendment is considered desirable in the context of a particular special law, it may more appropriately be made in that view.

Another suggestion was that there should be provision for "general amnesty" which would relieve the appropriate Government from the necessity of passing separate orders of remission and release in every case. In our

opinion an amendment of the Code for this purpose is not necessary. Once the policy of granting a "general amnesty" for certain categories of convicted prisoners is decided upon by the Government, it is hardly desirable that the Government should pass a general order and leave it to be applied to individual cases by the prison authorities.

Sub-section (1) of Section 402 enables the appropriate Government to commute sentences without the consent of the person sentenced. The general provision has, however, to be read with Section 54 and Section 55 of the I.P.C. which contains special provision in regard to commutation of sentences of death and of imprisonment for life. The definition of "appropriate Government" in Section 402(3) is substantially the same as that contained in Section 55A of the I.P.C. It would obviously be desirable to remove this duplication and to state the law in one place. In the present definition of "appropriate Government" in Section 402(3), the reference to State Government is somewhat ambiguous. It will be noticed that clause (b) of Section 55A of the Indian Penal Code specifies the particular State Government which is competent to order commutation as "the Government of the State within which the offender is sentenced."

We, therefore, propose that Sections 54, 55 and 55A may be omitted from the IPC and their substance incorporated in S.402 Criminal Procedure Code.

(ii) "Clauses 441 to 444 â\200\223 These clauses correspond to sections 401 and 402 and sections 54, 55 and 55A of the IPC.

The Commission has recommended that in respect of cases investigated by the Central Bureau of Investigation or involving misappropriation or destruction or damage to Central Government property and offences committed by Central Government servants in the discharge of their official duties, remission or commutation of sentences should be granted by the State Government only after consultation with the Central Government. It is considered better to require 'concurrence' of the Central Government instead of merely consultation with it.

Where persons are prosecuted for offences, some under laws in the State field and some in the Union field and sentenced to separate terms of imprisonment to run concurrently, State Governments sometime remit the whole sentence without a reference to the Central

Government, although legally the Central Government has to order remission in relation of offences in the Union field. A provision is being added requiring specifically that the person cannot be released unless the Central Government also remits the part of the sentence relating to an offence in the Union field".

It is brought to our notice that the amount directed to be deposited has been so done by the respondent-accused before the Trial Court.

We set aside the order of the High Court. We do not propose to restrict the right of the accused to move the appropriate Government for such relief as is available in law. It would be at sole discretion of the appropriate Government to exercise the power conferred on it in accordance with law.

The appeal is allowed to the extent indicated.