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Shades of Life Imprisonment and the Issue of Primacy Between Union and State in Releasing Life Convicts in India

by
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I. INTRODUCTION

The Supreme Court of India in *V. Sriharan* v. *Union of India*[1], speaking through Sathasivam, C.J., commuted the death sentence of three convicts on death rows, who were sentenced to death for conspiring to kill the former Prime Minister of India, Late. Rajiv Gandhi, owing to the fact that their mercy petitions had been rejected by the President of India after the unexplained delay of 11 years. The Court in this case rejected the argument of the Union of India that a petitioner claiming inordinate delay as a ground for commutation must bring before the court the evidence that such incarceration has had a dehumanising effect.[2] Pursuant to the decision of the Supreme Court in *Sriharan*, the Tamil Nadu State Government decided on the very next day of the verdict, to release the death row convicts whose death sentence was commuted to life imprisonment by the Supreme Court along with those serving life sentences in connection with the assassination

of Late. Mr. Rajiv Gandhi as the statutory minimum period of incarceration in jail as per law[3] was already undergone by them.[4] After this decision was announced by the Government of Tamil Nadu, the Union of India went to the Supreme Court against this decision of the State Government and the Supreme Court stayed the order of the Tamil Nadu Government pending final adjudication of the dispute.[5] The case was thereafter, referred to a constitutional bench with the following questions for determination:[6]

(i) Whether imprisonment for life in terms of Section 53 read with Section 45 of the Indian Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission and whether as per the principles enunciated in paras 91 to 93 of *Swamy Shraddananda*[7] a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission?

(ii) Whether the "appropriate Government" is permitted to exercise the power of remission under Section 432/433 of Cr.P.C. after the parallel power has been exercised by the President under Article 72 or the Governor under Article 161 or by this Court in its Constitutional power under Article 32 as in this case?

(iii) Whether Section 432(7) Cr.P.C. clearly gives primacy to the executive power of the Union and excludes the executive power of the State where the power of Union is co-extensive?

(iv) Whether the Union or the State has primacy over the subject matter enlisted in List III of Seventh Schedule of the Constitution of India for exercise of power of remission?

(v) Whether there can be two appropriate Governments in a given case under Section 432(7) Cr.P.C?

(vi) Whether *suo motu* exercise of power of remission under Section 432(1) Cr.P.C. is permissible in the scheme of the section, if, yes whether the procedure prescribed in Sub-clause (2) of the same Section is mandatory or not?

(vii) Whether the term "consultation" stipulated in Section 435(1) Cr.P.C. implies "concurrence"?

Except for the first question all other questions were directly relevant so far as the final determination of the dispute between the Union of India and the State of Tamil Nadu was concerned. The first question was included in the reference because the issue comprised therein, had a bearing upon the exercise of right of the State to release convicts undergoing life imprisonment. In *Swamy Shraddananda (2)* v. *State of Karnataka*[8] the Supreme Court while not confirming the sentence of death affirmed by the Karnataka High Court upon the convict Swamy Shraddananda held the case to be the one falling in between life imprisonment and death penalty, so far as the suitability of punishment is concerned for the crime committed. According to the Court, there is a huge hiatus between life imprisonment and death penalty. The Court, therefore, gave the punishment of an imprisonment for life with the condition that the convict must spend the rest of his natural life in jail.[9] This order, therefore barred the Government from exercising their right to release a convict undergoing life imprisonment after the convict has completed the statutory minimum fourteen years in prison.[10] A decision like this raised a very pertinent question because the Court found this to be a case falling short of death penalty and took away the executive's discretion to exercise the right to release life convicts; whereas, even in cases of death penalty, the executive has the discretion to commute it to imprisonment for life and thereafter even such convicts can be released after the completion of the statutory minimum fourteen years in prison.[11] Another very important issue is that of the constitutional right of President of India[12] and the Governor's of State[13] to grant pardon or remission of punishments. Whether, in *Swamy Shraddananda* the Court even barred the President of India and Governor of State from exercising their constitutional right to grant pardon and if so the correctness of such an order. An analogy may be drawn between the decision in *Swamy Shraddananda* and the possible exercise of

the right of remission by the Government in cases, wherein, death penalty has been commuted to life imprisonment by the Court on account of inordinate delay caused in executing a person on death row. However, whenever, the Supreme Court commuted the death sentence into life imprisonment on this ground, the Court did not further dwelled upon as to whether the Government's right to remission after the completion of statutory minimum fourteen years in jail by the convict would be available to the Government in such cases or not. But absence of such a discussion would only mean that the Court was not inclined to bar the Government from exercising this right.

