

CASE NO.:  
Appeal (crl.) 393-394 of 2004

PETITIONER:  
Dhananjoy Chatterjee alias Dhana

RESPONDENT:  
State of West Bengal & Ors.

DATE OF JUDGMENT: 26/03/2004

BENCH:  
K.G. Balakrishnan & B.N. Srikrishna.

JUDGMENT:  
J U D G M E N T

[Arising out of S.L.P. (Crl.) Nos. 497-498 of 2004]

K.G. BALAKRISHNAN, J.

Leave granted.

The appellant, Dhananjoy Chatterjee was found guilty of offences punishable under Sections 376, 302 and 380 of the Indian Penal Code by judgment dated 12.8.1991 of the IInd Addl. Sessions Judge, Alipore, who sentenced him to death for the main offence punishable under Section 302 IPC. The appellant filed a criminal appeal before the High Court of Calcutta and there was also a Reference made under Section 366 of the Code of Criminal Procedure. The death penalty imposed on the appellant was confirmed by the High Court and the appeal preferred by the appellant was dismissed. The appellant thereafter filed a special leave petition. Leave was granted in the special leave petition, but the appeal was dismissed by this Court on 11.1.1994 and the death sentence imposed on the appellant was confirmed. The appellant preferred a review petition and the same was rejected on 20.1.1994. Thereupon, the appellant filed a mercy petition before the Governor of West Bengal praying to commute the capital punishment imposed upon him to any other sentence prescribed under law. The appellant was informed by the prison authorities that the Governor had declined to interfere in the matter. Aggrieved by the rejection of his mercy petition, the appellant filed a writ petition. The writ petition was dismissed by the learned Single Judge of the Calcutta High Court on 14.11.2003 while upholding the order passed by the Governor. The appellant thereafter filed a writ petition seeking stay of execution and for commutation of the death sentence. The Division Bench of the Calcutta High Court dismissed the writ petition on 8.1.2004. Aggrieved by the aforesaid orders passed by the High Court, the present appeals are filed.

We heard the learned counsel for the appellant and also the counsel for the State of West Bengal.

It is brought to the notice of the court that the writ petition was filed by the appellant at the time when his mercy petition was pending before the Governor. That mercy petition was later rejected by the Governor, but the stay of execution was not vacated by the High Court as the fact of rejection of his mercy petition by the Governor was not brought to the notice of the court either by the counsel who appeared for the State of West Bengal or by the counsel for the appellant.

The counsel for the appellant submitted that the petition of the appellant filed under Article 161 of the Constitution of India was not properly dealt with by the authorities. It was contended that the Governor was not apprised of the relevant facts and the material and that there was no proper application of mind in the present case. The counsel for the appellant also submitted that the

appellant has been in jail since 1991 and when his petition under Article 161 of the Constitution came up for consideration, the mitigating factors favourable to the appellant should have been brought to the notice of the Governor.

It is settled position of law that an order passed by the Governor under Article 161 is subject to judicial review. In *Maru Ram vs. Union of India* AIR 1980 SC 2147, a Constitution Bench of this Court held as follows :

"72. We conclude by formulating our findings\005.

(8) The power under Articles 72 and 161 of the Constitution can be exercised by the Central and State Governments, not by the President or Governor on their own. The advice of the appropriate Government binds the Head of the State. No separate order for each individual case is necessary but any general order made must be clear enough to identify the group of cases and indicate the application of mind to the whole group.

(9) 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."

In *Kehar Singh vs. Union of India* AIR 1989 SC 653 and *Satpal vs. State of Haryana* (2000) 5 SCC 170, the dictum laid down in *Maru Ram's* case (supra) was followed.

In *Swaran Singh vs. State of U.P.* (1998) 4 SCC 75, it was held that though this Court cannot go into the merits of the grounds which persuaded the Governor in taking a decision in exercise of his powers, the order of the Governor is subject to judicial review within the strict parameters laid down in *Maru Ram's* case and that the Governor shall not be deprived of an opportunity to exercise his powers in a fair and just manner.

In the instant case, the counter affidavit was filed by the respondent in the writ petition which was sworn to by the Deputy Secretary, Judicial Department, Government of West Bengal. In paragraph 5, it was stated :

"After examining and considering the prayer the State Government rejected it, thereafter it was transmitted to the Governor only because it was addressed to him, and therefore, the Governor in his turn, rejected the convict's prayer which was duly communicated to the convict."

From the above averments, it is clear that the Governor was deprived of the opportunity to exercise his power in a fair and just manner. It is true that the power under Article 161 of the Constitution is to be exercised by the Governor on the basis of the aid and advice given by the State Government. However, the material facts should have been placed before the Governor. Pursuant to our direction, the relevant file was produced before this Court. We have also perused the same and we feel that all material facts, including the mitigating factors were not placed before the Governor. The appellant's mercy petition was rejected on 16.2.1994 without their being a proper consideration of all relevant facts.

Therefore, we direct the respondent authorities to put up the mercy petition filed by the appellant on 2.2.1994 to the Governor again and bring all relevant facts to the notice of the Governor for an appropriate decision in the case. It is made clear that the delay caused due to filing of the present special leave petitions shall not be taken as a ground by the appellant for commutation of his death sentence before any judicial fora.

The appeals are disposed of accordingly.

JUDIS