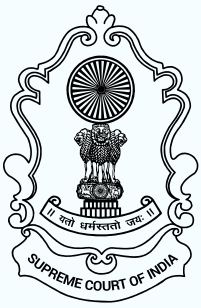

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v.
State by Adugodi Police Station & Anr.

(Criminal Appeal No. 335 of 2024)

22 January 2024

[Surya Kant* and Dipankar Datta, JJ.]

Issue for Consideration

The crux of respondent No. 2's allegations is that the appellants purportedly forged his signature on the passport application submitted to obtain the minor child's passport. Whether the actions of the appellants prima facie constitute the offence of cheating u/s. 420 IPC; Whether there has been a prima facie case made out for forgery u/ss. 468 and 471 IPC; Whether there has been a violation of s.12(b) of the Passports Act, 1967; Whether in the absence of any new evidence found to substantiate the conclusions drawn by the investigating officer in the supplementary report, a Judicial Magistrate was compelled to take cognizance, as such a report lacked investigative rigour and failed to satisfy the requisites of s.173(8) Cr.P.C.

Headnotes

Penal Code, 1860 – Cheating and Forgery – Appellants' prayer to discharge them u/ss. 420, 468, 471, 120-B, 201 r/w. s.34 of IPC was dismissed by the High Court – Propriety:

Held: In the peculiar facts and circumstances of the case, the appellant-wife seems to have breached the notion of mutual marital trust and unauthorizedly projected respondent no. 2's consent in obtaining the passport for their minor child – It, however, remains a question as to how such an act can be labelled as 'deceitful' – The motivations prompting either of the appellants to procure a passport for the minor child were not rooted in deceit – Furthermore, the grant of passport to the minor child did not confer any benefit upon the appellan-wife, nor did it result in any loss or damage to respondent no. 2 – In the same vein, appellant no. 2, being the father of the appellant-wife and assisting in securing the passport for the child, derived no direct or indirect benefit from this action – This grant can be best characterised as the minor

* Author

child's acquisition of property – Since the gain by the minor child is not at the cost of any loss, damage or injury to respondent no. 2, both the fundamental elements of 'deceit' and 'damage or injury', requisite for constituting the offence of cheating are conspicuously absent in this factual scenario – As far as forgery is concerned, the offences of 'forgery' and 'cheating' intersect and converge, as the act of forgery is committed with the intent to deceive or cheat an individual – The determination of whether the appellants prepared a false document, by forging respondent no. 2's signature, however, cannot be even *prima facie* ascertained at this juncture – Considering the primary ingredient of dishonest intention itself could not be established against the appellants, the offence of forgery too, has no legs to stand – The elementary ingredients of 'cheating' and 'forgery' are conspicuously missing – Thus, the continuation of the criminal proceedings against the appellants is nothing but an abuse of the process of law – The impugned judgments of the High Court and the trial Court are set aside. [Paras 16, 18, 20, 23, 34, 39]

Passport Act, 1967 – s. 12(b) – Whether there was a violation of s.12(b) of the Passports Act, 1967:

Held: Section 12(b) categorically states that, whoever knowingly furnishes any false information or suppresses any material information, with a view to obtaining a passport or travel document under this Act or without lawful authority, alters or attempts to alter or causes to alter the entries made in a passport or travel document – As discernible from the language of the provision, what must be established is that the accused knowingly furnished false information or suppressed material information with the intent of obtaining a passport or travel document – In the instant case, it is crucial to consider that the State FSL report explicitly stated that the alleged forgery of respondent No. 2's signatures on the passport application was inconclusive – Moreover, the cognizance of such like offence can be taken only at the instance of the Prescribed Authority – No complaint to that effect has been disclosed against the Appellants – The Court cannot proceed on the basis of conjectures and surmises.[Paras 35, 36]

Code of Criminal Procedure, 1973 – s. 173 (8) – Respondent no. 2 invoked s.173(8) Cr.P.C. and sought further investigation of the offences u/ss. 468 and 471 IPC in the concerned FIR – Trial Magistrate allowed respondent no. 2's prayer for further

investigation – Pursuant thereto, the investigating agency filed a supplementary charge-sheet against the appellants – Propriety:

Held: It is a matter of record that in the course of 'further investigation', no new material was unearthed by the investigating agency – Instead, the supplementary charge-sheet relies upon the Truth Lab report dated 15.07.2013, obtained by respondent no. 2, which was already available when the original chargesheet was filed – The term 'further investigation' stipulated in s.173(8) Cr.P.C. obligates the officer-in-charge of the concerned police station to 'obtain further evidence, oral or documentary', and only then forward a supplementary report regarding such evidence, in the prescribed form – The provision for submitting a supplementary report infers that fresh oral or documentary evidence should be obtained rather than re-evaluating or reassessing the material already collected and considered by the investigating agency while submitting the initial police report, known as the chargesheet u/s. 173(2) Cr.P.C. – In the absence of any new evidence found to substantiate the conclusions drawn by the investigating officer in the supplementary report, a Judicial Magistrate is not compelled to take cognizance, as such a report lacks investigative rigour and fails to satisfy the requisites of s.173(8) Cr.P.C. – The investigating agency acted mechanically, in purported compliance with the Trial Magistrate's order. [Paras 26 and 27]

Penal Code, 1860 – Cheating – Components of:

Held: It is paramount that in order to attract the provisions of s.420 IPC, the prosecution has to not only prove that the accused has cheated someone but also that by doing so, he has dishonestly induced the person who is cheated to deliver property – There are, thus, three components of this offence, i.e., (i) the deception of any person, (ii) fraudulently or dishonestly inducing that person to deliver any property to any person, and (iii) mens rea or dishonest intention of the accused at the time of making the inducement – There is no gainsaid that for the offence of cheating, fraudulent and dishonest intention must exist from the inception when the promise or representation was made. [Para 11]

Penal Code, 1860 – Forgery – Components of:

Held: There are two primary components that need to be fulfilled in order to establish the offence of 'forgery', namely: (i) that the

accused has fabricated an instrument; and (ii) it was done with the intention that the forged document would be used for the purpose of cheating – Simply put, the offence of forgery requires the preparation of a false document with the dishonest intention of causing damage or injury. [Para 22]

Case Law Cited

Krishna Chawla v. State of UP **[2021] 2 SCR 550: (2021) 5 SCC 435;** *Sushil Suri v. Central Bureau of Investigation* **[2011] 8 SCR 1: (2011) 5 SCC 708**; *Vinay Tyagi v. Irshad Ali and others* **[2012] 13 SCR 1005: (2013) 5 SCC 762**; *Maneka Gandhi v. Union of India and another* **[1978] 2 SCR 621: (1978) 1 SCC 248**; *K.S. Puttaswamy v. Union of India* **[2018] 8 SCR 1: (2019) 1 SCC 1 – referred to.**

Books and Periodicals Cited

P. Ramanatha Aiyar, *Advanced Law Lexicon*, 6th Edition, Vol.1, pg.903 – referred to.

List of Acts

Penal Code, 1860; Passport Act, 1967.

List of Keywords

Cheating; Components of cheating; Fraudulent intentions; Dishonest intentions; Deceit; Damage; Injury; Forgery; Components of forgery; Procedural irregularities; Abuse of the process of law; Further investigation; Supplementary charge-sheet; Fresh oral or documentary evidence.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.335 of 2024.

From the Judgment and Order dated 18.02.2021 of the High Court of Karnataka at Bengaluru in CRLRP No.692 of 2018.

Appearances for Parties

Ranbir Singh Yadav, Mohammed Sharookh, Prateek Yadav, Ms. Anzu K. Varkey, Ms. Mahesh Sharma, Ms. Chembugari Abheeshna, Advs. for the Appellants.

Narendra Hodda, Sr. Adv., Sanchit Garga, R. D. Singh, Ms. Mithu Jain, Kunal Rana, Pranshu Kaushal, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Surya Kant, J.

Leave granted.

2. The Appellants assail the judgment dated 18.02.2021, passed by the High Court of Karnataka, at Bengaluru **(hereinafter, 'High Court')**, whereby their Criminal Revision Petition challenging the order dated 15.03.2018 of the VI Additional Chief Metropolitan Magistrate, Bengaluru **(hereinafter, 'Trial Magistrate')** has been dismissed. Consequently, the Appellants' prayer to discharge them in connection with FIR No. 141/2010 under Sections 420, 468, 471 read with Section 34 of the Indian Penal Code, 1860 **(hereinafter, 'IPC')** registered at P.S. Adugodi, Bengaluru has been concurrently turned down.

A. FACTS

3. The brief facts that are relevant to the present proceedings are set out as follows:

3.1. The Appellant No. 1 – wife, and Respondent No. 2 – husband, got married in Bengaluru on 02.08.2007. At the time of their marriage, Respondent No. 2 was engaged in a software business, located in New Castle Upon Tyne, the United Kingdom. During this period, Respondent No. 2 statedly assured the Appellant – wife that post marriage they would reside together in London. It is the Appellants' case that Respondent No. 2 initially refused to take the Appellant – wife with him, but after considerable persuasion, she managed to accompany Respondent No. 2 to London. However, soon after, Respondent No. 2 allegedly abandoned her and forcefully confined her to the residence of her sister-in-law. At the same time, Respondent No. 2 returned to India.

3.2. Appellant No. 2, who is the father of the Appellant – wife, had to intervene in the aforesaid circumstances and facilitate the latter's return to India. Subsequently, on 02.06.2008, the Appellant

– wife gave birth to a male child. The Appellants allege that Respondent No. 2 and his family members did not provide any financial assistance to the Appellant – wife and the minor child. In January, 2009, the Appellant – wife sought to obtain a passport for the minor child based allegedly upon Respondent No. 2's instructions. Respondent No. 2 also assured them that he had arranged their stay in the United Kingdom. Shortly thereafter, the minor child's passport was issued, and Respondent No. 2 obtained a sponsorship letter from his brother-in-law, Dr. M.K. Shariff, which was duly forwarded to the United Kingdom High Commission. The sponsorship letter stated that Dr. M.K. Shariff would accommodate the Appellant – wife and the minor child during their visit to the United Kingdom and specifically mentioned the minor child's passport number.

3.3. However, as per the allegations of the Appellants, the duration of marriage with Respondent No. 2 was fraught with physical and mental torture solely on account of Respondent No. 2's relentless financial demands. More pertinently, Respondent No. 2, during his visit to India towards the end of 2009, subjected the Appellant – wife to coercion and torture. These acts of intimidation prompted the Appellant – wife to file a complaint against Respondent No. 2 and his family members on 07.04.2010 before the Basavangudi Women Police Station, Bengaluru. The complaint was registered as Crime No. 68 / 2010, under Sections 346, 498A and 506, read with Section 34 IPC. Additionally, the complaint alleges that Respondent No. 2, on the pretext of arranging for their travel to the United Kingdom, took away the minor child's passport and jewellery items belonging to the Appellant – wife.

3.4. Having learnt of the complaint filed by his wife, Respondent No. 2 also lodged a complaint of his own on 13.05.2010 before the Adugodi Police Station, alleging that the Appellants had forged his signatures on the minor child's passport application and submitted the same to the Regional Passport Office, Bengaluru, at the time when Respondent No. 2 was in the United Kingdom. This complaint was registered as FIR No. 141/2010 under Sections 420, 468 and 471 read with Section 34 IPC **(hereinafter, 'Concerned FIR')**.

3.5. Following the investigation conducted in the Concerned FIR, the investigating agency proceeded to file a chargesheet, implicating the Appellants and one Mr. Aksar Ahmed Sheriff, who is a travel agent, for procuring the minor child's passport using forged documents. Notably, the charges for offences under Sections 468 and 471 IPC were dropped. Consequently, a case numbered CC No. 23545 / 2011 commenced before the Trial Magistrate only for the offences punishable under Section 420 read with Section 34 IPC.

3.6. The Appellants sought quashing of the aforementioned chargesheet *vide* Criminal Petition No. 3600 / 2012, invoking the powers of the High Court under Section 482 of the Code of Criminal Procedure, 1973 **(hereinafter, 'CrPC'),** but their petition was dismissed *vide* order dated 22.04.2014. However, liberty was granted to the Appellants to approach the Trial Magistrate and seek their discharge from the case CC No. 23545/2011.

3.7. The Appellants consequently moved an application under Section 239 CrPC, seeking discharge in CC No. 23545 / 2011. In the meantime, Respondent No. 2 also invoked Section 173(8) CrPC and sought further investigation of the offences under Sections 468 and 471 IPC in the Concerned FIR. The Trial Magistrate on 24.06.2015, *vide* separate orders, allowed Respondent No. 2's prayer for further investigation and directed him, being the *de facto* complainant, to furnish necessary evidence before the investigating officer, if so required. On the other hand, the Trial Magistrate dismissed the Appellants' discharge application on the ground that the question as to whether an offence under Section 420 IPC was made out or not would be decided during the course of trial.

3.8. Pursuant to the abovementioned order of the Trial Magistrate, the investigating agency filed a supplementary chargesheet against the Appellants on 25.07.2017, adding offences under Sections 468, 471, 420, 120-B and 201 read with Section 34 IPC and Section 12(b) of the Passports Act, 1967. At this juncture, it is imperative to highlight that the concerned Passport Officer was also implicated as Accused No. 4, for allegedly providing false information regarding the availability of the original passport of the minor child and being complicit with the Appellants in its

destruction. The supplementary chargesheet also referred to a report provided by the State Forensic Laboratory, Madiwala, Bengaluru, dated 27.02.2016 **(hereinafter, 'State FSL')**, which categorically states as follows:

"Opinion on questioned photocopied signatures marked as Q1 to Q4 is not expressed since, the questioned photocopied signatures are showing bad line quality of strokes."

3.9. In addition to the State FSL Report, the supplementary chargesheet also mentioned a report dated 15.07.2013 purportedly obtained by Respondent No. 2 from a private agency, known as, 'Truth Lab'. This report opined that the signatures on the passport application did not signify a close resemblance with the specimens of Respondent No. 2's signatures.

3.10. Subsequent to these developments, when the case CC No. 23545 / 2011 was taken up for hearing before charge, it was urged on behalf of the Appellants that there were no grounds to frame charges. However, the Trial Magistrate repelled this contention by order dated 15.03.2018 and declined to discharge them.

3.11. The Appellants preferred to challenge the Trial Magistrate's order *vide* Criminal Revision Petition No. 692 / 2018, but as noticed at the outset, the High Court dismissed the same via the impugned order dated 18.02.2021, primarily on the ground that there were specific allegations against the Appellants which required a full-fledged trial.

3.12. The aggrieved Appellants are now before this Court.

B. CONTENTIONS OF THE PARTIES

4. Mr. Ranbir Singh Yadav, Learned Counsel appearing for the Appellants, argued that Respondent No. 2's complaint pertaining to the forgery of the passport application was merely a counterblast to the Appellant – wife's complaint alleging cruelty against him. He contended that Respondent No. 2 had expressly consented to obtaining the minor child's passport and after the issuance of passport, had even sent the sponsorship letter authored by his brother-in-law, Dr. M.K. Shariff, for the relocation of the Appellant – wife and the

minor child to London. It was argued that this sponsorship letter is vital since it had been obtained at the instance of Respondent No. 2 and it specifically mentioned the passport number of the minor child, thereby implying consent of Respondent No. 2.

5. Mr. Yadav further contended that the opinion rendered by the State FSL was inconclusive as to the alleged forgery, and no additional material whatsoever had been recovered by the investigating agency between filing the original chargesheet and the supplementary chargesheet. Mr. Yadav also highlighted the reliance placed by both the High Court and the Trial Magistrate on the opinion of a handwriting expert obtained by Respondent No. 2 through a private agency – known as the Truth Lab. He vehemently urged that the State FSL Report should have been given utmost weightage in comparison to a paid opinion so as to uphold the fairness and impartiality of the investigation. Mr. Yadav contended that no *prima facie* case had been made out against the Appellants. Citing the decision of this Court in ***Krishna Chawla v. State of UP***,[1] he emphasised upon the duty of the Trial Magistrate to nip frivolous prosecution in the bud before it reaches the trial stage by discharging the accused in fit cases.

6. Contrarily, Mr. Narender Hooda, Learned Senior Counsel representing Respondent No. 2, strongly refuted the allegations levelled by the Appellants. He strenuously urged that Respondent No. 2 was not present in India during the period from 13.07.2008 to 17.11.2009, when the alleged passport application with his forged signatures was submitted, to procure the minor child's passport. He further argued that the Trial Magistrate has unequivocally observed that the Passport Officer (Accused No. 4), who deliberately withheld the original passport application, was an accomplice in the offence of the destruction of evidence. Additionally, Mr. Hooda objected to discarding the Truth Lab report at the stage of deciding the discharge application on the premise that the report of the State FSL was ambiguous and that the veracity of the private lab report could be ascertained only at the time of trial.

7. In addition to the full insight of the controversy, as highlighted by the learned counsel for the parties, we have also meticulously perused the chargesheets and other documents brought on record by them.

1 (2021) 5 SCC 435, para 23.

C. ISSUES FOR CONSIDERATION

8. The foremost question that falls for consideration before us is whether a *prima facie* case, to subject the Appellants to the agony of trial, has been made out. In furtherance of this question, the following issues emerge for our further consideration:

(i) Whether the actions of the Appellants *prima facie* constitute the offence of cheating under Section 420 IPC?

(ii) Whether there has been a *prima facie* case made out for forgery under Sections 468 and 471 IPC?

(iii) Whether there has been a violation of Section 12(b) of the Passports Act, 1967?

D. ANALYSIS

9. In the present case, charges have been brought against the Appellants for offences punishable under Sections 420, 468, 471, 120-B, 201, read with Section 34 IPC, and Section 12(b) of the Passports Act, 1967. In this context, it is paramount to delve into the ingredients of 'forgery' and 'cheating' required to be *prima facie* established against the Appellants, at the very threshold. We are conscious of the fact that such an evaluation would have to proceed on the premise that the material gathered by the investigating agency is not to be discarded or disbelieved at this stage.

The offence of cheating under Section 420 IPC:

10. Section 420 IPC provides that whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy, the whole or any part of valuable security, or anything, which is signed or sealed, and which is capable of being converted into a valuable security, shall be liable to be punished for a term which may extend to seven years and shall also be liable to fine. Further, Section 415 IPC distinctly defines the term 'cheating'. The provision elucidates that an act marked by fraudulent or dishonest intentions will be categorised as 'cheating' if it is intended to induce the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, causing damage or harm to that person.

11. It is thus paramount that in order to attract the provisions of Section 420 IPC, the prosecution has to not only prove that the accused has cheated someone but also that by doing so, he has dishonestly induced the person who is cheated to deliver property. There are, thus, three components of this offence, i.e., *(i)* the deception of any person, *(ii)* fraudulently or dishonestly inducing that person to deliver any property to any person, and *(iii) mens rea* or dishonest intention of the accused at the time of making the inducement. There is no gainsaid that for the offence of cheating, fraudulent and dishonest intention must exist from the inception when the promise or representation was made.

12. It is well known that every deceitful act is not unlawful, just as not every unlawful act is deceitful. Some acts may be termed both as unlawful as well as deceitful, and such acts alone will fall within the purview of Section 420 IPC. It must also be understood that a statement of fact is deemed 'deceitful' when it is false, and is knowingly or recklessly made with the intent that it shall be acted upon by another person, resulting in damage or loss.[2] 'Cheating' therefore, generally involves a preceding deceitful act that dishonestly induces a person to deliver any property or any part of a valuable security, prompting the induced person to undertake the said act, which they would not have done but for the inducement.

13. The term 'property' employed in Section 420 IPC has a well-defined connotation. Every species of valuable right or interest that is subject to ownership and has an exchangeable value – is ordinarily understood as 'property'. It also describes one's exclusive right to possess, use and dispose of a thing. The IPC itself defines the term 'moveable property' as, **"*intended to include corporeal property of every description, except land and things attached to the earth or permanently fastened to anything which is attached to the earth.*"** Whereas immoveable property is generally understood to mean land, benefits arising out of land and things attached or permanently fastened to the earth.

14. Having fully addressed the contours of the offence of 'cheating', let us now advert to the facts of the instant case to appreciate whether the allegations made by Respondent No. 2, are sufficient to *prima*

2 P. Ramanatha Aiyar, Advanced Law Lexicon, 6th Edition, Vol. 1, pg. 903.

facie establish that: *(i)* the Appellants have deceived Respondent No. 2; *(ii)* Respondent No. 2 was induced with dishonest intentions; *(iii)* such inducement was for the delivery of any property or valuable security; and *(iv)* as a result of such an act, Respondent No. 2 has suffered some damage or injury.

15. Each of these ingredients need to be analysed to ascertain whether Respondent No. 2 has made allegations in his complaint to substantiate points *(i)* to *(iv)* above. Additionally, it would also aid in determining whether the original or supplementary chargesheet addresses any of these ingredients.

16. The crux of Respondent No. 2's allegations is that the Appellants purportedly forged his signature on the passport application submitted to obtain the minor child's passport. Assuming the allegation to be accurate, it would undoubtedly constitute an unlawful act. However, as set out earlier, it is crucial to underscore that not every unlawful act automatically qualifies as 'deceitful'. In the peculiar facts and circumstances of this case, the Appellant – wife seems to have breached the notion of mutual marital trust and unauthorizedly projected Respondent No. 2's consent in obtaining the passport for their minor child. It, however, remains a question as to how such an act can be labelled as 'deceitful'. The motivations prompting either of the Appellants to procure a passport for the minor child were not rooted in deceit. Furthermore, the grant of passport to the minor child did not confer any benefit upon the Appellant-wife, nor did it result in any loss or damage to Respondent No. 2. In the same vein, Appellant No. 2, being the father of the Appellant – wife and assisting in securing the passport for the chid, derived no direct or indirect benefit from this action.

17. In this context, the critical inquiry arises: how does the act of forging signatures on the passport application, aimed at obtaining the minor child's passport, amount to inducing Respondent No. 2 to relinquish any property or valuable security? Examining the situation, it becomes apparent that the aforementioned act does not entail inducement leading to the parting of any property by Respondent No. 2. The nature of the property which can be claimed to have been relinquished or the tangible loss, damage, or injury, if any, suffered by Respondent No. 2 are not visible at all. The unequivocal response to these queries is clearly in the negative.

18. Respondent No. 2, the biological father and natural guardian of the minor child, is positioned as such in relation to the grant of a passport to his son. This grant can be best characterised as the minor child's acquisition of property. Since the gain by the minor child is not at the cost of any loss, damage or injury to Respondent No. 2, both the fundamental elements of 'deceit' and 'damage or injury', requisite for constituting the offence of cheating are conspicuously absent in this factual scenario.

19. Conversely, can the Appellant – wife, being the natural mother of the child and a natural guardian, be accused of acting `dishonestly' when applying for the passport of her minor child? A passport, is an authorised instrument which enables a person to travel outside the country of his origin. In this case, the passport was admittedly issued in favour of the minor child. Whether it was stolen by Respondent No. 2 or misplaced, is wholly immaterial to the present discussion. The grant of passport to the minor child is nothing but a right conferred upon him by statute. The passport is meant to facilitate him to accompany his mother to London and stay with his father. However, there is not even a whisper of allegation or suggestion that the passport was obtained to the detriment of the child's wellbeing. The underlying intent of obtaining the passport was, ironically, essential for the Appellant – wife and minor child to live together with Respondent No. 2, on whose instructions the passport was statedly obtained. Conversely, it is the actions of Respondent No. 2 that have seemingly deprived the minor child of his right to seek the care and company of his father, as the passport was allegedly taken away by Respondent No. 2 in a clandestine manner.

20. The background of this case and the chronology of events squarely indicate that it is the touchstone of a marital dispute. The insinuations made by Respondent No. 2, even if they possess an iota of truth, have miserably failed to *prima facie* establish the elements of 'cheating' and thus, the accusation made against the Appellants under Section 420 IPC must fall flat.

The offence of forgery under Sections 468 and 471 IPC:

21. The offence of 'forgery' under Section 468 IPC postulates that whoever commits forgery, intending that the document or electronic document forged, shall be used for the purpose of cheating, shall be punished

with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. Whereas Section 471 IPC states that whoever fraudulently or dishonestly uses as genuine any documents which he knows or has reason to believe it to be a forged document, shall be punished in the same manner as if he had forged such document.

22. There are two primary components that need to be fulfilled in order to establish the offence of 'forgery', namely: *(i)* that the accused has fabricated an instrument; and *(ii)* it was done with the intention that the forged document would be used for the purpose of cheating. Simply put, the offence of forgery requires the preparation of a false document with the dishonest intention of causing damage or injury.[3]

23. The offences of 'forgery' and 'cheating' intersect and converge, as the act of forgery is committed with the intent to deceive or cheat an individual. Having extensively addressed the aspect of dishonest intent in the context of 'cheating' under Section 420 IPC, it stands established that no dishonest intent can be made out against the Appellants. Our focus therefore will now be confined, for the sake of brevity, to the first element, i.e., the preparation of a false document. The determination of whether the Appellants prepared a false document, by forging Respondent No. 2's signature, however, cannot be even *prima facie* ascertained at this juncture. Considering the primary ingredient of dishonest intention itself could not be established against the Appellants, the offence of forgery too, has no legs to stand. It is also significant to highlight that the proceedings as against the concerned Passport Officer, who was implicated as Accused No. 4, already stand quashed. In such like situation and coupled with the nature of allegations, we are unable to appreciate as to why the Appellants be subjected to the ordeal of trial.

24. That apart, there are glaring procedural irregularities that have been overlooked by the Trial Magistrate, which warrants examination. It is extremely important to delve into these improprieties since the supplementary chargesheet filed by the investigating authority included the offence of 'forgery' under Sections 468 and 471 IPC.

3 Sushil Suri v. Central Bureau of Investigation, (2011) 5 SCC 708, para 26.

Questions overlooked by the lower courts:

25. As previously noted, the Appellants stand accused of forging the signatures of Respondent No. 2 on the passport application of the minor child. The investigating agency initially found insufficient evidence to support charges under Sections 468 and 471 IPC. Accordingly, no chargesheet was filed under these provisions. However, in compliance with the Trial Magistrate's order dated 24.06.2015, a supplementary chargesheet was submitted under Sections 468, 471 and 201 IPC and Section 12(b) of the Passports Act, 1967.

26. It is a matter of record that in the course of 'further investigation', no new material was unearthed by the investigating agency. Instead, the supplementary chargesheet relies upon the Truth Lab report dated 15.07.2013, obtained by Respondent No. 2, which was already available when the original chargesheet was filed. The term 'further investigation' stipulated in Section 173(8) CrPC obligates the officer-in-charge of the concerned police station to 'obtain further evidence, oral or documentary', and only then forward a supplementary report regarding such evidence, in the prescribed form.

27. The provision for submitting a supplementary report infers that fresh oral or documentary evidence should be obtained rather than re-evaluating or reassessing the material already collected and considered by the investigating agency while submitting the initial police report, known as the chargesheet under Section 173(2) CrPC.[4] In the absence of any new evidence found to substantiate the conclusions drawn by the investigating officer in the supplementary report, a Judicial Magistrate is not compelled to take cognizance, as such a report lacks investigative rigour and fails to satisfy the requisites of Section 173(8) CrPC. What becomes apparent from the facts on record of this case is that the investigating agency acted mechanically, in purported compliance with the Trial Magistrate's order dated 24.06.2015.

28. Regrettably, the Trial Magistrate, while directing further investigation, overlooked the significant aspect that the offences imputed upon the Appellants fall within the ambit of **Chapter XVII, 'Of Offences**

4 Vinay Tyagi v. Irshad Ali and others, (2013) 5 SCC 762, para 22.

Against Property', and **Chapter XVIII, 'Of Offences Relating to Documents and to Property Marks'** of the IPC. All the offences delineated or illustrated under these two chapters predominantly pertain to commercial or property disputes arising from dishonest, deceitful and fraudulent transactions, wherein an individual is induced to part with their property or valuable security, leading to subsequent injury or damage. These offences typically diverge from the customary realm of matrimonial disputes, which constitute the underlying cause in this instance.

29. The Trial Magistrate, prior to entertaining the application filed by Respondent No. 2, should have applied his mind and posed certain queries in order to find out as to: *(i)* Why does Respondent No. 2 want to deprive his minor child of a passport?; *(ii)* Is it the case that he did not want his minor child to join his company in London?; *(iii)* How has Respondent No. 2 secured the maintenance, education and future prospects of the minor child?; *(iv)* Does the minor child have a civil right to hold a passport even if one of his parents does not accord consent?; *(v)* Can the minor child be granted a passport with the consent of one parent under whose care and custody he is?; *(vi)* What is the tangible loss, injury or damage suffered by Respondent No. 2 due to procurement of a passport by his minor son? Had the Trial Magistrate taken the pains to confront Respondent No. 2 with these questions, we have no reason to doubt that the vexatious persecution faced by the Appellants, could not at least be attributed to a judicial order.

30. We also fail to understand the reliability of the material based on which the investigating agency or the Trial Magistrate could form a *prima facie* opinion concerning the allegation of forgery of signatures of Respondent No. 2. As observed earlier, the State FSL report does not substantiate these allegations. In our opinion, a paid report obtained from a private laboratory seems to be a frail, unreliable, unsafe, untrustworthy and imprudent form of evidence, unless supported by some other corroborative proof. It is painful to mention that Respondent No. 2 has not produced any other substantive proof, nor has the investigating agency obtained any such material in compliance with the Trial Magistrate's order for further investigation. The basis on which the Trial Magistrate formed a *prima facie* opinion, in the absence of such supporting evidence is, therefore, beyond our comprehension.

31. The Trial Magistrate and the High Court unfortunately failed to appreciate that the genesis of the present controversy lies in a marital dispute. Respondent No. 2 is alleged to have abandoned the Appellant – wife and the minor child, even during the period when the Appellant – wife was temporarily residing with him in London. The timeline in this case is noteworthy: immediately after the Appellant – wife filed Crime No. 68 / 2010 against Respondent No. 2 on 08.04.2010, invoking Sections 346, 498A, 506, and 34 IPC, the counter-complaint by Respondent No. 2 followed on 13.05.2010. Further, the passport for the minor child was issued sometime in 2009. The question that naturally arises is whether it is a mere coincidence that Respondent No. 2 chose to make his complaint only after an FIR had been lodged against him.

32. On the one hand, there is no indication whatsoever that Appellant No. 1 ever endeavoured to deceive or induce Respondent No. 2 into parting with his movable or immovable property or valuable security, either for her benefit or that of the minor child. While on the other hand, the law imposes an obligation upon Respondent No. 2 to provide adequate maintenance to his wife and the minor child. The complaint lodged by Respondent No. 2 on 13.05.2010, while unleashing accusations of forgery and fabrication, is conveniently silent on what measures he has undertaken for his minor child's welfare.

33. In light of these circumstances, the Trial Magistrate should have approached the complaint with due care and circumspection, recognising that the allegations do not pertain to offences against property or documents related to property marks. Instead of wielding judicial authority against the Appellants, the Trial Magistrate should have exercised prudence, making at least a cursory effort to discern the actual 'victim' or 'victimiser'. The failure to do so is both fallible and atrocious.

34. The sum and substance of the above discussion is that the elementary ingredients of 'cheating' and 'forgery' are conspicuously missing. Thus, the continuation of the criminal proceedings against the Appellants is nothing but an abuse of the process of law.

In the context of Section 12(b) of the Passports Act, 1967:

35. In addition to the abovementioned provisions of the IPC, the Appellants have also been accused of committing an offence under Section 12(b) of the Passports Act, 1967. Section 12(b) categorically states that, whoever knowingly furnishes any false information or suppresses any material information, with a view to obtaining a passport or travel document under this Act or without lawful authority, alters or attempts to alter or causes to alter the entries made in a passport or travel document, shall be punishable with imprisonment for a term which may extend to two years or with fine which may extend to five thousand rupees or with both.

36. As discernible from the language of the provision, what must be established is that the accused knowingly furnished false information or suppressed material information with the intent of obtaining a passport or travel document. In the present case, it is crucial to consider that the State FSL report explicitly stated that the alleged forgery of Respondent No. 2's signatures on the passport application was inconclusive. Moreover, the cognizance of such like offence can be taken only at the instance of the Prescribed Authority. No complaint to that effect has been disclosed against the Appellants. This Court, therefore, will exercise caution before invoking such severe offences and penalties solely on the basis of conjectures and surmises.

The conduct exhibited by Respondent No. 2:

37. Having scrutinised the elements of cheating and forgery, it is also imperative to consider the conduct of Respondent No. 2 since the inception. *Firstly*, following the solemnisation of the marriage between the concerned parties, the Appellant – wife purportedly endured both physical and mental torture and was further not extended any support by Respondent No. 2 and his family members even after the birth of the minor child. *Secondly*, the original passport of the minor child was presumed to have been issued with the consent and support of Respondent No. 2. He allegedly even sponsored the travel of his wife and minor son through his brother-in-law for visa purposes, who in his sponsorship letter explicitly cited the passport number of the minor child. *Thirdly*, Respondent No. 2 chose to lodge the Concerned FIR as a counterblast to the complaint filed by the Appellant – wife in Crime No. 68/2010 in spite of being fully aware of the issuance of the minor child's passport. Thus, the Appellants were unnecessarily

implicated and dragged into criminal proceedings, thereby causing undue hardship to them. These instances shed light on Respondent No. 2's conduct preceding the initiation of the present proceedings and provide insight into his motivations for instigating the same.

38. It is undeniable that despite the evident discord between the Appellants and Respondent No. 2, resulting in numerous complaints and legal proceedings, the issue at hand has adversely impacted the rights and interests of the minor child. The right to travel abroad is a fundamental right of an individual, albeit not absolute, and subject to established legal procedures.[5] The conduct exhibited by Respondent No. 2 infringes upon the best interests of the minor child, which necessitates the child's travel abroad for the realisation of opportunities and intrinsic value, aligning with the child's dignity, as enshrined by the Constitution.[6]

E. CONCLUSION AND DIRECTIONS

39. Consequently, the appeal is allowed; the impugned judgment of the High Court dated 18.02.2021, and that of the Trial Magistrate dated 15.03.2018, are hereby set aside. As a sequel thereto, the FIR No. 141 / 2010 registered at Police Station Adugodi, Bengaluru under Sections 420, 468, 471 read with Section 34 IPC, lodged by Respondent No. 2 against the Appellants and all the proceedings arising therefrom are hereby quashed.

40. Respondent No. 2 is liable to pay the cost of Rs. 1,00,000/- to Appellant No. 1. Ordered accordingly, Respondent No. 2 shall pay the costs within six weeks, failing which the Trial Magistrate is directed to initiate coercive measures for recovery thereof.

Headnotes prepared by: Ankit Gyan *Result of the case:* Appeal allowed.

5 Maneka Gandhi v. Union of India and another (1978) 1 SCC 248, paras 76, 80-85.

6 K.S. Puttaswamy v. Union of India, (2019) 1 SCC 1, paras 376-379.

[2024] 1 S.C.R. 642 : 2024 INSC 53

M/s Mangalam Publications, Kottayam
v.
Commissioner of Income Tax, Kottayam

(Civil Appeal Nos. 8580-8582 of 2011)

23 January 2024

[B. V. Nagarathna and Ujjal Bhuyan*, JJ.]

Issue for Consideration

Reopening of a concluded assessment-reassessment u/s. 147 of the Income Tax Act, 1961 following issuance of notice u/s. 148 of the Act, legally sustainable or bad in law.

Headnotes

Income Tax Act, 1961 – ss. 147 and 148 – Reopening of a concluded assessment-reassessment u/s. 147 following issuance of notice u/s. 148 – Sustainability:

Held: On the basis of the balance sheet submitted by the assessee before the Bank for obtaining credit, the assessing officer upon a comparison of the same with a subsequent balance sheet filed by the assessee for the assessment year 1993-94 concluded that there was escapement of income and initiated reassessment proceedings – Dehors such balance sheet, there were no other material in the possession of the assessing officer to hold that income of the assessee for the assessment years had escaped assessment – When the assessee had not made any false declaration, it was nothing but a subsequent subjective analysis of the assessing officer that income of the assessee for the assessment years was much higher than what was assessed and thus, had escaped assessment – This was a mere change of opinion which cannot be a ground for reopening of assessment – Returns for the assessment years were not accompanied by the regular books of account – Such return may be a defective one but certainly not invalid return – Furthermore, in none of the assessment years, the assessing officer had issued any declaration that the returns were defective – Assessee asserted both in the pleadings and in the oral hearing that though it could not file regular books of account along with the returns for the assessment years because of seizure by the department, nonetheless the returns

* Author

of income were accompanied by tentative profit and loss account and other details of income which were duly enquired into by the assessing officer in the assessment proceedings – Thus, the tribunal justified in holding that the reassessments for the assessment years not justified – High Court erred in reversing the findings of the tribunal – Order of the High Court set aside and that of the tribunal restored. **[Paras 41-45]**

Income Tax Act, 1961 – s. 147 – Income escaping assessment – 'Full and true disclosure' – Meaning of:

Held: Word 'disclosure' means to disclose, reveal, unravel or bring to notice –Word 'true' qualifies a fact or averment as correct, exact, actual, genuine or honest – Word 'full' means complete – True disclosure of concealed income must relate to the assessee concerned – Full disclosure, in the context of financial documents, means that all material or significant information should be disclosed – Thus, the meaning of 'full and true disclosure' is the voluntary filing of a return of income that the assessee earnestly believes to be true – Production of books of accounts or other material evidence that could ordinarily be discovered by the assessing officer does not amount to a true and full disclosure. **[Para 31]**

Income Tax Act, 1961 – s. 147 – Income escaping assessment – Expression "change of opinion" in terms of assessment proceedings:

Held: Expression "change of opinion" would imply formulation of opinion and then a change thereof – In terms of assessment proceedings, it means formulation of belief by the assessing officer resulting from what he thinks on a particular question – Thus, before interfering with the proposed reopening of the assessment on the ground that the same is based only on a change of opinion, the court ought to verify whether the assessment earlier made has either expressly or by necessary implication expressed an opinion on a matter which is the basis of the alleged escapement of income that was taxable – If the assessment order is non-speaking, cryptic or perfunctory in nature, it may be difficult to attribute to the assessing officer any opinion on the questions that are raised in the proposed reassessment proceedings. **[Para 36]**

Income Tax Act, 1961 – s. 139 – Return of income – Obligation on assessee to disclose all material facts necessary for his assessment:

Held: s.139 places an obligation upon every person to furnish voluntarily a return of his total income if such income during the previous year exceeded the maximum amount which is not chargeable to income tax – Assessee is under further obligation to disclose all material facts necessary for his assessment for that year fully and truly – While the duty of the assessee is to disclose fully and truly all primary and relevant facts necessary for assessment, it does not extend beyond this – Once the primary facts are disclosed by the assessee, the burden shifts onto the assessing officer. **[Para 41]**

s. 139 – Return of income – When to be treated as invalid return:

Held: U/s. 139(9), where the assessing officer considers that the return of income furnished by the assessee is defective, he may intimate the defect to the assessee and give him an opportunity to rectify the defect within fifteen days from the date of such intimation or within such further period, the assessing officer may in his discretion allow – Burden is on the assessing officer – If he does not exercise the discretion, the return of income cannot be construed as a defective return – If the defect is not rectified within the specified period or within the further period as may be allowed, the return shall be treated as an invalid return – In such an eventuality, it would be construed that the assessee had failed to furnish the return. **[Para 24.1-24.2]**

Case Law Cited

Calcutta Discount Company Limited v. Income Tax Officer, [1961] 2 SCR 241 **: (1961) 41 ITR 1991 – followed.**

M/s Phool Chand Bajrang Lal v. Income Tax Officer, [1993] 1 Suppl. SCR 28 **: (1993) 4 SCC 77**; *Srikrishna Private Limited v. ITO, Calcutta*, [1996] 3 Suppl. SCR 627 **: (1996) 9 SCC 534**; *CIT, Delhi v. Kelvinator of India Limited*, [2010] 1 SCR 768 **: (2010) 2 SCC 723**; *CIT v. Bimal Kumar Damani*, **(2003) 261 ITR 87 (Cal)**; *Income Tax Officer v. Lakhmani Mewal Das*, [1976] 3 SCR 956 **: 1976 (3) SCC 757 : 1976 (103) ITR 437 – referred to.**

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M/S Mangalam Publications, Kottayam v.
Commissioner of Income Tax, Kottayam

List of Acts

Income Tax Act, 1961; Direct Tax Laws (Amendment) Act, 1987

List of Keywords

Income Tax Jurisprudence; Concluded assessment; Reassessment; Search and seizure operations; Disclosed income; Limitation period; Reopening the assessment; Omission; Reason to believe; Time limit; Full and true disclosure; Production of books of accounts; Change of opinion.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 8580-8582 of 2011.