The Constitution bench of five judges of the Supreme Court was constituted in the background of the abovementioned factual matrix, which gave its verdict on 2nd December 2015 in *Union of India* v. *V. Sriharan*[14]. The five judges' constitution bench constituted to answer the abovementioned questions comprised of the then Chief Justice of India, H.L. Dattu, Fakkir Mohamed Ibrahim Kalifulla J. Pinaki Chandra Ghosh J. Abhay Manohar Sapre J. and Uday Umesh Lalit J. Two separate judgments were delivered by the Bench; Kalifulla J. wrote the majority judgment on behalf of himself, Dattu C.J. and Ghosh and J. The second judgment concurring with the majority on questions (ii) to (vii) and dissenting with the majority on question (i) was written by Uday Umesh Lalit J. and Abhay Manohar Sapre J. concurred with Lalit J.'s judgment. In the beginning the issue of maintainability of the writ petition filed by the Union of India was raised by the State of Tamil Nadu, since a case for the violation of fundamental rights under the Constitution was not made out in the petition of the Union of India. But the Court refused to reject the petition on the narrow technical ground of maintainability as the petition involved substantial questions of law about the interpretation of several provisions of the Constitution and the provisions of the Indian Penal Code and the Code of Criminal Procedure. Same was the view espoused on the question of maintainability by Lalit J. as well.

II. FIRST QUESTION

The first question contains two parts. The first part raises the question as to whether imprisonment for life in terms of Section 53 read with Section 45 of the Indian Penal Code meant imprisonment for the rest of the natural life of the prisoner or a convict undergoing such punishment has a right to claim remission. The second part of the first question is based on the decision of *Swamy Shraddananda*, whereby, it was to be examined as to whether it is permissible to give a punishment in excess of fourteen years extending up to the rest of the natural life of the convict excluding these categories of cases from the application of power of remission. The

first part of the first question was simply answered by the majority of the bench by relying upon two constitutional bench judgment's of the Supreme Court in *Gopal Vinayak Godse* v. *State of Maharashtra*[15] and *Maru Ram* v. *Union of India*[16], which were followed in *Sambha Ji Krishan Ji* v. *State of Maharashtra*[17], *State of M.P.* v. *Ratan Singh*[18], *Ranjit Singh* v. *UT of Chandigarh*[19], *Subash Chander* v. *Krishan Lal*[20] and therefore, it was held that the meaning of imprisonment for life in terms of Section 53 read along with Section 45 means an imprisonment for the rest of the life of convict as Section 53 simply lists imprisonment for life as a punishment and Section 45 says that 'life' denotes the life of a human being unless the contrary appears from the context. Section 57 which provides for life imprisonment to be treated as an imprisonment for 20 years is relevant only for calculating the fractions of terms of punishment. The understanding that imprisonment for life is for the rest of the natural life of the convict is subject, however, to the right of remission, etc. exercisable by the President and Governor under Article 72 and 161 of the Constitution and also as provided under section 432 of Cr.P.C.[21]

On the most crucial second part of the first question, Kalifulla J. speaking for the majority held that as per the constitutional bench judgment of the Supreme Court in *Maru Ram*[22] the constitutional power of remission provided under Articles 72 and 161 of the Constitution will always remain untouched.[23] But interestingly, so far as the statutory power of remission is concerned the Court held that when the court after due application of the judicial mind has arrived at the conclusion that the "offender

deserves to be punished with the sentence of life imprisonment for the rest of his life or a specific period of 20 years, 30 years or 40 years, such a conclusion should survive without any interruption."[24] However, in order to give strength to such a punishment the Supreme Court held that the inherent power of the court should empower the court to ensure that its decision is not nullified.[25] The Court subsequently added that if the life imprisonment means imprisonment for life and there is no provision in law prohibiting the court from imposing a punishment of specific period within the said life span in case of an imprisonment for life, it only means that the Court is empowered to

inflict such punishment.[26] Kalifulla J. also added that by doing so, the court does not carve out a new punishment, as it seeks to give the punishment within the stipulated punishment of life imprisonment keeping in mind the nature of crime and the interest of the victim.[27]

In order to bring home the argument that such punishments are not unusual, reference to the amendments made in the Indian Penal Code in the year 2013 based on the recommendations made by Justice Verma Committee was also made, whereby, specific punishments extending up to the entire natural life of the convict has been provided for.[28] The Court therefore, also rejected the argument that giving such punishment violates the principle of separation of powers; however, it drew support for this by again highlighting the fact that the constitutional provisions namely Article 72 and 161 are without any restriction therefore not fettered by any order of the Court in this regard.[29] The Court also dismissed the argument of depriving such convicts with any ray of hope by citing the plight of the victim and the fact that the act of the offender actually dashed all the hopes of the victim.[30] The fact that the statutory right to remission is available under Cr.P.C. which deals with the procedure only and not under the Indian Penal Code which substantively provides for life imprisonment and death penalty, is another reason why the Court is not wrong in giving life imprisonments of specific terms extending up to the natural life of the convict.[31]

However, interestingly the Supreme Court held that power derived from the Indian Penal Code regarding giving of specified term punishments for life convicts can only be given by the High Court and Supreme Court and not by the Sessions Court. For Sessions Court only the option of life imprisonment with no specified term and death sentence is open.[32] This further complicates the issue because if the power is derived from the Code and life imprisonment actually admits giving of specified terms extending up to the natural life of the convict; why deprive the Sessions Court from exercising this power. Only plausible reason could be the fact that this is not permissible under the statutory law and therefore such a course is only open to courts empowered to use their inherent powers to do justice. The majority had already referred to this fact.[33] However, if inherent powers are the source for the courts to give such punishments why it refers to the fact that implicit in the punishment of life imprisonment is punishments for different specified terms. Clearly, inherent powers are to be resorted to when the

statute does not permit a course needed to be treaded in order to do justice but the arguments advanced by the Court clearly makes out a case for the availability of specified terms punishments under the law; then why take away from Sessions Court

the right to apply the statutory law. However, the Court ignoring this contradiction went ahead and declared that the judgment of the Court in *Swamy Shraddananda*[34] correctly lays down the law and overruled an earlier decision of the Supreme Court given in *Sangeet* v. *State of Haryana*[35] which had ruled that depriving the Government of its power of remission is not permissible under the law.

Uday Umesh Lalit J. while writing the judgment on his behalf with which Abhay Manohar Sapre J. concurred while answering the first part of the first question held that the sentence of life imprisonment means imprisonment for the remainder of the life of the convict. However, such convict can always seek remission under Articles 72 and 161 of the Constitution or as per the provisions of section 432 of Cr.P.C. On the second part of the first question, Lalit J. categorically held that it is not open to the Courts to give any special category of punishment by making it beyond the application of right of remission or to provide for a mandatory period of actual imprisonment not in consonance with section 433A of Cr.P.C. He while reaching his conclusion on this issue referred to several reasons. He started by referring to the report of the Committee of Reforms on Criminal Justice under the Chairmanship of Dr. Justice Malimath, which in its report submitted in the year 2003, had recommended for the addition of an additional kind of punishment in cases where imprisonment for life is one of the punishments, namely, "Imprisonment for life without commutation or remission".[36] The Committee had further clarified that such a provision, though, will have no bearing upon Articles 72 and 161 of the Constitution of India. The minority opinion also alluded to the 2013 Criminal Law Amendment Act, added pursuant to the recommendations of Justice J.S. Verma Committee which in sections 370(6), 376-A, 376-D and 376-E, prescribes punishment of "with imprisonment for life which shall mean imprisonment for the remainder of that persons natural life".[37] It was therefore, clarified that Justice Malimath Committee's recommendation has not been acted upon by the Parliament of India so far.[38] The recent judgment of the Supreme Court in *Vikram Singh* v. *Union of India*[39], was also referred to where the Supreme Court categorically ruled that prescribing punishment is the function of the legislature and not the Courts.

On the assumption made by the Supreme Court in *Shraddananda* that there is a hiatus between life imprisonment of 14 years and death penalty and therefore if the Court is empowered to give death penalty, it can certainly give a punishment falling in between the two punishments, Lalit J. stated that this assumption is not correct, as what actually happens practically can't be made the basis for creating a sentence by the Court. In fact if right of remission is exercised improperly, it can be corrected in a judicial review.[40] On the question as to whether, such recourse is available to the Supreme Court under Article 142 of the Constitution; it was again held that such recourse to Article 142 is impermissible.[41] Further, a very pertinent issue was raised regarding the logical fallout of what the majority held; *Shraddananda* is based on the assumption that such cases fall short of rarest of rare, however, as per section 433A Cr.P.C. even a person whose death sentence was confirmed by the Supreme Court may avail the benefit of remission after serving the statutory minimum 14 years in prison, if his death sentence gets commuted to life by the executive. Therefore, there can actually be a scenario, wherein, the person whose case fell short of rarest of rare will have no option of seeking remission, whereas, the one who was actually given

death sentence may be released as per section 432/433A of Cr.P.C.[42]