From the Judgment and Order dated 12.10.2009 of the High Court of Kerala at Ernakulam in ITA Nos.400 and 557 of 2009.

With

Civil Appeal Nos.8599-8603, 8604, 8593-8598, 8583-8587 and 8588-8592 of 2011.

Appearances for Parties

Raghenth Basant, Ms. Kaushitaki Sharma, Ms. Liz Mathew, Advs. for the Appellant.

N. Venkataraman, ASG, Shyam Gopal, Raj Bahadur Yadav, Prahlad Singh, Shashank Bajpai, Suyash Pandey, Prashant Singh Ii, T. S. Sabarish, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Ujjal Bhuyan, J.

The perennial question in income tax jurisprudence, whether reopening of a concluded assessment i.e. reassessment under Section 147 of the Income Tax Act, 1961 (briefly "the Act" hereinafter) following issuance of notice under Section 148 of the Act is legally sustainable or is bad in law, is again confronting us in the present batch of appeals. The Income Tax Appellate Tribunal, Cochin Bench, Cochin ('Tribunal' hereinafter) had decided in favour of the assessee

by setting aside the orders of reassessment. However, the High Court of Kerala in appeals filed by the revenue under Section 260A of the Act has reversed the findings of the Tribunal by deciding the appeals preferred by the revenue in its favour.

2. Aggrieved by the aforesaid orders passed by the High Court of Kerala (briefly "the High Court" hereinafter), the assessee had preferred special leave petitions to appeal before this Court and on leave being granted, civil appeals have been registered.

3. We have heard Mr. Raghenth Basant, learned counsel for the appellant/assessee (which would be referred to either as the appellant or as the assessee) and Mr. Shyam Gopal, learned counsel for the respondent/revenue (again, would be referred to either as the respondent or as the revenue).

4. A brief narration of facts is necessary.

5. For the sake of convenience, we may refer to civil appeal Nos. 8580, 8581 and 8582 of 2011 (M/s Mangalam Publications, Kottayam Vs. Commissioner of Income Tax, Kottayam).

6. The above three civil appeals pertain to assessment years 1990-91, 1991-92 and 1992-93.

7. The assessee was a partnership firm at the relevant point of time though it got itself registered as a company since the assessment year 1994-95. The assessee is carrying on the business of publishing newspaper, weeklies and other periodicals in several languages under the brand name "Mangalam". Prior to the assessment year 1994-95 including the assessment years under consideration, the status of the assessee was that of a firm, being regularly assessed to income tax.

8. For the assessment year 1990-91, assessee filed return of income on 22.10.1991 showing loss of Rs.5,99,390.00. Subsequently, the assessee filed a revised computation showing income at Rs.5,63,920.00. Assessee did not file any balance sheet alongwith the return of income on the ground that books of account were seized by the income tax department (department) in the course of search and seizure operations on 03.12.1995 and that those books of account were not yet returned. In the assessment proceedings, the assessing officer did not accept the contention of the assessee and

made an analysis of the incomings and outgoings of the assessee for the previous year under consideration. After considering various heads of income and sale of publications, the assessing officer made a lumpsum addition of Rs. 1 lakh to the disclosed income vide the assessment order dated 29.01.1992 passed under Section 143 (3) of the Act.

9. Likewise, for the assessment year 1991-1992, the assessee did not file any balance sheet along with the return of income for the same reason mentioned for the assessment year 1990-1991. The return of income was filed on 22.10.1991 showing a loss of Rs.21,66,760.00. As per the revised profit and loss account, the sale proceeds of the publications were shown at Rs.8,21,24,873.00. Assessing officer scrutinised the net sale proceeds as per the Audit Bureau of Circulation figure and the certified Performance Audit Report. On that basis assessing officer accepted the sale proceeds of Rs.8,21,24,873.00 as correct being in conformity with the facts and figures available in the Audit Bureau of Circulation report and the Performance Audit Report. After considering the incomings and outgoings of the relevant previous year assessing officer reworked the aforesaid figures but found that there was a deficiency of Rs.29,17,931.00 in the incoming and outgoing statement which the assessee could not explain. Accordingly, this amount was added to the total income of the assessee. Further, the assessee could not produce proper vouchers in respect of a number of items of expenditure. Accordingly, an addition of Rs.1,50,000.00 was made to the total income of the assessee vide the assessment order dated 29.01.2022 passed under Section 143 (3) of the Act.

10. For the assessment year 1992-1993 also, the assessee filed the return of income on 07.12.1992 showing a loss of Rs.10,50,000.00. However, a revised return was filed subsequently on 28.01.1993 showing loss of Rs.44,75,212.00. Like the earlier years, assessee did not maintain books of account and did not file the balance sheet for the same reason. However, the assessee disclosed total sale proceeds of the weeklies at Rs.7,16,95,530.00 and also advertisement receipts to the extent of Rs.40 lakhs. The profit was estimated at Rs.41,63,500.00 before allowing depreciation.

    10.1. On scrutiny of the performance certificate issued by the Audit Bureau of Circulation, the assessing officer observed that total sale proceeds of the weeklies after allowing sale commission

came to Rs.7,22,94,757.00. Following the profit percentage adopted in earlier years, the assessing officer estimated the income from the weeklies and other periodicals at 7.50% before depreciation, adding the estimated advertisement receipts of Rs.40 lakhs to the total sale receipts of Rs.7,22,94,757.00. The assessing officer held that the total receipt from sale of weeklies and periodicals came to Rs.7,62,94,757.00. The profit earned before depreciation at the rate of 7.50% on the turnover came to Rs.57,22,106.00. In respect of the daily newspaper, the assessing officer worked out the loss at Rs.22,95,872.00 as against the loss of Rs.41,23,500.00 claimed by the assessee. Taking an overall view of the matter, the assessing officer estimated the business income of the assessee during the assessment year 1992-1993 at Rs.10,00,000.00 vide the assessment order dated 26.03.1993 passed under Section 143(3) of the Act.

11. It may be mentioned that for the assessment year 1993-1994, the assessee had submitted the profit and loss account as well as the balance sheet along with the return of income. While examining the balance sheet, the assessing officer noticed that the balance in the capital account of all the partners of the assessee firm together was Rs.1,85,75,455.00 as on 31.03.1993 whereas the capital of the partners as on 31.12.1985 was only Rs.2,55,117.00. According to the assessing officer, none of the partners had any other source of income apart from one of the partners, Smt. Cleramma Vargese, who had a business under the name and style of "Mangalam Finance". As the income assessed for all the years was found to be not commensurate with the increase in the capital by Rs.1,83,20,338.00 (Rs.1,85,75,455.00 – Rs.2,55,117.00) from 1985 to 1993, it was considered necessary to reassess the income of the assessee as well as that of the partners for the assessment years 1988-1989 to 1993-1994. After obtaining the approval of the Commissioner of Income Tax, Trivandrum, notice under Section 148 of the Act was issued and served upon the assessee on 29.03.2000.

12. In respect of the assessment year 1990-1991, the assessee informed the assessing officer that the return of income filed which culminated in the assessment order dated 29.01.1992 may be considered as the return in the reassessment proceedings. The assessing officer took cognizance of the profit and loss account and the balance sheet filed

by the assessee before the South Indian Bank on the basis of which assessment of income for the assessment years 1988 - 1989 and 1989 - 1990 were completed. Objection of the assessee that the aforesaid balance sheet was prepared only for the purpose of obtaining loan from the South Indian Bank and therefore could not be relied upon for income tax assessment was brushed aside. The reassessment was made on the basis of the accounts submitted to the South Indian Bank. By the reassessment order dated 21.03.2002 passed under Section 144/147 of the Act, the assessing officer quantified the total income of the assessee at Rs.29,66,910.00 whereafter order was passed allocating income among the partners.

13. Likewise, for the assessment year 1991-1992, the assessing officer passed reassessment order dated 21.03.2002 under Section 144/147 of the Act determining total income at Rs.13,91,700.00. Following the same, allocation of income was also made amongst the partners.

14. In so far assessment year 1992-1993 is concerned, the assessing officer passed the reassessment order also on 21.03.2002 under Section 144/147 of the Act determining the total income of the assessee at Rs.25,06,660.00. Thereafter allocation of income was made amongst the partners in the manner indicated in the order of reassessment.

15. At this stage, we may mention that the assessing officer had worked out the escaped income for the three assessment years of 1990-91, 1991-92 and 1992-93 at Rs.50,96,041.00. This amount was further apportioned between the three assessment years in proportion to the sales declared by the assessee in the aforesaid assessment years as under:

Sr. No.	Assessment year	Amount
1.	1990-91	Rs.19,05,476.00
2.	1991-92	Rs.16,83,910.00
3.	1992-93	Rs.15,06,655.00
Total		Rs.50,96,041.00 rounded off to Rs.50,96,040.00

16. Against the aforesaid three reassessment orders for the assessment years 1990-91, 1991-92 and 1992-93, assessee preferred three

appeals before the first appellate authority i.e. Commissioner of Income Tax (Appeals), IV Cochin (briefly "the CIT(A)" hereinafter). Assessee raised the ground that it had disclosed all material facts necessary for completing the assessments. The assessments having been completed under Section 143(3) of the Act, the assessments could not have been reopened after expiry of four years from the end of the relevant assessment year as per the proviso to Section 147 of the Act. It was pointed out that the limitation period for the last of the three assessment years i.e. 1992-93, had expired on 31.03.1997 whereas the notices under Section 148 of the Act were issued and served on the assessee only on 29.03.2000. Therefore, all the three reassessment proceedings were barred by limitation. The assessee also argued that the alleged income escaping assessment could not be computed on an estimate basis. In the present case, the assessing officer had allocated the alleged escaped income for the three assessment years in proportion to the corresponding sales turnover. It was further argued that as per Section 282(2), notice under Section 148 of the Act in the case of a partnership firm was required to be made to a member of the firm. In the present case, the notices were issued to the partnership firm. Therefore, such notices could not be treated as valid.

16.1. CIT(A) rejected all the above contentions urged by the assessee. CIT(A) relied on Section 139(9)(f) of the Act and thereafter held that the assessee had not furnished the details as per the aforesaid provisions and therefore fell short of the requirements specified therein. Vide the common appellate order dated 26.02.2004, CIT(A) held that, as the assessee had failed to disclose all material facts necessary to make assessments, therefore it could not be said that the reassessment proceedings were barred by limitation in terms of the proviso to Section 147. The other two grounds raised by the assessee were also repelled by the first appellate authority. Thereafter, CIT(A) made a detailed examination of the factual aspect whereafter it proposed enhancement of the quantum of escaped income. Following the same, CIT(A) enhanced the assessment by fixing the unexplained income at Rs.1,44,02,560.00 for the assessment years 1987-88 to 1993-94 which was thereafter apportioned in respect of the relevant three assessment years. The pro-rata allotment of

escaped income for the three assessment years as directed by CIT(A) are as follows:

Sr. No.	Assessment year	Escaped income
1.	1990-91	Rs.24,98,755.00
2.	1991-92	Rs.23,01,204.00
3.	1992-93	Rs.20,20,895.00
Total		Rs.68,20,854.00

16.2. Thus, as against the total escaped income of Rs.50,96,040.00 for the above three assessment years as quantified by the assessing officer, CIT(A) enhanced and redetermined such income at Rs.68,20,854.00.

16.3. However, it would be relevant to mention that CIT(A) in the appellate order had noted that the assessee had filed its balance sheet as on 31.12.1985 while filing the return of income for the assessment year 1986-87. The next balance sheet was filed as on 31.03.1993. No balance sheet was filed in the *interregnum* on the ground that it could not maintain proper books of accounts as the relevant materials were seized by the department in the course of a search and seizure operation and not yet returned. CIT(A) further noted that the assessing officer had taken the balance sheet as on 31.03.1989 filed by the assessee before the South Indian Bank as the base for reconciling the accounts of the partners. It was noticed that CIT(A) in an earlier appellate order dated 26.03.2002 for the assessment year 1989-90 in the assessee's own case had held that the profit and loss account and the balance sheet furnished to the South Indian Bank were not reliable. CIT(A) in the present proceedings agreed with such finding of his predecessor and held that the unexplained portion, if any, of the increase in capital and current account balance with the assessee had to be analysed on the basis of the balance sheet filed before the assessing officer as on 31.12.1985 and as on 31.03.1993.

17. Aggrieved by the common appellate order passed by the CIT(A) dated 26.02.2004, assessee preferred three separate appeals before the Tribunal which were registered as under:

(i) ITA No. 282(Coch)/2004 for the assessment year 1990-91.

(ii) ITA No. 283(Coch)/2004 for the assessment year 1991-92.

(iii) ITA No. 284(Coch)/2004 for the assessment year 1992-93.

17.1. In the three appeals filed by the assessee, revenue also filed cross objections.

17.2. By the common order dated 29.10.2004, the Tribunal allowed the appeals filed by the assessee and set aside the orders of reassessment for the three assessment years as affirmed and enhanced by the CIT(A). Tribunal held that the re-examination carried out by the assessing officer was not based on any fresh material or evidence. The reassessment orders could not be sustained on the basis of the balance sheet filed by the assessee before the South Indian Bank because in an earlier appeal of the assessee itself, CIT(A) had held that such balance sheet and profit and loss account furnished to the bank were not reliable. The original assessments were completed under Section 143(3) of the Act. Therefore, it was not possible to hold that the assessee had not furnished necessary details for completing the assessments at the time of original assessment. In such circumstances, Tribunal held that the case of the assessee squarely fell within the four corners of the proviso to Section 147. Consequently, the reassessments were held to be barred by limitation, thus without jurisdiction. While allowing the appeals of the assessee, Tribunal dismissed the cross objections filed by the revenue.

18. Against the aforesaid common order of the Tribunal, the respondent preferred three appeals before the High Court under Section 260A of the Act, being IT Appeal Nos. 400, 557 and 558 of 2009 for the assessment years 1990-91, 1991-92 and 1992-93 respectively. All the three appeals were allowed by the High Court vide the common order dated 12.10.2009. According to the High Court, the finding of the Tribunal that the assessee had disclosed fully and truly all material facts necessary for completion of the original assessments was not tenable. Holding that there was no material before the Tribunal to come to the conclusion that the assessee had disclosed fully and truly all material facts required for completion of original assessments,

the High Court set aside the order of the Tribunal and remanded the appeals back to the Tribunal to consider the appeals on merit after issuing notice to the parties.

19. It is against this order that the assessee had filed the special leave petitions which on leave being granted have been registered as civil appeals. The related civil appeals have been filed by the partners of the assessee firm which would be dependent on the outcome of the present set of civil appeals.

20. Respondent has filed counter affidavit supporting the judgment under appeal. It is contended that the High Court has correctly appreciated the facts and the law and thereafter given a reasoned order as to why the reopening of assessment is valid. High Court has correctly held that the assessee had not disclosed fully and truly all the material facts necessary for completion of the assessments. Adverting to Section 139 (9) of the Act, it is submitted that, it is not mandatory for the assessing officer to treat a return as invalid even if the return is defective under any of the sub-clauses of Section 139 (9). It is the discretion of the assessing officer to issue notice. Since no notice was issued, the return and the assessment made thereon would be valid.

    20.1. It is submitted that the assessee had not even had accounts pertaining to the advertisement receipts which is a major source of income of a publication entity; as a matter of fact, the assessee had shown the income from advertisements on estimation basis.

    20.2. Though the assessee had been claiming that it did not maintain any books of account from the assessment years 1989- 1990 onwards, an audited balance sheet and profit and loss account submitted to the South Indian Bank were traced out and used as evidence against the assessee for reopening the assessment for the assessment year 1989- 1990. In the first appellate proceedings, CIT(A) took the view that the profit shown in the statement was for availing credit facility only and therefore set aside the reopening of assessment. Though the Tribunal concurred with the view of CIT(A), the department filed an appeal before the High Court. The assessing officer had compared the balance of the partners in their capital account in the firm in the said balance sheet (filed before the

bank) with capital in the balance sheet filed for the assessment year 1993 – 1994 and thereafter determined the probable escapement of income which is fully justified and rightly upheld by the High Court.

20.3. Respondent has contended that in the original assessments the assessing officer had made the assessments on the basis of limited information furnished by the assessee. The assessing officer made the reassessments on the basis of the increase in the capital in the balance sheets between the years ending 31.03.1989 and 31.03.1993. Respondent has denied that the reassessments were made on the basis of change of opinion. An audited balance sheet for the period ending 31.12.1984 was available with the department. Thereafter, no audited or unaudited balance sheets were furnished on the ground that books of account could not be maintained. However, an audited balance sheet for the period ending 31.03.1993 was furnished in the course of the assessment proceedings for the assessment year 1993 – 1994. Another balance sheet for the period ending 31.03.1989 which was claimed by the assessee to be an account prepared only for submission before the South Indian Bank for availing loan could be traced out. A perusal of the balance sheet for the assessment year 1993-1994 revealed that the increase in capital was not commensurate with the income assessed on estimation basis by the assessing officer for the assessment years 1989 – 1990 to 1992-1993. It was in view of such changed circumstances that notices under Section 148 were issued. The original assessments for the assessment years 1990 – 1991, 1991 – 1992 and 1992 – 1993 were completed on 29.01.1992, 29.01.1992 and 26.03.1993 respectively. The balance sheet for the assessment year 1993 – 1994 which was used as the basis for reassessment was not available with the assessing officer when the original assessments were made. Facts available with the assessing officer in the original assessments and in the reassessments were different. Since facts were different, question of any change in the opinion did not arise. In the circumstances respondent sought for dismissal of the special leave petitions since registered as civil appeals.

21. Mr. Raghenth Basant, learned counsel for the appellant at the outset submits that the High Court fell in error while setting aside the well-reasoned and correct order of the Tribunal. Order of the High Court should be set aside and the order of the Tribunal restored.

    21.1. He submits that the appellant is a partnership firm engaged in the business of publication of newspaper, weeklies and other periodicals under the brand name "Mangalam". Being an assessee under the Act it was maintaining proper books of accounts and had filed profit and loss accounts as well as balance sheets along with the returns of income till the assessment year 1985 – 1986. A search operation was carried out by officials of the department under Section 132 of the Act in the business premises of the appellant on 31.12.1985. In the said search operation, books of account, registers and ledgers of the appellant were seized. Because of the aforesaid, the appellant was unable to maintain proper books of account as it was not possible for it to obtain ledger balances to be brought down for the succeeding accounting years. Nonetheless, appellant maintained primary books of account and used to prepare profit and loss accounts. It also used to prepare a statement of source and application of funds in support of the income returned by it in the returns of income. Being a member of the Audit Bureau of Circulation, appellant was also required to maintain exhaustive details regarding printing and sale of newspaper and other periodicals published by it.

    21.2. Learned counsel submits that returns were filed by the appellant for the three assessment years in question. Those returns were supported by profit and loss accounts and statements showing the source and application of funds. Assessments for the three assessment years were carried out and completed under Section 143 (3) of the Act after making additions and providing for certain disallowances. He submits that for the assessment year 1993–1994, the appellant had maintained complete set of books of account, audited profit and loss account and balance sheet which were duly filed before the assessing officer. Following assessment proceedings, assessing officer passed the assessment order for the assessment year 1993 – 1994 on 27.01.1994 under Section 143 (3) of the Act.

21.3. More than eight to ten years after expiry of the relevant assessment years, appellant was served with notices dated 29.03.2000 issued under Section 148 of the Act for the assessment years 1990 – 1991, 1991 – 1992 and 1992 – 1993. He submits that the basis for reassessment was purportedly comparison of the current and capital accounts of the partners of the assessee firm in the balance sheet filed along with the return for the assessment year 1993 – 1994 with the capital and current accounts of the partners as on 31.12.1985, which showed unexplained increase. The revenue also sought to rely upon the balance sheet for the assessment year 1988 – 1989 obtained by the assessing officer from the South Indian Bank which was submitted by the assessee to the said bank to avail credit facility. He submits that on such comparison the assessing officer came to an erroneous conclusion that the profits for the assessment years 1990 – 1991, 1991 – 1992 and 1992 -1993 would be Rs.1,86,57,246.00 and as the assessment for the said years came to Rs.16,64,518.00 only, there was an under assessment of income to the tune of Rs.1,69,92,728.00.

21.4. Learned counsel submits that during the reassessment proceedings assessee sought for return of the books seized by the department. Though some books were returned, the entire seized materials were not returned. As it was an old matter assessee had sought for time to look into the old records and to consult its representative. However, the assessing officer declined to grant time and went ahead and passed the reassessment orders *ex parte* under Section 144/147 of the Act. He submits that the assessing officer made the reassessment on a comparison of the increase in the capital and current accounts of the partners for the period from 1986 to 1993. According to him, the assessing officer could not have done that because the balance sheet for the assessment year 1989 – 1990, which was obtained by the assessing officer from the South Indian Bank, was not prepared on actual and current accounts; that was prepared on provisional and estimate basis in the absence of the account books which were seized by the department, that too, only for the purpose of obtaining credit facilities from the bank.

21.5. It is the submission of learned counsel for the assessee that the High Court has erred in holding that even in the absence of the entire books of accounts, the assessee had not furnished the documents and particulars required under Section 139 (9) (f) of the Act. According to the High Court since the original assessment was completed without the books of account and the details under Section 139 (9) (f) being furnished, therefore, the assessee had not disclosed fully and truly all material facts necessary for completion of assessment. Learned counsel submits that for non-furnishing of particulars under Section 139 (9) (f) the original assessment would be rendered invalid. However, the assessing officer did not adopt the aforesaid course of action but instead proceeded to complete the assessments under Section 143 (3) of the Act. In the circumstances, he submits that non furnishing of details under Section 139 (9) (f) cannot lead to any inference that material facts had not been disclosed so as to justify reopening of assessments that too eight to ten years after expiry of the relevant assessment years.

21.6. Learned counsel asserts that even though the assessee was not maintaining regular books of accounts, all relevant details necessary for making the assessments were furnished before the assessing officer. These included detailed cash flow statements, profit and loss accounts, statements showing the source and application of funds reflecting the increase in the capital and current accounts of the partners of the assessee firm etc. It was thereafter that assessments were completed not only in respect of the assessee for the above three assessment years but also for the partners as well under Section 143(3) of the Act.

21.7. It is contended by learned counsel for the assessee that there was no specific information before the assessing officer wherefrom he could form a reason to believe that income exigible to income tax had escaped assessment for the three assessment years. The only reason for initiating reassessment proceedings was the impression of the assessing officer that there was an increase in the capital and current accounts of the partners upon a comparison of the balance sheets for the assessment year 1985 – 1986 and for the assessment year 1993 – 1994 which could not be properly explained. The

assessing officer also formed the above belief on the basis of the balance sheet for the assessment year 1989 – 1990 which was obtained from the South Indian Bank. According to him, on both counts, the revenue could not have initiated proceedings for reopening of concluded assessments that too under Section 143 (3) of the Act. He submits that CIT(A), in the appeal of the assessee for the assessment year 1989 -1990, had clearly held that such a balance sheet submitted before the bank was not reliable. Learned counsel asserts that an assessing officer would get the jurisdiction to reopen an assessment only on the basis of specific, reliable and relevant information coming to his possession subsequent to the original assessment and not otherwise. In support of such submission learned counsel has relied upon the decisions of this Court in:

(i) *M/s Phool Chand Bajrang Lal Vs. Income Tax Officer, (1993) 4 SCC 77.*

(ii) Srikrishna Private Limited Vs. ITO, Calcutta, (1996) 9 SCC 534.

21.8. Summing up his submissions, learned counsel submits that as rightly held by the Tribunal, it was the change of view of the assessing officer upon assessing the comparative accounts of the partners which led to the reassessments which is not based on any fresh material or evidence. It is evident that the assessing officer had only reviewed the original assessments on the basis of a fresh application of mind to the same set of facts. Therefore, it is a clear case of change of opinion leading to reassessment proceedings which is not permissible in law as held by this Court in *CIT, Delhi Vs. Kelvinator of India Limited, (2010) 2 SCC 723*. He therefore submits that the order of the High Court is liable to be set aside and that of the Tribunal restored.

22. Mr. Shyam Gopal, learned counsel for the respondent at the outset submits that there is no merit at all in the civil appeals, and therefore, the civil appeals should be dismissed.

22.1. Adverting to Section 145 (1) of the Act, he submits that income from the profits of business shall be computed in accordance with the cash or mercantile or any other system of accounting regularly employed by the assessee. Since the business income

had to be computed by following the method of accounting adopted by the assessee and based on the books of accounts so maintained, the assessee was required to produce the books of accounts but when the books of accounts were not available, at least to furnish the particulars in terms of Section 139 (9) (f) of the Act.

22.2. Referring to Section 139 (9) (f) of the Act, he submits that even in the absence of regular books of accounts, the assessee is bound to provide the information required under the aforesaid provision. An assessee who does not disclose the above information and instead submits returns on estimation basis cannot claim that it has fully and truly disclosed all material facts required for assessment.

22.3. According to Mr. Gopal, Tribunal erred in holding that the assessee had disclosed fully and truly all material facts necessary for assessment. In fact, Tribunal did not go into the merit of the case. Rather, Tribunal held that there were no materials before the assessing officer to take the view that income chargeable to tax had escaped assessment.

22.4. Learned counsel for the revenue strenuously argued that assessing officer had made a comparative analysis of the two balance sheets, one as on 31.12.1985 relevant to the assessment year 1986-1987 and the balance sheet dated 31.03.1994 relevant to the assessment year 1994–1995 and found therefrom unexplained increase in the capital and current accounts of the partners. That apart, the assessing officer also obtained a balance sheet for the assessment year 1988–1989 from the South Indian Bank which also indicated unexplained profits and gains of the partners. It was thereafter that reassessment proceedings were initiated. First appellate authority i.e. CIT(A) not only affirmed the reassessment orders of the assessing officer but also enhanced the quantum of escaped income which was restored by the High Court after setting aside the reversal order of the Tribunal.

22.5. Learned counsel for the respondent has submitted a convenience compilation and drew the attention of the Court therefrom to the relevant provisions of the Act i.e. Section 139 (9), 143, 144, 145, 147, 148, 149 and 151 of the Act, both pre

01.04.1989 and post 01.04.1989. He submits that there was admittedly non-disclosure of material facts by the assessee, and, therefore, the extended period under the proviso to Section 147 of the Act was available to the department. Viewed in the above context, the notices issued under Section 148 of the Act as well as the orders of reassessment passed under Section 144/147 of the Act were within limitation.

22.6. Learned counsel has specifically referred to Section 149 of the Act which deals with the time limit for issuance of notice under Section 148 of the Act. Post amendment with effect from 01.04.1989, he submits that under Section 149 (1) (b) (iii), the limitation is, if seven years but not more than ten years had elapsed from the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to rupees fifty thousand or more for that year. In the instant case, the quantum of escaped assessment is admittedly in excess of rupees fifty thousand. Therefore, the notices issued under Section 148 of the Act on 29.03.2000 for the three assessment years of 1990 – 1991, 1991 – 1992 and 1992 – 1993 were well within the limitation period.

22.7. Learned counsel has referred to the decision of this Court in *Calcutta Discount Company Limited Vs. Income Tax Officer, (1961) 41 ITR 1991* and submits that the duty of disclosing all the primary facts relevant to assessment before the assessing authority lies on the assessee. Only when all the primary facts are disclosed, the burden would shift to the assessing authority.

22.8. Asserting that the order of the High Court is fully justified, learned counsel seeks dismissal of the civil appeals.

23. Submissions made by learned counsel for the parties have received the due consideration of the Court.

24. At the outset, we may advert to certain provisions of the Act as existed at the relevant point of time having a bearing on the present *lis*. Chapter XIV of the Act comprising Sections 139 to 158 deals with procedure for assessment. Section 139 mandates filing of income tax return. At the relevant point of time, this provision provided that every person, if his total income or the total income of any other person in respect of whom he was assessable under the Act during the previous year had exceeded the maximum amount which is not

chargeable to income tax, he shall on or before the due date furnish a return of his income or the income of such other person during the previous year in the prescribed form and verified in the prescribed manner, setting forth such other particulars as may be prescribed.

24.1. Since reference was made to sub-section (9)(f) of Section 139, both in the pleadings and in the oral hearing, we may mention that under sub-section (9) of Section 139, where the assessing officer considers that the return of income furnished by the assessee is defective, he may intimate the defect to the assessee and give him an opportunity to rectify the defect within a period of fifteen days from the date of such intimation or within such further period, the assessing officer may in his discretion allow. If the defect is not rectified within the specified period or within the further period as may be allowed, the return shall be treated as an invalid return. In such an eventuality, it would be construed that the assessee had failed to furnish the return. There is an Explanation below sub-section (9) which clarifies that a return of income shall be regarded as defective unless all the conditions mentioned thereunder are fulfilled. Clause (f) says that where regular books of account are not maintained by the assessee but the return is accompanied by a statement indicating the amounts of turnover or gross receipts, gross profit, expenses and net profit of the business or profession and the basis on which such amounts have been computed and also disclosing the amounts of total sundry debtors, sundry creditors, stock in trade and cash balance as at the end of the previous year, such a return shall not be treated as defective.

24.2. Thus, Section 139 places an obligation upon every person to furnish voluntarily a return of his total income if such income during the relevant previous year had exceeded the maximum amount which is not chargeable to income tax. Under sub-section (9), if there are defects in the return which are not rectified within the stipulated period after being intimated by the assessing officer, the return of income would be treated as an invalid return. Of course, it would not be treated as defective and consequently invalid if in a case, such as, under clause (f) where regular books of account are not maintained but the return of income is accompanied by a statement indicating the amounts of turnover etc.

25. Section 142 deals with enquiry before assessment. As per sub-section (1), the assessing officer may issue notice upon an assessee who has made a return seeking details of such accounts, information or documents etc. which may be necessary for the purpose of making an assessment. Sub-section (2) empowers the assessing officer to make such enquiry as he considers necessary for obtaining full information and sub-section (3) requires the assessing officer to provide an opportunity of hearing to the assessee in respect of any material gathered on the basis of the enquiry.

26. This takes us to Section 143 which is the provision for assessment. As per sub-section (1), where a return is made under Section 139 or in response to a notice under Section 142(1), the assessing officer may carry out adjustments in accordance with law and thereafter, issue intimation to the assessee specifying the sums payable. Such intimation shall be deemed to be a notice of demand under Section 156 of the Act.

    26.1. Sub-section (2) provides that where a return has been furnished under Section 139 or in response to a notice under sub-section (1) of Section 142, to ensure that the assessee has not understated the income or has not computed excessive loss or has not under-paid the tax in any manner, the assessing officer shall serve on the assessee a notice to produce evidence in support of the claim made by the assessee.

    26.2. As per sub-section (3) of Section 143, after hearing such evidence as the assessee may produce and such other evidence as the assessing officer may require on specified points and after taking into account all relevant material which he has gathered, the assessing officer shall make an assessment of the total income or loss of the assessee by an order in writing. In the said exercise, he shall determine the sum payable by the assessee or refund of any amount due to him on the basis of such assessment.

27. Section 144 provides for best judgment assessment. It says that if any person fails to submit a return under sub-section (1) of Section 139 or fails to comply with the terms of a notice under sub-section (1) of Section 142 or having made a return fails to comply with all the terms of a notice issued under sub-section (2) of Section 143, the assessing officer after taking into account all relevant materials

and after giving the assessee an opportunity of being heard make the assessment to the best of his judgment and determine the sum payable by the assessee on the basis of such assessment.

28. This brings us to the pivotal section i.e. Section 147. Prior to the Direct Tax Laws (Amendment) Act, 1987, Section 147 read as under:

> 147. *Income escaping assessment*.—If
>
> (a) the Income Tax Officer has *reason to believe* that, by reason of the omission or failure on the part of an assessee to make a return under Section 139 for any assessment year to the Income Tax Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year, or
>
> (b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Income Tax Officer has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year,
>
> he may, subject to the provisions of Sections 148 to 153, assess or reassess such income or recompute the loss or the depreciation allowance, as the case may be, for the assessment year concerned (hereafter in Sections 148 to 153 referred to as the relevant assessment year).

28.1. This provision was amended by the Direct Tax Laws (Amendment) Act, 1987 with effect from 01.04.1989. Post such amendment, Section 147 read as under:

> 147. *Income escaping assessment*.—If the assessing officer, *for reasons to be recorded* by him in writing, is of the *opinion* that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of Sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as

the case may be, for the assessment year concerned (hereafter in this section and in Sections 148 to 153 referred to as the relevant assessment year).

28.2. As can be seen from the above, prior to 01.04.1989, the income tax officer was required to have reason to believe that by reason of the omission or failure on the part of an assessee to make a return under Section 139 for any assessment year or to disclose fully and truly all material facts necessary for such assessment, income chargeable to tax had escaped assessment for that assessment year or the income tax officer had in consequence of information in his possession reason to believe that income chargeable to tax had escaped assessment for any assessment year, the income tax officer could reopen an assessment. But with effect from 01.04.1989, the requirement of law underwent a change. It was sufficient if the assessing officer for reasons to be recorded by him in writing was of the opinion that any income chargeable to tax had escaped assessment for any assessment year, he could assess or reassess such income chargeable to tax which had escaped assessment and which came to his notice subsequently. Therefore, post 01.04.1989, the power to reopen an assessment became much wider.

28.3. It appears that a number of representations were received against the omission of the words "reason to believe" from Section 147 and their substitution by the word "opinion" of the assessing officer. It was pointed out by the representationists that the meaning of the expression "reason to believe" was explained in a number of judgments and was well settled. Omission of such an expression from Section 147 would give arbitrary powers to the assessing officer to reopen past assessments. To allay such apprehensions, Parliament enacted the Direct Tax Laws (Amendment) Act, 1989 again amending Section 147 by re-introducing the expression "reason to believe". Section 147 after the amendment carried out by the Direct Tax Laws (Amendment) Act, 1989 reads as under:

147. *Income escaping assessment*.—If the assessing officer has *reason to believe* that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of Sections 148 to 153, assess or reassess such income and also any other

> income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in Sections 148 to 153 referred to as the relevant assessment year).

28.4. Thus, Section 147 as it stood at the relevant point of time provides that if the assessing officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may assess or re-assess such income and such other income which has escaped assessment and which comes to his notice subsequently in the course of proceedings under Section 147.

29. Section 148 says that before making an assessment, re-assessment etc. under Section 147, the assessing officer is required to issue and serve a notice on the assessee calling upon the assessee to file a return of his income in the prescribed form etc., setting forth such particulars as may be called upon.

30. Such a notice is subject to the time limit prescribed under Section 149. Under sub-Section (1)(b), no notice under Section 148 shall be issued in a case where an assessment under sub-section (3) of Section 143 or Section 147 has been made for such assessment year if seven years but not more than 10 years have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to Rs. 50,000 or more for that year.

31. At this stage, we deem it necessary to expound on the meaning of disclosure. As per the P. Ramanatha Aiyar, Advanced Law Lexicon, Volume 2, Edition 6, 'to disclose' is to expose to view or knowledge, anything which before was secret, hidden or concealed. The word 'disclosure' means to disclose, reveal, unravel or bring to notice, *vide CIT Vs. Bimal Kumar Damani, (2003) 261 ITR 87 (Cal)*. The word 'true' qualifies a fact or averment as correct, exact, actual, genuine or honest. The word 'full' means complete. True disclosure of concealed income must relate to the assessee concerned. Full disclosure, in the context of financial documents, means that all material or significant information should be disclosed. Therefore, the meaning of 'full and true disclosure' is the voluntary filing of a

return of income that the assessee earnestly believes to be true. Production of books of accounts or other material evidence that could ordinarily be discovered by the assessing officer does not amount to a true and full disclosure.

32. Let us now discuss some of the judgments cited at the bar. First and foremost is the decision of a constitution bench of this Court in *Calcutta Discount Company Limited* (supra). That was a case under Section 34 of the Indian Income Tax Act, 1922 which is in *pari-materia* to Section 147 of the Act. The constitution bench explained the purport of Section 34 of the Indian Income Tax Act, 1922 and highlighted two conditions which would have to be satisfied before issuing a notice to reopen an assessment beyond four years but within eight years (as was the then limitation). The first condition was that the income tax officer must have reason to believe that income, profits or gains chargeable to income tax had been under-assessed. The second condition was that he must have also reason to believe that such under-assessment had occurred by reason of either (i) omission or failure on the part of the assessee to make a return of his income under Section 22, or (ii) omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that year. It was emphasized that both these were conditions precedent to be satisfied before the income tax officer could have jurisdiction to issue a notice for the assessment or re-assessment beyond the period of four years but within the period of eight years from the end of the year in question. The words used in the expression "omission or failure to disclose fully and truly all material facts necessary for his assessment for that year" would postulate a duty on every assessee to disclose fully and truly all material facts necessary for his assessment though what facts are material and necessary for assessment would differ from case to case. On the above basis, this Court came to the conclusion that while the duty of the assessee is to disclose fully and truly all primary facts, it does not extend beyond this. This position has been reiterated in subsequent decisions by this Court including in *Income Tax Officer Vs. Lakhmani Mewal Das*, 1976 (3) SCC 757; 1976 (103) ITR 437. The expression "reason to believe" has also been explained to mean reasons deducible from the materials on record and which have a live link to the formation of the belief that income chargeable to tax has escaped assessment. Such reasons must be based on material and specific information obtained subsequently and not on

the basis of surmises, conjectures or gossip. The reasons formed must be *bona fide*.

33. In *Phool Chand Bajrang Lal* (supra), this Court examined the purport of Section 147 of the Act and observed that the object of Section 147 is to ensure that a party cannot get away by willfully making a false or untrue statement at the time of original assessment and when that falsity comes to notice, to turn around and say "you accepted my lie, now your hands are tied and you can do nothing". This Court opined that it would be a travesty of justice to allow an assessee such latitude. After adverting to various previous decisions, this Court held that an income tax officer acquires jurisdiction to reopen an assessment under Section 147(a) read with Section 148 of the Act only if on the basis of specific, reliable and relevant information coming to his possession subsequently, he has reasons, which he must record, to believe that due to omission or failure on the part of the assessee to make a true and full disclosure of all material facts necessary for his assessment during the concluded assessment proceedings, any part of his income, profit or gains chargeable to income tax has escaped assessment. In the above context, Supreme Court has held as under:

> **25**. ……He may start reassessment proceedings either because some fresh facts come to light which were not previously disclosed or some information with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts. In such situations, it is not a case of mere change of opinion or the drawing of a different inference from the same facts as were earlier available but acting on fresh information. Since, the belief is that of the Income Tax Officer, the sufficiency of reasons for forming the belief, is not for the Court to judge but it is open to an assessee to establish that there in fact existed no belief or that the belief was not at all a bona fide one or was based on vague, irrelevant and non-specific information. To that limited extent, the Court may look into the conclusion arrived at by the Income Tax Officer and examine whether there was any material available on the record from which the requisite belief could be formed by the Income Tax Officer and further whether that material had any rational connection or a

> live link for the formation of the requisite belief. It would be immaterial whether the Income Tax Officer at the time of making the original assessment could or, could not have found by further enquiry or investigation, whether the transaction was genuine or not, if on the basis of subsequent information, the Income Tax Officer arrives at a conclusion, after satisfying the twin conditions prescribed in Section 147(a) of the Act, that the assessee had not made a full and true disclosure of the material facts at the time of original assessment and therefore income chargeable to tax had escaped assessment.……

34. This Court in the case of *Srikrishna Private Limited* (supra) emphasized that what is required of an assessee in the course of assessment proceedings is a full and true disclosure of all material facts necessary for making assessment for that year. It was emphasized that it is the obligation of the assessee to disclose the material facts or what are called primary facts. It is not a mere disclosure but a disclosure which is full and true. Referring to the decision in *Phool Chand Bajrang Lal* (supra), it has been highlighted that a false disclosure is not a true disclosure and would not satisfy the requirement of making a full and true disclosure. The obligation of the assessee to disclose the primary facts necessary for his assessment fully and truly can neither be ignored nor watered down. All the requirements stipulated by Section 147 must be given due and equal weight.