It is discomforting that the majority chose to skirt the very pertinent issues raised by Lalit J. in his judgment. The fact that the majority judgment does not clarify as to whether, the right of giving punishments in accordance with *Shraddananda* is a right flowing from the statute or owing to the inherent powers of the Court is equally strange. How can it be argued that a punishment actually falling in between the hiatus of life imprisonment and death penalty is not available for the Sessions Court (though the Sessions Court can even give death penalty) but available only for the High Court and Supreme Court. This smacks of lack of confidence on the part of the Supreme Court over the competence of Sessions Courts without being suspicious of the Sessions Court's competence to give death sentence. If, at this juncture, the argument of inherent powers of the High Court and Supreme Court is advanced to justify this otherwise implausible distinction, then why talk about the existence of hiatus between life imprisonment and death penalty repeatedly. Even in the absence of the argument of hiatus between life imprisonment and death sentence such a punishment by resorting to inherent powers solely raises serious objections which the minority opinion rightly pointed out to be not permissible constitutionally as the exercise of Article 142 must be consistent with fundamental rights and it cannot even be inconsistent with the substantive provisions of relevant

statutory laws.[43] In addition to this the distinction between constitutional and statutory provisions, in so far as the constitutional powers under Article 72 and 161 are not circumscribed by the decision in *Shraddananda* but the statutory provisions becoming otiose as a consequence, is also a difficult distinction to maintain in reality. What can stop the appropriate government from invoking the constitutional provisions wherein the resort to statutory provisions is barred, particularly when the decisions given by the President and Governor under the constitutional provisions are also to be taken on the aid and advice of the council of ministers?[44] Ironic that the Court went so much into the practical reality of life imprisonment being imprisonment for 14 years but ignored the practical reality of this theoretical distinction. Perhaps, the Court by implication wanted to even hedge the exercise of constitutional provisions without saying it in so many words.

III. SECOND QUESTION

The second question deals with the legality of the use of the right of remission by the appropriate government after the exercise of pardon under Articles 72 and 161 by the President and Governor and commutation of death sentence into imprisonment for life by the Supreme Court and High Court on the ground of inordinate delay in execution or other reasons being violative of the fundamental right of the convict.

In *V. Sriharan* v. *Union of India*[45], the Supreme Court while commuting the sentence of death on account of inordinate delay in the disposal of mercy petitions resulting in inordinate delay in execution has categorically stated that such commutation is independent of the power of commutation/remission as provided in sections 432, 433, 433A, 434 and 435 of Cr.P.C as the exercise of judicial power under Article 32 is independent of the power of the government under the statute. This decision was endorsed by the Supreme Court while dealing with the second question. On the question of legality of the use of the right of remission by the appropriate government after the exercise of pardon under Articles 72 and 161 by the President and Governor, the Court rejected the argument advanced by the learned Solicitor General that since the exercise of power under Articles 72 and 161 is with the aid of

the Council of Ministers, it must be held that Sections 432 and 433 of the Code of Criminal Procedure are only enabling provisions for the exercise of power under Articles 72 and 161 of the Constitution.[46] The Court in fact distinguished these constitutional and statutory provisions by arguing that President is empowered under Article 72 to grant pardons, reprieves, respites or remission, suspend or commute the sentence. The Governor

also has these powers under Article 161, whereas under Sections 432 and 433 of Cr.P.C. the power is confined to suspension, remission and commutation. Further under section 432(2) the appropriate government may require the opinion of the presiding judge of the court which convicted the person before deciding to suspend or remit the sentence. In addition to this the statutory exercise of power also envisages imposition of conditions while deciding to exercise the power in favour of the convict.[47] The Court therefore, rightly concluded that the option of exercising the power under Section 432 and 433 of Cr.P.C. is available to the appropriate government even after the exercise of constitutional provisions by the President and Governor under Articles 72 and 161 of the Constitution.

IV. THIRD, FOURTH AND FIFTH QUESTIONS

The third, fourth and fifth questions were taken simultaneously, as the three questions were intertwined with each other. The issue germane to these questions was the question as to whether the Central Government or the State Government is the "Appropriate Government" having the power of remission. For this purpose the third question raises the issue as to whether Section 432(7) of the Cr.P.C. gives primacy to the Union and excludes the executive power of the State where the power of the Union is co-extensive? Section 432(7) of Cr.P.C. defines appropriate government for the purposes of section 432. Under clause (a) of Section 432(7) in cases where the sentence is for an offence against, or the order referred to in sub-section (6) is passed under, any law relating to a matter to which the executive power of Union extends, the Central government. Clause (6) of Section 432 applies to any order passed by a Criminal Court under any Section of Cr.P.C. or of any other law which restricts the liberty of any person or imposes any liability upon him or his property. Sub-clause (b) of Section 432(7) applies to cases not covered by sub-clause (a) and states that the appropriate government shall be State government if the offender is sentenced or the said order is passed within the territory of the State. Fourth question is actually concomitant of third and points to the issue of primacy over the subject-matter enlisted in List III of the Seventh Schedule of the Constitution for the exercise of power of remission. Another issue interweaved is in these questions is the fifth question posing a possibility to be explored as to whether there can be two Appropriate Governments in a given case?

The phraseology of the aforesaid questions is borrowed from the two provisions of the Constitution namely Articles 73[48] and

162[49]. Article 73 deals with executive power of the Union and Article 162 deals with the executive power of the State. The meaning of the term appropriate government is to be understood by properly analyzing these two provisions of the Constitution

primarily because the appropriate government under Section 432(7) of the Cr.P.C. is to exercise executive power of remission. As per Article 73(1)(a) if a sentence imposed upon a convict is under a law enacted by the Parliament under the Union List of the Seventh Schedule of the Constitution, then the executive power of the Union extends to such cases and therefore the appropriate government shall be the Central government. The proviso in Article 73(1)(a) clarifies that the executive power of the Union shall even extend to matters with respect to which the Legislature of the State has power to make laws, if the same is expressly provided in the Constitution or in any law made by the Parliament, and consequently the appropriate government shall be Central government. Under section 432(7)(b) barring cases falling in clause (a) of sub -section (7), where the sentencing order was passed within the territorial jurisdiction of the concerned State, then only the State government would be the appropriate government.

The Supreme Court also tried to explain the intricacies by citing the precedent from *G.V. Ramanaiah* v. *Supt. of Central Jail*[50], were the Supreme Court while dealing with the offences under section 489(A) to 489(D) of the Indian Penal Code held that though the offences fell under Penal Code, which was covered by Entry I of List III[51], namely the Concurrent List of the Seventh Schedule enabling both the Union and the State to pass laws but having regard to the fact that the provisions in question related to laws enacted to deal with the offences associated with currency notes and bank notes, the matter actually fell under Entries 36 and 93 of the Union List of

the Seventh Schedule, since these provisions were inserted by an amendment and for the present purpose the Amendment Act is actually the law in question and as a result Central Government would be the appropriate government.[52] Explaining the impact of the proviso in Article 73 read along with 73(1)(a) the Court noted that if a law is passed by the Parliament under Articles 248, 249, 250, 251 and 252 of the Constitution, though the legislative power of the State would remain, yet, the actual effect would be that the Central Government would be the appropriate government in the event of special constitutional prescription under Articles 248 to 252 of the Constitution extending the legislative power to the Union.[53]

The Court also delved into the possibility of the power to legislate on matters of both Centre and State being actually co-extensive, for example when the matter is covered under the Concurrent List of the Seventh Schedule. The question of primacy of executive power was answered by the Court by referring to the proviso of Article 162, which makes the executive power of the State subject to the executive power of the Union in the event of any matter with respect to which the Legislature of a State and Parliament both have the power to make laws.[54]

Therefore under section 432(7) the primacy for the purposes of appropriate government shall be with the Central government except those cases, which are covered by Section 432(7)(b). So far as primacy of the power of remission over matters covered by the Concurrent List of the Seventh Schedule is concerned, the primacy shall be with the Central Government. Consequently, there cannot be a situation for two appropriate governments in a case under Section 432(7).

V. SIXTH QUESTION

The constitutive facts germane to the sixth question were the State of Tamil Nadu's decision to release the convicts responsible for the assassination of former Prime Minister Shri. Rajiv Gandhi undergoing imprisonment for life and those whose death

sentence got commuted to life imprisonment by the Supreme Court on account of inordinate delay in the execution of death sentence. The decision of the State of Tamil Nadu was taken *suo motu* and therefore the sixth question raises the issue of the legality of the exercise of the right of remission under Section 432(1) of Cr.P.C. *suo motu*. Sixth question is in two parts, the second part raises the issue of the procedure under section 432(2) of Cr.P.C. as to whether the same is mandatory or not?