35. *Kelvinator of India Limited* (supra) is a case where this Court examined the question as to whether the concept of "change of opinion" stands obliterated with effect from 01.04.1989 i.e. after substitution of Section 147 of the Act by the Direct Tax Laws (Amendment) Act, 1987. This Court considered the changes made in Section 147 and found that prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under two conditions i.e., (a) the Income Tax Officer had reason to believe that by reason of omission or failure on the part of the assessee to make a return under Section 139 for any assessment year or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax had escaped assessment for that year, or (b) notwithstanding that there was no such omission or failure on the part of the assessee, the Income Tax Officer had in consequence of information in his

possession reason to believe that income chargeable to tax had escaped assessment for any assessment year. Fulfilment of the above two conditions alone conferred jurisdiction on the assessing officer to make a re-assessment. But with effect from 01.04.1989, the above two conditions have been given a go-by in Section 147 and only one condition has remained, viz, that where the assessing officer has reason to believe that income has escaped assessment, that would be enough to confer jurisdiction on the assessing officer to reopen the assessment. Therefore, post 01.04.1989, power to reopen assessment is much wider. However, this Court cautioned that one needs to give a schematic interpretation to the words "reason to believe", otherwise Section 147 would give arbitrary powers to the assessing officer to reopen assessments on the basis of "mere change of opinion", which cannot be *per se* reason to reopen.

35.1. This Court also referred to Circular No.549 dated 31.10.1989 of the Central Board of Direct Taxes (CBDT) to allay the apprehension that omission of the expression "reason to believe" from Section 147 and its substitution by the word "opinion" would give arbitrary powers to the assessing officer to reopen past assessments on mere change of opinion and pointed out that in 1989 Section 147 was once again amended to reintroduce the expression "has reason to believe" in place of the expression "for reasons to be recorded by him in writing, is of the opinion". This Court thereafter explained as under:

> 6. We must also keep in mind the conceptual difference between power to review and power to reassess. The assessing officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain precondition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place.
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> 7. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the assessing officer. Hence, after 1-4-1989, the assessing officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a

> live link with the formation of the belief. Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in Section 147 of the Act. However, on receipt of representations from the companies against omission of the words "reason to believe", Parliament reintroduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the assessing officer.

36. Elaborating further on the expression "change of opinion", this Court in *Techspan India Private Limited (supra)* observed that to check whether it is a case of change of opinion or not one would have to see its meaning in literal as well as legal terms. The expression "change of opinion" would imply formulation of opinion and then a change thereof. In terms of assessment proceedings, it means formulation of belief by the assessing officer resulting from what he thinks on a particular question. Therefore, before interfering with the proposed reopening of the assessment on the ground that the same is based only on a change of opinion, the court ought to verify whether the assessment earlier made has either expressly or by necessary implication expressed an opinion on a matter which is the basis of the alleged escapement of income that was taxable. If the assessment order is non-speaking, cryptic or perfunctory in nature, it may be difficult to attribute to the assessing officer any opinion on the questions that are raised in the proposed reassessment proceedings.

37. Learned counsel for the respondent has placed before the Court in the convenience compilation the reasons recorded by the assessing officer for initiating reassessment proceedings. The same is extracted as under:

> Reasons for the belief that income has escaped assessment.
>
> As per the last balance sheet of the assessee for AY 1989-90 obtained from the South Indian Bank, the capital of the assessee is as under:-
>
> | | |
> |---|---|
> | Fixed capital of partners. | Rs. 20,50,000/- |
> | Investment allowance. | Rs. 41,47,873/- |

Current a/c of partners.	Rs. 44,28,597/-
Total	Rs. 1,06,26,470/-

The B/S/P & L a/c for the intervening period is not available. But the balance sheet/P&L a/c for AY 1993-94 shows increase in capital which is as under:

Fixed capital of partners.	Rs. 20,50,000/-
Investment allowance.	Rs. 40,02,614/-
Current a/c of partners.	Rs. 1,65,25,455/-
Total	Rs. 2,25,78,069/-

The difference of Rs. 1,19,51,599/- is obviously the profit of the assessee during the AY 1990-91 to 1993-94. The profit of AY 1993-94 as per the accounts is Rs. 5,08,548/-. If this is excluded, the profit for the three years i.e. 1990-91, 1991-92 and AY 1992-93 is Rs. 1,14,43,051/-. The profit will be more, if the drawings during the period of the partners are included. The drawings and taxes paid is:

	drawings	taxes paid
1990-91	Rs.20,30,584/-	Rs.2,48,287/-
1991-92	Rs.18,87,648/-	
1992-93	Rs.29,12,038/-	Rs.2,72,212/-
1993-94 (Figures not available from assessment records.)	Rs.68,30,270/-	Rs.3,83,925/-

Thus, the profit for the three years would be Rs. 1,86, 57, 246/- (1,14,43,051 + 68,30,270 + 3,83,925). Under assessment of income for the three years is, therefore, Rs.1,69,92,728 i.e., (18657246 – 1664518).

The sales estimated by AO for each of the 3 years less depreciation for each year is taken as the basis for determining the proportion in which the under-assessment has been made.

AY	Sales estimated by AO	Depreciation	Balance	Under-Assessment
1990-91	90079199	4329815	85749384	6324989
1991-92	82124877	6222432	75902441	5598817
1992-93	72294757	3575079	68719678	5068892
Total under-assessment				16992728

> In view of the above, I have reason to believe that by reason of omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, income as determined above, chargeable to tax has escaped assessment.

38. Thus, from a reading of the reasons recorded by the assessing officer leading to formation of his belief that income of the assessee had escaped assessment for the assessment years under consideration, it is seen that the only material which came into possession of the assessing officer subsequently was the balance sheet of the assessee for the assessment year 1989-90 obtained from the South Indian Bank. After obtaining this balance sheet, the assessing officer compared the same with the balance sheet and profit loss account of the assessee for the assessment year 1993-94. On such comparison, the assessing officer noticed significant increase in the current and capital accounts of the partners of the assessee. On that basis, he drew the inference that profit of the assessee for the three assessment years under consideration would be significantly higher which had escaped assessment. The figure of under assessment was quantified at Rs.1,69,92,728.00. Therefore, he recorded that he had reason to believe that due to omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessments, incomes chargeable to tax for the three assessment years had escaped assessment.

39. Assessee did not submit regular balance sheet and profit and loss account for the three assessment years under consideration on the ground that books of account and other materials/documents of the assessee were seized by the department in the course of search and seizure operation which were not yet returned to the assessee. In

the absence of such books etc., it became difficult for the assessee to maintain yearwise regular books of account etc. However, regular books of account and profit and loss account were filed by the assessee along with the return of income for the assessment year 1993-94. What the assessing officer did was to cull out the figures discernible from the balance sheet for the assessment year 1989-90 obtained from the South Indian Bank and compared the same with the balance sheet submitted by the assessee before the assessing officer for the assessment year 1993-94 and thereafter arrived at the aforesaid conclusion.

40. It may be mentioned that the assessee had filed its regular balance sheet as on 31.12.1985 while filing the return of income for the assessment year 1986-87. The next balance sheet filed was as on 31.03.1993 for the assessment year 1993-94. No balance sheet was filed in the *interregnum* as according to the assessee, it could not maintain proper books of account as the relevant materials were seized by the department in the course of a search and seizure operation and not yet returned. It was not possible for it to obtain ledger balances to be brought down for the succeeding accounting years. As regards the balance sheet as on 31.03.1989 filed by the assessee before the South Indian Bank and which was construed by the assessing officer to be the balance sheet of the assessee for the assessment year 1989-90, the explanation of the assessee was that it was prepared on provisional and estimate basis and was submitted before the South Indian Bank for obtaining credit and therefore could not be relied upon in assessment proceedings. It appears that this balance sheet was also relied upon by the assessing officer in the re-assessment proceedings of the assessee for the assessment year 1989-90. In the first appellate proceedings, CIT(A) in its appellate order dated 26.03.2002 held that such profit and loss account and the balance sheet furnished to the South Indian Bank were not reliable and had discarded the same. That being the position, the assessing officer could not have placed reliance on such balance sheet submitted by the assessee allegedly for the assessment year 1989-90 to the South Indian Bank for obtaining credit. *Dehors* such balance sheet, there were no other material in the possession of the assessing officer to come to the conclusion that income of the

assessee for the three assessment years had escaped assessment.

41. It is true that Section 139 places an obligation upon every person to furnish voluntarily a return of his total income if such income during the previous year exceeded the maximum amount which is not chargeable to income tax. The assessee is under further obligation to disclose all material facts necessary for his assessment for that year fully and truly. However, as has been held by the constitution bench of this Court in *Calcutta Discount Company Limited* (supra), while the duty of the assessee is to disclose fully and truly all primary and relevant facts necessary for assessment, it does not extend beyond this. Once the primary facts are disclosed by the assessee, the burden shifts onto the assessing officer. It is not the case of the revenue that the assessee had made a false declaration. On the basis of the "balance sheet" submitted by the assessee before the South Indian Bank for obtaining credit which was discarded by the CIT(A) in an earlier appellate proceeding of the assessee itself, the assessing officer upon a comparison of the same with a subsequent balance sheet of the assessee for the assessment year 1993-94 which was filed by the assessee and was on record, erroneously concluded that there was escapement of income and initiated reassessment proceedings.

42. We may also mention that while framing the initial assessment orders of the assessee for the three assessment years in question, the assessing officer had made an independent analysis of the incomings and outgoings of the assessee for the relevant previous years and thereafter had passed the assessment orders under Section 143(3) of the Act. We have already taken note of the fact that an assessment order under Section 143(3) is preceded by notice, enquiry and hearing under Section 142(1), (2) and (3) as well as under Section 143(2). If that be the position and when the assessee had not made any false declaration, it was nothing but a subsequent subjective analysis of the assessing officer that income of the assessee for the three assessment years was much higher than what was assessed and therefore, had escaped assessment. This is nothing but a mere change of opinion which cannot be a ground for reopening of assessment.

43. There is one more aspect which we may mention. Admittedly, the returns for the three assessment years under consideration were not accompanied by the regular books of account. Though under sub-section (9)(f) of Section 139, such returns could have been treated as defective returns by the assessing officer and the assessee intimated to remove the defect failing which the returns would have been invalid, however, the materials on record do not indicate that the assessing officer had issued any notice to the assessee bringing to its notice such defect and calling upon the assessee to rectify the defect within the period as provided under the aforesaid provision. In other words, the assessing officer had accepted the returns submitted by the assessee for the three assessment years under question. At this stage, we may also mention that it is the case of the assessee that though it could not maintain and file regular books of account with the returns in the assessment proceedings for the three assessment years under consideration, nonetheless it had prepared and filed the details of accounts as well as incomings and outgoings of the assessee etc. for each of the three assessment years which were duly verified and enquired into by the assessing officer in the course of the assessment proceedings which culminated in the orders of assessment under sub-section (3) of Section 143. Suffice it to say that a return filed without the regular balance sheet and profit and loss account may be a defective one but certainly not invalid. A defective return cannot be regarded as an invalid return. The assessing officer has the discretion to intimate the assessee about the defect(s) and it is only when the defect(s) are not rectified within the specified period that the assessing officer may treat the return as an invalid return. Ascertaining the defects and intimating the same to the assessee for rectification, are within the realm of discretion of the assessing officer. It is for him to exercise the discretion. The burden is on the assessing officer. If he does not exercise the discretion, the return of income cannot be construed as a defective return. As a matter of fact, in none of the three assessment years, the assessing officer had issued any declaration that the returns were defective.

44. Assessee has asserted both in the pleadings and in the oral hearing

that though it could not file regular books of account along with the returns for the three assessment years under consideration because of seizure by the department, nonetheless the returns of income were accompanied by tentative profit and loss account and other details of income like cash flow statements, statements showing the source and application of funds reflecting the increase in the capital and current accounts of the partners of the assessee etc., which were duly enquired into by the assessing officer in the assessment proceedings.

45. Thus, having regard to the discussions made above, we are therefore of the view that the Tribunal was justified in coming to the conclusion that the reassessments for the three assessment years under consideration were not justified. The High Court has erred in reversing such findings of the Tribunal. Consequently, we set aside the common order of the High Court dated 12.09.2009 and restore the common order of the Tribunal dated 29.10.2004.

46. The above conclusions reached by us would cover the other civil appeals of this batch as well. Resultantly, all the civil appeals filed by the assessee and its partners are hereby allowed. No costs.

Headnotes prepared by: Nidhi Jain *Result of the case:* Appeals allowed.

[2024] 1 S.C.R. 677 : 2024 INSC 58

Central Bureau of Investigation
v.
Kapil Wadhawan & Anr.

(Criminal Appeal No. 391 of 2024)

24 January 2024

[Bela M. Trivedi* and Pankaj Mithal, JJ.]

Issue for Consideration

Whether the respondents were entitled to the benefit of the statutory right conferred under the proviso to s.167(2), Cr.P.C, on the ground that the investigation qua some of the accused named in the FIR was pending, though the report u/s.173(2) against respondents along with the other accused was filed within the prescribed time limit and the cognizance of the offence was taken by the special court before the consideration of the application of the respondents seeking default bail u/s.167(2).

Headnotes

Code of Criminal Procedure, 1973 – Proviso to s.167(2), s.173 – Statutory right conferred under Proviso to s.167(2) – Benefit of – When entitled to – FIR was registered for the offences punishable u/s.120-B r/w s.409, 420 and 477A, IPC and s.13(2) r/w s.13(1)(d), PC Act, 1988 – Chargesheet for the offences u/s.120B r/w s.206, 409, 411, 420, 424, 465, 468 and 477A, IPC and s.13(2) r/w 13(1)(d), PC Act was filed against 75 persons/ entities including the respondents-accused – Special Court took the cognizance of the alleged offences against all the accused and issued warrants/summons – Subsequently, Special Court holding that the investigation was incomplete and the chargesheet filed was in piecemeal, respondents were granted default bail u/s.167(2) – Order upheld by High Court:

Held: The statutory requirement of the report/chargesheet u/s.173(2) would be complied with if the various details prescribed therein are included in the report – It is complete if it is accompanied with all the documents and statements of witnesses as required by s.175(5) and it is not necessary that all the details of the offence must be stated – The benefit of proviso appended to sub-section (2) of s.167 would be available to the offender only when a chargesheet is not filed and the investigation is kept pending against him – However,

* Author

once a chargesheet is filed, the said right ceases – Thus, once from the material produced along with the chargesheet, the court is satisfied about the commission of an offence and takes cognizance of the offence allegedly committed by the accused, it is immaterial whether the further investigation in terms of s.173(8) is pending or not – The pendency of the further investigation qua the other accused or for production of some documents not available at the time of filing of chargesheet would neither vitiate the chargesheet, nor would it entitle the accused to claim right to get default bail on the ground that the chargesheet was an incomplete chargesheet or that the chargesheet was not filed in terms of s.173(2) – In the present case, the chargesheet having been filed against the respondents within the prescribed time limit and the cognizance having been taken by the Special Court of the offences allegedly committed by them, the respondents could not have claimed the statutory right of default bail u/s.167(2) on the ground that the investigation qua other accused was pending – Special Court as well as High Court committed serious error of law – Impugned orders set aside. [Paras 22, 23 and 25]

Code of Criminal Procedure, 1973 – s.167(2) – Right of default bail – Constitution of India – Article 21:

Held: Right of default bail is not only a statutory right but is a right that flows from Article 21 – It is an indefeasible right, however, it is enforceable only prior to the filing of the challan or the chargesheet, and does not survive or remain enforceable on the challan being filed, if already not availed of – Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to the accused after the filing of the challan. [Para 15]

Code of Criminal Procedure, 1973 – s.173 – Report/chargesheet under:

Held: Is an intimation to the court that upon investigation into the cognizable offence, the investigating officer has been able to procure sufficient evidence for the court to inquire into the offence and the necessary information is being sent to the court – Though ordinarily all documents relied upon by the prosecution should accompany the chargesheet, nonetheless for some reasons, if all the documents are not filed along with the chargesheet, that by itself would not invalidate or vitiate the chargesheet. [Paras 22, 23]

Code of Criminal Procedure, 1973 – ss.173(2), (8):

Held: The right of the investigating officer to pray for further investigation in terms of s.173(8) is not taken away only because a chargesheet is filed under sub-section (2) thereof against the accused. [Para 23]

Case Law Cited

Sanjay Dutt v. State through CBI, Bombay (II) [1994] 3 Suppl. SCR 263 **: (1994) 5 SCC 410;** *K. Veeraswami v. Union of India and Others* [1991] 3 SCR 189 **: (1991) 3 SCC 655 – followed.**

Dinesh Dalmia v. CBI [2007] 9 SCR 1124 **: (2007) 8 SCC 770;** *Suresh Kumar Bhikamchand Jain v. State of Maharashtra & Anr.* [2013] 1 SCR 1037 **: (2013) 3 SCC 77;** *Serious Fraud Investigation Office v. Rahul Modi & Ors.* [2022] 1 SCR 597 **: 2022 SCC OnLine SC 153 – relied on.**

M. Ravindran v. Intelligence Officer, Directorate of Revenue Intelligence [2020] 12 SCR 915 **: (2021) 2 SCC 485;** *Rakesh Kumar Paul v. State of Assam* [2017] 8 SCR 785 **: (2017) 15 SCC 67– referred to.**

List of Acts

Code of Criminal Procedure, 1973; Penal Code, 1860; Prevention of Corruption Act, 1988; Constitution of India.

List of Keywords

Right of default bail; Statutory requirement of the report/chargesheet; Further investigation; Further investigation pending qua other accused; Incomplete chargesheet; Right of the investigating officer to pray for further investigation; Special Court.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.391 of 2024.

From the Judgment and Order dated 30.05.2023 of the High Court of Delhi at New Delhi in CRLMC No.6544 of 2022.

Appearances for Parties

S.V. Raju, A.S.G., Mukesh Kumar Maroria, Zoheb Hussain, Annam Venkatesh, Akshay Nain, Advs. for the Appellant.

Mukul Rohatgi, Amit Desai, Sr. Advs., Mahesh Agarwal, Ankur Saigal, Rohan Dakshini, Ms. Pooja Kothari, Ms. Kamakshi Sehgal, Ms. Kajal Dalal, Archit Jain, Rajesh Kumar, E. C. Agrawala, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Bela M. Trivedi, J.

1. Leave granted.

2. The appellant-CBI has sought to challenge the impugned order dated 30.05.2023 passed by the High Court of Delhi at New Delhi in CRL. M.C. No. 6544 of 2022 upholding the order dated 03.12.2022 passed by the Special Judge (PC Act), CBI-08, New Delhi (hereinafter referred to as the Special Court), by which respondent nos. 1 and 2 have been granted default bail under Section 167(2) Cr.P.C.

3. The short facts giving rise to the present appeal are that an FIR bearing no. RC2242022A0001 came to be registered in CBI, AC-VI / SIT, New Delhi on 20.06.2022, on the basis of the complaint lodged by Sh. Vipin Kumar Shukla, DGM, Union Bank of India, Nariman Point, Mumbai, for the offences punishable under Section 120-B r/w Section 409, 420 and 477A of IPC and Section 13(2) r/w Section 13(1)(d) of PC Act, 1988 (hereinafter referred to as the PC Act), against Dewan Housing Finance Corporation Ltd. (DHFL) and 12 other accused persons/companies. It was alleged in the said FIR *inter alia* that the DHFL, Sh. Kapil Wadhawan, the then Chairman and Managing Director, DHFL, along with 12 other accused persons entered into a criminal conspiracy to cheat the consortium of 17 banks led by Union Bank of India, and in pursuance to the said criminal conspiracy, the said accused persons/entities induced the consortium banks to sanction huge loans aggregating to Rs. 42,000 crores approx. and thereafter they siphoned off and misappropriated a significant portion of the said funds by falsifying the books of account of DHFL and deliberately and dishonestly defaulted on repayment of the legitimate dues of the said consortium banks, and thereby caused a wrongful

loss of Rs. 34,000 crores to the consortium lenders during the period January, 2010 to December, 2019.

4. The respondent no. 1- Kapil Wadhawan and respondent no. 2-Dheeraj Wadhawan came to be arrested by the appellant-CBI in connection with the said FIR on 19.07.2022 and were remanded to judicial custody on 30.07.2022.

5. After carrying out the investigation, a chargesheet for the offences under Section 120B r/w Section 206, 409, 411, 420, 424, 465, 468 and 477A of IPC and Section 13(2) r/w 13(1)(d) of PC Act came to be filed by the CBI against 75 persons/entities including the respondent nos. 1 and 2 on 15.10.2022.

6. Respondent nos. 1 and 2 filed an application under Section 167(2) of Cr.P.C. on 29.10.2022 before the Special Court seeking statutory bail on the ground that the chargesheet filed by the CBI was incomplete and no final report as defined under Section 173(2) Cr.P.C. was filed within the statutory period provided under Section 167(2) Cr.P.C., or in the alternative seeking their release from judicial custody in view of lack of jurisdiction of the court as there was no approval under Section 17A of the PC Act as amended in 2018.

7. The Special Court vide the order dated 26.11.2022 held that the Special Court had the jurisdiction to deal with the matter and the bar under Section 17A of the PC Act was not applicable to the facts of the case. By a separate order dated 26.11.2022, the Special Court took the cognizance of the alleged offences against all the 75 accused and issued production warrants against the present respondent nos. 1 and 2 (A-1 and A-2) as also against accused no. 7. The Special Court also issued warrants/summons against the other accused.

8. Thereafter, the Special Court vide the order dated 03.12.2022 holding that the investigation was incomplete and the chargesheet filed was in piecemeal, further held that the respondent nos. 1 and 2 (A-1 and A-2) were entitled to the statutory bail under Section 167(2) Cr.P.C.

9. The appellant-CBI, being aggrieved by the said order dated 03.12.2022 passed by the Special Court filed a petition being Crl.M.C. No. 6544 of 2022 before the High Court under Section 482 r/w Section 439(2) of Cr.P.C. The High Court vide the impugned order dated 30.05.2023 dismissed the said petition and upheld the order dated 03.12.2022 passed by the Special Court.

SUBMISSIONS:

10. The learned ASG, Mr. S.V. Raju for the appellant vehemently submitted that the chargesheet was filed by the appellant-CBI on the completion of the investigation qua 75 accused including the present respondents stating that further investigation qua some other accused was pending, which did not mean that an incomplete chargesheet was filed against the respondents. Learned ASG submitted that report under Section 173 Cr.P.C. filed by the CBI was complete containing all the details as required by law. In the instant case, the statutory bail under Section 167(2) Cr.P.C. has been granted by the courts below after the Special Court took the cognizance of the alleged offences against the respondents, which is against the statutory scheme of the Code. According to him, it is only when a chargesheet is not filed and investigation is kept pending, the benefit of the proviso appended to sub-section (2) of Section 167 of the Code would be available to the offender, however once the chargesheet is filed, the said right of the accused ceases, and such a right does not revive merely because a further investigation remains pending within the meaning of Section 173(8) of the Code. To buttress his submissions, Mr. S.V. Raju has placed heavy reliance on the decision in case of ***Dinesh Dalmia vs. CBI***[1]**.** He also relied upon the judgment in ***M. Ravindran v. Intelligence Officer, Directorate of Revenue Intelligence***[2], to submit that where the accused fails to apply for default bail when his right accrues, and subsequently a chargesheet, additional complaint or a report seeking extension of time is preferred before the Magistrate, the right to default bail would be extinguished.

11. *Per contra,* the learned Senior Advocate Mr. Mukul Rohatgi for the respondent no. 1 submitted that the issue of cognizance had nothing to do with the default bail, in as much as the right under Section 167(2) is a statutory right, when the chargesheet is not filed within the prescribed time limit and even if filed, a complete chargesheet is not filed. According to him, the courts below have concluded that it was an incomplete chargesheet that was filed by the CBI, which entitled the respondents to the statutory right of getting the benefit of default

1 **(2007) 8 SCC 770**

2 **(2021) 2 SCC 485**

bail under Section 167(2) of Cr.P.C. Mr. Mukul Rohatgi has relied upon the decision in ***Suresh Kumar Bhikamchand Jain Vs. State of Maharashtra & Anr.***[3] to buttress his submission that cognizance is not relevant basis for determining whether the investigation is complete or not for the purpose of default bail under Section 167(2) Cr.P.C. Reliance is also placed on the decision in case of ***Rakesh Kumar Paul vs. State of Assam***[4], to submit that if the chargesheet is not filed and the right for default bail has ripened into the status of indefeasibility, it cannot be frustrated by the prosecution on any pretext. Mr. Rohatgi sought to distinguish the *Dalmia's case* (supra) relied upon by Ld. ASG Mr. S.V. Raju by submitting that in the said case, the accused was absconding and the chargesheet was already filed, whereas in the instant case, the chargesheet filed has been held to be incomplete. According to him, the concurrent findings recorded by two courts, unless perverse should not be interfered with, even if there was an error of law. He further submitted that once the bail is granted and interim order staying the operation of such order passed by the High Court is not passed by the Supreme Court, the proceeding partakes the colour of cancellation of bail for which the criteria are absolutely different.

12. Learned Senior Advocate Mr. Amit Desai appearing for the respondent no. 2 adopted the arguments made by the Ld. Senior Advocate Mr. Mukul Rohatgi for the respondent no. 1, and further submitted that the filing of chargesheet was a subterfuge or ruse to defeat the indefeasible right of the respondents conferred under Section 167(2) Cr.P.C.

ANALYSIS:

13. In the instant appeal, the main question that falls for our consideration is, whether the respondents were entitled to the benefit of the statutory right conferred under the proviso to sub section 2 of Section 167 Cr.P.C, on the ground that the investigation qua some of the accused named in the FIR was pending, though the report under sub-section (2) of Section 173 (Chargesheet) against respondents along with the other accused was filed within the prescribed time limit and though

3 **(2013) 3 SCC 77**

4 **(2017) 15 SCC 67**

the cognizance of the offence was taken by the special court before the consideration of the application of the respondents seeking default bail under Section 167 (2) Cr.P.C.?

14. For better appreciation of the submissions made by the learned Counsels for the parties, the relevant parts of Section 167 and Section 173 are reproduced as under: -

> **"167. Procedure when investigation cannot be completed in twenty-four hours. –**
>
> 1. .....
>
> 2. The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:
>
> Provided that—
>
> [5][(a) the Magistrate may authorise the detention of the accused person, otherwise than in custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding—
>
> (i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;
>
> (ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under

5 **Subs. by Act 45 of 1978, sec. 13(a), for paragraph (a) (w.e.f. 18-12-1978).**

this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;]

(b).....

(c).....

173. Report of police officer on completion of investigation. —

(1) Every investigation under this Chapter shall be completed without unnecessary delay.

[6][(1A) The investigation in relation to 3 [an offence under sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB or 376E] from the date on which the information was recorded by the officer in charge of the police station.]

(2) (i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating—

(a) the names of the parties;

(b) the nature of the information;

(c) the names of the persons who appear to be acquainted with the circumstances of the case;

(d) whether any offence appears to have been committed and, if so, by whom;

(e) whether the accused has been arrested;

(f) whether he has been released on his bond and, if so, whether with or without sureties;

(g) whether he has been forwarded in custody under section 170.

[7][(h) whether the report of medical examination of the woman has been attached where investigation relates to

6 **Inst. By Act 5 of 2009, sec. 16(a) (w.e.f. 31-12-2009).**

7 **Ins. By Act 5 of 2009, sec. 16(b) (w.e.f. 31-12-2009).**

an offence under 2 [sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB] or section 376E of the Indian Penal Code (45 of 1860)].]

(ii) The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him, to the person, if any, by whom the information relating to the commission of the offence was first given.

(3)……..

(4)……..”

15. There cannot be any disagreement with the well settled legal position that the right of default bail under Section 167(2) Cr.P.C. is not only a statutory right but is a right that flows from Article 21 of the Constitution of India. It is an indefeasible right, nonetheless it is enforceable only prior to the filing of the challan or the chargesheet, and does not survive or remain enforceable on the challan being filed, if already not availed of. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to the accused after the filing of the challan. The Constitution Bench in ***Sanjay Dutt vs. State through CBI, Bombay (II)***[8], while considering the provisions of Section 20(4)(bb) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 read with Section 167 (2) Cr.P.C. had very pertinently held that:-

> “**48.** We have no doubt that the common stance before us of the nature of indefeasible right of the accused to be released on bail by virtue of Section 20(4)(*bb*) is based on a correct reading of the principle indicated in that decision. The indefeasible right accruing to the accused in such a situation is enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed of. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant

8 **(1994) 5 SCC 410**

of bail to an accused after the filing of the challan. The custody of the accused after the challan has been filed is not governed by Section 167 but different provisions of the Code of Criminal Procedure. If that right had accrued to the accused but it remained unenforced till the filing of the challan, then there is no question of its enforcement thereafter since it is extinguished the moment challan is filed because Section 167 CrPC ceases to apply. The Division Bench also indicated that if there be such an application of the accused for release on bail and also a prayer for extension of time to complete the investigation according to the proviso in Section 20(4)(*bb*), both of them should be considered together. It is obvious that no bail can be given even in such a case unless the prayer for extension of the period is rejected. In short, the grant of bail in such a situation is also subject to refusal of the prayer for extension of time, if such a prayer is made. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. It is settled by Constitution Bench decisions that a petition seeking the writ of *habeas corpus* on the ground of absence of a valid order of remand or detention of the accused, has to be dismissed, if on the date of return of the rule, the custody or detention is on the basis of a valid order. (See *Naranjan Singh Nathawan* v. *State of Punjab* [(1952) 1 SCC 118 : 1952 SCR 395 : AIR 1952 SC 106 : 1952 Cri LJ 656] ; *Ram Narayan Singh* v. *State of Delhi* [1953 SCR 652 : AIR 1953 SC 277 : 1953 Cri LJ 1113] and *A.K. Gopalan* v. *Government of India* [(1966) 2 SCR 427 : AIR 1966 SC 816 : 1966 Cri LJ 602] .)

16. In ***Suresh Kumar Bhikamchand Jain Vs. State of Maharashtra & Anr.*** (supra), the appellant-accused had sought default bail under Section 167(2) on the ground that though the chargesheet was filed within the stipulated time, the cognizance was not taken by the court, for want of sanction to prosecute the accused. The court dispelling the claim of the accused held: -

"17. In our view, grant of sanction is nowhere contemplated under Section 167 CrPC. What the said section contemplates is the completion of investigation in respect of different types of cases within a stipulated period and the right of an accused to be released on bail on the failure of the investigating authorities to do so. The scheme of the provisions relating to remand of an accused, first during the stage of investigation and, thereafter, after cognizance is taken, indicates that the legislature intended investigation of certain crimes to be completed within 60 days and offences punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, within 90 days. In the event, the investigation is not completed by the investigating authorities, the accused acquires an indefeasible right to be granted bail, if he offers to furnish bail. Accordingly, if on either the 61st day or the 91st day, an accused makes an application for being released on bail in default of charge-sheet having been filed, the court has no option but to release the accused on bail. The said provision has been considered and interpreted in various cases, such as the ones referred to hereinbefore. Both the decisions in *Natabar Parida case* [(1975) 2 SCC 220 : 1975 SCC (Cri) 484] and in *Sanjay Dutt case* [(1994) 5 SCC 410 : 1994 SCC (Cri) 1433] were instances where the charge-sheet was not filed within the period stipulated in Section 167(2) CrPC and an application having been made for grant of bail prior to the filing of the charge-sheet, this Court held that the accused enjoyed an indefeasible right to grant of bail, if such an application was made before the filing of the charge-sheet, but once the charge-sheet was filed, such right came to an end and the accused would be entitled to pray for regular bail on merits.

18. None of the said cases detract from the position that once a charge-sheet is filed within the stipulated time, the question of grant of default bail or statutory bail does not arise. As indicated hereinabove, in our view, the filing of charge-sheet is sufficient compliance with the provisions of Section 167(2)(*a*)(*ii*) in this case. Whether cognizance is taken or not is not material as far as Section 167 CrPC

is concerned. The right which may have accrued to the petitioner, had charge-sheet not been filed, is not attracted to the facts of this case. Merely because sanction had not been obtained to prosecute the accused and to proceed to the stage of Section 309 CrPC, it cannot be said that the accused is entitled to grant of statutory bail, as envisaged in Section 167 CrPC. The scheme of CrPC is such that once the investigation stage is completed, the court proceeds to the next stage, which is the taking of cognizance and trial. An accused has to remain in custody of some court. During the period of investigation, the accused is under the custody of the Magistrate before whom he or she is first produced. During that stage, under Section 167(2) CrPC, the Magistrate is vested with authority to remand the accused to custody, both police custody and/or judicial custody, for 15 days at a time, up to a maximum period of 60 days in cases of offences punishable for less than 10 years and 90 days where the offences are punishable for over 10 years or even death sentence. In the event, an investigating authority fails to file the charge-sheet within the stipulated period, the accused is entitled to be released on statutory bail. In such a situation, the accused continues to remain in the custody of the Magistrate till such time as cognizance is taken by the court trying the offence, when the said court assumes custody of the accused for purposes of remand during the trial in terms of Section 309 CrPC. The two stages are different, but one follows the other so as to maintain a continuity of the custody of the accused with a court."

17. Again, in ***Serious Fraud Investigation Office vs. Rahul Modi & Ors.***[9]**,** this Court following ***Suresh Kumar Bhikamchand Jain*** (supra) observed: -

> **"11.** It is clear from the judgment of this Court in *Bhikamchand Jain* (supra) that filing of a charge-sheet is sufficient compliance with the provisions of Section 167, CrPC and that an accused cannot demand release

9 **2022 SCC OnLine SC 153**

> on default bail under Section 167(2) on the ground that cognizance has not been taken before the expiry of 60 days. The accused continues to be in the custody of the Magistrate till such time cognizance is taken by the court trying the offence, which assumes custody of the accused for the purpose of remand after cognizance is taken. The conclusion of the High Court that the accused cannot be remanded beyond the period of 60 days under Section 167 and that further remand could only be at the post-cognizance stage, is not correct in view of the judgment of this Court in *Bhikamchand Jain* (supra)."

18. In the instant case as transpiring from the record, the respondents (A1 and A2) were arrested in connection with the FIR in question on 19.07.2022, and the report (the chargesheet) running into about 900 pages under Section 173(2) was filed by the CBI against the respondents along with other 73 accused on 15.10.2022. In the said report it was stated in Para no. 66 that: -

> **"66**. With regard to ascertaining roles of remaining FIR named accused persons namely Sh. Sudhakar Shetry, M/s Amaryllis Realtors & M/s Gulmarg Realtors, remaining CAs (who had audited balance sheets of e-DHFL & Shell companies and who had facilitated the promoters), ultimate beneficiaries/end use of diverted funds through shell companies & other Wadhawan Group Companies, the DHFL officials, insider share trading of DHFL shares, bank officials, NHB officials and other connected issues, further investigation u/s 173 (8) of Cr. PC is continuing.
>
> List of additional witnesses and additional documents will be filed as and when required.
>
> It is, therefore, humbly prayed that the aforesaid accused persons may be summoned and be tried in accordance with the provisions of law."

19. The Special Court thereafter had taken cognizance of the alleged offences as per the order dated 26.11.2022. It appears that earlier the Special Court had rejected the application of the respondents (accused) seeking statutory bail under Section 167(2) Cr.P.C., however at that time the issue was whether qua the offences against

the respondents, period of sixty days or ninety days was applicable for grant of mandatory bail due to non-filing of chargesheet by the investigating agency, and it was held by the Special Court that the period of ninety days was applicable in case of the respondents, in which the chargesheet could be filed by the CBI. The respondents thereafter filed another application under Section167(2) after the cognizance of the offences was taken by the Special Court, on the ground that the chargesheet filed against them was an incomplete chargesheet.

20. The bone of contention raised by the learned Senior Counsels for the Respondents in this appeal is that the appellant – CBI having kept the investigation open qua other respondents as stated in Para 66 of the chargesheet, the ingredients of Section 173 Cr.P.C. could not be said to have been complied with and therefore the report/ chargesheet under Section 173 could not be said to be a complete chargesheet. It is immaterial whether cognizance has been taken by the court or not. According to them the chargesheet filed against the respondents and others was a subterfuge or ruse to defeat the indefeasible right of the respondents conferred under Section 167(2) Cr.P.C.

21. In our opinion, the Constitution Bench in ***K. Veeraswami vs. Union of India and Others***[10] has aptly explained the scope of Section 173(2).

> "**76.** The charge-sheet is nothing but a final report of police officer under Section 173(2) of the CrPC. The Section 173(2) provides that on completion of the investigation the police officer investigating into a cognizable offence shall submit a report. The report must be in the form prescribed by the State Government and stating therein (*a*) the names of the parties; (*b*) the nature of the information; (*c*) the names of the persons who appear to be acquainted with the circumstances of the case; (*d*) whether any offence appears to have been committed and, if so, by whom (*e*) whether the accused has been arrested; (*f*) whether he had been released on his bond and, if so, whether with or without sureties; and (*g*) whether he has been forwarded in custody under Section 170. As observed by this Court in

10 **(1991) 3 SCC 655**

> *Satya Narain Musadi* v. *State of Bihar* [(1980) 3 SCC 152, 157 : 1980 SCC (Cri) 660] that the statutory requirement of the report under Section 173(2) would be complied with if the various details prescribed therein are included in the report. This report is an intimation to the magistrate that upon investigation into a cognizable offence the Investigating Officer has been able to procure sufficient evidence for the court to inquire into the offence and the necessary information is being sent to the court. In fact, the report under Section 173(2) purports to be an opinion of the Investigating Officer that as far as he is concerned he has been able to procure sufficient material for the trial of the accused by the court. The report is complete if it is accompanied with all the documents and statements of witnesses as required by Section 175(5). Nothing more need be stated in the report of the Investigating Officer. It is also not necessary that all the details of the offence must be stated. The details of the offence are required to be proved to bring home the guilt to the accused at a later stage i.e. in the course of the trial of the case by adducing acceptable evidence."

22. In view of the above settled legal position, there remains no shadow of doubt that the statutory requirement of the report under Section 173 (2) would be complied with if the various details prescribed therein are included in the report. The report under Section 173 is an intimation to the court that upon investigation into the cognizable offence, the investigating officer has been able to procure sufficient evidence for the court to inquire into the offence and the necessary information is being sent to the court. The report is complete if it is accompanied with all the documents and statements of witnesses as required by Section 175 (5). As settled in the afore-stated case, it is not necessary that all the details of the offence must be stated.

23. The benefit of proviso appended to sub-section (2) of Section 167 of the Code would be available to the offender only when a chargesheet is not filed and the investigation is kept pending against him. Once however, a chargesheet is filed, the said right ceases. It may be noted that the right of the investigating officer to pray for further investigation in terms of sub-section (8) of Section 173 is not

taken away only because a chargesheet is filed under sub-section (2) thereof against the accused. Though ordinarily all documents relied upon by the prosecution should accompany the chargesheet, nonetheless for some reasons, if all the documents are not filed along with the chargesheet, that reason by itself would not invalidate or vitiate the chargesheet. It is also well settled that the court takes cognizance of the offence and not the offender. Once from the material produced along with the chargesheet, the court is satisfied about the commission of an offence and takes cognizance of the offence allegedly committed by the accused, it is immaterial whether the further investigation in terms of Section 173(8) is pending or not. The pendency of the further investigation qua the other accused or for production of some documents not available at the time of filing of chargesheet would neither vitiate the chargesheet, nor would it entitle the accused to claim right to get default bail on the ground that the chargesheet was an incomplete chargesheet or that the chargesheet was not filed in terms of Section 173(2) of Cr.P.C.

24. In ***Dinesh Dalmia*** (supra), this Court has elaborately explained the scope of Section 167(2) vis-à-vis Section 173(8) Cr.P.C. The paragraphs relevant for the purpose of this appeal are reproduced hereinbelow: -

> **"19.** A charge-sheet is a final report within the meaning of sub-section (2) of Section 173 of the Code. It is filed so as to enable the court concerned to apply its mind as to whether cognizance of the offence thereupon should be taken or not. The report is ordinarily filed in the form prescribed therefor. One of the requirements for submission of a police report is whether any offence appears to have been committed and, if so, by whom. In some cases, the accused having not been arrested, the investigation against him may not be complete. There may not be sufficient material for arriving at a decision that the absconding accused is also a person by whom the offence appears to have been committed. If the investigating officer finds sufficient evidence even against such an accused who had been absconding, in our opinion, law does not require that filing of the charge-sheet must await the arrest of the accused.

20. Indisputably, the power of the investigating officer to make a prayer for making further investigation in terms of sub-section (8) of Section 173 is not taken away only because a charge-sheet under sub-section (2) thereof has been filed. A further investigation is permissible even if order of cognizance of offence has been taken by the Magistrate.

21. ……..

22. It is true that ordinarily all documents accompany the charge-sheet. But, in this case, some documents could not be filed which were not in the possession of CBI and the same were with GEQD. As indicated hereinbefore, the said documents are said to have been filed on 20-1-2006 whereas the appellant was arrested on 12-2-2006. The appellant does not contend that he has been prejudiced by not filing of such documents with the charge-sheet. No such plea in fact had been taken. Even if all the documents had not been filed, by reason thereof submission of charge-sheet itself does not become vitiated in law. The charge-sheet has been acted upon as an order of cognizance had been passed on the basis thereof. The appellant has not questioned the said order taking cognizance of the offence. Validity of the said charge-sheet is also not in question.