Under Section 432(1) of Cr.P.C. the appropriate government is empowered to either suspend the execution of a sentence or remit the whole or any part of the punishment at any time to which he has been sentenced. Passing of such orders may be with or without any conditions; in case of conditions being imposed, the convict must agree to such conditions. Clause (2) of Section 432 states that whenever an application is made to the appropriate government for the suspension or remission of a sentence, the appropriate government may seek the opinion and the reasons thereof of the presiding judge of the trial court which passed the order of conviction along with the certified copy of the record of the trial or of such record thereof that exists. The Supreme Court while dealing with this question relied upon an observation made by another constitutional bench of the Supreme Court in *Maru Ram*[55] where the Court had held that constitutional provisions in Article 72 and 161 are to be treated differently than the statutory provisions of suspension and remission of sentence. The constitutional power is unfettered to such an extent that even the statutory requirement of Section 433A of Cr.P.C. mandating that a person who is given life imprisonment or a person whose death sentence is commuted to life imprisonment by an earlier order is not to be released from prison before he completes the minimum of 14 years in prison, is not applicable to the exercise of the constitutional provisions. The Court, however, simultaneously cautioned against the arbitrary and mala fid *e* use of these constitutional provisions, which can then be interfered with by the Courts while exercising the power of judicial review. Acting on this circumspect note of the Court in *Maru Ram*, Kalifulla J. in his judgment held that if the unfettered constitutional provisions are to be exercised with caution, then there is no reason to deviate from the procedure prescribed for the exercise of the statutory power under Section 432 of Cr.P.C. Therefore, the procedure set out under Section 432(2) of Cr.P.C. is sine-qua-non for the exercise of power under section 432(1), even though the powers mentioned in Section 432(1) do not refer to the procedure therein.[56] He added that "extent of power is one thing and the procedure to be followed for the exercise of the power is different thing."[57] The Court therefore concluded by agreeing with an earlier judgment of the Supreme Court in *Sangeet*[58] that the powers given under Section 432(1) cannot be exercised *suo motu.*[59]

However, interestingly while dealing with the second part of the sixth question, the Supreme Court made it mandatory for the appropriate government to seek the reasoned opinion of the presiding officer of the trial court which convicted the offender and the records thereof before deciding

the fate of the application of suspension or remission of sentence, despite the fact that

Section 432(2) of Cr.P.C. uses the expression 'may' which otherwise would mean giving discretion to the appropriate government to decide on the need for seeking such opinion.[60] The Court reasoned that such a procedure will throw much light on the nature of crime committed and on other relevant factors. The question to be raised it, whether the Court is right in making an optional provision mandatory; the reason given by the Court are well intentioned but does it not circumscribe the executive power of remission in an unjustified manner by going beyond the mandate of the legislature?

VI. SEVENTH QUESTION

The Seventh question was based on the meaning that is required to be given to the term 'consultation' as it appears in Section 435(1) of Cr.P.C. Section 435(1) provides for instances wherein it shall be mandatory for the State government, if the State Government is the appropriate government, to consult the Central Government while exercising its powers of suspension and remission of sentence under Section 432 and commutation of sentence under Section 433 of Cr.P.C. Section 435 enumerates the following three instances in this regard:

(a) where the sentence is for an offence which was investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, or

(b) where the sentence is for an offence which involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or

(c) where the sentence is for an offence which was committed by a person in service of the Central Government, while acting or purporting to act in the discharge of his official duty.

It is important to note here that this question was included in the reference when the meaning of appropriate government under Section 432 and 433 of Cr.P.C. was not clear. In the backdrop of the answer given by the Supreme Court of earlier questions referred to it in this case, the scope for State Governments to be the appropriate government gets considerably narrowed. However, the question is still relevant if in a given case the State government actually becomes the appropriate government then Section 435 further puts fetters on the exercise of this power by the State government

by making consultation with the Central Government mandatory in aforementioned three instances. It is not debated that the consultation must be an effective consultation, but the question is whether the State government has the discretion to reject the advice of the Central Government after consulting it or whether such rejection shall make the consultation ineffective. If State government cannot reject the advice of the Central government, an effective consultation then can only mean 'concurrence'.[61]