23 to 27…….

28. It is now well settled that the court takes cognizance of an offence and not the offender. (See *Anil Saran* v. *State of Bihar* [(1995) 6 SCC 142 : 1995 SCC (Cri) 1051] and *Popular Muthiah* v. *State* [(2006) 7 SCC 296 : (2006) 3 SCC (Cri) 245] .)

29. The power of a court to direct remand of an accused either in terms of sub-section (2) of Section 167 of the Code or sub-section (2) of Section 309 thereof will depend on the stages of the trial. Whereas sub-section (2) of Section 167 of the Code would be attracted in a case where cognizance has not been taken, sub-section (2) of Section 309 of the Code would be attracted only after cognizance has been taken.

30. If submission of Mr Rohatgi is to be accepted, the Magistrate was not only required to declare the charge-sheet illegal, he was also required to recall his own order of taking cognizance. Ordinarily, he could not have done so. (See *Adalat Prasad* v. *Rooplal Jindal* [(2004) 7 SCC 338 : 2004 SCC (Cri) 1927], *Subramanium Sethuraman* v. *State of Maharashtra* [(2004) 13 SCC 324 : 2005 SCC (Cri) 242 : (2004) 7 Scale 733] and *Everest Advertising (P) Ltd.* v. *State, Govt. of NCT of Delhi* [(2007) 5 SCC 54 : (2007) 2 SCC (Cri) 444 : JT (2007) 5 SC 529].) It is also well settled that if a thing cannot be done directly, the same cannot be permitted to be done indirectly. If the order taking cognizance exists, irrespective of the conduct of CBI in treating the investigation to be open or filing applications for remand of the accused to police custody or judicial remand under sub-section (2) of Section 167 of the Code stating that the further investigation was pending, would be of no consequence if in effect and substance such orders were being passed by the court in exercise of its power under sub-section (2) of Section 309 of the Code.

31 to 37.....

38. It is a well-settled principle of interpretation of statute that it is to be read in its entirety. Construction of a statute should be made in a manner so as to give effect to all the provisions thereof. Remand of an accused is contemplated by Parliament at two stages; pre-cognizance and post-cognizance. Even in the same case, depending upon the nature of charge-sheet filed by the investigating officer in terms of Section 173 of the Code, a cognizance may be taken as against the person against whom an offence is said to have been made out and against whom no such offence has been made out even when investigation is pending. So long a charge-sheet is not filed within the meaning of sub-section (2) of Section 173 of the Code, investigation remains pending. It, however, does not preclude an investigating officer, as noticed hereinbefore, to carry on further investigation despite filing of a police report, in terms of sub-section (8) of Section 173 of the Code.

> **39.** The statutory scheme does not lead to a conclusion in regard to an investigation leading to filing of final form under sub-section (2) of Section 173 and further investigation contemplated under sub-section (8) thereof. Whereas only when a charge-sheet is not filed and investigation is kept pending, benefit of proviso appended to sub-section (2) of Section 167 of the Code would be available to an offender; once, however, a charge-sheet is filed, the said right ceases. Such a right does not revive only because a further investigation remains pending within the meaning of sub-section (8) of Section 173 of the Code."

25. In view of the afore-stated legal position, we have no hesitation in holding that the chargesheet having been filed against the respondents-accused within the prescribed time limit and the cognizance having been taken by the Special Court of the offences allegedly committed by them, the respondents could not have claimed the statutory right of default bail under Section 167(2) on the ground that the investigation qua other accused was pending. Both, the Special Court as well as the High Court having committed serious error of law in disregarding the legal position enunciated and settled by this Court, the impugned orders deserve to be set aside and are accordingly set aside.

26. The respondents-accused shall be taken into custody in this case, if released on default bail pursuant to the impugned orders. However, it is clarified that observations made in this judgment shall not influence the Special Court or High Court while deciding the other proceedings, if any pending before them, on merits.

27. The Appeal stands allowed accordingly.

Headnotes prepared by: Divya Pandey *Result of the case:* Appeal allowed.

[2024] 1 S.C.R. 697 : 2024 INSC 55

Prakashchandra Joshi
v.
Kuntal Prakashchandra Joshi @ Kuntal Visanji Shah

(Civil Appeal No. 934 of 2024)

24 January 2024

[B.R. Gavai and Prashant Kumar Mishra,* JJ.]

Issue for Consideration

Whether a decree for divorce can be granted for the reason that the marriage has irretrievably broken down.

Headnotes

Marriage – Irretrievable break down – Appellant contended that the appellant and the respondent were living apart due to matrimonial discord for the last 13 years and as there are no prospects for reconciliation, the marriage has irretrievably broken down:

Held: The appellant lost his job in Canada and the family came back to India in January, 2011 – The couple last resided together in appellant's mother's house till 19.02.2011 – After this date, they lost contact with each other, and the respondent refused to return to the matrimonial home – On being contacted, the respondent refused to resume matrimonial life unless the appellant separates from his family and resides in a separate household – On account of appellant's inability to accede to this demand of the respondent, she never returned to resume the matrimonial life – The respondent did not appear in the proceedings u/s. 9 of the Hindu Marriage Act, despite receiving summons – Similarly, in the present divorce proceedings also the respondent failed to enter appearance despite service of notice in the Trial Court, High Court and Supreme Court as well – Thus, it is apparent that the respondent does not wish to continue the marital chord and is not responding to court summons – There is no hesitation in holding that the present is a case of irretrievable breakdown of marriage as there is no possibility of the couple staying together – For the foregoing reasons, the marriage between the parties is dissolved in exercise of powers u/Art. 142(1) of the Constitution. [Paras 11, 12, 15, 16]

* Author

Case Law Cited

Shilpa Sailesh vs. Varubn Sreenivasan, [2023] 5 SCR 165 **: (2023) SCC online SC 544 – relied on.**

Sukhendu Das vs. Rita Mukherjee, **(2017) 9 SCC 632;** *Samar Ghosh vs. Jaya Ghosh,* [2007] 4 SCR 428**: (2007) 4 SCC 511 – referred to.**

List of Acts

Constitution of India.

List of Keywords

Irretrievable break down of marriage; matrimonial discord; Couple living separately; non-appearance of party; Dissolution of marriage; Decree for divorce; Article 142(1) of Constitution.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 934 of 2024.

From the Judgment and Order dated 24.06.2021 of the High Court of Judicature at Bombay in FCA No.162 of 2019.

Appearances for Parties

Dhananjay Bhaskar Ray, Adv. for the Appellant.

Judgment / Order of the Supreme Court

Judgment

Prashant Kumar Mishra, J.

Leave granted.

2. The instant appeal is directed against the judgment and order impugned dated 24.06.2021 passed by the High Court of Judicature at Bombay in Family Court Appeal No. 162 of 2019 whereby the High Court, while affirming the order of the Family Court, dismissed the appeal seeking dissolution of marriage by a decree of divorce.

3. The facts in brief are that the marriage between the appellant and respondent was solemnized on 05.01.2004 as per the rituals of Hindu religion after having spent eight years in courtship. They are Indian citizens by birth. However, they acquired citizenship

of Canada for financial gain and were living a normal and happy matrimonial life in Canada. A male child was born from the wedlock on 21.05.2010. In the year 2011, the appellant started experiencing medical problems namely, constant back and shoulder pain as well as skin related problems, especially during summer due to rag weed allergy resulting into sleepless nights and miserable days. During the period of recession in Canada, the appellant lost his job and the couple along with the minor child returned to India on 29.01.2011. The respondent after wilfully staying at her matrimonial home, joined her parental house on 20.02.2011. After some time, when the appellant asked the respondent to resume cohabitation, the respondent did not pay any heed and refused to join the company of the appellant. The respondent was interested in returning to Canada for a better future. The appellant, however, expressed his unwillingness to shift to Canada owing to his health issues. Various attempts were made by the family of the parties to resolve the matrimonial discord between them but to no avail. The respondent left for Canada with her son. Thereafter, the appellant tried to contact the respondent either through e-mail or by other modes requesting her to come and cohabit with him. It was neither responded to nor complied with.

4. The appellant was, therefore, constrained to prefer a petition under Section 9 of the Hindu Marriage Act for restitution of conjugal rights which remained uncontested on behalf of the respondent though the respondent was duly served. Desperately, the appellant withdrew the petition for restitution of conjugal rights. Since the appellant realized that there would be no hope of any restitution, he filed a divorce petition on the ground of cruelty and desertion.

5. The petition proceeded *ex parte* as, despite due service, the respondent remained unrepresented. After considering the pleadings and evidence, the learned Family Court dismissed the petition of the appellant, *inter alia*, observing that no case had been made from the alleged cruelty caused to the appellant by the respondent.

6. Being aggrieved with and dissatisfied by the dismissal of the petition by the learned Family Court, the appellant moved a Family Court Appeal before the High Court. The High Court dismissed the appeal by holding that no case has been made out by the appellant for seeking a decree of divorce on the ground of either cruelty or desertion. Hence, this appeal.

7. Considering the facts and circumstances, a short question arises for our consideration as to whether a decree for divorce can be granted for the reason that the marriage has irretrievably broken down.

8. Notice was issued to the sole respondent/wife on 21.01.2022, which was duly served upon the respondent. The respondent once again did not put in appearance either in-person or through an advocate.

9. We have heard Mr. Dhananjay Bhaskar Ray, learned counsel appearing for the appellant at length and have also perused the pleadings.

10. Mr. Dhananjay would submit that the respondent deserted the appellant about 13 years ago and she refused to cohabit with the appellant. Learned counsel would further submit that the appellant and the respondent have been living apart due to matrimonial discord for the last 13 years and as there are no prospects for reconciliation, the marriage has been irretrievably broken down. The learned counsel would argue that the uncontroverted evidence substantially establishes the fact that the appellant had been treated with mental cruelty by his wife who had left his company despite an objection from the appellant. The learned counsel further submitted that the conduct of the respondent itself indicates that she is not willing to live with the appellant. Learned counsel for the appellant, in support of the contentions, placed reliance on the decisions of this Court in the case of "***Sukhendu Das Vs. Rita Mukherjee***[1]**"** and ***"Samar Ghosh vs. Jaya Ghosh***[2]***".***

11. The record reveals that after appellant's car accident in November, 2009 the couple was blessed with a baby boy on 21.05.2010. The appellant lost his job owing to the deep recession in Canada and eventually the family came back to India in January, 2011. The couple last resided together in appellant's mother's house at Mumbai till 19.02.2011. After this date, they lost contact with each other, and the respondent refused to return to the matrimonial home. On being contacted, the respondent refused to resume matrimonial life unless the appellant separates from his family and resides in a

1 (2017) 9 SCC 632

2 (2007) 4 SCC 511

separate household. On account of appellant's inability to accede to this demand of the respondent, she never returned to resume the matrimonial life.

12. It is also to be seen that in the proceedings initiated by the appellant for restitution of conjugal rights under Section 9 of the Hindu Marriage Act, the respondent did not appear despite receiving the summons. Similarly, in the present divorce proceedings also the respondent failed to enter appearance despite service of notice in the Trial Court, High Court and Supreme Court as well. Thus, it is apparent that the respondent does not wish to continue the marital chord and is not responding to court summons much less the request made by the appellant.

13. On the basis of the above factual matrix the present appears to be a case of irretrievable breakdown of marriage. In the matter of ***"Shilpa Sailesh vs. Varubn Sreenivasan[3]"***, this Court has held that exercise of jurisdiction under Article 142 (1) of the Constitution of India is clearly permissible to do 'complete justice' to a 'cause or matter' and this Court can pass an order or decree which a family court, trial court or High Court can pass and when such power is exercised, the question or issue of lack of subject-matter jurisdiction does not arise.

14. On the issue as to grant of divorce on the ground of irretrievable breakdown of marriage in exercise of jurisdiction under Article 142 (1) of the Constitution of India, this Court in ***Shilpa Sailesh*** (supra) held thus in paras 33 and 42 (iii):

> "33. Having said so, we wish to clearly state that grant of divorce on the ground of irretrievable breakdown of marriage by this Court is not a matter of right, but a discretion which is to be exercised with great care and caution, keeping in mind several factors ensuring that 'complete justice' is done to both parties. It is obvious that this Court should be fully convinced and satisfied that the marriage is totally unworkable, emotionally dead and beyond salvation and, therefore, dissolution of marriage is the right solution and the only way forward. That the

3 (2023) SCC online SC 544

marriage has irretrievably broken down is to be factually determined and firmly established. For this, several factors are to be considered such as the period of time the parties had cohabited after marriage; when the parties had last cohabited; the nature of allegations made by the parties against each other and their family members; the orders passed in the legal proceedings from time to time, cumulative impact on the personal relationship; whether, and how many attempts were made to settle the disputes by intervention of the court or through mediation, and when the last attempt was made, etc. The period of separation should be sufficiently long, and anything above six years or more will be a relevant factor. But these facts have to be evaluated keeping in view the economic and social status of the parties, including their educational qualifications, whether the parties have any children, their age, educational qualification, and whether the other spouse and children are dependent, in which event how and in what manner the party seeking divorce intends to take care and provide for the spouse or the children. Question of custody and welfare of minor children, provision for fair and adequate alimony for the wife, and economic rights of the children and other pending matters, if any, are relevant considerations. We would not like to codify the factors so as to curtail exercise of jurisdiction under Article 142(1) of the Constitution of India, which is situation specific. Some of the factors mentioned can be taken as illustrative, and worthy of consideration.

42 (iii) Whether this Court can grant divorce in exercise of power under Article 142(1) of the Constitution of India when there is complete and irretrievable breakdown of marriage in spite of the other spouses opposing the prayer?

This question is also answered in the affirmative, inter alia, holding that this Court, in exercise of power under Article 142(1) of the Constitution of India, has the discretion to dissolve the marriage on the ground of its irretrievable breakdown. This discretionary power is to be exercised to do 'complete justice' to the parties, wherein this Court is satisfied that the facts established show that the marriage

has completely failed and there is no possibility that the parties will cohabit together, and continuation of the formal legal relationship is unjustified. The Court, as a court of equity, is required to also balance the circumstances and the background in which the party opposing the dissolution is placed."

15. Reverting back to the case in hand, to accord satisfaction as to whether the present is a fit case for exercise of power under Article 142 (1) of the Constitution of India to dissolve the marriage on the ground of irretrievable breakdown, we see that the parties are residing separately since February, 2011 and there have been no contact whatsoever between them during this long period of almost 13 years. The respondent-wife is not even responding to the summons issued by the courts. It seems she is no longer interested in continuing the marital relations with the appellant. Therefore, we have no hesitation in holding that the present is a case of irretrievable breakdown of marriage as there is no possibility of the couple staying together.

16. For the foregoing reasons, the appeal is allowed and we dissolve the marriage between the parties on the ground of irretrievable breakdown in exercise of powers under Article 142(1) of the Constitution of India. Accordingly, the marriage between the parties solemnized on 05.01.2004 is dissolved by a decree of divorce. A decree to this effect be drawn accordingly.

Headnotes prepared by: Ankit Gyan *Result of the case:* Appeal allowed.

[2024] 1 S.C.R. 704 : 2024 INSC 59

In Re: T. N. Godavarman Thirumulpad
v.
Union of India and Others

(Writ Petition (Civil) No.202 of 1995)

24 January 2024

[B. R. Gavai, Aravind Kumar* and Prashant Kumar Mishra, JJ.]

Issue for Consideration

Matter pertains to criteria issued for the identification of private 'forest' land in the State of Goa.

Headnotes

Environmental laws – Forests – Criteria issued by the State of Goa for the identification of private 'forest' land in the State of Goa – Challenge to, by the appellant seeking change in the criteria:

Held: Existing criteria for identification of private forests in the State of Goa are adequate and valid, thus, requires no alteration – Criteria of the canopy density of 0.4 and minimum area of 5 ha if reduced to 0.1 and 1 ha as contended by the appellant, would result in the plantations of coconut, orchards, bamboo, palm, supari, cashew, etc., grown by farmers on their private lands into the category of 'private forest' – Even for a minor development on the concerned land, the permission of the Government under the FCA 1980, for the landholders, would become indispensable – Also none of the States have adopted the 0.1 density criteria – Furthermore, on the one hand, the appellant is challenging the criteria adopted by the Sawant and Karapurkar Committees for the identification of *inter alia* private forests and on the other hand has relied on the same criteria, the the appellant cannot be permitted to approbate and reprobate – Also the appellant having not challenged the criteria as prescribed by the Expert Committee and published in the public notice is estopped from raising the said issue at this stage – Process of physical demarcation of such forests in State of Goa seems to have attained finality by virtue of the Reports and the State of Goa has issued a gazette notification notifying 46.11 sq. km. as

* Author

private forest – Furthermore, the application of criteria cannot be universally standardized across the country, as it is contingent upon the specific geographical conditions prevalent in each State, and as a result, the criteria may vary from one State to another – Thus, the task of identifying forest areas expressly delegated to Expert Committees to be constituted by State Governments, thereby recognising that there can be no uniform criteria for such identification across the country. [Paras 63, 67-69]

Environmental laws – Forests – 'Forest Cover' and 'Recorded Forest Area' – Distinction between:

Held: 'Forest Cover' encompasses all lands exceeding 1 (one) hectare in size with a tree canopy exceeding 10%, regardless of land use, ownership, and legal status – This category may encompass various features like orchards, bamboo groves, palm plantations, etc., and is evaluated through remote sensing techniques – Term 'Recorded Forest Area' or 'Forest Area' refers to all geographic areas officially designated as 'Forests' in government records – Recorded forest areas primarily include Reserved Forests and Protected Forests which are notified under the provisions of the Forest Act, 1927, or equivalent State Acts – Recorded forest area may also cover regions recorded as forests in revenue records or established as such under any State Act or local laws. [Para 66]

Case Law Cited

Shivanand Salgaocar v. Tree Officer & Ors. **Writ Petition No.162 of 1987**; *T.N. Godavarman Thirumulpad v. Union of India* [1996] 9 Suppl. SCR 982 **: (1997) 2 SCC 267**; *Goa foundation v. State Government of Goa* **Writ Petition (Civil) No. 181 of 2001**; *TN Godavarman Thirumulpad v. Union of India & Ors.* [2008] 6 SCR 321 **: (2008) 7 SCC 126**; *Lafarge Umiam Mining Pvt. Ltd. v. Union of India and Ors* [2011] 7 SCR 954 **: (2011) 7 SCALE 242**; *Tata Housing Development Corporation v. Goa Foundation* **(2003) 11 SCC 714**; *Nisarga v. Asst. Conservator of Forests* **OA No.19 (THC) of 2013**; *T.N. Godavarman Thirumalpad (87) v. Union of India* [2005] 3 Suppl. SCR 552 **: (2006) 1 SCC 1**; *Park-Anand Arya v. Noida* [2010] 15 SCR 783 **: (2011) 1 SCC 744** – referred to.

List of Acts

National Green Tribunal Act, 2010; Forest (Conservation) Act, 1980; Goa Daman and Diu Preservation of Trees Act, 1984; Scheduled Tribe and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006; Forest Rights Act, 2006; Forest Act, 1927.

List of Keywords

Forests; Forest land; Identification of forest; Demarcation of private forest; Sawant Committee, Karapurkar Committee; Sharma Reports; Deep Shikha Committee; Degraded forest lands; Private forests; Open forest; Forest Survey of India; Tree canopy density; Non-forestry purpose; Net Present Value; Compensatory Afforestation costs; Central Empowered Committee; Very dense forest; Moderate dense forest; Forest cover; Forest area; Policy decision, Forest Clearance; Forest identification criteria; Conversion Sanad; Principle of sustainable development; Deemed forest; Res judicata; Estopped; Minimum Mappable Area; India State of Forest Report 1989; India State of Forest Report 1999; India State of Forest Report, 2008; India State of Forest Report, 2017; Coastal Regulation Zone Notification; Ecologically Sensitive Area; Areas under riverine and other wetlands; Expert Appraisal Committee; Deforestation; Recorded Forest Area; Remote sensing techniques; Geographical ecosystem; Specific geography; Approbate and reprobate.

Case Arising From

CIVIL APPELLATE JURISDICTION: Writ Petition (Civil) No.202 of 1995

(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

With

Civil Appeal No.12234-35 of 2018

Appearances for Parties

Harish N. Salve, A.D.N. Rao, Ms. Aparajita Singh, Sr. Advs. [A.Cs.], K. Parameshwar, Siddhartha Chowdhury, Advs. [A.Cs.], M.V. Mukunda, Ms. Kanti, Ms. Aarti Gupta, Chinmay Kalgaonkar, Advs.

Ms. Aishwarya Bhati, A.S.G., A.N.S. Nadkarni, Sr. Adv., Ms. Shagun Thakur, Ms. Manisha Chava, Gurmeet Singh Makker, Ms. Archana Pathak Dave, Ms. Suhashini Sen, S. S. Rebello, Shyam Gopal, Raghav Sharma, Sughosh Subramanyam, Ms. Ruchi Kohli, Atul Sharma, Salvador Santosh Rebello, Ms. Deepti Arya, Ms. Arzu Paul, Siddhant Gupta, Ms. Manisha Gupta, Rishikesh Haridas, Abhishek Atrey, Ms. Vidyottma Jha, Advs for the appearing parties.

Petitioner/Applicant-in-person

Judgment / Order of the Supreme Court

Judgment

Aravind Kumar, J.

1. The present civil appeals arise out of common order dated 30.07.2014 passed by the National Green Tribunal (Western Zone) Bench, Pune[1] in Application No.14 (THC) of 2013 (WZ) and Application No.16 (THC) of 2013 (WZ) filed by the appellant, whereunder the NGT has disposed of both the applications on the ground that the issue of determination of criteria for the identification of 'forest' forms part of the proceedings in ***TN Godavarman Case***[2] which is presently seized by this Court and hence, granted liberty to the appellant to approach this Court for the remedy. Therefore, the appellant has filed the present civil appeals under Section 22 of the National Green Tribunal Act, 2010,[3] seeking the modification of such criteria.

2. We have heard the arguments of Mr. Sanjay Parikh, Senior Advocate for the Appellant assisted by Ms. Srishti Agnihotri, Ld. Advocate, Mr. Nalin Kohli, Ld. Advocate for State of Goa assisted by Mr. Sanjay Upadhyay, Ld. Advocate, Ms. Suhashini Sen, Ld. Advocate for Union of India and Mr. Mukul Rohatgi, Ld. Senior Advocate for impleading applicant, perused the case-papers.

FACTUAL MATRIX IN BRIEF

3. The challenge in the present appeals revolves around the criteria issued by the Respondent(s) i.e., the State of Goa and Others for the identification of 'forests' in the State, hence, it is important to trace

1 Hereinafter to be read as "NGT".

2 In Re: TN Godavarman Thirumulpad (Writ Petition No.202 of 1995).

3 Hereinafter to be referred as "NGT Act, 2010".

the history of adoption of these criteria which are under challenge before us. Accordingly, in the subsequent paragraphs we have traced the brief history of these criteria.

4. Pursuant to the Judgement of the High Court of Bombay in ***Shivanand Salgaocar v. Tree Officer & Ors***.[4] declaring the application of the Forest (Conservation) Act, 1980[5] to all lands, whether government or privately owned, the Conservator of Forests, State of Goa, in 1991 set out the guidelines for identifying '*forest'* in private properties. Vide letter dated 04.10.1991 the attention of the Ministry of Environment and Forest (MoEF) was sought on the said guidelines with a request to issue suitable guidelines to implement the FCA 1980 on the basis of the aforesaid decision of the Bombay High Court. The guidelines were as follows:

> "*Criteria for application of Forest (Conservation) Act, 1980 to private forests.*
>
> *i) Extent of area: Long term viability of a piece of forest land is an important consideration. Obviously, very small patches of forest cannot be viable in the long run from conservation Point of view. Therefore, a minimum extent of area will have to be determined to which the Forest (Cons.) Act, 1980 would be applicable in private and revenue areas not recorded as 'forest'. I propose that this area should be at least 5 hectares. It is not worthy that the Forest (Cons.) Act, 1980 and guidelines made there under do not prescribe any such minimum area for application of the Act.*
>
> *ii) Proximity and/or contiguity: The proximity of the private forests concerned to a larger forest area and / or its contiguity with the later area should also be an important aspect to consider while examining such areas.*
>
> *iii) Composition of crop: It is important to prescribe minimum standards in terms of crop composition in order to distinguish forest species from horticultural species. This is particularly relevant in State like Goa where occurrence*

4 Writ Petition No.162 of 1987.

5 Hereinafter to be read as "FCA 1980".

of large number of cashew, jackfruit and coconut trees in private areas is a common feature. We may perhaps prescribe that at least 75 of the crop should comprise of forest species.

iv) Crown density: It would not be meaningful to apply the Forest (Cons.) Act, 1980 to degraded and open areas under private ownership. Therefore, a minimum crown density of 40% may be adopted as a standard assessing the applicability of the Act in such private and revenue areas which are not recorded as 'forests' in the land records." [Emphasis supplied]

5. By an order dated 12.12.1996 in ***T.N. Godavarman Thirumulpad v. Union of India***[6]**,** this Court explained that the word "forest" for the purpose of Section 2(i) of the FCA 1980 must be understood according to its dictionary meaning, and would cover *"all statutorily recognised forests, whether designated as reserved, protected or otherwise".* This Court further explained that the term "forest land", occurring in Section 2 would include not only "forest" as understood in the dictionary sense, but also *"any area recorded as forest in the Government record irrespective of the ownership".*

6. Further, this Court vide order dated 12.12.1996 in ***TN Godavarman Case*** (*supra*) directed all the States to constitute an expert committee for the following tasks:

"(i) Identify areas which are "forests", irrespective of whether they are so notified, recognised or classified under any law, and irrespective of the ownership of the land of such forest;

(ii) identify areas which were earlier forests but stand degraded, denuded or cleared; and

(iii) identify areas covered by plantation trees belonging to the Government and those belonging to private persons."

7. The Government of Goa, to implement the said order, constituted the *Sawant* Committee in 1997[7] which identified a total of 46.89 sq. kms as private forest. Thereafter the *Karapurkar* Committee

6 (1997) 2 SCC 267.

7 Under the Chairmanship of Shri SM Sawant on 24.01.1997.

was constituted in 2000[8] to identify the remaining areas. Since the *Karapurkar* Committee suggested a revisit to exclude some of the forest areas already identified by the Sawant Committee, the present appellant herein, Goa Foundation, filed Writ Petition (Civil) No.181 of 2001[9] before this court challenging the appointment of the *Karapurkar* Committee. Meanwhile, the *Karapurkar* Committee submitted its final report and identified 20.18 sq. kms of private forests. Both the Committees for identification of an area as private forest followed the same criteria as was formulated by the Forest Department of Goa in 1991. However, the task of both the Committees was incomplete as some areas were left unidentified. This Court vide order dated 10.02.2006 disposed of the W.P. (C) No.181 of 2001 in following terms:-

> "……*bulk of private forests in the State of Goa still remains to be identified and the same is being sacrificed in collusion with developers and vested interest persons and no action has been taken by the State Government to set up a fresh committee that will bring a finality to the order dated 12.12.1996 passed in WP Civil No. 202/1995. In substance, the prayer in the application is for appointment of another committee or for consideration of the issue by the Central Empowered Committee to identify the private forests. These issues, we are afraid, do not arise out of the writ petition which has become infructuous on Karapurkar Committee and Sawant Committee having submitted their reports. In case, the petitioner has any further relief to seek, it may, in accordance with law, file a fresh substantive petition before an appropriate forum which would be considered on its own merits".*

8. As a result of the order dated 10.02.2006, the present appellant i.e., Goa Foundation, filed Writ Petition No.334 of 2006 for directions to the State Government of Goa to complete the process of identification of forest and to identify the degraded forest lands in accordance with this Court's order dated 12.12.1996.

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8 Under the Chairmanship of Dr. H. Karapurkar on 04.09.2000.

9 Goa foundation v. State Government of Goa.

9. The State Government appointed two new Committees[10] to identify the remaining areas of private forests in North and South Goa districts that had not been identified by the previous Committee(s). The criteria used by these Committees to identify private forest were same as adopted earlier.

10. Further, the Appellant filed another Writ Petition being W.P. No.495 of 2010 before the High Court of Bombay, seeking the quashing of criteria pertaining to the canopy density which should not be less than 0.4. It was the Appellant's case that the non-consideration of forest areas having canopy density of 0.1-0.4 (10-40%) was contrary to the criteria allegedly accepted by this Court in the order dated 28.03.2008[11]. Hence, appellant claimed that category of open forest or degraded forest having canopy density of 10-40% were totally omitted from the identification process. Subsequently the petition was amended and the criteria of minimum 5 (five) Hectare was also challenged in view of the affidavit filed by the Forest Survey of India[12] wherein the forest cover was defined as being *"all lands more than 1 ha in area, with tree canopy density of more than 10% irrespective of ownership and legal status".* Meanwhile, by a notification dated 27.11.2012, the State of Goa again constituted two Committees[13] to identify the balance areas of private forests that had not been covered by the previous Committees. The criteria for identification of forest lands were same as followed earlier.

11. The Bombay High Court vide order dated 17.10.2013 transferred both the Writ Petitions[14] to the NGT which were renumbered as Application No.14 (THC) of 2013[15] and Application No.16 (THC) of 2013[16]. The NGT by the impugned order has set aside both the applications and hence the appellant is before this Court.

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10 The North Goa District Committee headed by K.G. Sharma and the South Goa District Committee headed by P.V. Sawant on 03.02.2010.

11 TN Godavarman Thirumulpad v. Union of India & Ors. (2008) 7 SCC 126.

12 Hereinafter to be read as "FSI"

13 The North Goa Forest Division Committee headed by V.T. Thomas and the South Goa Forest Division Committee headed by Francisco Araujo.

14 W.P. No. 495 of 2010 & W.P. No. 334 of 2006.

15 Writ Petition No. 495 of 2010.

16 Writ Petition No. 334 of 2006.

12. It is pertinent to mention that this Court vide order dated 04.02.2015, converted the Civil Appeal No.37942 of 2014 filed by Goa Foundation in IA No. 3845 of 2015 in WP No. 202 of 1995 and passed the following directions:

> *"In the meanwhile, we direct that the respondents herein will not issue any 'No Objection Certificate' for the conversion of any plot that has natural vegetation with tree canopy density in excess of 0.1 and an area above one hectare."*

13. It is pertinent to note that the present appeal originally came to be filed on 19.11.2014 as Civil Appeal No.37942 of 2014 assailing the final judgment dated 30.07.2014 passed by NGT. Thereafter, this Court vide Order dated 04.02.2015 converted the Civil Appeal No.37942 of 2014 filed by present appellant to I.A. No.3845 of 2015 in the proceedings before this Court in W.P. No.202 of 1995 (***T.N. Godavarman case).*** Vide order dated 04.02.2015, this Court issued a direction to State of Goa to not issue any 'No Objection Certificate' for conversion of any plot that has natural vegetation with tree canopy density in excess of 0.1 and an area above one hectare. Subsequent to Order dated 04.02.2015 of this Court, Respondent No.1 (i.e., State of Goa) filed I.A. No.40261 of 2017 for modification and clarification of Order dated 04.02.2015 of this Court. Thereafter, on 25.10.2018, this Court vide order dated 25.10.2018 passed in W.P. No.202 of 1995 directed to restore I.A. No.3485 filed by present appellant to its original status of a civil appeal and further it directed that I.A. No.40261 of 2017 filed by Respondent No.1 will be heard along with the said civil appeal. Accordingly, I.A. No.3845 in W.P. No.202 of 1995 came to be re-numbered as Civil Appeal No.12234-12235 of 2018, which are the present civil appeals for adjudication before us. In the present civil appeals, I.A. No.116495 of 2022, came to be filed by Confederation of Real Estate Developer's Association of India (hereinafter referred to as "CREDAI"), seeking permission to be impleaded as party respondent, along with the said I.A., CREDAI has also filed I.A. No.116496 of 2022, wherein the impleading party sought vacation of Order dated 04.02.2015. Accordingly, the respondents in the present civil appeals along with the impleading party (i.e., CREDAI) are seeking to challenge the reliefs prayed for by the present appellant and have also sought vacation of the *ex-parte* interim order dated 04.02.2015 passed by this Court in W.P. No.202 of 1995.

DISCUSSION PERTAINING TO IMPUGNED JUDGEMENT DATED 30.07.2014 PASSED BY NGT:

14. It was the contention of the appellant before the NGT that the subject applications raised the issue of identification and demarcation of private forests in the State of Goa as a result of this Court's order dated 12.12.1996 in ***TN Godavarman Case*** (*supra)* as per which the State Governments were required to identify and demarcate the forest area and degraded forest areas.

15. The appellant stated before NGT that there was no basis for criteria No.(iii) in the guidelines of 1991, which related to canopy density, as there are several forest areas, which are presently degraded and having canopy density of less than 0.4 but which were originally dense or medium dense forests and which must, accordingly, be identified as forests. It was also submitted that such lands cannot be unilaterally diverted to non-forestry purpose except with the prior approval under the FCA 1980. It was submitted that if criteria No.(iii) was accepted there would be no compliance with the directions given in terms of reference No.2 of the order dated 12.12.1996.

16. To back its contentions, the appellant relied upon this Court's order dated 28.03.2008[17] wherein this court while deciding the matters relating to Net Present Value (NPV) and compensatory afforestation costs accepted the report submitted by the Central Empowered Committee (CEC) titled "*Supplementary Report of CEC in IA No.826 & IA No.566 regarding calculation of Net Present Value (NPV) payable on Loss of Forest Lands of Different Types in non-forest purpose".* This Court had accepted the CEC's recommendations on certain economic values, proposed for Calculating the NPV and costs for Compensatory Afforestation (CA), involved in diversion of dense, moderate dense and open forest.

17. The appellant further relied upon the FSI Report, according to which, forest vegetation in the country falls specifically in three mutually inclusive canopy density classes:

i. Very Dense Forest (with crown density) 0.7 to 1.

ii. Moderate dense Forest (with crown density) 0.4 to 0.7.

iii. Open forest (with crown density) 0.1 to 0.4.

17 Order in Writ Petition No.202 of 1995

18. It was, therefore, argued by the appellant before NGT that for the purpose of implementation of the FCA 1980, all the authorities including this Court, have clearly accepted that the areas of natural vegetation, having tree canopy density varying anywhere between 0.1 to 0.4, are to be considered as forest for the purpose of applicability of FCA 1980 and thereafter determination of NPV and CA. This aspect of enlarging the scope of criteria No.3 will be an essential step, as the report of the FSI, 2009 showed that the category of open forest (crown density of 0.1 to 0.4) is almost the same in extent, as both the categories of very dense forest and moderate dense forests are put together.

19. With regard to criteria No.(ii), which requires Minimum 5 Ha, the appellant had argued that the said criteria is defeating the purpose and mandate of FCA 1980 and the order of this Court dated 12.12.1996.

20. It was submitted before the tribunal that the FSI in its affidavit dated 23rd March 2011, submitted that it defines 'forest cover' as being all lands, more than 1 ha area, with a tree canopy density of more than 10% irrespective of ownership and legal status. Such lands may not necessarily be recorded as forest areas. Therefore, the appellant sought the following reliefs in the Application No.14 (THC) of 2013:

> *"For an order quashing the criteria nos. 2 & 3 of the Forest guidelines/criteria and the order of the Respondent No. 1, if any, approving the same".*

21. In the application No.16 (THC) of 2013, the appellant submitted that in ***TN Godavarman's*** case *(supra),* this Court had issued various directions, vide its order dated 12.12.1996. It was the grievance of the appellant that the *Sawant* and *Karapurakar* Committees had not identified the areas, which were earlier forests but now stand degraded, denuded or cleared as per the directions of this Court. The appellant submitted that these Committees have not dealt with this issue or even formulated suitable criteria or framework for notifying such degraded forest areas and therefore, the appellant prayed for following relief(s) in Application No.16 (THC) of 2013:

- *For an order directing the Govt of Goa to complete the process of identification of private forest in the State, within a time bound period in terms of Apex Court's order dated 12.12.1996 and report compliance;*

- *For an order directing the Govt. of Goa to complete the process of notifying the degraded forest within the State i.e., the areas which were earlier forest but stand degraded, denuded or cleared, in terms of Apex Court's order dated 12.12.1996 and report compliance.*

22. The Forest Department, Government of Goa, Respondent No.4, submitted that in the case of ***Shivananda Salgaonkar (supra)***, the High Court of Bombay, Goa Bench, in the judgement delivered on 27th November 1990 held that *"since the term 'forest' is not defined in the Forest (Conservation) Act, the term has to be taken as per the dictionary meaning".* Pursuant to this judgement, the forest department framed guidelines in 1991, for identifying the forest in private properties. These guidelines were submitted to the Ministry of Environment and Forest (MoEF), Government of India on 04.10.1991 for their response.

23. The Forest Department further submitted that pursuant to the orders of this Court, dated 12.12.1996, the State Govt. had appointed *Sawant* Committee for the purpose of identification of forest lands in the State of Goa on 24th January 1997, which submitted its report on 8th December 1999. The Committee was given task to identify areas which are 'forest' irrespective of whether they are so notified, recognized or classified under any law and irrespective of ownership of land of such forest and to identify areas which were earlier forests but stand degraded, denuded or cleared.

24. Since no cut off was given for the tasks, Committee decided 1980 year in which the Forest Act was promulgated, to be the benchmark for Government forest lands. Subsequently, another Expert Committee was appointed on 4th September, 2000 for further identification of private forest, which also submitted its report on 16.02.2002.

25. The respondent further submitted that the *Sawant* Committee has already obtained data on clearings and diversion made on Government forest lands for various purposes from 1980 and identified that total 13.078 Ha of forest Land has been diverted for various purposes. It was claimed that the Expert Committees have already considered all aspects of the Apex Court direction dated 12.12.1996.

26. The respondent further submitted that the State had already defined the forest identification criteria based on the scientific basis

considering various aspects as a policy decision and also, these two Expert Committees are functioning effectively and the work of identification of private forest area, is being carried out expeditiously and considering the above, the respondent had opposed both the applications.

27. The MoEF, Respondent No.2 stated that pursuant to the judgement in ***Lafarge Umiam Mining Pvt. Ltd. Vs. Union of India and ors.***[18], it was directed to prepare a comprehensive policy for inspection, verification and monitoring and overall procedure related to grant of Forest Clearance (FC) and Identification of Forest in consolidation with States and the process will likely take some more time and only after finalization of such comprehensive policy, the Ministry will be in position to put forth its stand as regards criteria, which is to be applied for identification of forests and further pleaded for sufficient time to place the stand of Ministry before the Tribunal.

28. The Forest Survey of India, Respondent No.3 submitted before the NGT that FSI has mandated to conduct survey and assessment of the Forest resources in the country. It was submitted that India's States of Forest Report is published by the Respondent No.3 and in the said report forest cover is defined being of lands more than 1 Ha in area, with tree canopy density of more than 10% irrespective of ownership and legal status. Such lands may not necessarily be recorded as forest areas. It also includes the orchards, bamboo and palm.

29. Issues framed by NGT:

- *Whether the Tribunal has jurisdiction to consider and alter or newly fix the forest identification criteria?*
- *Whether the forest identification criteria set out by the Govt of Goa, needs modification, as prayed in the applications?*
- *Whether the Tribunal can issue directions for expediting forest identification and demarcation process, as prayed in the application?*
- *Whether the applications are barred by limitation?*

18 (2011) 7 SCALE 242

FINDINGS OF NGT IN THE IMPUGNED JUDGEMENT:

30. Having referred to the earlier pronouncements of this Court the Tribunal observed in paragraph 38 of the impugned order that all the States have formed Expert Committees for identification of forest and have submitted progress reports to this Court by evolving their own methodology for forest identification criteria. As such it was of the view that it would not be in the domain of the tribunal to render opinion with regard to the method of identification to be adopted for fixing the criteria for determining private forest to be adopted by State of Goa and answered point No.1 formulated by it in the negative.

31. In so far as the timeline to be fixed for expediting forest identification and its demarcation process is concerned, the tribunal took note of the fact that out of 256 square kilometres forest area, the work has been completed in respect of 67 square kilometres by the two Committees and as such called upon the Chief Secretary of Goa to call for a meeting of all the concerned and work out time bound action plan for early completion of forest identification and its demarcation within next six (6) weeks and submit a time bound program to the tribunal within 8 weeks thereof. All other reliefs sought for in the application of the appellant came to be denied. Hence the appellant has approached this Court by way of the present civil appeal.

CONTENTIONS ON BEHALF OF THE APPELLANT IN THE PRESENT APPEAL:

32. It is the contention of learned counsel appearing for the appellant that the tribunal erred in not passing an order on merits on the premise that the issue is seisin before this Court. It is further contended that WP No.495 of 2010 was filed challenging the criteria of minimum 40 per cent canopy density for identification as forest land. In the teeth of the order of this Court dated 28.03.2008 passed in batch of IA's filed in WP No.202 of 1995 ***(T.N. Godavarman)*** in which the petition was amended and the minimum 5 (five) hectares area was also challenged in view of FSI's affidavit which stated that minimum 1 (one) hectare of area and minimum 10 per cent canopy or the criteria adopted by FSI for identifying the forest cover in India and this writ petition was transferred to the tribunal. Hence, it is contended that identification of private forests on the basis of criteria accepted by FSI and by this Court in the order of 2008 passed for determining NPV also to be adopted and followed for identification of forest,

which would be in the interest of protection of environment and also a step for implementing the order dated 12.12.1996 passed by this Court as it has remained unmet by the State of Goa.

33. By referring to the three interim orders, namely 17.12.2006 and 26.03.2012 passed by the High Court and the order dated 04.02.2015 passed by this Court, it is contended that authorities have been injuncted from issuing conversion Sanad for any private properties with tree cover in excess of 0.1 all having natural vegetation and tree canopy density in excess of 0.1 and area above 1 (one) hectare which would clearly indicate that in order to protect the environment this relief was essential and so as to prevent any further degradation of the forest by its destruction.

34. It is also contended that to meet the mandate of the order dated 12.12.1996 the identification and demarcation of private forest area on the basis of 1 (one) hectare and 10 percent (0.1) canopy density is an exercise which must be carried out for meeting the said criteria which would be over and above the identification of forest area done on the criteria that is 75 per cent forest species, 40 per cent canopy density and 5 (five) hectare of area, as the objective is to ensure restoration (and not diversion) of such forest area to their original status. Hence, contending if such identification is done on the basis of this criteria, it would sub-serve the interest of conservation and protection of environment and in a given case the Central/State Government can grant 'prior permission' within the provisions of FCA 1980 if it considers that such diversion is necessary in public interest and it would be in consonance with the principle of sustainable development. In this background the objection of the State of Goa to the criteria of the FSI to identify the open forest that is 0.1 canopy density and the area above 1 (one) hectare would not stand to reason. Elaborating the submissions, he would contend that the ISFR has identified 552 square kilometres on the basis of criteria fixed by it and if the said criteria is not adopted it would reduce the open forest area in the State of Goa to an extent of 552 square kilometre. Hence, he prays for the petition being allowed.

35. As mentioned in the submissions of the Appellant in the preceding paragraphs, to summarise, the Appellant herein prays for revisiting the criteria for identification of private forest/deemed forest on private lands in the State of Goa, by using the parameters used by FSI, that is based on 0.1 density forest in an area of 1 (one) ha.

CONTENTIONS ON BEHALF OF RESPONDENT NO.(S) 1,4,5,6,7 & 8 ALONG WITH CONTENTIONS OF THE IMPLEADING PARTY I.E., CREDAI.

36. The respondents have sought the modification and vacation of the above-mentioned order in the IA No.40261 of 2017 filed by them, and further have made submissions and raised various grounds for the dismissal of the present Civil Appeal Nos.12234-12235 of 2018. The respondents have urged that the Stay Order dated 04.02.2015 of this Court, has continued to operate for over eight years, which is impacting several developmental works in the State of Goa. In addition to this, by way of their Counter Affidavit, and numerous submissions made during the hearing of the present appeals, the Senior Counsel has raised several grounds for the dismissal of the present appeals and for vacation of the Order dated 04.02.2015.

37. Respondent No(s). 1,4,5,6,7 and 8, along with the impleading party i.e., CREDAI, have sought the vacation of the *ex parte* interim order dated 04.02.2015 passed by this Court in the present appeal, and they have also opposed the grant of relief sought by the Appellant in its appeal. In furtherance of this, the learned Senior Counsel for Respondent No.(s) 1,4,5,6,7 and 8 along with the learned Senior Counsel for the impleading party, i.e., CREDAI have raised various grounds and made elaborate submissions for the dismissal of the present appeals, which have been recorded by us in the subsequent paragraphs.

38. The respondent(s) contended that the criteria for identification of forest has attained finality and cannot be challenged on the principles of *res judicata*. It was submitted that the criteria for identification of forest on private land was determined in 1991 pursuant to the Judgement of the Bombay High Court dated 27.11.1990 in ***Shivanand Salgaonkar case*** (*supra)*.

39. It was further submitted that the criteria for identification of forests, which forms the basis of the reports filed by the *Sawant, Karapurkar* and *Sharma* Reports, were first proposed by the Forest Department of the State of Goa, in 1991. The Forest Department had proposed a crown density of 40% and a minimum area of 5 (five) Ha since it was not viable in the long run for the forest department to conserve small patches of forest land, as is evident from the letter dated 04.10.1991, and from the Affidavit filed by the State of Goa before this Court on 21.08.2012.

40. The counsel for the respondents contended that the aforesaid criteria formulated in 1991 was adopted by the State of Goa (*Sawant* and *Karapurkar* Committees) pursuant to the order dated 12.12.1996 passed by this Court in ***T.N. Godavarman*** *(supra),* however, despite being aware of the same, the Appellant did not challenge it. The respondents further contend that the State of Goa, on 08.12.1997 issued a public notice, which delineated the following criteria for the purpose of classifying "Forest":

i. 75% of the tress composition should be forestry species.

ii. The area should be contiguous to the Govt. Forest and if in isolation, the minimum area should be 5 ha.

iii. Canopy density should not be less than 0.4.

41. The learned counsel for the respondents contended that the public notice dated 08.12.1997, has also not been challenged by the present appellants Further, the Appellant had an opportunity to challenge the same before this Court in ***Goa Foundation Case (supra)***[19], wherein it had raised grievances about the *Karapurkar* Committee report, however, it did not do so, and the said proceedings were thereafter disposed of as being infructuous on account of the filing of the *Karapurkar* report, by an order dated 10.02.2006.

42. Further, the counsel for the respondents have contended that Civil Appeal is *ex facie* barred by *res judicata* inasmuch as the very party that has preferred the same had sought to revisit the criteria twice before and failed. The respondents have pointed out to us that the Appellant preferred a Writ Petition before the High Court of Bombay at Goa disputing the criteria so adopted, and its application to a housing project. In an appeal preferred against the same, this Court in ***Tata Housing Development Corporation v. Goa Foundation (2003) 11 SCC 714*** strongly disapproved any departure from such criteria and adoption of a new criteria.

43. The learned counsel has submitted that this Court in ***Tata Housing (supra)*****,** after examining the reports of the *Sawant* Committee, recorded the genesis of the criteria, and also took note of its facets. Further, the learned counsel has laid emphasis on paragraph 13 of the

19 Writ Petition No. 181 of 2001.

judgement in ***Tata Housing (supra),*** wherein this Court disapproved the approach of the High Court in accepting a new criterion, in what it termed as giving a "complete go-by" to the existing criteria. Accordingly, the counsel for the respondents contends that in sum and substance the pre-existing criteria received the imprimatur of this Court in ***Tata Housing (supra)*****,** hence, the principle of *Res Judicata* would apply and the present challenge to the criteria for identification of Forest deserves to be dismissed on this ground alone. The relevant paragraph 13 has been extracted below:

> *"13. From a bare perusal of the Third Interim Report, it would appear that the three criteria laid down in the Second Interim Report of the Sawant Committee have been given a complete go-by and in relation to the appellants' plot altogether different criteria have been adopted. The course adopted by the Committee in taking into consideration different criteria while examining an individual case of the appellants' plot was wholly unwarranted, especially when the Committee in its Report has not assigned any reason for making the deviation."*

44. The learned counsel for the respondent further contended that another judgment i.e., ***Nisarga v. Asst. Conservator of Forests*** *OA No.19 (THC) of 2013*, was concealed by the Appellant. The learned counsel submitted that the Appellant herein, approached the NGT arguing that the minimum canopy density to be adopted as a criterion ought to be 0.1 (i.e. 10%). It was submitted that the basis of this argument was identical to that advanced in this appeal, inasmuch as the Indian State of Forests Report, 2009 (ISFR) was relied upon to suggest that the said report had classified lands with canopy density between 10% to 40% as open forests. In other words, it was urged by the Appellant that even such lands were forest nonetheless. The NGT rejected this argument based on the judgment of this Court in ***Tata Housing (supra).*** The learned Counsel emphasized on the point that, the Appellant herein chose not to appeal the said judgment before this Court, and has allowed the same to attain finality. The counsel for the respondents submitted that Appellant cannot now be allowed to reagitate the very same issue on the very same basis before this Court.

45. The counsel for the respondent accordingly submitted that, criteria adopted by the State of Goa ought not to be interfered with; and the order dated 04.02.2015 passed by this Court directing a restraint on the grant of conversion *sanads* in the State of Goa ought to be vacated since the criterion for the identification of forest in the State of Goa has become final and binding, its variation having been rejected in ***Tata Housing (Supra)*** and ***Nisarg (Supra)*** by this Court and the NGT respectively.

46. The counsel for the respondent has submitted that the sheet anchor of the instant appeal is the formula adopted by this Court for the computation of NPV in ***T.N. Godavarman Thirumalpad v. Union of India***[20], and in turn the reliance by this Court on the report of Ms. *Kanchan Chopra*, which in turn relies on the Indian State of Forests Report, 2008 (ISFR) issued by the FSI. It is submitted that ISFR has classified canopy density into 3 kinds, namely, very dense, moderately dense, and open. Furthermore, this Court while fixing the NPV rates has fixed them per Hectare, basis which the Appellant contends that even 1 (one) Ha of land can be a forest. It is submitted that the Appellant sought to change the criteria for a private forest in Goa to a minimum area of 1 (one) Ha, and also a minimum canopy density of 0.1 which was the least denominator employed by the ISFR in classifying an open forest for the purposes of fixing NPV rates. The counsel for the respondents urged and emphasized that this argument of the Appellant is misconceived as it fails to take into account that the private forest criteria not only in Goa but throughout the country is distinct from that for government lands. Importantly, government land of even 1 (one) Ha can be a forest, and accordingly can attract the imposition of NPV. Moreover, this Court in ***T.N. Godavarman Thirumalpad (87) v. Union of India***[21] observed that the criteria for NPV must be worked out on economic principles and hence it is submitted that this can have no nexus with identification. Furthermore, the NPV imposition also encompasses government forests which could even be of 1 (one) Hectare. Hence, it is understandable that the NPV criteria is per Hectare i.e., it conceives of NPV being imposed even for government forests of 1 (one) Ha.

20 (2008) 7 SCC 126.

21 (2006) 1 SCC 1.

47. The counsel for the respondent further contends that this Court has never directed the adoption of NPV norms as those for identification of private forests. To suggest that the NPV norms be today adopted as the criteria for private forests would be nullifying the exercise conducted by the State of Goa in terms of the express order of this Court dated 12.12.96. Above all, the order of this Court, in directing each State to constitute its own Expert Committee expressly accepted that there can be no uniform criteria for such identification across the country. Lastly, in this regard, the counsel for the respondents contended that no State in the country has adopted the NPV norms for classification of land as private forests, and if the Appellant's plea is accepted it would create dual legal regimes, namely, one in Goa and one in rest of the country.

48. The respondents further contends that if the criteria are implemented, this would also roughly mean that if there are 10 to 20 planted trees in an area of 10,000 sq. metres, it will be a 'deemed forest' and prior approval from the Central Government under the FC Act would be required. The respondent also drew our attention to the case of Re: Constitution of ***Park-Anand Arya v. Noida***[22] wherein the 3-Judge bench of this Court had stated that if such criteria is agreed, then most of Delhi would be forest.

49. The learned counsel on behalf of the respondent(s) submits that there are enough safeguards in the State of Goa for protection of trees. The Goa Daman and Diu Preservation of Trees Act, 1984 is strictly enforced in this regard. The respondent further submits that the Ministry of Environment, Forest & Climate Change Guidelines as well as the Scheduled Tribe and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 have been clear and unambiguous where it has exempted the application of FCA 1980 on areas which are less than 1 (one) ha and where not more than 75 trees have to be cut vide letter dated 03.01.2005 of Ministry of Environment and Forest and also Section 3(2) of the Forest Rights Act, 2006.

50. The learned counsel for the respondent(s) submits that the parameters used by FSI is to map the forest cover and the tree cover in India. This is distinguished from the Forest area and forest land which has been dealt with by this court in the ***Godavarman case (supra)***

22 (2011) 1 SCC 744 Para 30.

in detail since 12.12.1996. The counsel drew our attention to the definition of 'Forest Cover' given by the FSI based on the "Minimum Mappable Area" available with FSI from Satellite Data. At present, the Minimum Mappable Area available to FSI for forest cover assessment is 1 (one) hectare since 2001 based on the resolution of satellite data. Prior to 2001, the Minimum Mappable Area for forest cover was 25 hectares from India State of Forest Report 1989 to India State of Forest Report 1999 and the same was 400 ha in 1987. The India State of Forest Report, 2017 which clearly shows that the FSI is describing the term 'forest cover' in all its India State of Forest Reports based on the "Minimum Mappable Area" available to them through Satellite Data only based on the technological status and not on any other parameters. Thus, description of the forest cover by FSI was based on the availability of high resolution of Satellite data which has advanced/improved over period of time. Thus, in future, due to technical advancement, FSI might be able to map minimum forest area even less than 1 (one) hectare. However, the States cannot keep on changing the criteria for identification of deemed forests based on such parameters which have been set for an entirely different purpose. Therefore, respondent(s) submit that there is no-co-relation between the parameters set by FSI for identifying deemed forest based on Minimum mappable area and identification of the said area by respective states under the FCA 1980, in view of the Judgment dated 12.12.1996 in ***TN Godavarman case (supra)***, of this Court.

51. Further, the learned counsel for the respondents submits that if the 0.1 density argument is acceded by this Court, then every 10,000 sq. metres plot which has 10 to 20 trees would have to be determined as a forest and a cumbersome prior clearance would be required on every private land. They also submit that the State of Goa is placed uniquely in the Geographical ecosystem whereas per FSI, the total area under forest cover is about 60.2% under Forest Cover and another 8% as tree cover. This is almost three times the national average and twice the national goal. Thus, in addition to the 68% forest and tress cover, there are areas under the Coastal Regulation Zone Notification; areas under Ecologically Sensitive Area; areas under riverine and other wetlands; areas of no development where gradient is 25%. In other words, no, or very minimal area would be available for any future development. Hence, they submit the

approach of the appellant would amount to punishing those people who have diligently planted trees on the private land for increasing the green cover of Goa.

52. The counsel for the respondent(s) also drew our attention to Part II of the ***Lafarge Judgement*** *(supra)* relating to Guidelines to be followed in future cases dealing with disputes regarding what constitutes a forest, wherein it is stated that if the project proponent makes a claim regarding the status of the land being non-forest and if there is any doubt then the site shall be inspected by the State Forest Department along with the regional office of Ministry of Environment & Forest to ascertain the status of forest, based on which the certificate in this regard would be issued. In all such cases, it would be desirable for the representative of the State Forest Department to assist the Expert Appraisal Committee. In view of the above, if there is any doubt on the criteria for identification of forests, it is the State Forest Department and the Regional Office of Ministry of Environment, Forest & Climate Change, which would be the deciding authority.

53. The counsel on behalf of the respondent(s) lastly submits that the criteria for identifying the forests and the process therein by different States is under an Order of this Court dated 12.12.1996 in the ***TN Godavarman case*** *(supra)*. This Court mandated that the State Government to evolve the criteria as per their local situation and considering the fact that Forest, being a concurrent subject, needs to be determined as such by the State Government for applicability of the FCA 1980.

54. In the light of the above submissions, learned counsel for the respondent(s) pray for dismissal of the appeals.

DISCUSSION AND ANALYSIS:

55. Having heard learned advocates appearing for the parties, we are of the considered view that the following points would arise for our consideration:

1. Whether the impugned order of the tribunal requires to be affirmed or reversed?

2. Whether any further directions requires to be issued in the facts and circumstances? And if so, what directions or orders?

3. What order?

RE: POINT NO.1

56. At the outset, it requires to be noticed that the High Court of Judicature at Bombay in Writ Petition No.162 of 1987, disposed of on 27.11.1990, had taken note of the guidelines issued for division of forest area for non-forest purposes under the FCA 1980 and pursuant to the same the State of Goa proposed certain criteria for identifying forest and the consequent application of the FCA 1980 to private forest. The then existing criteria are as follows: -

i. 75% of the tree composition should be forestry species.

ii. The area should be contiguous to the government forest and if in isolation the minimum area should be 5 (five) hectares;

iii. The canopy density on the plot should not be less than 0.4.

Subsequently, this Court in ***T.N. Godavarman Case (supra)***[23] vide order dated 12.12.1996 directed the State Governments to constitute within 1 (one) month an Expert Committee to: -

i. Identify the areas which are "forest", irrespective of whether they are so notified, recognized or classified under any law and irrespective of ownership of the land of such forest;

ii. Identify areas which were earlier forests but stand degraded, denuded or cleared and;

iii. Identify areas covered by plantation trees belonging to private persons.

57. Pursuant to the same the Government of Goa constituted *Sawant* Committee with terms of reference as indicated in Para 5 of ***TN Godavarman case*** *(supra)* by order dated 12.12.1996, the said Committee adopted the criteria (referred to herein above as then existing) which was also based upon the ***Shivanand Salgaocar's case*** (*supra)*. The criteria so determined was published in public notice dated 08.02.1997 and this was not challenged by anyone including the appellant herein.

23 (1997) 2 SCC 267

58. It would be apt and appropriate to note at this juncture that in the matter of ***Tata Housing*** *(supra)* this Court had an occasion to consider the said criteria and to examine as to whether the report of the *Sawant* Committee is to be accepted or otherwise and the question so formulated in that regard reads as under: -

> **"11.** *Thus, the question which falls for consideration of this Court is whether the High Court was justified in accepting the Third Interim Report of the Sawant Committee and allowing the writ application on the basis thereof. For deciding this question, it would be necessary to refer to the Second Interim Report of the Sawant Committee in which it has laid down three criteria for classifying any land as "forest". Relevant portions of the said Report run thus:*
>
> *"After the formation of the Committee, it was first decided to get the forest cover through NRSA, Hyderabad but seeing the time involved and nature of interpretation, it was decided to carry out the exercise through physical verification by the departmental staff only. Nature of interpretation means the satellite data gives the natural green cover which includes most of the plantation/seasonal crops such as cashew, coconut, areca nut etc. For the purpose of classifying 'forest' such growth cannot be considered. The Committee has taken the stand that for considering any area as forest:*
>
> *(i) 75% of its composition should be forestry species.*
>
> *(ii) The area should be contiguous to government forest and if in isolation the minimum area should be 5 hectares.*
>
> *(iii) The canopy density should not be less than 0.4.*
>
> *The above criteria which was in existence with the Forest Department, Government of Goa has been approved by the Government of Goa.*
>
> *****
>
> *Based on the satellite imageries, toposheets, the areas outside the government forests have been marked on the map and the forest officials have done the physical verification of such areas applying the above criteria.*

***

The Committee has procured the maps of 1978 from the Town and Country Planning Department which have been prepared based on the aerial photographs of 1960 and toposheets of 1960. In these maps natural green cover has been shown but again it does not either speak about the density or the species composition…. This natural green cover (pvt.) outside the government forests being very high compared to the figure likely to be arrived at by the Committee finally under the classification of private forests, it is obvious as this private green cover includes all types of vegetation and of all density class including cashew crop which may not be fitted into the criteria taken for identification of private forests."

59. After having examined the records of the Sawant Committee, this Court in ***Tata Housing*** *(supra)* observed that the three criteria prescribed in the 2nd Report was just and proper and in conclusion it has been held: -

> **"12.** *From a bare perusal of the aforesaid passages from the Second Interim Report of the Sawant Committee it would appear that the Committee had categorically laid down three criteria for identifying a land to be forest and it had rejected the Satellite Imagery and Toposheets of 1960 and Nature Green Cover Maps as the relevant criteria for classifying any land to be forest. In the Third Interim Report of the Sawant Committee in which it was reported that the appellants› plot was a forest, curiously enough, the three criteria referred to above, which were earlier followed by the Committee for holding a land to be a forest land, were abandoned. Instead, the Third Interim Report laid down principally the following criteria:*
>
> *(i) Satellite Imagery and Toposheets of 1960.*
>
> *(ii) Report of the Sub-Committee for maintaining Nature Reserve Green Belt around cities, particularly with reference to the map prepared for nature reserve on hill slopes.*

(iii) Enumeration of the plants in a 50-metre-wide belt adjoining the boundaries of the appellants' plot on three sides i.e. the north, east and west, but excluding the south side which had a huge public structure admeasuring 1000 sq metres."

18. *This being the position, we are of the view that the Third Interim Report of the Sawant Committee, having been based upon the criteria which were rejected by it in its previous report, cannot be accepted as there was no ground for making a departure therefrom while submitting the Report in relation to the appellants' plot. The Committee was not justified in holding the appellants' plot to be a forest land on the basis of an altogether different criteria for which there is no reasonable nexus, especially when none of the three criteria laid down in the Second Interim Report has been adhered to. Thus the High Court was not justified in accepting the Third Interim Report of the Sawant Committee and concluding on the basis thereof that the appellants' plot was a forest."*

60. These aspects were well within the knowledge of the petitioner/appellant herein inasmuch as they were parties to the proceedings in ***Tata Housing*** *(supra)*. Therefore, they cannot feign ignorance about the reports of the Expert Committees. Also, the appellant, asserting a public cause, cannot be considered unaware of the criteria proposed by the Committee. These criteria as recommended by the Committee were published in the public notice dated 08.02.1997 and have been a subject of agitation by the appellant/petitioner across various forums. Hence, the appellant/petitioner having not raised its little finger to the criteria as prescribed and published in the public notice dated 08.02.1997 is estopped from raising the said issue at this stage. On this short ground itself the appeal has to fail and appellant has to be non-suited. However, in the teeth of contentions having raised with the merits of the case, we do not propose to nip this litigation at the bud but propose to examine the claim on its merits so as to avoid any repetitive litigation in future and ensuring finality in such matters with the object of putting an end to the litigation that has arisen in this regard.

61. The appellants have also made valiant attempts to buttress their arguments with regard to the criteria to be adopted for determination of an area to be declared as forest by relying upon the pronouncement of this Court in ***T.N. Godavarman Thirumulpad Vs. Union of India***[24] by its order dated 26.09.2005 whereunder the concept of NPV was verified to determine economic loss caused on account of deforestation. Hence, we deem it proper to extract the relevant paragraph of the said order and it reads as under: -

> **"49.** *Regarding the parameters for valuation of loss of forest, we may only note as to what is stated by the Ministry of Environment and Forests, Government in its handbook laying down guidelines and clarifications up to June 2004 while considering the grant of approval under Section 2 of the FC Act. Dealing with environmental losses (soil erosion, effect on hydrological cycle, wildlife habitat, microclimate upsetting of ecological balance), the guidelines provide that though technical judgment would be primarily applied in determining the losses, as a thumb rule, the environmental value of one hectare of fully stocked forest (density 1.0) would be taken as Rs 126.74 lakhs to accrue over a period of 50 years. The value will reduce with density, for example, if density is 0.4, the value will work out at Rs 50.696 lakhs. So, if a project which requires deforestation of 1 hectare of forest of density 0.4 gives monetary returns worth over Rs 50.696 lakhs over a period of 50 years, may be considered to give a positive cost-benefit ratio. The figure of assumed environmental value will change if there is an increase in the bank rate; the change will be proportional to percentage increase in the bank rate. Ms Kanchan Chopra, while conducting a case study of Keoladeo National Park in respect of economic valuation of biodiversity at the Institute of Economic Growth, Delhi as a part of the Capacity 21 Project sponsored by UNDP and MoEF, Government of India examined the question as to what kind of values are to be taken into consideration. As per the study, different components of biodiversity system possess different kinds of value : (1) a commodity value (as for instance the value of grass in a park), (2) an amenity value (the recreation value of the park), and/or (3) a moral value (the right of the flora*

24 (2006) 1 SCC Page 1.

and fauna of the park to exist). It is recognised that it is difficult to value an ecosystem, since it possesses a large number of characteristics, more than just market-oriented ones. It also leads to the need to carry out a biodiversity valuation both in terms of its market linkages and the existence value outside the market as considered relevant by a set of pre-identified stakeholders. It is, however, evident that while working out the biodiversity valuation, it is not trees and the leaves but is much more. Various techniques for valuing biodiversity that have been developed to assess the value of living resources and habitats rich in such resources have been considered by the author for her case study while considering the aspect of value, their nature and stakeholders' interest. Insofar as the value of ecology function in which the stakeholders or scientists, tourists, village residents, non-users, the nature of value is — regulation of water, nutrient cycle, flood control. These instances have been noted to highlight the importance of the biodiversity valuation to protect the environments. The conclusions and the policy recommendations of the author are:

"Biodiversity valuation has important implications for decision-making with respect to alternative uses of land, water and biological resources. Since all value does not get reflected in markets, its valuation also raises methodological problems regarding the kinds of value that are being captured by the particular technique being used. Simultaneously, in the context of a developing country, it is important to evolve methods of management that enable self-financing mechanisms of conservation. This implies that biodiversity value for which a market exists must be taken note of, while simultaneously making sure that the natural capital inherent in biodiversity-rich areas is preserved and values which are crucial for some stakeholders but cannot be expressed in the market are reflected in societal decision-making.

A focus on both the above aspects is necessary. It is important to take note of the nature of market demand for aspects of biodiversity that stakeholders, such as tourists, express a revealed preference for by way of paying a price for it. Simultaneously, it is important to examine the extent to which a convergence or divergence exists between value perceptions

of this and other categories of stakeholders. It is in this spirit that two alternative methodologies are used here to arrive at an economic valuation of biodiversity in Keoladeo National Park. The travel-cost methodology captures the market-linked values of tourism and recreation. It throws up the following policy implications:

1. *Keeping in mind the location of the park and the consequent joint product nature of its services, cost incurred locally is a better index of the price paid by tourists. It is found that demand for tourism services is fairly insensitive to price. A redistribution of the benefits and costs of the park through an increase in entry fee would not affect the demand for its services.*

2. *Cross-substitution between different categories of stakeholders can improve the financial management of the wetland. A part of the proceeds can go to the local management. Also, high-income tourists, scientists and even non-users with a stake in preservation can pay for or compensate low-income stakeholders for possible loss in welfare due to limits on extraction and use.*

3. *However, the limit to such a policy is determined by the number of visitors and their possible impact on the health of the wetland. Such a constraint did not appear to be operational in the context of the present park.*

Identification and ranking of values of different aspects of biodiversity resources as perceived and expressed by different categories of stakeholders namely scientists, tourists, local villagers and non-users is an important object in the process of valuation. In the KNP study, a fair degree of congruence in respect of ecological function value and livelihood value is discovered to exist in the perceptions of diverse groups. Stakeholders as diverse as scientists, tourists, local villagers and non-users give high rankings to these uses."

It has been so held hereunder that a Committee is to be constituted to formulate base on which NPV could be calculated. It has been further held that the NPV has to be worked out on economic principles.

62. Pursuant to the afore-stated directions by this Court, the Committee so constituted had examined the recommendations of the Central Empowered Committee which was accepted and the NPV rate was fixed for a period of three years. The said Committee classified forest into three types, namely, (i) very dense; (ii) moderately dense and; (iii) open, which was based on the maps prepared by NRSC, Hyderabad. It would be pertinent to note that the appellant is attempting to import the figure of 1 (one) hectare in place of 5 (five) hectares (as indicated in the prescribed criteria by State of Goa) solely on the ground that the NPV cost therein was determined by this Court on per hectare basis. It is relevant to observe that the analogies employed to calculate the forest coverage area, which the appellant is attempting to introduce, may be incongruent and unrelated to the identification or demarcation of forest area. This process necessitates the application of a distinct yardstick. The process of identification has been gone into by the experts as reflected from the *Sawant* Committee report and accepted by this Court in ***Tata Housing*** *(supra)*. Hence, it would not be apt and appropriate for us to sit in the arm chair of the experts and to substitute our opinion or that of the appellants in contrary distinction to the opinion expressed by the experts and as such we refrain from doing so. As a consequence of the same the contention raised by the appellants cannot be accepted and it deserves to be rejected and accordingly, it stands rejected.

63. In fact, the process of physical demarcation of such forests in the State of Goa seems to have attained finality by virtue of the reports. The Final Report prepared by *Deep Shikha* Committee as also known as Private Forest Review Report identified 46.11 sq. km. of area as private forest which has been accepted by the Tribunal in OA No.479 of 2018 vide Order dated 18.08.2020 and the appeal filed by the State of Goa against the said order in Civil Appeal No.01 of 2021 which has been dismissed by this Court by order dated 01.02.2021. In other words, the issue relating to identification and demarcation of private forests in the State of Goa has attained finality on three criteria as indicated herein *supra* pertaining to forest tree composition, contiguous forest land and minimum area should be 5 (five) hectares and canopy density should not be less than 0.4. In the teeth of the afore-stated facts and the orders passed by the Tribunals as affirmed by this Court, the State of Goa has issued a gazette notification on 22.09.2022 notifying 46.11 sq. km. as private forest.

64. It is also curious to note that on the one hand the appellant has been challenging the criteria adopted by *Sawant* and the *Karapurkar* Committees for identification of private forest land in the State of Goa before this Court and simultaneously has relied upon the said criteria adopted by these Committees before the Tribunal in this regard. The order of the tribunal dated 21.01.2015 rendered in OA No.22 of 2013 (Western Bench) title as ***'Goa Foundation Vs. Union of India and Others***' can be looked up.

65. At the cost of the repetition, it requires to be noticed that appellant is seeking a change in the criteria being followed by State of Goa for identification and demarcation of forest under private ownership or private forest by contending that State should follow the same criteria for identification of forest land as is being used by FSI, Dehradun for describing "forest cover" i.e., all lands more than one hectare area with 10% irrespective of land use, ownership and legal status. This exercise is being carried out by FSI, primarily for assessment of forest and tree cover and monitoring the period change based on satellite remote sensing to:

i. Prepare State of Forest report on State-wise Forest cover biennially, providing assessment of latest forest cover in the country and monitoring changes therein;

ii. Conduct inventory in forest and non-forest areas and develop database on forest tree resources and prepare thematic maps;

iii. Support State/UT Forest Departments in forest resources survey, mapping and inventory.

In fact, para 1.3 of the report published by FSI in 2017, the distinction in the term 'Forest Cover' and 'Forest Area' has been stated as under:

> *"The term "Forest Cover" as used in Indian State of Forest Report refers to all lands more than one hectare in area with a tree canopy of more than 10%, irrespective of land use, ownership and legal status. It may include even orchards, bamboo, palm etc and is assessed through remote sensing. On the other hand, the term 'Recorded Forest Area' or 'Forest Area" refers to all the geographical areas recorded as 'Forests' in government records. Recorded forest area mainly consists of Reserved Forests (RF) and Protected Forests (PF), which have been notified under the provisions*

of Indian Forest Act, 1927 or its counterpart State Acts. Beside RFs and PFs, the recorded forest area may also include all such areas, which have been recorded as forests in the revenue records or have been constituted so under any state Act or local laws.

Recorded Forest area may have blank areas with tree density less than 10 % such as degraded lands, wetlands, rivers, riverbeds, creeks in mangroves, snow covered areas, glaciers and other snow covered .areas, alpine pastures, cold deserts, grasslands etc. As per the definition of forest cover, such areas are excluded from the assessment of the forest cover. On the other hand, there are areas outside the recorded forests with tree patches of one hectare and more with canopy density above 10%. For example plantations on the private community lands, road, rail and canal sides, rubber, tea and coffee plantations etc. Such areas also constitute forest cover and are li included in the forest cover assessment."

66. Upon examining the FSI Report, a clear distinction emerges between 'Forest Cover' and 'Recorded Forest Area.' 'Forest Cover' encompasses all lands exceeding 1 (one) hectare in size with a tree canopy exceeding 10%, regardless of land use, ownership, and legal status. This category may encompass various features like orchards, bamboo groves, palm plantations, etc., and is evaluated through remote sensing techniques. Conversely, the term 'Recorded Forest Area' or 'Forest Area' refers to all geographic areas officially designated as 'Forests' in government records. Recorded forest areas primarily include Reserved Forests (RF) and Protected Forests (PF), which are notified under the provisions of the Indian Forest Act, 1927, or equivalent State Acts. In addition to RFs and PFs, the recorded forest area may also cover regions recorded as forests in revenue records or established as such under any State Act or local laws.

67. The State of Goa is one of the smallest States in the country having geographical area of 3,702 sq. km. As per the India State of Forest Report, 2017 published by FSI, the forest cover of Goa is 2,229 sq. km. which is 60.21% of the total geographical area of the State. It is three times higher than the National Forest Cover which is 21.54%. If the tree cover of the State is included which is 323 sq. km. the total

forest and tree cover of Goa works out to be 2,552 sq. km. which is 68.94% of the geographical area of the State. As rightly pointed out by Mr. Kohli, learned Senior Counsel appearing for the State of Goa the change of existing criteria in determining the deemed forest would have a negative impact on the conservation measures being undertaken hitherto and the reasons enumerated in paragraph 15 could support the said contentions. It reads as thus: -

(i) All open forest area (10% to 40 % canopy density} under private ownership shall be identified as deemed forest in the state of Goa, whereas most of this open forest area is habitation area having trees planted traditionally by the people around. their houses for meeting their daily needs of food, fruits, firewood, small timber, agriculture implement etc.

(ii) If a person wants to plant 10 trees preferred by him like Mango, Tamarind, teak, jackfruit, chickoo, kathal, etc in his own land of one hectare for the above mentioned needs it will cross the threshold of 0.1 canopy density and be declared as private forests.

(iii) It will be a huge disincentive for the small land owners, whose lands will fall under private forest and they will be compelled to seek approval under FCA, 1980 from the Central Government for every parcel of land which may discourage the people of Goa to plant, protect and conserve trees on their lands. Such land owners would lose their right to use their own land for their bona fide needs in view of stringent conditions as laid down in various provisions of the FCA, 1980.

(iv) This criteria being independent of ownership, will also attract almost all of the government, private office and residential complexes, educational and other institutions since one hectare criteria with 0.1 canopy density will be applicable to the entire state of Goa.

(v) The people, who have cleared the forest / trees on their land before 1996, would appear to be in advantageous position in the eyes of private forest owners.

(vi) It may give a wrong message to private land holders to not only destroy existing forests/ tree vegetation but there would be no incentive for planting trees or helping in their conservation in ·. view of the restrictions being placed on the usage of their own land.

(vii) As per order dated 12.12.1996 passed by this Hon'ble Court in T. N. Godavarman Vs Union of India, W.P No.202/1995, Govt. of Goa initiated the process of identification of private forests in true spirit following the existing criteria. It is being confirmed using satellite imageries and ground verification by a Review Committee at present. These criteria as mentioned in above para number 4 were formulated by State of Goa way back in 1991 based on the High Court of Bombay order in Writ petition No.162/1987, Shivanand Salgaonkar Vs. Tree officer & others. And it has taken almost two decades to identify and demarcate this private forest area on the ground, which is still not complete and is being done presently by the Review Committee. Reducing the criteria to 0.1 Canopy Density and 1 Hectare will again restart the process to bring large number of private lands with few trees under private forests thereby adversely impacting even the small land owners who have protected trees in good spirit.

(viii) It will be a huge burden on small land owners (i) to find alternative land for Compensatory Afforestation and (ii) to pay Net Present Value (NPV) for his own small bonafide needs such as extension/ construction of even one room use of even small part of his land, and for planting of trees by removal of existing trees on his own land under CA.

(ix) It will put serious pressure on available land for development of the State and bonafide aspirations of its people including conservation imperatives.

(x) In the State of Goa, geographically available land of 3702 Sq. Km has been divided into Eco Zone 1, Eco Zone 2 and Developable Zones, under the Regional Plan Goa 2021 under the Town and Country Planning Act, 1974. In so far as Eco Zone- 1 IS concerned, it comprises Forest (Protected/Reserved/National Park/Wildlife Sanctuaries),

Mangrove Forest, identified Private Forests till 2008, Water Bodies/nallas/ponds and paddy fields/khazan lands. Eco Zone 1 constitutes 50.94 % of the geographical area of the State and is completely a 'No Development Zone'. In so far as Eco Zone- 2 is concerned, it comprises orchards, natura! cover, cultivable land, salt pans and fish farms/mud flats. Eco Zone-2 constitutes 31.42% of the geographical area of the State where development is restricted to the land use which is completely regulated. Together Eco Zone 1 & 2 constitutes 82.37% of the geographical area of the State leaving behind 17.63% of land as Developable Zones in which also development is regulated and restricted. A copy of the forest cover map of state of Goa as per India State of Forest Report, 2017, FSI Dehradun is annexed hereto and marked as Annexure – B.

68. It is necessary to mention at this juncture, the application of criteria cannot be universally standardized across the country, as it is contingent upon the specific geography and geographical conditions prevalent in each State. Each State possesses its distinctive geographical features, and as a result, the criteria may vary from one State to another. In this regard, it would be apt to consider the criteria/parameters formulated by various States to identify the private forest as indicated in the affidavit filed on behalf of the respondent No. 1, 4 to 8 dated 07.05.2019 are as under:

State	Description of the Criteria/parameters
Andhra Pradesh and Telangana	All private lands bearing natural tree growth **more than 0.40 density** and having an extent of **10 hectares**, shall be treated as forest subject to the conditions that it should not adversely affect customary rights of 'Tribal Land owners'.
Arunachal Pradesh	Areas recorded as forest in the government records were only treated as forests for the purpose of the FC Act. Expert committee did not formulate any parameter to classify an area as 'forest' by dictionary meaning.
Assam	Minimum forest area of **Ten hectare** and more under private ownership were treated as 'forest' by dictionary meaning.

Chhattisgarh and Madhya Pradesh	A patch of land irrespective of their ownership will be deemed as 'forest' if (a) Its area is not less than **10 hectares**. (b) It is covered with naturally growing timber, fuel wood and yielding trees. (c) Average number of trees standing on it is **200 or more tree per hectare**.
Goa	A patch of land irrespective of their ownership will be deemed as forest if a. 75% of the crop composition of such lands should be of from forest species and b. Area should be either be contiguous to Government Forest land or in isolation the minimum area so identified should be **5 hectares**. In case of mangroves, area less than 5 hectares is also considered a forest whether or not in contiguity to Government Forest land. c. Minimum **0.40** canopy density.
Himachal Pradesh	Compact blocks of wooded land above **5 ha** in extent.
Karnataka	a. Government land parcels with area of **2 hectares** and above, minimum density 50 naturally grown trees per hectares of girth at breast height 30 cm and above b. Block plantations on Government lands with area of 2 hectares and above having minimum density of 100 planted trees per hectares of 30 cm and above girth at breast height and c. Private lands with area of **5 hectares** & above, minimum density of 50 naturally grown trees per hectares of 30 centimetres and above girth at breast height.
Maharashtra	Following parameters were followed a. An area which falls under the definition of word 'forest' and b. All the mangroves shall be treated as 'forest'

Meghalaya	An area would be 'forest' if it is a compact or continuous tract of minimum **4 hectares** land, irrespective of ownership, and where- a. More than **250** naturally growing trees per hectare of 15 cm and highest diameter at breast height (DBH) over bark are present or b. More than 100 naturally growing bamboos clumps per hectare are present in case of the tracts containing predominantly sympodial bamboo.
Odisha	Those areas which are **5 hectares** or more in extent in one continuous patch of private land covered with plantations and/or natural growth.
Rajasthan	Area not less than **5 hectares** and having not less than **200 plants** per hectare were treated as 'forest' by dictionary meaning.
Sikkim	Contiguous patch of minimum **10 hectares** area having more than **0.40 crown density** were treated as 'Forest' by dictionary meaning.
Uttar Pradesh	Minimum **3 hectares** area with minimum **100 trees** per hectare in Vindhya & Bundelkhand region and minimum **2 hectares** area with minimum 50 trees in Terai & Plain areas were treated as 'Forest' by dictionary meaning, subject to the following conditions; a. Trees means naturally grown perennial trees b. Shrubs will not be counted among trees c. Minimum area of land will be based on gata-wise d. In case of private land, in case a gata is registered in name of several persons in the form of minjumula, then area of each minjumula will be considered for area limit. e. Plantations raised on government and private land will not be considered as forest.
West Bengal	Compact patches of minimum **1 hectare** area having minimum crown density of **0.40** were treated as 'forest' by dictionary meaning.