The Supreme Court in order to answer this question relied heavily upon the nine judge Constitution bench judgment of the Supreme Court in *Supreme Court Advocates -on-Record Assn.* v. *Union of India*[62], where the Supreme Court held that the term 'consultation', as used in Articles 124(2) and 217(1) of the Constitution, with the Chief Justice of India by the President of India with a view to appoint the judges of the Supreme Court and judges of the High Court may mean 'concurrence' owing to the

consultee i.e. the Chief Justice of India having the primacy of opinion by way of implication. The Court by citing this precedent established the fact that reading consultation to mean concurrence is not something that is wrong *per se* merely because of the choice of word by the Legislature preferring consultation over concurrence. The Court in order to further prepare the edifice of its ultimate decision also referred to the decision of the Supreme Court in *Chandrashekaraiah* v. *Janekere C. Krishna*[63], wherein, the Supreme Court while interpreting the provisions of Karnataka Lok Ayukta Act, 1984 had held that the consultation by the Chief Minister with Chief Justice for the appointment of Lok Ayukta is mandatory and owing to the position of Lok Ayukta being a *sui generis* quasi judicial authority, consultation will amount to concurrence.[64] The judgment of another nine judge Constitution bench in *S.R. Bommai* v. *Union of India*[65], was also referred to bring home the argument that strong centre is not necessarily antithetic to federalism as contemplated under the Indian Constitution.[66]

Therefore, in the light of these earlier pronouncements made by the Supreme Court, the Court in the present case concluded that three instances enumerated in Section 435 of Cr.P.C. envisage such situations wherein, by implication the role of the Central Government will get primacy over the State Government. As a consequence, the Court concluded that in reality the term 'consultation' therefore be held to be a requirement of 'concurrence'.[67]

VII. CONCLUSION

This judgment is very significant because it answers some very complex legal issues; however, whether all the questions answered in this case have been settled finally, remains to be seen in the times to come. The answer of the majority on the second part of the first question validating *Shraddananda* but excluding the Sessions Courts from exercising such powers clearly appears to be flawed. The Supreme Court has rightly protected the exercise of the statutory power of remission of the appropriate government even after the exercise of constitutional powers of remission and commutation of death penalty into life imprisonment by the Courts on account of inordinate delay in execution. However, the judgment of the Court in relation to the issues of identifying the appropriate government in a given case empowered to exercise the right of remission considerably circumscribes the possibility of the State government becoming the appropriate government. At the same time though, the inferences drawn by the Court appears to be logical and sound. *Suo motu* exercise of the right of remission is rightly denied by the Court but certainly in relation to the question of applicable procedure for the exercise of right of remission, mandatory seeking of the reasoned opinion of the trial court which passed the order of sentence on the offender appears be an unjustified intrusion into the executive's power of remission. Reading 'consultation' to mean 'concurrence' is problematic but it is only symptomatic of the absence of the co-operative federalism in reality in India in this regard.

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1 (2014) 4 SCC 242.

[2] The Supreme Court of India in catena of cases has held that a person condemned to death penalty by the Supreme Court continues to have his Article 21 rights under the Indian Constitution intact until he is executed and therefore, if inordinate delay is caused in deciding the mercy petition of such convicts by the President of India or the Governor of State while the convict remains on death row, the death penalty is to be commuted to an imprisonment for life, as the inordinate delay caused while the convict remains on death row has a dehumanizing effect on the convict which is violative of Article 21. See generally, *Triveniben* v. *State of Gujarat*, (1988) 4 SCC 574; *Triveniben* v. *State of Gujarat*, (1989) 1 SCC 678; *Madhu Mehta* v. *Union of India*, (1989) 4 SCC 62; *Jagdish* v. *State of M.P.*, (2009) 9 SCC 495; *Devender Pal Singh Bhullar* v. *State (NCT of Delhi)*, (2013) 6 SCC 195; *Mahendra Nath Das* v. *Union of India*, (2013) 6 SCC 253; *Shatrughan Chauhan* v. *Union of India*, (2014) 3 SCC 1.

[3] Section 433A of the Code of Criminal Procedure, 1973 prescribes 14 years as the minimum period of incarceration in such cases.

[4] Gopu Mohan, 'Day after SC reprieve, Jaya says all 7 Rajiv convicts will walk free' The Indian Express (Delhi, 20 February 2014).

[5] Utkarsh Anand, 'SC Stops Tamil Nadu from freeing 3 Rajiv convicts' The Indian Express (Delhi, 21 February 2014).

[6] *Union of India* v. *V. Sriharan*, (2014) 11 SCC 1 at 19.

[7] *Swamy Shraddananda (2)* v. *State of Karnataka*, (2008) 13 SCC 767. See also, *Haru Ghosh* v. *State of W.B.*, (2009) 15 SCC 551; *Dilip Premnarayan Tiwari* v. *State of Maharashtra*, (2010) 1 SCC 775.