Dadra & Nagar Haveli	Private/Government areas with minimum **5 hectares** or more having tree vegetation with species variations and required stocking area to be treated as 'forest' by dictionary meaning.

6. In view of the above, we summarise our discussion as under:

i. *Firstly,* the existing criteria for identification of private forests in the State of Goa are adequate and valid, hence, they require no alteration. The Ministry of Environment, Forest & Climate Change guidelines, as well as the Scheduled Tribes & other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, are clear and unambiguous, as they have exempted the application of the Forest Conservation Act, 1980, on areas that are less than 1 hectare and where not more than 75 trees have to be cut. Reference can be made to the communication dated 03.01.2005 of MoEF. Further, it can be noticed if the criteria i.e., the canopy density of 0.4 and minimum area of 5 ha is reduced to 0.1 and 1 ha as contended, respectively, it will result in the plantations of coconut, orchards, bamboo, palm, supari, cashew, etc., grown by farmers on their private lands into the category of 'private forest'. The effect would be that even for a minor development on the concerned land, the permission of the Government under the FCA 1980, for the landholders, would become indispensable. It would be of necessity to note that none of the States have adopted the criteria proposed by the appellant, namely the 0.1 density criteria, as it would result in opening a pandora's box, and it would result in all the States undertaking the task of reassessing the forest area all over again which has since been settled on the basis of existing criteria.

ii. *Secondly*, it has been noticed that appellant is attempting to take a contrary stand on the issue of criteria for the identification of forests, namely, suggesting a change in criteria for the identification of deemed forests under private ownership. On the one hand, the appellant is challenging the criteria adopted by the *Sawant* and *Karapurkar* Committees for the identification of *inter alia* private forests and on the other hand has relied on the same criteria adopted by these two committees for the identification of forests, including private forests, before the Tribunal, as has been observed by the Tribunal in its judgement

rendered in O.A. No.22 of 2013 on 22/01/2015 in the matter of ***Goa Foundation v Union of India & Others*** and in O.A. No.479 of 2018 in the matter of ***Goa Foundation v State of Goa & Others***. Thus, appellant cannot be permitted to approbate and reprobate. The appellant has also failed in its endeavour to have the second interim report of the *Sawant* Committee and the criteria laid down thereunder to be revisited in ***Tata Housing* (*supra*)** and before the Tribunal in ***Nisarga* (*supra*)**. In fact, appellant and another NGO had argued before the Tribunal in ***Nisarga* (*supra*)** that the criteria ought to be 10% canopy density, which did not find favour with the Tribunal in the teeth of ***Tata Housing (supra),*** and said order passed in ***Nisarga*** (O.A. No.19 of 2013) has attained finality.

iii. *Thirdly,* this Court vide its order dated 12.12.1996 had expressly delegated the task of identifying forest areas to Expert Committees to be constituted by State Governments, thereby recognising that there can be no uniform criteria for such identification across the country.

7. In light of the above conclusion, we are of considered view that the present appeals would not merit acceptance and accordingly same stand rejected and the impugned order dated 30.07.2014 is upheld. Consequently, the interim order dated 04.02.2015 passed in I.A. No.3845 of 2015 in WP No.202 of 1995 is vacated. I.A. No.40261 of 2017 filed by Respondent No.1 and I.A. No.116496 of 2022 filed by the impleading party (CREDAI), are allowed. We also place on record the valuable assistance rendered by Mr. K. Parameshwar as *Amicus Curiae.*

Headnotes prepared by: Nidhi Jain *Result of the case:* Appeals dismissed.

[2024] 1 S.C.R. 743 : 2024 INSC 24

Bilkis Yakub Rasool
v.
Union of India & Others

(Writ Petition (Crl.) No. 491 of 2022)

08 January 2024

[B.V. Nagarathna* and Ujjal Bhuyan, JJ.]

Issue for Consideration

Writ petition filed u/Art. 32 by one of the victims challenging the order of State of Gujarat granting remission and early release of 11 convicts held guilty in Bilkis Bano matter, if maintainable; writ petitions filed as Public Interest Litigation, assailing the impugned orders of remission dated 10.08.2022, if maintainable; Government of State of Gujarat, if competent to pass the impugned orders of remission in favour of convicts in Bilkis Bano case; Order of remission passed by the State of Gujarat in favour of convicts in Bilkis Bano case, if in accordance with law; and the 11 convicts having been granted liberty and released from imprisonment by virtue of the orders of remission which has been declared and quashed as wholly without jurisdiction and non est, should the convicts be sent back to prison.

Headnotes

Code of Criminal Procedure, 1973 – ss. 432, 433, 433A and 435 – Grant of remission – Bilkis Bano matter – Order of State of Gujarat granting remission and early release of 11 convicts held guilty of committing heinous crimes of gangrape, murder and rioting armed with deadly weapons during the large-scale riots in Gujarat in the aftermath of the Godhra train burning incident – Challenge to:

Held: Government of State of Gujarat was not competent to pass the orders of remission in favour of the convicts as it was not the appropriate Government – State of Maharashtra, had the jurisdiction to consider the application for remission as the convicts were sentenced by the Special Court, Mumbai – Government of the State of Gujarat usurped the powers of the State of Maharashtra which only could have considered the applications seeking remission – Also the Remission Policy of 1992 of the State of Gujarat was not applicable to the convicts – Thus, the Orders of remission dated

* Author

10.08.2022 not being in accordance with law is illegal, vitiated and thus, quashed – Also the judgment dated 13.05.2022 passed by this Court directing the State of Gujarat to consider the application for pre mature release is a nullity and is non est in law since the said order was fraudulently obtained at the hands of this Court, and the said order being contrary to the larger bench decisions of this Court, is per incuriam – Thus, the rule of law is to prevail – 11 convicts to report to the concerned jail authorities within the stipulated period. [Paras 56, 70]

Constitution of India – Art. 32 – Bilkis Bano matter – Writ petition filed u/Art. 32 by one of the victims challenging the order of State of Gujarat granting remission and early release of 11 convicts held guilty of committing heinous crimes of gangrape, murder and rioting armed with deadly weapons during the large-scale riots in Gujarat in the aftermath of the Godhra train burning incident – Maintainability:

Held: Writ Petition filed u/Art. 32 is clearly maintainable – It was not mandatory for the petitioner to have filed a writ petition u/Art. 226 before the Gujarat High Court – Petitioner-Bilkis Bano filed writ petition u/Art. 32 to enforce her fundamental rights u/Art. 21 and Art. 14 – Access to justice includes speedy remedy, the petition could not be dismissed on the ground of availability of an alternative remedy u/Art. 226 – Furthermore, in view of the submission regarding the State of Gujarat not being the competent State to consider the validity of the orders of remission in a petition filed u/Art. 226, particularly, when the question of competency was raised, could not have been dealt with by the Gujarat High Court on the principle of judicial propriety. [Paras 22.2-22.3, 56]

Constitution of India – Art. 32 – Public interest litigation – Bilkis Bano matter – Writ petition filed as public interest litigation challenging the order of State of Gujarat granting remission in favour of convicts guilty of committing heinous crimes of gangrape, murder and rioting armed with deadly weapons during the large-scale riots in Gujarat in the aftermath of the Godhra train burning incident – Maintainability:

Held: Writ petitions filed as public interest litigation assailing the impugned orders of remission dated 10.08.2022 are maintainable or not, is kept open to be raised in any other appropriate case – It is not necessary to answer the point regarding maintainability of the PILs inasmuch as one of the victims, also filed a writ petition

invoking Art. 32 assailing the orders of remission which has been held to be maintainable – Consideration of that petition on its merits would suffice in the instant case. [Paras 27, 56]

Code of Criminal Procedure, 1973 – ss. 432, 433, 433A and 435 – Bilkis Bano matter – Grant of remission – Investigation transferred to CBI by this Court – Thereafter, trial of the case pending before the Sessions Judge, Dahod, Ahmedabad transferred to the competent court in Mumbai – 11 accused convicted for offence of gangrape and murder by Mumbai court which was upheld by the High Court and this Court – One of the victims, respondent no. 3 challenged the non-consideration of his application for premature release u/ss.433 and 433A before the Gujarat High Court – High Court held that since the trial had taken place in the State of Maharashtra, the 'appropriate government' would be the State of Maharashtra and not the Government of Gujarat to grant remission – Application for remission moved before the Government of Maharashtra, who sought opinion of CBI and Special CBI court which opined against premature release in view of the remission policy, as also against other convicts remission applications – Thereafter, respondent no. 3 filed writ petition before this Court seeking direction to the State of Gujarat to consider his application for pre-mature release under its policy of 1992 – Issuance of direction by this Court by order dated 13.05.2022, to the State of Gujarat to consider the application for pre mature release in terms of the policy of 1992, being the appropriate government – Subsequently, the State of Gujarat issued orders dated 10.08.22 granting remission and early release of 11 convicts – Government of State of Gujarat, if competent to pass the impugned orders of remission:

Held: When an authority does not have the jurisdiction to deal with a matter or it is not within the powers of the authority i.e. the State of Gujarat in the instant case, to be the appropriate Government to pass orders of remission u/s. 432 , the orders of remission would have no legs to stand – In view of s. 432 (7) read with s. 432 (1) and (2), the Government of State of Gujarat had no jurisdiction to entertain the applications for remission or pass the orders of remission on 10.08.2022 in favour of 11 convicts as it was not the appropriate Government within the meaning of the said provisions – It is the State of Maharashtra, which had the jurisdiction to consider the application for remission vis-à-vis 11

convicts as they were sentenced by the Special Court, Mumbai – Orders of remission dated 10.08.2022 made in favour of 11 convicts are illegal, vitiated and thus, quashed – Also the judgment dated 13.05.2022 passed by this Court is a nullity and is non est in law since the said order was sought by suppression of material facts as well as by misrepresentation of facts and thus, fraudulently obtained at the hands of this Court – Furthermore, the order dated 13.05.2022, being contrary to the larger bench decisions of this Court, (holding that it is the Government of the State within which the offender is sentenced which is the appropriate Government which can consider an application seeking remission of a sentence) is per incuriam and is not a binding precedent – Thus, the impugned orders of remission dated 10.08.2022 are quashed. [Paras 33.8, 33.9, 46, 56]

Code of Criminal Procedure, 1973 – ss. 432, 433, 433A and 435 – Bilkis Bano matter – Investigation transferred to CBI by this Court – Thereafter, trial of the case pending before the Sessions Judge, Dahod, Ahmedabad transferred to the competent court in Mumbai – 11 accused convicted for offence of gangrape and murder by Mumbai court which was upheld by the High Court and this Court – One of the victims, respondent no. 3 challenged the non-consideration of his application for premature release u/ss.433 and 433A before the Gujarat High Court – High Court held that since the trial had taken place in the State of Maharashtra, the 'appropriate government' would be the State of Maharashtra and not the Government of Gujarat to grant remission – Application for remission moved before the Government of Maharashtra, who sought opinion of CBI and Special CBI court which opined against premature release in view of the remission policy as also against other convicts remission applications – Thereafter, respondent no. 3 filed writ petition before this Court seeking direction to the State of Gujarat to consider his application for pre-mature release under its policy of 1992 – Issuance of direction by this Court by order dated 13.05.2022, to the State of Gujarat to consider the application for pre mature release in terms of the policy of 1992, being the appropriate government – Subsequently, the State of Gujarat issued orders dated 10.08.22 granting remission and early release of 11 convicts – Order of remission dated 10.08.2022 passed by the State of Gujarat in favour of convicts, if in accordance with law:

Held: Order of remission dated 10.08.2022 passed by the State of Gujarat in favour of 11 convicts is not in accordance with law – Government of the State of Gujarat had usurped the powers of the State of Maharashtra which only could have considered the applications seeking remission – Hence, the doctrine of usurpation of powers applies – State of Gujarat never sought for the review of the order of this Court dated 13.05.2022 by bringing to the notice of this Court that it was contrary to s.432(7) and judgments of this Court – Policy of 1992 of the State of Gujarat was not applicable to the case of 11 convicts – Opinion of the Presiding Judge of the Court before which the conviction of 11 convicts was made-Special Court, Mumbai (Maharashtra) was rendered ineffective by the Government of the State of Gujarat which in any case had no jurisdiction to entertain the plea for remission of convicts – Opinion of the Sessions Judge at Dahod was wholly without jurisdiction as the same was in breach of s.432(2) – Furthermore, while considering the applications seeking remission, the Jail Advisory Committee, Dahod and the other authorities lost sight of the fact that 11 convicts had not yet paid the fine ordered by the Special Court, Mumbai which had been upheld by the Bombay High Court. [Paras 50.4, 56]

Code of Criminal Procedure, 1973 – s. 432(2) – Power to suspend or remit sentence – Application made to the appropriate Government for remission of a sentence – Requirement of the opinion of the Presiding Judge of the convicting court:

Held: s. 432(2) states that when an application is made to the appropriate Government, inter alia, for remission of a sentence, the appropriate Government may require the Presiding Judge of the Court before or by which the conviction was had or confirmed, to state his opinion – The opinion must state as to, whether, the application should be granted or refused, together with his reasons for such opinion which must have bearing on the facts and circumstances of the case and be in tandem with the record of the trial or of such record thereof as exists; and also must forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists – Having regard to the requirements which the Presiding Judge must comply with while stating his opinion to the appropriate Government on an application for remission of sentence made by a convict, the expression "may" has to be interpreted as "shall" and as a mandatory requirement

u/s.432 – Furthermore, it cannot be left to the whims and fancies of the appropriate Government either to seek or not to seek the opinion of the Presiding Judge or the Court before which the conviction had taken place. [Paras 51, 52.2, 52.3]

Sentence/sentencing – Imprisonment undergone in default of payment of fine – Nature of:

Held: Sentence of imprisonment awarded to a person for committing an offence is distinct than the imprisonment ordered to be undergone in default of payment of fine – Latter is not a substantive sentence for commission of the offence but is in the nature of penalty for default in payment of fine – On facts, while considering the applications for remission, the Jail Advisory Committee did not take into consideration whether the convicts had tendered the fine imposed by the Special Court and affirmed by the High Court as well as by this Court – Had the State of Gujarat considered the opinion from the Presiding Judge of the Court which had convicted, the accused, the aspect regarding non-payment of fine would have surfaced – In the absence of non-compliance with the direction to pay fine, there would be default sentence which would be in the nature of penalty – Question whether the default sentence or penalty had to be undergone by these respondents, was a crucial consideration at the time of recommending remission to the State Government by the Jail Advisory Committee – This aspect of the matter has also not been taken into consideration by the State Government while passing the impugned orders of remission. [Paras 54.3-54.4]

Constitution of India – Art. 32 – Bilkis Bano matter – Remission order by the State of Gujarat granting remission and early release of 11 convicts held guilty of committing heinous crimes of gangrape, murder and rioting armed with deadly weapons during the large-scale riots in Gujarat in the aftermath of the Godhra train burning incident – 11 convicts granted liberty and released from imprisonment by virtue of the orders – Said order has been declared and quashed as wholly without jurisdiction and non est – Effect of, on the beneficiaries of the remission order:

Held: Rule of law means wherever and whenever the State fails to perform its duties, the Court would step in to ensure that the rule of law prevails over the abuse of the process of law – Such abuse may result from, inter alia, inaction or even arbitrary action

of protecting the true offenders or failure by different authorities in discharging statutory or other obligations in consonance with the procedural and penal statutes – Breach of the rule of law, amounts to negation of equality u/Art. 14 – On facts, convicts have been the beneficiaries of the orders passed by an incompetent authority inasmuch as the impugned orders are not passed by the appropriate Government within the meaning of s. 432 – Art. 142 cannot be invoked in favour of the convicts to allow them to remain out of jail as that would be an instance of this Court's imprimatur to ignore rule of law and instead aid persons who are beneficiaries of orders which are null and void and therefore non est in the eye of law – Furthermore, respondent No.3 abused the process of law and the court in obtaining remission – Thus, in complying with the principles of rule of law which encompasses the principle of equal protection of law as enshrined in Art. 14, 'deprivation of liberty' vis-à-vis 11 convicts is justified in as much as the said respondents have erroneously and contrary to law been set at liberty – They were released pursuant to the impugned remission orders which have been quashed – Impugned orders of remission having been set aside, the natural consequences must follow – Thus, 11 convicts directed to report to the concerned jail authorities within the stipulated period. [Paras 62, 70]

Code of Criminal Procedure, 1973 – ss. 432 and 433 – Expression 'appropriate government' – Meaning of – 'Appropriate government' when can assume power to grant remission:

Held: Expression "appropriate Government" used in s. 432 as well as in s. 433, is defined in sub-section (7) of s.432 – It clearly indicates that the Government of the State within which the offender is sentenced, is the appropriate Government to pass an order of remission – Expression "appropriate Government" also finds place in sub section (1) of s. 432 which states that when any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without conditions or upon any condition which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced – Sub-section (1) of s. 432 deals with a power vested with the appropriate Government which is an enabling power – Discretion vested with the appropriate Government has to be exercised judiciously in an appropriate case and not to abuse the same – However, when an application is made

to the appropriate Government for the suspension or remission of a sentence, the appropriate Government may seek the opinion of the Presiding Judge of the Court before or by which the conviction was had or confirmed and on considering the reasons for such opinion, may consider the application for remission – In almost all cases, the court before which the offender was sentenced is located within the territory of a State Government wherein the offence occurred and, therefore, in such a case, there can be no further doubt about the meaning of the expression appropriate Government – Even in a case where the trial has been transferred by this Court from a court of competent jurisdiction of a State to a court in another State, it is still the Government of the State within which the offender was sentenced which is the appropriate Government which has the jurisdiction as well as competency to pass an order of remission u/s. 432 – Thus, it is not the Government of the State within whose territory the offence occurred or the convict is imprisoned which can assume the power of remission. [Paras 32.2, 33.2, 33.3, 33.5, 33.6]

Code of Criminal Procedure, 1973 – ss. 432, 433, 433A and 435 – Power to grant remission on an application filed by the convict or on his behalf – Exercise of:

Held: Is an exercise of discretion by the appropriate Government – Where there is exercise of legal power coupled with discretion by administrative authorities, the test is, whether, the authority concerned was acting within the scope of its powers – This would not only mean that the concerned authority and the appropriate Government had not only the jurisdiction and authority vested to exercise its powers but it exercised its powers in accordance with law i.e., not in an arbitrary or perverse manner without regard to the actual facts or unreasonably or which would lead to a conclusion in the mind of the Court that there has been an improper exercise of discretion – If there is improper exercise of discretion, it is an instance of an abuse of discretion – There can be abuse of discretion when the administrative order or exercise of discretion smacks of mala fides or when it is for any purpose based on irrelevant consideration by ignoring relevant consideration or it is due to a colourable exercise of power; it is unreasonable and there is absence of proportionality – There could also be an abuse of discretion where there is failure to apply discretion owing to mechanical exercise of power, non application of mind, acting under dictation or by seeking assistance or advice or there is any usurpation of power. [Para 49]

Code of Criminal Procedure, 1973 – ss. 432, 433A – Application for remission under – Factors to be taken into account:

Held: Application for remission u/s. 432 could be only before the Government of the State within whose territorial jurisdiction the applicant was convicted (appropriate Government) and not before any other Government within whose territorial jurisdiction the applicant may have been transferred on conviction or where the offence has occurred – Consideration for remission must be by way of an application u/s. 432 which has to be made by the convict or on his behalf – Whether there is compliance of s. 433A must be noted – Guidelines u/s. 432(2) with regard to the opinion to be sought from the Presiding Judge of the Court which had convicted the applicant must be complied with mandatorily – Policy of remission applicable would be the Policy of the State which is the appropriate Government and which has the jurisdiction to consider that application – Policy of remission applicable at the time of the conviction could apply and only if for any reason, the said policy cannot be made applicable a more benevolent policy, if in vogue, could apply – While considering an application for remission, there cannot be any abuse of discretion – Jail Advisory Committee which has to consider the application for remission may not have the District Judge as a Member inasmuch as the District Judge, being a Judicial Officer may coincidently be the very judge who may have to render an opinion independently in terms of s. 432(2) – Reasons for grant or refusal of remission should be clearly delineated in the order by passing a speaking order – Also, it is to be considered whether the order has been passed without application of mind; that the order is mala fide; that the order has been passed on extraneous or wholly irrelevant considerations; that relevant materials have been kept out of consideration; and that the order suffers from arbitrariness. [Para 55]

Code of Criminal Procedure, 1973 – ss. 432, 433, 433A and 435 – Remission – Grant of – Abuse of discretion by administrative authorities – Usurpation of power arises when:

Held: Usurpation of power arises when a particular discretion vested in a particular authority is exercised by some other authority in whom such power does not lie – In such a case, the question whether the authority which exercised discretion was competent to do so arises. [Para 50]

Code of Criminal Procedure, 1973 – ss. 432, 433, 433A and 435 – Remission – Scope and ambit of – Principles covering grant of remission – Distinction from the concepts of commutation, pardon and reprieve – Stated and discussed – Constitution of India – Arts 72 and 161. [Paras 30-32.5]

Rule of law – Meaning and concept of:

Held: Rule of law means, no one, howsoever high or low, is above the law; it is the basic rule of governance and democratic polity – It is only through the courts that rule of law unfolds its contours and establishes its concept – Concept of rule of law is closely intertwined with adjudication by courts of law and also with the consequences of decisions taken by courts – Therefore, the judiciary has to carry out its obligations effectively and true to the spirit with which it is sacredly entrusted the task and always in favour of rule of law – There can be no rule of law if there is no equality before the law; and rule of law and equality before the law would be empty words if their violation is not a matter of judicial scrutiny or judicial review and relief and all these features would lose their significance if the courts don't step in to enforce the rule of law – Thus, the judiciary is the guardian of the rule of law and the central pillar of a democratic State – Judiciary has to perform its duties and function effectively and remain true to the spirit with which they are sacredly entrusted to it – This Court must be a beacon in upholding rule of law failing which it would give rise to an impression that this Court is not serious about rule of law and, therefore, all Courts in the country could apply it selectively and thereby lead to a situation where the judiciary is unmindful of rule of law – This would result in a dangerous state of affairs in our democracy and democratic polity – Therefore, it is the primary duty and the highest responsibility of this Court to correct arbitrary orders at the earliest and maintain the confidence of the litigant public in the purity of the fountain of justice and thereby respect rule of law. [Paras 63, 68]

Precedents – Rule of precedents – Exception to rule of precedents:

Held: Although it is the *ratio decidendi* which is a precedent and not the final order in the judgment, however, there are certain exceptions to the rule of precedents which are expressed by the doctrines of *per incurium* and *sub silentio* – A decision rendered

by ignorance of a previous binding decision of its own or of a court of coordinate or higher jurisdiction or in ignorance of the terms of a statute or of a rule having the force of law is per *incurium* – A decision per *incurium* is not binding – A decision is passed *sub-silentio* when the particular point of law in a decision is not perceived by the court or not present to its mind or is not consciously determined by the court and it does not form part of the *ratio decidendi* it is not binding – On facts, the submission that since this Court in the order dated 13.05.2022 had directed that the State of Gujarat was the appropriate Government, the same was binding on the parties even though it may be contrary to the earlier decisions of this Court, cannot be accepted inasmuch as when a judgment has been delivered per incuriam or passed sub silentio, the same cannot bind either the parties to the judgment or be a binding precedent for the future even between the same parties. [Paras 44.1, 44.2, 45]

***Per incuriam* – Meaning of:**

Held: *Incuria* legally means carelessness and per *incurium* may be equated with per *ignorantium* – If a judgment is rendered in *ignorantium* of a statute or a binding authority, it becomes a decision per *incurium* – Thus, a decision rendered by ignorance of a previous binding decision of its own or of a court of coordinate or higher jurisdiction or in ignorance of the terms of a statute or of a rule having the force of law is per *incurium* – Such a per *incurium* decision would not have a *precedential* value – If a decision has been rendered per *incurium*, it cannot be said that it lays down good law, even if it has not been expressly overruled – Thus, a decision per *incurium* is not binding. [Para 44.1]

Constitution of India – Art. 21 – Personal liberty – Protection of liberty – When:

Held: Personal liberty is the most important constitutional value which is a fundamental right enshrined in Art. 21 – It is an inalienable right of man and can be deprived of or taken away only in accordance with law – That is the quintessence of Art. 21 – Person is entitled to protection of his liberty only in accordance with law. [Paras 58, 60]

Words and phrases –Fraud – Meaning of – Stated. [Paras 42, 43, 43.1]

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Maru Ram v. Union of India [1981] 1 SCR 1196 : **AIR 1980 SC 2147;** *Radheshyam Bhagwandas Shah v. State of Gujarat* **(2022) 8 SCC 552;** *State of Haryana v. Jagdish* [2010] 3 SCR 716 : **(2010) 4 SCC 216;** *Rajiv Ranjan Singh 'Lalan' (VIII) v. Union of India* [2006] 4 Suppl. SCR 742 : **(2006) 6 SCC 613;** *Gulzar Ahmed Azmi v. Union of India* [2012] 9 SCR 287 : **(2012) 10 SCC 731;** *Simranjit Singh Mann v. Union of India* [1992] Suppl. SCR 592 : **(1992) 4 SCC 653;** *Ashok Kumar Pandey v. State of West Bengal* [2003] 5 Suppl. SCR 716 : **(2004) 3 SCC 349;** *Tehseen Poonawalla v. Union of India* [2018] 9 SCR 1 : **(2018) 6 SCC 72;** *State of Maharashtra v. M.V. Dabholkar* [1976] 1 SCR 306 : **(1975) 2 SCC 702;** *Jasbhai Motibhai Desai v. Roshan Kumar, Haji Bashir Ahmed* [1976] 3 SCR 58 : **(1976) 1 SCC 671;** *Thammanna v. K. Veera Reddy* [1981] 1 SCR 73 : **(1980) 4 SCC 62;** *State of M.P. v. Ratan Singh* [1976] Suppl. SCR 552 : **(1976) 3 SCC 470;***Government of A.P. v. M.T. Khan* [2003] 6 Suppl. SCR 490 : **(2004) 1 SCC 616;** *Hanumant Dass v. Vinay Kumar* [1982] 3 SCR 595 : **(1982) 2 SCC 177;** *Ram Ram Chander v. State of Chhattisgarh* **(2022) 12 SCC 52;** *State of Haryana v. Mohinder Singh* [2000] 1 SCR 698 : **(2000) 3 SCC 394;** *Epuru Sudhakar v. State of A.P.* [2006] 7 Suppl. SCR 81 : **(2006) 8 SCC 161;** *Swamy Shraddhananda (2) v. State of Karnataka* [2008] 11 SCR 93 : **(2008) 13 SCC 767;** *Sharad Hiru Kolambe v. State of Maharashtra* [2018] 11 SCR 720 : **(2018) 18 SCC 718;** *Shantilal v. State of M.P.* [2007] 10 SCR 727 : **(2007) 11 SCC 243;** *Rajan v. Home Secretary, Home Department of Tamil Nadu* [2019] 6 SCR 1035 : **(2019) 14 SCC 114;** *B.P Singhal v. Union of India* [2010] 6 SCR 589: **(2010) 6 SCC 331;** *S.P. Gupta v. Union of India* [1982] 2 SCR 365 : **(1981) Supp**

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[2013] 8 SCR 520 : (2013) 10 SCC 465; *Sheonandan Paswan v. State of Bihar* [1987] 1 SCR 702 : (1987) 1 SCC 288; *Abdul Wahab K. v. State of Kerala* [2018] 11 SCR 155 : (2018) 18 SCC 448; *A.R Antulay v. Ramdas Sriniwas Nayak* [1984] 2 SCR 914 : (1984) 2 SCC 500; *Manohar Lal v. Vinesh Anand* [2001] 2 SCR 1036 : (2001) 5 SCC 407; *Ratanlal v. Prahlad Jat* [2017] 8 SCR 682 : (2017) 9 SCC 340; *Mohammad Giasuddin v. State of A.P.* [1978] 1 SCR 153: (1997) 3 SCC 287; *State (Govt. of NCT of Delhi) v. Prem Raj* [2003] 2 Suppl. SCR 235 : (2003) 7 SCC 121; *Sarat Chandra Rabha v. Khagendranath Nath* [1961] 2 SCR 133 : AIR 1961 SC 334; *State of Mysore v. H. Srinivasmurthy* [1976] 3 SCR 255 : (1976) 1 SCC 817; *Gopal Vinayak Godse v. State of Maharashtra,* (1961) 3 SCR 440; *Poonam Latha v. M.L. Wadhwan* [1987] 2 SCR 1123 : (1987) 3 SCC 347; *State, through Superintendent of Police, CBI v. Nalini* [1999] 3 SCR 1 : (1999) 5 SCC 253; *S.P. Chengalvaraya Naidu v. Jagannath (Dead) through LRs* [1993] 3 Suppl. SCR 422 : (1994) 1 SCC 1; *State of Maharashtra v. Prabhu* (1994) 2 SCC 481; *K.D. Sharma v. Steel Authority of India Limited* [2008] 10 SCR 454 : (2008) 12 SCC 481; *K. Jayaram v. Bangalore Development Authority* 2021 SCC OnLine SC 1194; *Ram Kumar v. State of Uttar Pradesh* AIR 2022 SC 4705; *State of U.P. v. Synthetics and Chemicals Ltd.* [1991] 3 SCR 64 : (1991) 4 SCC 139; *Synthetics and Chemicals Ltd. v. State of U.P.* [1989] 1 Suppl. SCR 623 : (1990) 1 SCC 109; *Mukesh K. Tripathi v. Senior Divisional Manager, LIC* [2004] 4 Suppl. SCR 127 : (2004) 8 SCC 387; *Amrit Das v. State of Bihar* [2000] 1 Suppl. SCR 69 : (2000) 5SCC 488; *Kehar Singh v. Union of India* [1988] 3 Suppl. SCR 1102 : (1989) 1 SCC 204; *Mansukhlal Vithaldas Chauhan v. State of Gujarat* [1997] 3 Suppl. SCR 705 : (1997) 7 SCC 622; *State of Haryana v. Balwan* [1999] 2 Suppl. SCR 211: (1999) 7 SCC 355; *State of Haryana v. Bhup Singh* [2008] 17 SCR 1306 : (2009) 2 SCC 268; *Swaran Singh v. State of Uttar Pradesh* [1998] 2 SCR 206: (1998) 4 SCC 75; *Joginder Singh v. State of Punjab* (2001) 8 SCC 306; *Shantilal v. State of Madhya Pradesh* [2007] 10 SCR 727 : (2007) 11 SCC 243; *Sharad Hiru Kolambe v. State of Maharashtra* [2018] 11 SCR 720 : (2018)

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Penal Code, 1860; Code of Criminal Procedure, 1973.

List of Keywords

Bilkis Bano; Prevention and reformation; Remission; Heinous crimes; Gujarat riots; Godhra Train incident; Communal hatred; Gangrape; Murder; Rioting armed with deadly weapons; Jail Advisory Committees; Remission Policy; Premature release; Appropriate Government; Public Interest Litigation; Third party stranger; Fundamental rights; Persons aggrieved; Premature Release of Convicts Policy of 1992; Early release of prisoners; Judicial review; Imprisonment in default for the non-payment of fine; Arbitrariness; Mala fides; Alternative legal remedies; Administrative Law; Executive power; Constitutional morality; Recidivism; Judicial intervention; Locus standi; Administrative order; Judicial propriety; Rule of law; Administrative decisions; Pardon; Reprieve; Clemency powers; Respites; Incarceration; Commutation; Transferring of a trial; Territorial Jurisdiction; 1992 Policy of Remission of the State of Gujarat; Fraud; Remission Policy dated 23.01.2014; Suppression and misleading; Suppressio veri suggestio falsi; Judicial acts; Ratio decidendi; Per incurium; Sub silentio; Rule of precedents; Jail Manual; Usurpation of power; Opinion of the Presiding Judge; Remission of sentence; Wednesbury principles; Binding precedent; Abuse of the process of law; Deprivation of liberty; Protection of the liberty.

Case Arising From

CRIMINAL ORIGINAL JURISDICTION: Writ Petition (Crl.) No.491 of 2022.

(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

With

Writ Petition (Crl.) Nos.319, 326, 352, 403 and 422 of 2022.

Appearances for Parties

Ms. Indira Jaising, Sr. Adv., Ms. Aparna Bhat, Ms. Karishma Maria, Ms. Shobha Gupta, Pratik R. Bombarde, Yogesh Yadav, Nizam P., Ms. Rashmi Singh, Ms. Sumita Hazarika, Ms. Vrinda Grover, Ms. Devika Tulsiani, Aakarsh Kamra, Soutik Banerjee, Shadan Farasat, Ms. Warisha Farasat, Paras Nath Singh, Rohin Bhatt, Harshit Anand, Aman Naqvi, Ms. Hrishika Jain, Ms. Natasha Maheshwari, Ms. Mriganka Kukreja, Advs. for the Petitioner.

Tushar Mehta, Solicitor General, Suryaprakash V Raju, A.S.G., Mrs. Sonia Mathur, V. Chitambaresh, Sidharth Luthra, S. Guru Krishna Kumar, Sr. Adv., Kanu Agarwal, Ms. Shraddha Deshmukh, Sanjay Kumar Tyagi, Annam Venkatesh, Siddharth Dharmadhikari, Arvind Kumar Sharma, Ms. Swati Ghildiyal, Rajat Nair, Ms. Devyani Bhatt, Yashraj Singh Bundela, Simarjeet Singh Saluja, Nikhil Chandra Jaiswal, Divik Mathur, Ms. Pratiksha Mishra, Ms. Rupakshi Soni, Ms. Prerna Dhall, Surjeet Singh, Ms. Ronika Tater, Pawan Sharma, Ms. Jyoti Verma, Surjit Nehra, Satya Ranjan Swain, Vishnu Kant, Praneet Pranav, Alabhya Dhamija, Ms. Megha Sharma, Ms. Akanksha Gupta, Amit Tiwari, Shoumendu Mukherji, Pashupathi Nath Razdan, Santosh Kumar, Nachiketa Joshi, Ms. Rajni Gupta, Ms. Rajni Singh, Sheezan Hashmi, Ms. Maitreyee Jagat Joshi, Astik Gupta, Udbhav Sinha, Arsh Chauhan, Ayush Kaushik, Ayush Agarwal, Pankaj Singhal, Ayush Anand, Ms. Akanksha Tomar, Ms. Ankita Chaudhary, Santosh Kumar, Amit Sharma, Shreyas Balaji, Vaibhav Dwivedi, Sandeep Singh, Rajan K. Chourasia, Rajeev Ranjan, Ms. Snehlata Mishra, Ms. Ankita Sharma, Adarsh Pandey, Rishi Malhotra, Vishal Arun, Sushil Kumar Dubey, Santosh Kumar, Sayooj Mohan Das M., Bhaskar Gautham, Mrinal Gopal Elker, Saurabh Singh, Ms. Aarushi Gupta, Divyansh Singh, Hira Singh Rawat, Shiv Kumar Vats, Shailja Sharma, Ms. Rinki Singh, Sandeep Singh, Prashant Padmanabhan, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Nagarathna, J.

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*** Ed. Note: Pagination is as per the original judgment.**

Preface:

Plato, the Greek Philosopher in his treatise, *The Laws*, underscores that punishment is to be inflicted, not for the sake of vengeance, for what is done cannot be undone, but for the sake of prevention and reformation (Thomas L. Pangle, The Laws of Plato, Basic Book Publishers, 1980). In his treatise, Plato reasons that the lawgiver, as far as he can, ought to imitate the doctor who does not apply his drug with a view to pain only, but to do the patient good. This curative theory of punishment likens penalty to medicine, administered for the good of the one who is being chastised (Trevor J. Saunders, Plato's Penal Code: Tradition, Controversy, and Reform in Greek Penology, Oxford University Press, 1991).

Thus, if a criminal is curable, he ought to be improved by education and other suitable arts, and then set free again as a better citizen and less of a burden to the state. This postulate lies at the heart of the policy of remission. In addition, there are also competing interests involved– the rights of the victim and the victim's family to justice *vis-a-vis* a convict's claim to a second chance by way of remission or reduction of his sentence for reformation.

Over the years, this Court initially attached greater weight to the former and has expressed scepticism over the latter, particularly if the offence in question is a heinous one. This sentiment can be gathered from the following observations of Fazal Ali J. in ***Maru Ram vs. Union of India*, AIR 1980 SC 2147 ("Maru Ram")**:

> *"77. … It is true that there appears to be a modern trend of giving punishment a colour of reformation so that stress may be laid on the reformation of the criminal rather than his confinement in jail which is an ideal objective. At the same time, it cannot be gainsaid that such an objective cannot be achieved without mustering the necessary facilities, the requisite education and the appropriate climate which must be created to foster a sense of repentance and penitence in a criminal so that he may undergo such a mental or psychological revolution that he realises the consequences of playing with human lives. In the world of today and particularly in our country, this ideal is yet to be achieved and, in fact, with all our efforts it will take us a long time to reach this sacred goal.*
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> ××× ××× ×××

> *79. The question, therefore, is — should the country take the risk of innocent lives being lost at the hands of criminals committing heinous crimes in the holy hope or wishful thinking that one day or the other, a criminal, however dangerous or callous he may be, will reform himself. Valmikis are not born everyday and to expect that our present generation, with the prevailing social and economic environment, would produce Valmikis day after day is to hope for the impossible."*

A woman deserves respect howsoever high or low she may be otherwise considered in society or to whatever faith she may follow or any creed she may belong to. Can heinous crimes, *inter alia*, against women permit remission of the convicts by a reduction in their sentence and by granting them liberty? These are the issues which arise in these writ petitions.

With the aforesaid philosophical preface, we proceed to consider these writ petitions, both on maintainability as well as on merits purely from a legal perspective.

Details of the writ petitioners:

2. These writ petitions have been filed assailing the Orders dated 10.08.2022, granting remission and early release of respondent Nos.3 to 13 in Writ Petition (Crl.) No.491 of 2022 (which petition shall be considered to be the lead petition), who were all convicted, having been found guilty of committing heinous crimes during the large-scale riots in Gujarat on 28.02.2002 and a few days thereafter which occurred in the aftermath of the burning of the train incident in Godhra in the State of Gujarat on 27.02.2002.

   2.1. The grotesque and diabolical crime in question was driven by communal hatred and resulted in twelve convicts, amongst many others, brutally gang-raping the petitioner in Writ Petition (Crl.) No.491 of 2022, namely, Bilkis Yakub Rasool, who was pregnant at that time. Further, the petitioner's mother was gang raped and murdered, her cousin who had just delivered a baby was also gang raped and murdered. Eight minors including the petitioner's cousin's two-day-old infant were also murdered. The petitioner's three-year-old daughter was murdered by smashing her head on a rock, her two minor brothers, two minor sisters, her *phupha, phupi, mama*(uncle, aunt and uncle respectively) and three-cousins were all murdered.

2.2. While eventually, the perpetrators of the crime, including the police personnel were convicted and sentenced, the petitioner, who was aged twenty-one years and pregnant at that time, having lost all members of her family in the diabolical and brutal attacks, has once again approached this Court seeking justice by challenging the *en-masse* remission granted to respondent Nos.3 to 13. Bilkis Yakub Rasool, being an unfortunate victim of the heinous crimes hereinabove narrated, has filed the present writ petition under Article 32 of the Constitution of India, seeking issuance of a writ, order or direction quashing the Orders dated 10.08.2022 passed by the State of Gujarat by which the convicts in Sessions Case No.634 of 2004, Mumbai (respondent Nos.3 to 13 herein), whose convictions were upheld by a Division Bench of the Bombay High Court and thereafter by this Court, have been released prematurely.

2.3. Writ Petition (Crl.) No.352 of 2022 titled ***Dr. Meeran Chadha Borwankar vs. State of Gujarat*** has been preferred by a former woman police officer, a woman bureaucrat who had served in the Indian Foreign Service and an academic, seeking, *inter alia,* the setting aside of the remission Orders dated 10.08.2022. The petitioners by way of the writ petition have also sought a writ or order in the nature of mandamus directing that the States must endeavour to have a pluralistic composition in Jail Advisory Committees, adequately representing the diverse nature of our society.

2.4. Writ Petition (Crl.) No.319 of 2022 titled ***Subhashini Ali vs. State of Gujarat*** being the first of the petitions filed in this batch has been preferred under Article 32 by Subhashini Ali, a former parliamentarian and presently the Vice-President of All India Democratic Women's Association; Revati Laul, an independent journalist and Roop Rekha Verma, former Vice-Chancellor of Lucknow University, challenging the Orders dated 10.08.2022.