[8] Supra note 7.

[9] Acting on the strength of the precedent created in Swamy Shraddananda the *Supreme Court in Haru Ghosh* v. *State of W.B.*, (2009) 15 SCC 551 gave the life imprisonment of not less than 35 years and in *Dilip Premnarayan Tiwari* v. *State of Maharashtra*, (2010) 1 SCC 775, the Court gave the life imprisonment of 20 years in prison. After these decisions even Sessions Courts started acting on the strength of these precedents; for example a former Minister in the State of Gujarat Dr. Maya Kodnani was given the life term of 28 years and another convict in the same case Babu Bajrangi was given a life sentence of the rest of the remaining natural life by an Ahmedabad Court. See, Manas Dasgupta, "28 Years for Kodnani, Bajrangi to Spend Entire Life in Prison" The Hindu (Delhi, 1 September 2012).

[10] See, Section 433A of the Code of Criminal Procedure, 1973.

[11] Section 55 of the Indian Penal Code, 1860 and Section 433A of the Code of Criminal Procedure, 1973 explicitly contemplates such a situation.

[12] Article 72 of the Constitution of India.

[13] Article 161 of the Constitution of India.

[14] 2015 SCC OnLine SC 1267; also available at http://dspace.judis.nic.in/bitstream/123456789/154045/1/43153.pdf, (last visited March 01, 2016).

[15] AIR 1961 SC 600.

[16] (1981) 1 SCC 107.

[17] (1974) 1 SCC 196.

[18] (1976) 3 SCC 470.

[19] (1984) 1 SCC 31.

[20] (2001) 4 SCC 458.

[21] http://dspace.judis.nic.in/bitstream/123456789/154045/1/43153.pdf, (last visited March 01, 2016) at Para 61.

[22] Supra note 16.

[23] Supra note 21 at Para 77.

[24] Supra note 21 at Para 78.

[25] Supra note 21 at Para 78.

[26] Supra note 21 at Para 87.

[27] Ibid.

[28] Ibid.

[29] Ibid.

[30] Supra note 21 at Para 88.

[31] Supra note 21 at Paras 100 and 101.

[32] Supra note 21 at Paras 103 and 104.

[33] Supra note 25.

[34] Supra note 7.

[35] (2013) 2 SCC 452.

[36] Supra note 21 at Para 62 of the Uday Umesh Lalit, J.'s Judgment.

[37] Id. at Para 63.

[38] Id. at Para 64, on this Kalifulla, J. in his majority opinion had stated that Malimath Committee was not having the benefit of the existence of the order passed in Shraddananda (Para 87).

[39] (2015) 9 SCC 502.

[40] Supra note 21 at Para 66 of the Uday Umesh Lalit, J.'s Judgment.

[41] Id. at Para 69.

[42] Id. at Para 70.

[43] Id. at Para 74.

[44] The majority opinion itself in Supra note 21 at Para 109 acknowledges this.

[45] (2014) 4 SCC 242.

[46] Supra note 21 at Para 110.

[47] Supra note 21 at Para 109.

[48] 73. Extent of executive power of the Union - (1) Subject to the provisions of this Constitution, the executive power of the Union shall extend -

(a) To the matters with respect to which Parliament has power to make laws; and

(b) To the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:

Provided that the executive power referred to in sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws.

(2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer or authority thereof could exercise immediately before the commencement of this Constitution.

[49] 162. Extent of executive power of State - Subject to the provisions of this Constitution, the executive power of a State shall extend to matters with respect to which the legislature of the State has power to make laws: Provided that in any matter with respect to which the legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof.

[50] (1974) 3 SCC 531.

[51] Criminal Law, including all matters included in the Indian Penal Code at the commencement of this Constitution.

[52] Supra note 21 at Para 131.

[53] Supra note 21 at Para 132.

[54] Supra note 21 at Para 133.

[55] Supra note 16.

[56] Supra note 21 at Para 141.

[57] Supra note 21 at Para 141.

[58] Supra note 35.

[59] Supra note 21 at Para 143.

[60] Supra note 21 at Para 142.

[61] Supra note 21 at Para 155.

[62] (1993) 4 SCC 441.

[63] (2013) 3 SCC 117.

[64] Supra note 21 at Para 159.

[65] (1994) 3 SCC 1.

[66] Supra note 21 at Para 157.

[67] Supra note 21 at Para 161.