2.5. Writ Petition (Crl.) No.326 of 2022 titled ***Mahua Moitra vs. State of Gujarat*** has been preferred by Mahua Moitra, a Member of Parliament from the Krishnanagar constituency in West Bengal, seeking issuance of a writ, order, or direction, quashing the Orders dated 10.08.2022. The petitioner in the said writ petition has also sought the framing of guidelines and the equitable

application of existing guidelines by the State Government for the grant of remission so as to channelise the exercise of discretion in granting remission and to prevent the misuse of such discretion, if found necessary upon an examination of the existing statutory framework.

2.6. Writ Petition (Crl.) No.403 of 2022 titled ***National Federation of Indian Women (NFIW) vs. State of Gujarat*** has been filed by the National Federation of Indian Women (NFIW), which is a women centric organization that was established on 04.06.1954 for the purpose of securing women's rights, seeking appropriate directions in the form of a writ of mandamus to the respondent to revoke the remission granted to respondent Nos.3 to 13 by the competent authority of the Government of Gujarat under the remission policy dated 09.07.1992 and to re-arrest respondent Nos.3 to 13 herein.

2.7. Writ Petition (Crl.) No.422 of 2022 titled ***Asma Shafique Shaikh vs. State of Gujarat*** has been filed by Asma Shafique Shaikh, a lawyer by profession and a social activist, seeking issuance of a writ, order or direction, quashing the Orders dated 10.08.2022.

2.8. As Writ Petition (Crl.) No.491 of 2022 has been filed by one of the victims, Bilkis Yakub Rasool, seeking quashing of the orders dated 10.08.2022, for the sake of convenience, the factual background, details as well as the status of the parties shall be with reference to Writ Petition (Crl.) No.491 of 2022.

Factual Background:

3. The factual background in which these writ petitions have been filed is that following the aforesaid unfortunate and grave incident, a First Information Report ("FIR" for short) was registered against unknown accused, on 04.03.2002. The Investigation Agency filed a closure report stating that the accused could not be traced and the said closure report was accepted by the Judicial Magistrate vide Order dated 25.03.2003. The closure report was challenged by the petitioner-victim-Bilkis Yakub Rasool, before this Court in Writ Petition (Crl.) No.118 of 2003. This Court directed the reopening of the case and transferred the investigation of the same to the Central Bureau of Investigation ("CBI" for short).

3.1. The CBI commenced a fresh investigation and submitted a chargesheet on 19.04.2004 against twenty persons accused of the crime. Charges of gang rape, murder and rioting armed with deadly weapons with a common intention were framed against twelve persons, six police personnel and two doctors

3.2. The petitioner-victim approached this Court by filing Transfer Petition (Crl.) No.192 of 2004, seeking transfer of the trial from the State of Gujarat to a neutral place. This Court in Transfer Petition (Crl.) No.192 of 2004, by an Order dated 06.08.2004, in the peculiar facts and circumstances of the case, considered it appropriate to transfer Sessions Case No.161 of 2004 pending before the learned Additional Sessions Judge, Dahod, Ahmedabad to the competent Court in Mumbai for trial and disposal. Charges were framed on 13.01.2005 amongst others against the eleven convicts for the commission of offences under Sections 143, 147, 302, 376(2)(e) and (g) of the Indian Penal Code, 1860 (hereinafter referred to as the "IPC" for the sake of brevity).

3.3. The Special Judge, Greater Mumbai, *vide* Judgment dated 21.01.2008 in Sessions Case No.634 of 2004 convicted the eleven accused and sentenced them to life imprisonment for the commission of the offences of, *inter alia*, gang rape and murder of the petitioner's mother; gang rape and murder of her cousin Shamim; murder of twelve more victims including the three and a half year old daughter of the petitioner, rioting, etc. and one police personnel for deliberately recording the FIR incorrectly. However, the Trial Court acquitted the remaining five police personnel and the two doctors, against whom there were serious charges. Respondent Nos.3 to 13 herein were convicted for the offences punishable under Sections 143, 147, 148, 302 r/w 149 of the IPC for the murder of fourteen people; Section 376 (2)(e) & (g) for having committed gang-rape on the petitioner-victim; Section 376(2)(g) for having committed gang rape on other women. The police officer, Somabhai Gori was convicted of the offence punishable under Sections 217 and 218 of the IPC.

3.4. On 05.08.2013, a Division Bench of the High Court of Bombay passed an Order in Criminal Writ Petition No.305 of 2013 titled ***Ramesh Rupabhai Chandana vs. State of Maharashtra*****,**

preferred by respondent No.13 herein, holding that where a trial has been transferred from one State to another and such trial has been concluded and the prisoner has been convicted, the prisoner should be transferred to the prison of his State.

3.5. Against the judgment of the Trial Court dated 21.01.2008, the persons convicted, as well as the State filed Criminal Appeals before the Bombay High Court. While the convicts filed criminal appeals assailing their conviction, the State filed criminal appeal against acquittal of the police officials and the doctors A bench comprising Mrs. Mridula Bhatkar and Mrs. V. K. Tahilramani, JJ. of the Bombay High Court upheld the conviction of the eleven persons accused of the offence of rioting armed with deadly weapons, gang-rape and murder by judgment dated 04.05.2017 in Criminal Appeal Nos.1020-1023 of 2009, 487 of 2010, 194 and 271 of 2011 titled ***Jaswantbhai Chaturbhai Nai vs. State of Gujarat.*** The five police officials and the two doctors who were acquitted by the Trial Court were also convicted by the High Court. The High Court also observed that the investigation by the Gujarat police was not proper and that the Gujarat police had taken the investigation in the wrong direction from the beginning i.e., the day of registering the FIR. That the investigation was not only unsatisfactory but it also smacked of dishonest steps to shield the culprits. It was further observed that the earlier investigation had played the role of a villain in the case. The High Court while going through the evidence also noted that *"the truth and the falsehood are mixed up in such a manner that at every stage of investigation the truth is hidden under layers of intentional laxity, omissions, contradictions and falsehood and the truth is required to be unearthed"*.

3.6. All the persons convicted filed Special Leave Petitions against the judgment of the High Court. This Court *vide* Order dated 10.07.2017 passed in SLP (Crl.) Nos.4290/2017, 4705/2017 and 4716/2017 and by Order dated 20.11.2017 passed in SLP (Crl.) No.7831/2017 dismissed the Special Leave Petitions preferred by the convicts and upheld the findings rendered by the High Court, as well as the sentence awarded.

3.7. It is noteworthy that the petitioner-victim approached this Court by way of Criminal Appeal Nos.727-733 of 2019 seeking just and adequate compensation for her ordeals. This Court *vide* order dated 23.04.2019 observed that the petitioner is a victim of riots which occurred in the aftermath of the Godhra train burning. This Court noted that the petitioner's case had to be dealt with differently as the loss she has suffered surpassed normal cases. That the gruesome and horrific acts of violence had left an indelible imprint on the mind of the petitioner, which will continue to torment and cripple her. This Court therefore directed the State Government to pay Rs. 50,00,000/- (Rupees Fifty Lakhs) to the petitioner within two weeks noting that the petitioner had been coerced into living the life of a nomad and an orphan and was barely sustaining herself on the charity of NGOs, having lost her family members.

3.8. After undergoing 14 years 5 months and 6 days of his sentence, respondent No.3 herein, namely, Radheshyam Bhagwandas Shah, filed Criminal Application No.4573 of 2019 before the Gujarat High Court challenging the non-consideration of his application for premature release under Sections 433 and 433A of the Code of Criminal Procedure, 1973 (hereinafter, the "CrPC" for the sake of brevity). The High Court after considering the submissions observed that respondent No.3 herein had been tried in the State of Maharashtra, hence, as per Section 432 (7), the 'appropriate government' for the purpose of Sections 432 and 433 of the CrPC would be the State of Maharashtra. The High Court placed reliance on the dictum of this Court in ***Union of India vs. V. Sriharan, (2016) 7 SCC 1 ("V. Sriharan")*** and by Order dated 17.07.2019 directed the petitioner therein (respondent No.3 herein) to pursue his remedy within the State of Maharashtra.

3.9. Respondent No.3 then moved an application dated 01.08.2019 before the Secretary, Department of Home Affairs, State of Maharashtra, seeking premature release under Sections 432 and 433A of the CrPC. Respondent No.3 specifically relied on the order dated 17.07.2019 of the Gujarat High Court granting liberty to the convict to approach the State of Maharashtra seeking premature release.

3.10. As the case was investigated and prosecuted by the CBI, the opinion of the said Agency was sought on the application for premature release. The CBI submitted its report dated 14.08.2019 wherein it was recommended that respondent No.3 should serve his sentence fully and no leniency should be given to him. The CBI submitted that respondent No.3 had actively participated in the heinous crime and that the offences committed by him and others were serious in nature and thus, he should not be pardoned or the sentence, suspended or remitted.

3.11. Further, on 03.01.2020, the Special CBI Court, Mumbai, also gave a negative report and objected to the prayer for premature release of respondent No.3 on the ground of seriousness of the offence. It was observed that the offences committed by the accused fell into category 5 (b) of the relevant State policy and were extremely serious, thus, it would be improper to grant remission to respondent No.3.

3.12. Similarly, on 03.02.2020, the Superintendent of Police, Dahod, in his report submitted to the Collector and District Magistrate, Dahod, gave a negative opinion against the pre-mature release of respondent No.3 on the ground that the victim and her family members apprehended serious crimes against them if respondent No.3 was released prematurely. The Office of the Collector and District Magistrate, Dahod, on 19.02.2020 also opined against the pre-mature release of respondent No.3 by relying on the opinion dated 03.02.2020 of the Superintendent of Police, Dahod.

3.13. Respondent No.3 again approached the High Court of Gujarat by way of Criminal Miscellaneous Application No. 1 of 2019 in Criminal Application No.4573 of 2019 seeking remission under Section 432 read with Section 433 of the CrPC. The High Court *vide* Order dated 13.03.2020 rejected the application preferred by respondent No.3 with a specific observation that the appropriate government under Section 432(7)(b) to exercise the powers of remission would be the State of Maharashtra and not the State of Gujarat. It was further recorded in the said order that the counsel for respondent No.3 had sought the permission of the Court to move the High Court of Bombay for the same relief and therefore the application was disposed of with liberty to

the writ petitioner therein in the aforesaid terms. It is pertinent to note that this order still holds the field as it has neither been challenged nor recalled or set aside in accordance with law.

3.14. On 20.07.2021, a meeting of the Jail Advisory Committee of the State of Gujarat took place which comprised of four social workers; two members of the State Legislative Assembly; the Superintendent of Police, Godhra; the District and Sessions Judge, Godhra; the Secretary, Jail Advisory Committee and Superintendent, Godhra Sub-Jail and the District Magistrate, Godhra (Chairman of the Jail Advisory Committee, Godhra Sub-Jail).

3.15. The Sessions Judge, Godhra, being one of the ten members of the Jail Advisory Committee, after going through the case papers observed that the convict, respondent No.3 herein, had been sentenced to undergo life imprisonment in a sensitive case and that if he was released prematurely, it may create an adverse effect on the society and there is a possibility of peace being disturbed. The other Committee members recommended the grant of remission to respondent No.3, on the ground that he had completed fifteen years of imprisonment and that his conduct in prison had been good.

3.16. On 18.08.2021, the Additional Director General of Police, Prisons and Correctional Administration, State of Gujarat, *vide* his letter to the Additional Chief Secretary, Home Department, Gujarat, after considering the opinion given by the Jail Advisory Committee, concurred with the opinion given by the Superintendent of Police, Dahod; CBI; the Special CBI Court, Mumbai and the District Magistrate, Dahod and did not recommend the premature release of the convict- respondent No.3.

3.17. In the interregnum, the rest of the convicts, respondent Nos.4 to 13 had applied for remission on varying dates in the month of February 2021 to the Superintendent, Godhra Sub-Jail. The opinion of the CBI was sought in this regard, and a negative opinion was given, so also by the Special Judge (CBI), Greater Mumbai. By a common opinion dated 22.03.2021, Special Judge (CBI), Greater Mumbai stated that since all the accused were tried and convicted in Mumbai, i.e., the State of Maharashtra,

the Government Resolution issued by the Home Department, Government of Maharashtra would be applicable to them. The Special Judge after perusing the guidelines issued by the Government of Maharashtra on 16.11.1978 and 11.05.1992 and the Government Resolution dated 11.04.2008 (Policy dated 11.04.2008), observed that the said resolution dated 11.04.2008 would apply as it had superseded all earlier orders and guidelines and would have been applicable in the normal course to the convicts undergoing life imprisonment. The Special Judge further noted that the case of the convicts mentioned above would fall under categories 2(c), 2 (d) and 4(d) of the Policy dated 11.04.2008, according to which the minimum period of imprisonment to be undergone is 28 years (Category 2(d)). However, the Superintendent of Police, Dahod, gave a positive opinion with respect to the premature release of respondent Nos.3 to 13. His opinion was seconded by the Collector and District Magistrate, Dahod.

3.18. In the aforesaid backdrop, when various steps were in progress at various stages, stealthily a writ petition, being Writ Petition (Crl.) No.135 of 2022 titled ***Radheshyam Bhagwandas Shah vs. State of Gujarat, (2022) 8 SCC 552 ("Radheshyam Bhagwandas Shah")***,was filed before this Court by respondent No.3 herein, seeking a direction in the nature of mandamus to the State of Gujarat to consider his application for pre-mature release under its policy dated 09.07.1992, which was existing at the time of commission of his crime and his conviction.

3.19. This Court noted that the policy on the date of conviction was as per the resolution dated 09.07.1992 passed by the State of Gujarat. Hence, respondent No.3 (petitioner therein) would be governed by the same. This Court placed reliance on the dictum in ***State of Haryana vs. Jagdish, (2010) 4 SCC 216 ("Jagdish")*** to observe that the application for grant of pre-mature release will have to be considered on the basis of the policy which stood as on the date of conviction. The other pertinent findings of this Court in its judgment and Order dated 13.05.2022, in Writ Petition (Crl.) No.135 of 2022 are culled out hereunder:

i. The argument advanced by the respondents – State of Gujarat therein that since the trial had been concluded in the State of Maharashtra, the 'appropriate Government' as referred to under Section 433 of the CrPC would be the State of Maharashtra, was rejected by this Court holding that the crime in the instant case was admittedly committed in the State of Gujarat and ordinarily, the trial would have been concluded in the same State and in terms of Section 432(7) of the CrPC, the appropriate Government in the ordinary course would have been the State of Gujarat but in the instant case, the case was transferred under exceptional circumstances by this Court for the limited purpose of trial and disposal to the State of Maharashtra. However, after the conclusion of trial and on conviction, the case stood transferred to the State where the crime was committed and the State of Gujarat remains the appropriate Government for the purpose of Section 432(7) of the CrPC.

ii. This Court observed that once the crime was committed in the State of Gujarat, after the trial came to be concluded and judgment of conviction came to be passed, all further proceedings would have to be considered, including remission or pre-mature release, as the case may be, in terms of the policy which is applicable in the State of Gujarat where the crime was committed and not the State where the trial stood transferred and concluded for exceptional reasons under the orders of this Court.

iii. This Court directed the State of Gujarat to consider the application of the petitioner therein for pre-mature release in terms of its policy dated 09.07.1992 which was applicable on the date of conviction.

3.20. Pursuant to the judgment of this Court dated 13.05.2022, a meeting of the Jail Advisory Committee of the State of Gujarat took place on 26.05.2022 and all the members recommended grant of remission to respondent Nos.3 to 13.

3.21. The Sessions Judge, Godhra, also considered the applications of respondent Nos.3 to 13 and upon going through the particulars provided by the Jail Superintendent, Sub-Jail, Godhra noted that

the said report recorded that the convicts had demonstrated good behavior and conduct during the period of incarceration and that no adverse incident had been recorded against the convicts even when they were on furlough or on parole, except against one convict, namely, Mitesh Chimanlal Bhatt. That all convicts, by and large, surrendered themselves within the time after enjoying parole/furlough and participated in rehabilitation and corrective programmes. That the convicts still had substantial years of life remaining. Accordingly, the Sessions Judge applied the policy dated 09.07.1992 and gave an 'affirmative' opinion as regards the premature release of respondent Nos.3 to 13.

3.22. The Additional Director General of Police, Prisons and Correctional Administration, State of Gujarat, addressed a letter dated 09.06.2022 to the Additional Chief Secretary, Home Department, Government of Gujarat, regarding the premature release of accused Kesarbhai Khimabhai Vahoniya. In the said letter, the details of the opinion given by the concerned authorities regarding the premature release of the said convict were also discussed. It was stated in the letter that the Superintendent of Police, Dahod, had given a positive opinion regarding premature release from jail; the Superintendent of Police, Special Crime Branch, Mumbai, however, had given a negative opinion about premature release from jail; the District Magistrate, Dahod, had given a positive opinion about the premature release from jail; the Sessions Court, Mumbai, which pronounced the sentence had given a negative opinion about premature release; however, the Jail Advisory Committee of Gujarat had given a positive opinion about the convict's premature release and the Superintendent, Godhra Sub-Jail had also given a positive opinion about the premature release. Thus, the Additional Director General of Police, Prisons and Correctional Administration, State of Gujarat gave a positive opinion regarding the premature release of Kesarbhai Khimabhai Vahoniya to the Additional Chief Secretary, Home Department, Government of Gujarat. So also, as regards the other convicts, namely, Salesh Chimanlal Bhatt, Pradip Ramanlal Modhhiya, Mitesh Chimanlal Bhatt, Bipinchand Kanhaiyalal Joshi, Rajubhai Babulal Soni, Bakabhai Khimabhai Vahoniya, Jaswantbhai Chaturbhai Nai (Rawal) and Ramesh Rupabhai Chandana.

3.23. On 28.06.2022, the Department of Home Affairs, Government of Gujarat, addressed a letter to the Secretary, Ministry of Home Affairs, Government of India, seeking sanction from the Government of India on the proposal for the premature release of the prisoners, respondent Nos.3 to 13.

3.24. By letter dated 11.07.2022, the Ministry of Home Affairs, Government of India conveyed its approval under Section 435 of the CrPC for the premature release of all 11 convicts, respondent Nos.3 to 13.

3.25. Pursuant to the concurrence of the Central Government, the State of Gujarat issued the impugned orders dated 10.08.2022.

3.26. In the above background, these writ petitions have been filed, praying,*inter-alia,* for issuance of a writ, order, or direction, quashing the Orders dated 10.08.2022.

Counter affidavit of State of Gujarat:

4. Under Secretary, Home Department, State of Gujarat (first respondent) has filed his affidavit stating that he is acquainted with the facts of the case as appearing from the official records of the case. While denying every assertion, contention and statement made by the petitioner in Writ Petition (Crl.) No.319 of 2022, which was the first of the writ petitions filed before this Court, certain preliminary submissions have been advanced at the outset.

4.1. It is contended that the public interest litigation (PIL) filed by the petitioners (Subhashini Ali and others) is neither maintainable in law nor tenable on facts. That a third party has no locus to challenge the orders of remission passed by a competent authority under the garb of a PIL. A PIL is not maintainable in a criminal matter as the petitioners are in no way connected with the proceedings with which the convicted persons have been granted remission. Therefore, the writ petition may be dismissed on that ground alone. In support of this submission, reliance has been placed on ***Rajiv Ranjan Singh 'Lalan' (VIII) vs. Union of India, (2006) 6 SCC 613 ("Rajiv Ranjan"); Gulzar Ahmed Azmi vs. Union of India, (2012) 10 SCC 731 ("Gulzar Ahmed"); Simranjit Singh Mann vs. Union of India, (1992) 4 SCC 653 ("Simranjit Singh");*** and, ***Ashok Kumar Pandey vs. State of West Bengal, (2004) 3 SCC 349 ("Ashok Kumar")***.

It is submitted that a third party/stranger either under the provisions of the CrPC or under any other statute is precluded from questioning the correctness of grant or refusal of 'sanction for prosecution' or the conviction and sentence imposed by the Court after a regular trial. Similarly, a third party stranger is precluded from questioning a remission order passed by the State Government which is in accordance with law. Therefore, dismissal of the petition at the threshold is sought.

4.2. It is next averred that the petitioners have not pleaded as to how they have the locus to seek a writ of certiorari for quashing the orders of remission passed by respondent no.1 with respect to the eleven convicts sentenced by the Special Judge, Greater Mumbai in Sessions Case No.634 of 2004. That the petitioners have not pleaded as to how their fundamental rights have been abridged or how they are aggrieved by the action of the State Government. Therefore, filing of the writ petition as Public Interest Litigation (in short, 'PIL') is an abuse of PIL jurisdiction and is motivated by political intrigues and machinations. In this regard, reliance has been placed on ***Tehseen Poonawalla vs. Union of India, (2018) 6 SCC 72* (*"Tehseen"*)**; and ***Ashok Kumar.***

4.3. It is further submitted that the petitioners not being aggrieved persons have invoked the jurisdiction of this Court under Article 32 of the Constitution for extraneous purposes. As the petitioners are not the "persons aggrieved", the writ petition is not maintainable. On the scope and ambit of the expression "person aggrieved", reliance has been placed on **State of Maharashtra vs. M.V. Dabholkar*, (1975) 2 SCC 702* (*"M.V. Dabholkar"*)**; ***Jasbhai Motibhai Desai vs. Roshan Kumar, Haji Bashir Ahmed, (1976) 1 SCC 671* (*"Jasbhai Motibhai"*)**; and ***Thammanna vs. K. Veera Reddy, (1980) 4 SCC 62* (*"Thammanna"*).**

4.4. On merits, it is stated that one of the respondents/prisoners, namely, Radheshyam Bhagwandas Shah had filed Writ Petition (Crl.) No.135 of 2022, *inter alia,* praying to consider his remission application. This Court by its order dated 13.05.2022 held that the policy which will be applicable for deciding the remission application is the one which was in vogue at the time of conviction i.e. Premature Release of Convicts Policy of 1992. Further, this

Court held that for the purposes of Section 432 of the CrPC, the "appropriate Government" for considering the remission application is the State in which the offence was committed and not the State in which the trial was conducted and therefore, directed the State of Gujarat to consider the application of the prisoner within a period of two months. Accordingly, the State of Gujarat considered the application of the prisoners as per Section 432 read with Section 435 of the CrPC along with the Premature Release of Convicts Policy of 1992. That, the State Government *vide* its Circular dated 09.07.1992 had issued a policy for early release of prisoners who have completed fourteen years of imprisonment and who were imposed punishment of life imprisonment. As per the aforesaid Policy of 1992, the Inspector General of Jail is mandated to obtain the opinion of the District Police Officer, District Magistrate, Jail Superintendent and Advisory Board Committee for early release of a convict. Thereafter, the Inspector General of Jail is mandated to give his opinion with the copy of the nominal roll and copy of the judgment and the recommendation of the Government. Further, the Jail Advisory Board at the time of consideration of the premature release application shall be guided by the Policy of 1992. A copy of the policy has been annexed as Annexure R-2. It is further submitted that the State Government considered the case of all the eleven convicts as per the Policy of 1992. Further, the remission in these cases was not granted under the Circular governing grant of remission to prisoners as part of celebration as 'Azadi Ka Amrit Mahotsav".

4.5. The State Government in fact directed the Additional Director General of Prisons, Ahmedabad to send the necessary proposal of remission as per the direction of this Court before 31.05.2022 vide letter dated 25.05.2022. A reminder was also sent on 08.06.2022. Ten proposals were received on 09.06.2022 and one proposal was received on 17.06.2022. The applications of the accused were considered according to the remission policy dated 09.07.1992 in accordance with the directions issued by this Court. As laid down in the abovementioned policy, the Department received the opinions of the concerned District Police Officer, District Magistrate and Chairman of Jail Advisory Board Committee. It is further stated that the State Government has considered the opinions of the Inspector General of Prisons,

Gujarat State, Jail Superintendent, Jail Advisory Committee, District Magistrate, Police Superintendent, CBI, Special Crime Branch, Mumbai and Sessions Court, Mumbai (CBI). Therefore, the opinions of seven authorities were considered. Further, having regard to the provisions of Section 435 of the CrPC, sanction of the Government of India was also necessary. As the CBI was a central investigating agency, the State Government obtained the approval/suitable orders of the Government of India. The prisoners/convicts had completed fourteen years of imprisonment and the opinions of the concerned authorities were obtained as per Policy dated 09.07.1992. The same was submitted to the Ministry of Home Affairs, Government of India *vide* letter dated 28.06.2022 and sought the approval/suitable orders of the Government of India. The Government of India vide its letter dated 11.07.1992 conveyed its concurrence/ approval. On considering all the opinions, the State Government decided to release the eleven convicts since they had completed fourteen years and above in jail and their behaviour was found to be good.

4.6. Reliance has been placed on ***Jagdish*** and ***V. Sriharan*** to contend that if a policy which is beneficial to the convict exists at the time of consideration of the application of premature release then the convict cannot be deprived of such beneficial policy and that judicial review of the order of remission is not permissible in law. The Under Secretary has further proceeded to place the following facts to contend that the impugned orders are in accordance with law:

> "29. I say that the relevant records pertaining to the application for remission *qua* the prisoner, Kesharbhai Khimabhai Vahoniya, is as under:

Sl. No.	Document	Opinion of the concerned Authority
1.	Premature release application dated 19.02.2021.	-
2.	Letter dated 11.03.2021 from the Superintendent of Police, CBI, SCB, Mumbai.	Prisoner should not be released prematurely.

3.	Letter dated 22.03.2021 from the Special Judge (CBI), City Civil & Sessions Court, Gr. Bombay	Considering the Govt. Resolution dated 11.04.2008, issued by the State of Maharashtra, prisoner should not be released prematurely.
4.	Letter dated 07.03.2022 from the Superintendent of Police, Dahod, Gujarat.	No objection to the premature release of the prisoner.
5.	Letter dated 07.03.2022 from the Collector & DM, Dahod, Gujarat	No objection to the premature release of the prisoner.
6.	Opinion of the Jail Superintendent, Godhra Sub-Jail, Gujarat.	No objection to the premature release of the prisoner.
7.	Opinion of the Jail Advisory Committee, dated 26.05.2022.	The committee has unanimously given the opinion in favour of the premature release of the prisoner.
8.	Letter dated 09.06.2022 to the Home Department, Govt. of Gujarat, from the Addl. Director General of Police, Prisons & Correctional Administration, Ahmedabad.	No objection to the premature release of the prisoner.
9.	Letter dated 28.06.2022 to the Ministry of Home Affairs, Govt. of India from Home Department, Govt. of Gujarat.	Recommended premature release of the prisoner. Sought approval/suitable orders from the Govt. of India.
10.	Letter dated 11.07.2022 to the Home Department, Govt. of Gujarat from the Ministry of Home Affairs, Govt. of India	Approved the premature release of the prisoner.

Copy of the relevant records *qua* the prisoner, Kesharbhai Khimabhai Vahoniya is annexed herewith as ANNEXURE R-3.

30. I say that the relevant records pertaining to the application for remission *qua* the prisoner, Shaileshbhai Chimanlal Bhatt, is as under:

Sl. No.	Document	Opinion of the concerned Authority
1.	Premature release application dated 23.02.2021.	-
2.	Letter dated 11.03.2021 from the Superintendent of Police, CBI, SCB, Mumbai.	Prisoner should not be released prematurely.
3.	Letter dated 22.03.2021 from the Special Judge (CBI), City Civil & Sessions Court, Gr. Bombay	Considering the Govt. Resolution dated 11.04.2008, issued by the State of Maharashtra, prisoner should not be released prematurely.
4.	Letter dated 07.03.2022 from the Superintendent of Police, Dahod, Gujarat.	No objection to the premature release of the prisoner.
5.	Letter dated 07.03.2022 from the Collector & DM, Dahod, Gujarat	No objection to the premature release of the prisoner.
6.	Opinion of the Jail Superintendent, Godhra Sub-Jail, Gujarat.	No objection to the premature release of the prisoner.
7.	Opinion of the Jail Advisory Committee, dated 26.05.2022.	The committee has unanimously given the opinion in favour of the premature release of the prisoner.
8.	Letter dated 09.06.2022 to the Home Department, Govt. of Gujarat, from the Addl. Director General of Police, Prisons & Correctional Administration, Ahmedabad.	No objection to the premature release of the prisoner.
9.	Letter dated 28.06.2022 to the Ministry of Home Affairs, Govt. of India from Home Department, Govt. of Gujarat.	Recommended premature release of the prisoner. Sought approval/suitable orders from the Govt. of India.
10.	Letter dated 11.07.2022 to the Home Department, Govt. of Gujarat from the Ministry of Home Affairs, Govt. of India	Approved the premature release of the prisoner.

Copy of the relevant records *qua* the prisoner, Shaileshbhai Chimanlal Bhatt is annexed herewith as Annexure-RG-4.

31. I say that the relevant records pertaining to the application for remission *qua* the prisoner, Pradip Ramanlal Modhiya, is as under:

Sl. No.	Document	Opinion of the concerned Authority
1.	Premature release application dated 23.02.2021.	-
2.	Letter dated 11.03.2021 from the Superintendent of Police, CBI, SCB, Mumbai.	Prisoner should not be released prematurely.
3.	Letter dated 22.03.2021 from the Special Judge (CBI), City Civil & Sessions Court, Gr. Bombay	Considering the Govt. Resolution dated 11.04.2008, issued by the State of Maharashtra, prisoner should not be released prematurely.
4.	Letter dated 07.03.2022 from the Superintendent of Police, Dahod, Gujarat.	No objection to the premature release of the prisoner.
5.	Letter dated 07.03.2022 from the Collector & DM, Dahod, Gujarat	No objection to the premature release of the prisoner.
6.	Opinion of the Jail Superintendent, Godhra Sub-Jail, Gujarat.	No objection to the premature release of the prisoner.
7.	Opinion of the Jail Advisory Committee, dated 26.05.2022.	The committee has unanimously given the opinion in favour of the premature release of the prisoner.
8.	Letter dated 09.06.2022 to the Home Department, Govt. of Gujarat, from the Addl. Director General of Police, Prisons & Correctional Administration, Ahmedabad.	No objection to the premature release of the prisoner.

9.	Letter dated 28.06.2022 to the Ministry of Home Affairs, Govt. of India from Home Department, Govt. of Gujarat.	Recommended premature release of the prisoner. Sought approval/suitable orders from the Govt. of India.
10.	Letter dated 11.07.2022 to the Home Department, Govt. of Gujarat from the Ministry of Home Affairs, Govt. of India	Approved the premature release of the prisoner.

Copy of the relevant records *qua* the prisoner, Pradip Ramanlal Modhiya is annexed herewith as ANNEXURE RG-5.

32. I say that the relevant records pertaining to the application for remission *qua* the prisoner, Mitesh Chimanlal Bhatt, is as under:

Sl. No.	Document	Opinion of the concerned Authority
1.	Premature release application dated 18.02.2021.	-
2.	Letter dated 10.03.2021 from the Superintendent of Police, CBI, SCB, Mumbai.	Prisoner should not be released prematurely.
3.	Letter dated 22.03.2021 from the Special Judge (CBI), City Civil & Sessions Court, Gr. Bombay.	Considering the Govt. Resolution dated 11.04.2008, issued by the State of Maharashtra, prisoner should not be released prematurely.
4.	Letter dated 25.05.2022 from the Superintendent of Police, Dahod, Gujarat.	No objection to the premature release of the prisoner.
5.	Letter dated 25.05.2022 from the Collector & DM, Dahod, Gujarat	No objection to the premature release of the prisoner.
6.	Opinion of the Jail Superintendent, Godhra Sub-Jail, Gujarat.	No objection to the premature release of the prisoner.

7.	Opinion of the Jail Advisory Committee, dated 26.05.2022.	The committee has unanimously given the opinion in favour of the premature release of the prisoner.
8.	Letter dated 09.06.2022 to the Home Department, Govt. of Gujarat, from the Addl. Director General of Police, Prisons & Correctional Administration, Ahmedabad.	No objection to the premature release of the prisoner.
9.	Letter dated 28.06.2022 to the Ministry of Home Affairs, Govt. of India from Home Department, Govt. of Gujarat.	Recommended premature release of the prisoner. Sought approval/suitable orders from the Govt. of India.
10.	Letter dated 11.07.2022 to the Home Department, Govt. of Gujarat from the Ministry of Home Affairs, Govt. of India	Approved the premature release of the prisoner.

Copy of the relevant records *qua* the prisoner, Mitesh Chimanlal Bhatt is annexed herewith as ANNEXURE RG-6.

33. I say that the relevant records pertaining to the application for remission *qua* the prisoner, Bipinchandra Kanaiyalal Joshi, is as under:

Sl. No.	Document	Opinion of the concerned Authority
1.	Premature release application dated 16.02.2021.	-
2.	Letter dated 10.03.2021 from the Superintendent of Police, CBI, SCB, Mumbai.	Prisoner should not be released prematurely.
3.	Letter dated 22.03.2021 from the Special Judge (CBI), City Civil & Sessions Court, Gr. Bombay.	Considering the Govt. Resolution dated 11.04.2008, issued by the State of Maharashtra, prisoner should not be released prematurely.

4.	Letter dated 07.03.2022 from the Superintendent of Police, Dahod, Gujarat.	No objection to the premature release of the prisoner.
5.	Letter dated 07.03.2022 from the Collector & DM, Dahod, Gujarat.	No objection to the premature release of the prisoner.
6.	Opinion of the Jail Superintendent, Godhra Sub-Jail, Gujarat.	No objection to the premature release of the prisoner.
7.	Opinion of the Jail Advisory Committee, dated 26.05.2022.	The committee has unanimously given the opinion in favour of the premature release of the prisoner.
8.	Letter dated 09.06.2022 to the Home Department, Govt. of Gujarat, from the Addl. Director General of Police, Prisons & Correctional Administration, Ahmedabad.	No objection to the premature release of the prisoner.
9.	Letter dated 28.06.2022 to the Ministry of Home Affairs, Govt. of India from Home Department, Govt. of Gujarat.	Recommended premature release of the prisoner. Sought approval/ suitable orders from the Govt. of India.
10.	Letter dated 11.07.2022 to the Home Department, Govt. of Gujarat from the Ministry of Home Affairs, Govt. of India	Approved the premature release of the prisoner.

Copy of the relevant records *qua* the prisoner, Bipinchandra Kanaiyalal Joshi is annexed herewith as ANNEXURE RG-7.

34. I say that the relevant records pertaining to the application for remission *qua* the prisoner, Rajubhai Babulal Soni, is as under:

Sl. No.	Document	Opinion of the concerned Authority
1.	Premature release application dated 15.02.2021.	-

2.	Letter dated 11.03.2021 from the Superintendent of Police, CBI, SCB, Mumbai.	Prisoner should not be released prematurely.
3.	Letter dated 22.03.2021 from the Special Judge (CBI), City Civil & Sessions Court, Gr. Bombay.	Considering the Govt. Resolution dated 11.04.2008, issued by the State of Maharashtra, prisoner should not be released prematurely.
4.	Letter dated 07.03.2022 from the Superintendent of Police, Dahod, Gujarat.	No objection to the premature release of the prisoner.
5.	Letter dated 07.03.2022 from the Collector & DM, Dahod, Gujarat.	No objection to the premature release of the prisoner.
6.	Opinion of the Jail Superintendent, Godhra Sub-Jail, Gujarat.	No objection to the premature release of the prisoner.
7.	Opinion of the Jail Advisory Committee, dated 26.05.2022.	The committee has unanimously given the opinion in favour of the premature release of the prisoner.
8.	Letter dated 09.06.2022 to the Home Department, Govt. of Gujarat, from the Addl. Director General of Police, Prisons & Correctional Administration, Ahmedabad.	No objection to the premature release of the prisoner.
9.	Letter dated 28.06.2022 to the Ministry of Home Affairs, Govt. of India from Home Department, Govt. of Gujarat.	Recommended premature release of the prisoner. Sought approval/suitable orders from the Govt. of India.
10.	Letter dated 11.07.2022 to the Home Department, Govt. of Gujarat from the Ministry of Home Affairs, Govt. of India	Approved the premature release of the prisoner.

Copy of the relevant records *qua* the prisoner, Rajubhai Babulal Soni is annexed herewith as ANNEXURE RG-8.

35. I say that the relevant records pertaining to the application for remission *qua* the prisoner, Bakabhai Khimabhai Vahoniya, is as under:

Sl. No.	Document	Opinion of the concerned Authority
1.	Premature release application dated 18.02.2021.	-
2.	Letter dated 10.03.2021 from the Superintendent of Police, CBI, SCB, Mumbai.	Prisoner should not be released prematurely.
3.	Letter dated 22.03.2021 from the Special Judge (CBI), City Civil & Sessions Court, Gr. Bombay.	Considering the Govt. Resolution dated 11.04.2008, issued by the State of Maharashtra, prisoner should not be released prematurely.
4.	Letter dated 07.03.2022 from the Superintendent of Police, Dahod, Gujarat.	No objection to the premature release of the prisoner.
5.	Letter dated 07.03.2022 from the Collector & DM, Dahod, Gujarat.	No objection to the premature release of the prisoner.
6.	Opinion of the Jail Superintendent, Godhra Sub-Jail, Gujarat.	No objection to the premature release of the prisoner.
7.	Opinion of the Jail Advisory Committee, dated 26.05.2022.	The committee has unanimously given the opinion in favour of the premature release of the prisoner.
8.	Letter dated 09.06.2022 to the Home Department, Govt. of Gujarat, from the Addl. Director General of Police, Prisons & Correctional Administration, Ahmedabad.	No objection to the premature release of the prisoner.
9.	Letter dated 28.06.2022 to the Ministry of Home Affairs, Govt. of India from Home Department, Govt. of Gujarat.	Recommended premature release of the prisoner. Sought approval/ suitable orders from the Govt. of India.

10.	Letter dated 11.07.2022 to the Home Department, Govt. of Gujarat from the Ministry of Home Affairs, Govt. of India	Approved the premature release of the prisoner.

Copy of the relevant records *qua* the prisoner, Bakabhai Khimabhai Vahoniya is annexed herewith as ANNEXURE R-9.

36. I say that the relevant records pertaining to the application for remission *qua* the prisoner, Govindbhai Akhambhai Nai (Raval), is as under:

Sl. No.	Document	Opinion of the concerned Authority
1.	Premature release application dated 15.02.2021	-
2.	Letter dated 10.03.2021 from the Superintendent of Police, CBI, SCB, Mumbai.	Prisoner should not be released prematurely.
3.	Letter dated 22.03.2021 from the Special Judge (CBI), City Civil & Sessions Court, Gr. Bombay	Considering the Govt. Resolution dated 11.04.2008, issued by the State of Maharashtra, prisoner should not be released prematurely.
4.	Letter dated 07.03.2022 from the Superintendent of Police, Dahod, Gujarat.	No objection to the premature release of the prisoner.
5.	Letter dated 07.03.2022 from the Collector & DM, Dahod, Gujarat	No objection to the premature release of the prisoner.
6.	Opinion of the Jail Superintendent, Godhra Sub-Jail, Gujarat	No objection to the premature release of the prisoner.
7.	Opinion of the Jail Advisory Committee, dated 26.05.2022	The committee has unanimously given the opinion in favour of the premature release of the prisoner.
8.	Letter dated 09.06.2022 to the Home Department, Govt. of Gujarat, from the Addl. Director General of Police, Prisons & Correctional Administration, Ahmedabad.	No objection to the premature release of the prisoner.

9.	Letter dated 28.06.2022 to the Ministry of Home Affairs, Govt. of India from Home Department, Govt. of Gujarat.	Recommended premature release of the prisoner. Sought approval/ suitable orders from the Govt. of India
10.	Letter dated 11.07.2022 to the Home Department, Govt. of Gujarat from the Ministry of Home Affairs, Govt. of India.	Approved the premature release of the prisoner.

37. Copy of the relevant records *qua* the prisoner, Govindbhai Akhambhai Nai (Raval) is annexed herewith as Annexure R-10.

38. I say that the relevant records pertaining to the application for remission *qua* the prisoner, Jashvantbhai Chaturbhai Nai (Raval), is as under:

Sl. No.	Document	Opinion of the concerned Authority
1.	Premature release application dated 15.02.2021	-
2.	Letter dated 10.03.2021 from the Superintendent of Police, CBI, SCB, Mumbai.	Prisoner should not be released prematurely.
3.	Letter dated 22.03.2021 from the Special Judge (CBI), City Civil & Sessions Court, Gr. Bombay	Considering the Govt. Resolution dated 11.04.2008, issued by the State of Maharashtra, prisoner should not be released prematurely.
4.	Letter dated 07.03.2022 from the Superintendent of Police, Dahod, Gujarat.	No objection to the premature release of the prisoner.
5.	Letter dated 07.03.2022 from the Collector & DM, Dahod, Gujarat	No objection to the premature release of the prisoner.
6.	Opinion of the Jail Superintendent, Godhra Sub-Jail, Gujarat	No objection to the premature release of the prisoner.

7.	Opinion of the Jail Advisory Committee, dated 26.05.2022	The committee has unanimously given the opinion in favour of the premature release of the prisoner.
8.	Letter dated 09.06.2022 to the Home Department, Govt. of Gujarat, from the Addl. Director General of Police, Prisons & Correctional Administration, Ahmedabad.	No objection to the premature release of the prisoner.
9.	Letter dated 28.06.2022 to the Ministry of Home Affairs, Govt. of India from Home Department, Govt. of Gujarat.	Recommended premature release of the prisoner. Sought approval/ suitable orders from the Govt. of India
10.	Letter dated 11.07.2022 to the Home Department, Govt. of Gujarat from the Ministry of Home Affairs, Govt. of India.	Approved the premature release of the prisoner.

Copy of the relevant records *qua* the prisoner, Jashvantbhai Chturbhai Nai (Raval) is annexed herewith as Annexure R-11.

39. I say that the relevant records pertaining to the application for remission *qua* the prisoner, Rameshbhai Rupabhai Chandana, is as under:

Sl. No.	Document	Opinion of the concerned Authority
1.	Premature release application dated 25.02.2021	-
2.	Letter dated 10.03.2021 from the Superintendent of Police, CBI, SCB, Mumbai.	Prisoner should not be released prematurely.
3.	Letter dated 22.03.2021 from the Special Judge (CBI), City Civil & Sessions Court, Gr. Bombay	Considering the Govt. Resolution dated 11.04.2008, issued by the State of Maharashtra, prisoner should not be released prematurely.

4.	Letter dated 07.03.2022 from the Superintendent of Police, Dahod, Gujarat.	No objection to the premature release of the prisoner.
5.	Letter dated 07.03.2022 from the Collector & DM, Dahod, Gujarat	No objection to the premature release of the prisoner.
6.	Opinion of the Jail Superintendent, Godhra Sub-Jail, Gujarat	No objection to the premature release of the prisoner.
7.	Opinion of the Jail Advisory Committee, dated 26.05.2022	The committee has unanimously given the opinion in favour of the premature release of the prisoner.
8.	Letter dated 09.06.2022 to the Home Department, Govt. of Gujarat, from the Addl. Director General of Police, Prisons & Correctional Administration, Ahmedabad.	No objection to the premature release of the prisoner.
9.	Letter dated 28.06.2022 to the Ministry of Home Affairs, Govt. of India from Home Department, Govt. of Gujarat.	Recommended premature release of the prisoner. Sought approval/ suitable orders from the Govt. of India
10.	Letter dated 11.07.2022 to the Home Department, Govt. of Gujarat from the Ministry of Home Affairs, Govt. of India.	Approved the premature release of the prisoner.

Copy of the relevant records *qua* the prisoner, Rameshbhai Rupabhai Chandana is annexed herewith as Annexure R-12.

40. I say that the relevant records pertaining to the application for remission *qua* the prisoner, Radheshyam Bhagwandas Shah @ Lala Vakil, is as under:

Sl. No.	Document	Opinion of the concerned Authority
1.	Premature release application dated 01.08.2019	-
2.	Letter dated 14.08.2019 from the Superintendent of Police, CBI, SCB, Mumbai.	Prisoner should not be released prematurely.
3.	Letter dated 03.01.2020 from the Special Judge (CBI), City Civil & Sessions Court, Gr. Bombay	Objected to the premature release of the prisoner.
4.	Letter dated 13.02.2020 from the Superintendent of Police, Dahod, Gujarat.	Objected to the premature release of the prisoner.
5.	Letter dated 19.02.2020 from the Collector & DM, Dahod, Gujarat	Objected to the premature release of the prisoner.
6.	Opinion of the Jail Superintendent, Godhra Sub-Jail, Gujarat	No objection to the premature release of the prisoner.
7.	Opinion of the Jail Advisory Committee, dated 20.07.2021	9 out of 10 members of the Committee has recommended the premature release of the prisoner.
8.	Letter dated 18.08.2021 to the Home Department, Govt. of Gujarat, from the Addl. Director General of Police, Prisons & Correctional Administration, Ahmedabad.	Did not recommend to the premature release of the prisoner.
9.	Letter dated 28.06.2022 to the Ministry of Home Affairs, Govt. of India from Home Department, Govt. of Gujarat.	Recommended premature release of the prisoner. Sought approval/ suitable orders from the Govt. of India
10.	Letter dated 11.07.2022 to the Home Department, Govt. of Gujarat from the Ministry of Home Affairs, Govt. of India.	Approved the premature release of the prisoner.

Copy of the relevant records *qua* the prisoner, Radheshyam Bhgwandas Shah @ Lala Vakil is annexed herewith as Annexure R-13."

4.7. Therefore, it has been contended that PIL is not maintainable as it is misconceived and devoid of any merit and as such is liable to be dismissed.

5. Respondent No.2 has not filed any pleading in this matter. Even though respondent Nos.3 to 13 have filed their counter affidavits, we do not find it necessary to advert to the same as they would be replicating the stand of the State of Gujarat.

Submissions:

6. We have heard learned counsel Ms. Shobha Gupta for the petitioner in Writ Petition (Crl.) No.491 of 2022; learned ASG, Sri S.V. Raju appearing on behalf of the State of Gujarat and Union of India;and learned senior counsel Mr. Sidharth Luthra and other counsel for respondent Nos.3 to 13 and perused the material on record.

6.1 We have also heard learned senior counsel and learned counsel Ms. Indira Jaising, Ms. Vrinda Grover and Ms. Aparna Bhat, for the petitioners in the public interest litigations.

6.2 We have perused the material on record as well as the judicial dicta cited at the Bar.

7. Learned counsel for the petitioner in Writ Petition (Crl.) No.491 of 2022, Ms. Shobha Gupta at the outset submitted that the *en-masse* remission granted to respondent Nos.3 to 13 by Orders dated 10.08.2022 has not only shattered the victim-petitioner and her family but has also shocked the collective conscience of the Indian society. That in the present case, the right of the victim and the cry of the society at large have been ignored by the State and Central Governments while recommending the grant of remission to all convicts in the case.

7.1. It was asserted that though the crime was committed in the State of Gujarat, the investigation and trial were carried out in the State of Maharashtra pursuant to the orders of this Court. Hence, in view of the unambiguous language of Section 432(7)(b), only the State of Maharashtra would be the appropriate government which could have considered the applications filed

by respondent Nos.3 to 13 seeking remission of their sentences. Learned counsel has placed reliance on the following judgments to buttress her argument, namely, ***State of M.P. vs. Ratan Singh*, *(1976) 3 SCC 470 ("Ratan Singh");** ***Government of A.P. vs. M.T. Khan*, *(2004) 1 SCC 616 ("M.T. Khan");** ***Hanumant Dass vs. Vinay Kumar*, *(1982) 2 SCC 177* ("*Hanumant Dass*")** and ***V.Sriharan***.

7.2. According to learned counsel, once a competent Court in the State of Maharashtra had tried and convicted the accused then that State is the 'appropriate Government'. Therefore, the Orders of remission passed by the State of Gujarat in respect of respondent Nos.3 to 13 is without jurisdiction and a nullity and thus, are liable to be quashed.

7.3. As regards the applicability of the relevant remission policy, learned counsel for the petitioner submitted that since the 'appropriate government' in the instant case is the State of Maharashtra, the remission policy of the State of Maharashtra would be applicable. Thus, the remission policy of the State of Gujarat dated 09.07.1992 would be wholly inapplicable. It was contended that the remission policy dated 09.07.1992 of the State of Gujarat was not even in existence as on the date for consideration of the remission applications as it was scrapped by way of a Circular dated 08.05.2014 pursuant to the letter of the Central Government circulated to all the States/UTs requiring the implementation of the judgment of this Court in ***Sangeet vs. State of Haryana*, *(2013) 2 SCC 452 ("Sangeet"),*** wherein this Court held that before actually exercising the power of remission under Section 432 of the CrPC, the appropriate government must obtain the opinion of the Presiding Judge of the convicting or confirming court and that the remission shall not be granted in a wholesale manner, such as, on the occasion of Independence Day etc. That pursuant to the cancellation of the policy dated 09.07.1992, the State of Gujarat came up with a new remission policy dated 23.01.2014, and even this policy would not entitle remission of the accused herein, for two reasons: firstly, because the remission policy of the State of Maharashtra would be applicable as it is the 'appropriate government', and secondly, the 2014 policy of the State of Gujarat bars the grant of remission to convicts of heinous crimes.

7.4. Relying on the opinion of the Special Judge, Sessions Court, Greater Mumbai, it was submitted that the Special Judge had rightly stated that the remission policy applicable in the present case would be the Policy dated 11.04.2008 of the State of Maharashtra in respect of which the Circular dated 13.06.2008 of the State of Maharashtra was issued, wherein a convict of communal crime, gang rape and murder would fall under the categories 2(c), 2(d) and 4 (e) of the Policy which prescribes that the minimum period of imprisonment to be undergone by the convict before remission can be considered would be twenty eight years. Thus, respondents-convicts were not entitled to be granted remission as they had not completed the minimum period of imprisonment as per the applicable remission policy.

7.5. It was further contended that the remission orders under challenge failed to meet the criteria laid down by this Court in ***Sangeet***; and ***Ram Chander vs. State of Chhattisgarh, (2022) 12 SCC 52 ("Ram Chander")***, wherein it has been stated that the appropriate government must obtain the opinion of the Presiding Judge of the convicting court before deciding the remission application. That the State of Gujarat granted remission to all the convicts by completely ignoring the negative opinions expressed by two major stakeholders i.e., the Presiding Judge of the convicting Court in Mumbai and the prosecuting agency (CBI).

7.6. Reliance was placed on the decisions of this Court in ***State of Haryana vs. Mohinder Singh, (2000) 3 SCC 394 ("Mohinder Singh")***; ***Sangeet***; ***Ratan Singh***,and ***Laxman Naskar vs. State of West Bengal, (2000) 2 SCC 595 ("Laxman Naskar")*** to emphasize that a convict cannot claim remission as a matter of right. The remission policies only give a right to the convict to be considered and do not provide an indefeasible right to remission.

7.7. Further, reference was made to the dicta of this Court in ***Mohinder Singh***; ***Epuru Sudhakar vs. State of A.P., (2006) 8 SCC 161 ("Epuru Sudhakar")***; ***Maru Ram; Sangeet; Ratan Singh*** and ***Laxman Naskar*** to contend that the decision to grant remission should be well informed, reasonable and fair and that the power cannot be exercised arbitrarily.

7.8. Emphasizing the gravity of the offences in this case and the grotesque nature of the crimes committed by the accused, learned counsel Ms. Shobha Gupta submitted that while considering the application for remission, the appropriate government was required to bear in mind the effect of its decision on the victim and the family of the victims, the society as a whole and the precedent it would set for the future. To buttress the said submission, she relied on ***Epuru Sudhakar***, ***Swamy Shraddhananda (2) vs. State of Karnataka, (2008) 13 SCC 767***, ***("Shraddhananda")***, and ***Jagdish***. Reliance was also placed on the decision in ***Laxman Naskar*** wherein this Court had discussed the factors to be considered before granting remission.

7.9. It was urged that the prerogative power of remission is not immune from judicial review, *vide* ***Epuru Sudhakar*** wherein it was observed that judicial review of the order of remission is available on the following grounds: (i) non-application of mind; (ii) order is *malafide;* (iii) order has been passed on extraneous or wholly irrelevant considerations; (iv) relevant materials kept out of consideration; (v) order suffers from arbitrariness.

7.10. It was contended that in the present case, remission was granted to all the convicts mechanically and without application of mind to each of the cases andthat the relevant factors were not considered. That the State Government failed to consider the relevant material and make an objective assessment while considering the applications of the convicts for remission. The nature and gravity of the crime, the impact of the remission orders on the victim and her family, witnesses and society at large, were not considered. That mere good behaviour in jail and completion of fourteen years in jail are not the only pre-requisites while considering the application for premature release of the convicts.

7.11. Attention was drawn to the fact that respondent No.3 herein had approached the High Court of Gujarat by way of Crl. Application No.4573 of 2019 seeking a direction to the State Government to consider his application for remission. The High Court *vide* Order dated 17.07.2019 dismissed the same in view of Section 432 of the CrPC. Respondent No.3's second

application was also dismissed *vide* Order dated 13.03.2020 passed by the Gujarat High Court. That infact, within fourteen days of the First Order dated 17.07.2019, respondent No.3 had approached the Government of Maharashtra by way of an application dated 01.08.2019. Upon his application, opinion was sought from the (i) Investigating Agency (CBI) and the (ii) Presiding Officer of the convicting court (Special Judge, Sessions Court, Greater Mumbai), both of whom opined in the negative and against remission being granted to the said respondent. Further, the Superintendent of Police, Dahod, *vide* letter dated 03.02.2020 gave a negative opinion by noting that the victim and her relatives stated that respondent No.3 should not be released. The District Magistrate, Dahod, also gave a negative opinion *vide* letter dated 19.02.2020, so also the Jail Advisory Committee at its meeting held on 20.07.2021. That it was thereafter that respondent No.3 approached this Court by filing Writ Petition (Crl.) No.135 of 2022 and by Order dated 13.05.2022 this Court directed the State of Gujarat to consider respondent No.3's application within a period of two months from the date of the order.

7.12. Further adverting to the sequence of events, it was stated that in the meanwhile, the rest of the convicts had also applied separately for remission in February 2021. The Presiding Officer (Special Judge, Greater Mumbai) *vide* a common letter dated 22.03.2021 gave a negative opinion against the premature release of the remaining ten convicts, respondent Nos.4 to 13 herein. That thereafter, for one good year, their case was kept pending and only after 07.03.2022 the new Superintendent of Police, Dahod, gave a 'no objection' for the premature release of all the convicts by separate letters of the same date. The District Magistrate, Dahod, also gave a positive opinion in favour of the premature release of all the convicts. On 26.05.2022, a meeting of the Jail Advisory Committee of Gujarat was held and this time, all the members of the Committee gave a positive opinion. The Additional Director General of Police, Prisons and Correctional Administration vide letter dated 09.06.2022 this time gave a positive opinion and did not raise any objection for the release of the ten convicts.

7.13. That although the reference by the Jail Advisory Committee to the State Government, was only *qua* respondent Nos.4 to 13, the State Government erroneously recommended the name of respondent No.3 also, to the Central Government for remission even in the absence of any application pending before the State Government.

7.14. Learned counsel for the petitioner next submitted that the Presiding Judge's reasoned negative opinion opposing the premature release was disregarded and this was contrary to the mandate of Section 432(2) of the CrPC. The remission Orders dated 10.08.2022 of respondent No.1 are in the teeth of the negative opinion of the Presiding Judge, Special Judge (CBI), Sessions Court, Greater Mumbai, dated 03.01.2020 and 22.03.2021, thereby, defeating the purpose of Section 432(2) of the CrPC. Further, the remission Orders dated 10.08.2022 are conspicuously silent about the opinion of the Presiding Judge to be mandatorily obtained under Section 432(2) of the CrPC. Not even a reference is made to the said opinion. This amounts to an erasure of record by removing from consideration a document that is statutorily mandated to be considered and judicially held to be determinative. Reliance was placed on ***Ram Chander*** to contend that the opinion of the Presiding Judge of the court that convicted the offender will 'have a determinative effect' on the exercise of executive discretion under Section 432 of the CrPC. Further, reference was made to the decision of this Court in ***V.Sriharan***, wherein a Constitution Bench of this Court held that the procedure stipulated in Section 432(2) of the CrPC is mandatory and that the opinion of the Presiding Judge of the Court which had tried the convict is critical and an essential safeguard to check that the power of remission is not exercised arbitrarily.

7.15. It was next contended that the premature release was granted illegally as the imprisonment in default for the non-payment of fine was not served. The Trial Court while sentencing the respondents-convicts had also imposed a fine of Rs. 2,000/- on each of them, for each of the fourteen counts of murder and three counts of rape and in the event of default in payment of said fine, sentenced them to suffer rigorous imprisonment for a further period of two years each for each count. The

total fine payable by the respondents-convicts amounted to Rs.34,000/- each and, in default, they were liable to serve rigorous imprisonment for a period of thirty-four years (two years each for each count). The Trial Court had further directed that the 'substantive sentences' shall run concurrently and that the period of detention, if any, undergone by the respondents-convicts during the investigation, enquiry, trial, shall be set off against the terms of imprisonment, not being imprisonment in default of payment of fine imposed on the accused. That as per the nominal roll of respondent Nos.3 to 13, none of them had paid the fine sentenced by the Trial Court, making them liable to serve the penalty of rigorous imprisonment for default in payment of fine. But the respondents have neither paid the fine of Rs. 34,000/- to which each of them was sentenced, nor have they served any sentence in default of the non-payment of fine. It was submitted that the penalty of imprisonment ordered for default in payment of fine stands on a completely different footing from the substantive sentence of imprisonment to be undergone for an offence. While under Section 432 of the CrPC, the Government has the power to remit 'punishment for offence', the executive discretion does not extend to waiving off the penalty of imprisonment for default in payment of fine under Section 64 of the IPC. In this regard, reliance was placed on ***Sharad Hiru Kolambe vs. State of Maharashtra, (2018) 18 SCC 718 ("Sharad Kolambe")*** and ***Shantilal vs. State of M.P., (2007) 11 SCC 243 ("Shantilal")***.

7.16. It was asserted that respondent No.1 while granting premature release failed to apply its mind and address the determinative factors outlined by this Court in ***Laxman Naskar***. Thus, the orders of remission are vitiated by the vice of arbitrariness for non-consideration of relevant facts and factors. According to learned counsel for the petitioners, a bare perusal of the Orders dated 10.08.2022 would make it clear that premature release was granted mechanically and arbitrarily, without giving due consideration to the factors enumerated in ***Laxman Naskar,*** qua each of the respondents-convicts. That the Order(s) dated 10.08.2022 are conspicuous in their silence on the behavior and the following acts of misconduct of each of the respondents-convicts, including the offences committed while on parole/ furlough, namely,:

i. Case Crime No.1121001200158/2020 was registered against the respondent-convict, Mitesh Chimanlal Bhatt, under Sections 354, 304 and 306 of the IPC, committed on 19.06.2020 during parole/furlough; and

ii. Case Crime No.02/2015 was registered against the respondent-convict, Rameshbhai Rupabhai Chadana under the Prisons Act.

7.17. It was further submitted that it is trite that in cases where a convict has been sentenced to more than one count of life imprisonment, he can only be released if remission is duly granted as per law for each count of life imprisonment. That it is a matter of record that the respondents-convicts were sentenced on fifteen counts of life imprisonment. However, the Orders dated 10.08.2022 have not granted remission for each of the fifteen counts and is only a generic and blanket order, making the release of the convicts illegal and arbitrary.

7.18. That respondent No.3 approached this Court in Writ Petition (Crl.) No.135 of 2022, without disclosing that he had already acted on the judgment of the Gujarat High Court dated 17.07.2019 and had submitted his application to the Home Department, State of Maharashtra, and that his application had already been considered by the authorities concerned, whereby, the major stakeholders had written against the grant of remission to him. Further, when the matter was listed before this Court, no notice was issued to the petitioner– victim and neither was she heard by this Court in the matter.

7.19. That the Orders dated 10.08.2022 have blatantly ignored the grave and real apprehension regarding the safety and security of the victims-survivors raised by public functionaries whose opinions are required to be taken into account by respondent No.1 State before granting premature release as per the 1992 policy. That this Court in a catena of judgments, such as, ***Epuru Sudhakar*** and ***Rajan vs. Home Secretary, Home Department of Tamil Nadu (2019) 14 SCC 114 ("Rajan")*** has highlighted the importance of considering the impact of premature release on the victims in particular and the society in general. That even the Superintendent of Police, Dahod, on 03.02.2020 had recommended against the release of

Radheyshyam Bhagwandas Shah as he had cited the possibility of peace being disturbed. The Sessions Judge, Panchmahal at Godhra also raised questions regarding the security of the victim – petitioner herein.

7.20. Learned counsel next asserted that the *en-masse* and non-speaking "sanction" of the Central Government dated 11.07.2022 under Section 435(1)(a) of the CrPC does not meet the statutory requirement of "consultation". The said sanction conveys its approval for the premature release of eleven convicts *sans* any reason as to why the case of each respondent-convict is deemed fit for grant of remission. Thus, the approval was granted without considering the relevant factors outlined in ***Laxman Naskar***.

7.21. That non-application of mind is evident in the non-speaking and stereotyped orders dated 10.08.2022 which are bereft of any reason. The Orders are devoid of reasons or grounds as to why the respondents-convicts were found fit for the grant of remission. All of the eleven orders are a verbatim replication of each other, having only substituted the name and personal details of the respondents-convicts. Further, the recommendations of the Jail Advisory Committee dated 26.05.2022 as regards remission of respondent Nos.3 to 13 are untenable, being arbitrary and mechanical and vitiated by non-application of mind. The said opinions are verbatim and mechanical reproductions of each other that show no independent consideration of facts of each case of the convicts.

7.22. With the aforesaid submissions, it was prayed that Writ Petition (Crl.) No.491 of 2022 be allowed and a writ, order or direction be issued quashing the Orders dated 10.08.2022 passed by the State of Gujarat by which the convicts in Sessions Case No. 634 of 2004, Mumbai (respondent Nos.3 to 13 herein), were released prematurely.

8. Learned senior counsel Ms. Indira Jaising appearing for the petitioner in Writ Petition(Crl.) No.326 of 2022, at the outset submitted that the petitioner is a Member of Parliament and is a public personality and consequently possesses the locus to file this petition as a bona fide person and citizen of India. That the petitioner seeks to discharge her fundamental duty under Article 51A(e) of the Constitution of India,

seeking to promote harmony and the spirit of brotherhood amongst the people of India, as well as to denounce the derogation of the dignity of women. That the petitioner seeks to uphold the rule of law and thus is not a mere busybody.

8.1. The following submissions were made to contest the orders of remission:

(i) that when the actions of the State cause some harm to the general public, an action by a concerned citizen would be maintainable and reliance was placed on ***B.P Singhal vs. Union of India, (2010) 6 SCC 331 ("B.P Singhal")*** in this regard.

(ii) that the impugned decisions of remission is characterized by arbitrariness and *mala fides* and bear no consideration of relevant factors That the power of the executive must be exercised in line with constitutional ideals and must be for the benefit of the public. In this regard, reliance is placed on ***Maru Ram*** and ***S.P. Gupta vs. Union of India, (1981) Supp SCC 87 ("S.P. Gupta")***.

(iii) that there exists no statutory right of appeal against an order of remission. The only avenue available to assail an order of remission is either under Article 32 or Article 226. Reliance was placed on ***Epuru Sudhakar*** and ***Ram Chander.*** Further, the jurisdiction of this Court is not ousted by the existence of alternative legal remedies. Reliance was placed on a Constitution Bench decision of this Court in ***Kavalappara Kottarathil Kochuni vs. States of Madras and Kerala, (1960) 3 SCR 887 ("Kochuni")***.

(iv) that the present proceedings pertain to administrative law and not criminal law and as a result, the principle of being a stranger to the criminal proceeding does not apply to the case at hand. Nevertheless, this Court has entertained petitions filed by 'strangers' in criminal matters in the past, as in the case of ***K. Anbazhagan vs. Superintendent of Police, (2004) 3 SCC 767 ("K. Anbazhagan")***.

(v) that such exercises of executive power may be challenged on the basis of the grounds laid down in ***Epuru Sudhakar*** and ***Maru Ram***.

(vi) that an important question of law arises in the present proceedings, namely, whether it is appropriate to grant remission after a period of fourteen years to convicts of heinous crimes. That a further question arises, as to whether, the victims of such crimes must be heard and due consideration given to their vulnerability prior to the grant of remission. That there needs to be a consideration of how compliant such executive actions and the associated policies are with constitutional morality. Therefore, this Court may quash the remission orders passed under Section 432 of the CrPC if they appear to be poorly reasoned.

(vii) that there is a need to situate the crimes committed in the larger context of sectarian and communal violence that was ensuing in the 2002 riots in Gujarat State. That the crimes were specifically targeted at the victim on the basis of her religion and gender. That these heinous crimes constitute crimes against humanity. It was submitted that the nature of the crime is important to consider while deciding whether to grant remission. The heinousness of the crimes committed by respondent Nos.3 to 13, the communal motivation of the crimes and the context in which those took place are contended to have not been considered by the State while granting remission. Reliance was placed on ***Sanaboina Satyanarayana vs. Government of Andhra Pradesh, (2003) 10 SCC 78 ("Sanaboina Satyanarayana")***, wherein a certain Government Order issued by the State of Andhra Pradesh that excluded from the scope of remission those prisoners who had committed crimes against women and were sentenced to life imprisonment was upheld by this Court considering the nature of the offences.

(viii) that the Executive is bound not merely by provisions of the CrPC but also by the overarching spirit of the Constitution that seeks to promote the upliftment of women, children, and minorities and to protect these groups from further vulnerability and marginalization. That the policies and actions of the State must be guided by this vision.

(ix) that, in accordance with the aforementioned constitutional principles, grant of remission to those persons sentenced to life imprisonment and accused of crimes under the Scheduled Castes and Schedules Tribes (Prevention of Atrocities) Act, the Explosive Substances Act and the Indian Arms Act, as well as crimes against women under Sections 376 and 354 of the IPC must not be permissible. Factors such as the opinion of the Presiding Judge, public interest, potential for recidivism, impact on the victims and on society and the nature of the offence must be borne in mind by the State, as held in ***Epuru Sudhakar, Sanaboina Satyanarayana*** and ***Zahid Hussain vs. State of West Bengal, 2001 (3) SCC 750 ("Zahid Hussain")***. That the non-consideration of these factors proves the *mala fide*, arbitrary and unreasonable manner in which the impugned orders were passed.

(x) that the 1992 Policy of remission of the State of Gujarat does not contain any substantive guidelines pertaining to remission and merely deals with procedural formalities. That the 2014 Policy is thus the first instance at which categories of crimes for which remission may not be granted was outlined. As such, it is the 2014 Policy that would apply to the question of remission for respondent Nos.3 to 13.

(xi) that the grant of remission to the respondent Nos.3 to 13 is in violation of India's obligations under international law, specifically instruments such as the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Discrimination Against Women. That rape was used as a tool of oppression by the perpetrators and the victim in the instant case experienced significant trauma as a consequence.

(xii) that the grant of remission in the instant case is in violation of the obligation to prevent crimes against humanity, which itself forms a part of the norm of jus cogens. That there is a link between the peremptory norm of jus cogens and fundamental values, making the former non-derogable

and a part of domestic law even if not explicitly codified. Reliance was placed on ***State of Punjab vs. Dalbir Singh, (2012) 3 SCC 346 ("Dalbir Singh")*** on this aspect.

(xiii) that the acts of violence that were committed in Gujarat in 2002 are crimes against humanity, owing to their widespread nature and communal motivations. That remission must not be granted to perpetrators of crimes of such gravity.

8.2. With the above submissions learned senior counsel for the petitioners sought quashing of the impugned orders.

9. Learned counsel Ms. Vrinda Grover for the petitioner in Writ Petition(Crl.) No.352 of 2022, submitted that it was absolutely necessary to consider the opinion of the Presiding Judge. Reliance was placed on ***Ram Chander*** and ***V. Sriharan***. Her further submissions are recorded as under:

(i) that the Presiding Judge, namely the Special Judge (CBI), Sessions Court, Mumbai gave negative opinions dated 03.01.2020 and 22.03.2021 as to grant of remission to respondent Nos.3 to 13. The said opinion was well-reasoned and took into account all of the relevant factors, but this was completely disregarded by the respondent-State.

(ii) that a fine was imposed on each of the respondent-convicts as a part of their sentence, amounting to Rs. 34,000/- per person. That they had defaulted in paying these fines and thus would be required to undergo rigorous imprisonment for a further period of 34 years. The Trial Court had clarified that these sentences were substantive in nature and would run concurrently. In this context, reliance was placed on ***Sharad Kolambe*** and ***Shantilal***.

(iii) reiterating the submissions regarding the remission orders being arbitrary by virtue of non-consideration of relevant factors, it was urged that the criteria outlined in the decision of this Court in ***Laxman Naskar*** were not considered at all. Reliance was further placed on the decision of this Court in ***Mohinder Singh***, wherein it was held that the decision to grant remission must be reasonable, well-informed and fair. That non-application of mind and the mechanical nature of the remission orders utterly belie these principles.

(iv) that reference has only been made to four documents, namely (1) the order of this Court dated 13.05.2022, (2) the letter of the Additional Director General of Police and Inspector General of Prisons, State of Gujarat at Ahmedabad, (3) the Department Circular dated 09.07.1992 and (4) the letter of the Ministry of Home Affairs, Government of India in the impugned orders of remission. It was contended that the non-consideration of determinative factors has rendered the remission orders mechanical and arbitrary, with reliance placed on what is described as the untenable and unlawful *en-masse* approval of the Central Government.

(v) that one of the criteria that is required to be considered which was highlighted in ***Laxman Naskar*** is the possibility of reformation and recidivism. That these factors have been given no consideration as there is no mention of the respondent-convicts' behavior while in prison, as well as offences committed while out on parole/furlough. That a case has been registered against one of the respondent-convicts under Sections 304, 306 and 354 IPC while on parole. That a range of punishments were imposed on the respondent-convicts in prison hence, the possibility of recidivism cannot be entirely ruled out.

(vi) that there is a real and grave apprehension of danger to the victim if the respondent-convicts are released into society. This has been reflected in the recommendation of Superintendent of Police, Dahod as well as the questions raised by the Principal and Sessions Judge, Panchmahal at Godhra in the Jail Advisory Committee meeting dated 26.05.2022.

(vii) that remission must be granted for each particular count of life imprisonment, as all of these are superimposed over each other. Remission granted qua one sentence does not automatically extend to the others as well. That a generic, mechanical and unreasoned blanket order of remission has been passed by the respondent-State, as remission is not stated to have been granted for all of the life sentences of each respondent-convict.

(viii) that Section 435(1)(a) of the CrPC makes it mandatory for the State Government to consult the Central Government regarding the exercise of power to grant remission. But the *en-masse* and non-speaking nature of the sanction granted by the Central

Government, merely conveys approval of the premature release of the respondent-convicts, which do not meet the requirement of 'consultation'. Reliance was again placed on ***Laxman Naskar***.

(ix) further, the opinion of the Sessions Judge, Panchmahal, Godhra is of a casual and perfunctory character, that doesn't pay heed to the heinous nature of the crimes committed.

(x) it was further submitted that the remission orders having thus been established as unreasoned, untenable and vitiated by arbitrariness and *mala fides*, there is a need for judicial intervention in the same.

10. Learned counsel for the petitioner in Writ Petition(Crl.) No.319 of 2022, Ms. Aparna Bhat submitted that the aforesaid writ petition has been filed purely in the interest of the general public and out of concern for the impact on society if the respondents-convicts were released. That there is no political agenda behind the filing of this writ petition by the petitioner, who is a member of a national political party and an advocate for women's rights.

11. Sri Mohammad Nizamuddin Pasha, learned counsel appearing on behalf of the petitioner in Writ Petition (Crl.) No.403 of 2022 submitted that the cases which are at stages prior to conviction. i.e., investigation and trial must be treated as being on a different footing as guilt would not have been established and the fair trial rights of the accused still subsisted. However, there is no right to remission post-conviction as held in ***V.Sriharan***. That it is only upon conviction that the need for the accused to remain in prison becomes a concern of the society. That all theories of punishment, including those of retributivism and utilitarianism, emphasize the impact on society as being of primary importance. Reliance was placed on ***T.K. Gopal vs. State of Karnataka, (2000) 6 SCC 168 ("T.K. Gopal"),*** ***Narinder Singh vs. State of Punjab, (2014) 6 SCC 466 ("Narinder Singh"),*** ***Shailesh Jasvantbhai vs. State of Gujarat, (2006) 2 SCC 359 ("Shailesh Jasvantbhai")*** and ***Ahmed Hussain Vali Mohammed Saiyed vs. State of Gujarat, (2009) 7 SCC 254 ("Mohammed Saiyed")***.

12. Sri. S.V. Raju, learned Additional Solicitor General of India, appearing on behalf of the State of Gujarat and Union of India, at the outset submitted that the writ petitions filed by persons other than the victim are not maintainable. That the said persons are strangers and

have no locus-standi to challenge the remission orders passed by the State of Gujarat. The said petitioners are in no way connected with the proceedings which convicted the respondents herein nor the proceedings which culminated in the grant of remission to the convicts. Reliance was placed on the decisions of this Court in ***Rajiv Ranjan***; ***Gulzar Ahmed Azmi***; ***Simranjit Singh*** and ***Ashok Kumar*** to contend that no third party/stranger's interference in criminal matters is permissible in law in the garb of filing a PIL.

12.1. Referring to Writ Petition (Crl.) No.319 of 2022, it was contended that nowhere has the petitioner therein, namely, Subhasini Ali pleaded as to how her fundamental rights had been abridged and as to how she was aggrieved by the action of the State Government. That the petitioner therein was nothing but an interloper and a busybody and not a 'person aggrieved' as per the dicta of this Court in ***M. V. Dabholkar***and ***Jasbhai Motibhai.*** Thus, the PIL filed by such a person is nothing but an abuse of the PIL jurisdiction of this Court and against the principles laid down in ***Tehseen*** and ***Ashok Kumar***. Therefore, learned ASG sought for dismissal of all the PILs challenging the impugned orders of remission on the ground of maintainability.

12.2. It was next contended that there was no illegality in the Orders granting remission to respondent Nos.3 to 13, dated 10.08.2022. That this Court in Writ Petition (Crl.) No.135 of 2022 *vide* judgment dated 13.05.2022 had held that the policy which would be applicable for deciding the remission application was the one which was in vogue at the time of conviction i.e., the premature release policy of 1992 and that for the purposes of Section 432 of the CrPC, the 'appropriate government' for considering the remission application is that State in which the offence was committed and not the State in which the trial was conducted and therefore, had directed the State of Gujarat to consider the application of respondent No.3, Radheshyam Bhagwandas Shah. Accordingly, the respondent-State of Gujarat had considered the application of the convict as per the procedure prescribed under Section 432 of the CrPC read with Section 435 of the CrPC, along with the Premature Release of Convicts Policy of 1992. The State Government considered the cases of all eleven prisoners as per the policy of 1992 and remission was granted on 10.08.2022.

12.3. That further, the Order(s) dated 10.08.2022 were passed after duly considering the opinions expressed by Inspector General of Prisons, Gujarat State; Jail Superintendent; Jail Advisory Committee, District Magistrate; Superintendent of Police, CBI, Special Crime Branch, Mumbai; and the Special Court, Mumbai (CBI). That as per Section 435 of the CrPC, it is indispensable to obtain the sanction of the Government of India in cases in which the investigation of the offence was carried out by a central investigation agency. In the present case, the investigation was carried out by CBI, hence, the State Government obtained the approval of Government of India.

12.4. It was next submitted that respondent Nos.3 to 13 had completed more than fourteen years in custody, that their behaviour had been good and the opinions of the concerned authorities had been obtained as per the policy of 09.07.1992. The State Government submitted the opinions of the concerned authorities to the Ministry of Home Affairs, Government of India *vide* letter dated 28.06.2022 and sought the approval of the Government of India which conveyed its concurrence/ approval under Section 435 of the CrPC for the premature release of eleven convicts vide letter dated 11.07.2022. Hence, after following the due procedure, Orders were issued on 10.08.2022 to release the convicts which would not call for any interference by this Court.

12.5. Reliance was placed on the judgment of this Court in ***Jagdish*** wherein it was held that if a policy which is beneficial to the convict exists at the time of consideration of his application for premature release, then the convict cannot be deprived of such a beneficial policy. It was held in the said case that, *"In case a liberal policy prevails on the date of consideration of the case of a "lifer" for premature release, he should be given the benefit thereof."* That bearing in mind such considerations, the applications of respondent Nos.3 to 13 for remission were considered and decided.

12.6. That the crime in the instant case was admittedly committed in the State of Gujarat and ordinarily, the trial was to be concluded in the same State and in terms of Section 432 (7) of the CrPC, the appropriate government in the ordinary course would be

the State of Gujarat. However, the trial in the instant case was transferred under exceptional circumstances by this Court to the neighboring State of Maharashtra for the limited purpose of trial and disposal by an order dated 06.08.2004 but after the conclusion of trial and the prisoners being convicted, the matter stood transferred to the State where the crime was committed and thus, the State of Gujarat was the appropriate government for the purpose of Section 432(7) of the CrPC.

12.7. It was submitted that the Orders dated 10.08.2022 were passed by the Government of Gujarat after following the due procedure laid down in this regard and on an application of mind. Therefore, the same do not call for any interference by this Court in these petitions.

13. Learned Counsel for respondent No.3, Sri Rishi Malhotra at the outset attacked the maintainability of the writ petitions on the ground that in substance, the petitions seek to challenge the judgment of this Court dated 13.05.2022 in Writ Petition(Crl.) No.135 of 2022; that the same is impermissible and is in the teeth of the judgment of a Constitution Bench of this Court in ***Rupa Ashok Hurra vs. Ashok Hurra, (2002) 4 SCC 388***, ***("Rupa Ashok Hurra")*** wherein it has been held that a writ petition assailing the judgment or order of this Court after the dismissal of the Review Petition is not maintainable. Thus, the only remedy, if any, available to the petitioner-victim herein against the dismissal of the Review Petition, is to file a Curative Petition as propounded by this Court in the case of ***Rupa Ashok Hurra***.

13.1. Sri Rishi Malhotra further submitted that in this proceeding this Court cannot sit over the judgment passed by another co-ordinate bench. It was further submitted that this Court by its judgment dated 13.05.2022 was right in categorically directing the State of Gujarat to consider the application for premature release of respondent No.3 in terms of the policy dated 09.07.1992 which was applicable on the date of conviction. That after duly taking into account the fact that respondent No.3 had undergone over fifteen years of imprisonment and that no objections were received from the Jail Superintendent, Godhra and that nine out of ten members of the Jail Advisory Committee had recommended his premature release. That coupled with the aforesaid facts the Home Department of the State of

Gujarat as well as the Union Government had recommended and approved the premature release of respondent No.3. This clearly demonstrates that the remission order was correct. Further, it is nowhere mentioned in the 1992 policy that all stakeholders must give a unanimous opinion for the release of the convict. All it says is that the State Government should collate various opinions from different quarters in order to arrive at a decision.

13.2. As regards the contention of learned counsel for the petitioner-victim to the effect that the Orders are illegal inasmuch as those were passed without consulting the Presiding Judge of the convicting court as required under Section 432(2) of the CrPC, it was submitted that the said provision categorically stipulates that the appropriate government 'may require' the Presiding Judge of the Trial Court to give his opinion, hence obtaining such an opinion is not mandatory; whereas, Section 435 of the CrPC uses the word 'shall' in respect to the State Government to act only after consultation with the Central Government. The legislature is conscious to use the words 'may' and 'shall' whenever it deems appropriate and necessary and that the said procedure has been followed in the instant case.

14. At the outset, learned senior counsel appearing for respondent No.13, Sri Sidharth Luthra contended that a writ petition does not lie against the final order of this Court, thus the petitioners could have only filed a Curative Petition. He further submitted as follow:

i) In this regard reliance was placed on the decision of this Court in ***Rupa Ashok Hurra***, wherein it was held that a writ petition under Article 32 assailing a final judgment of this Court is not maintainable. That since the Review Petition against the Order dated 13.05.2022 has been dismissed by this Court, similar contentions cannot be re-agitated in the guise of the present writ petition. Reliance was also placed on the decision of this Court in ***Naresh Shridhar Mirajkar vs. State of Maharashtra, AIR 1967 SC 1 ("Naresh Shridhar Mirajkar")***, wherein it has been held that a writ shall not lie against an order of a Constitutional Court. It was thus submitted that the order dated 13.05.2022 has attained finality and cannot be questioned by way of a

writ petition under Article 32. Furthermore, in view of the Rules framed by this Court, Order XLVIII thereof lays down how an order of this Court can be questioned by means of a Curative Petition and thus, a natural corollary is that the same cannot be done through a writ petition.

ii) As regards the issue of appropriate government and appropriate policy, learned senior counsel Sri Luthra submitted that the said issues stood settled in view of this Court's Order dated 13.05.2022. The judgments of this Court in ***Rashidul Jafar vs. State of U.P., 2022 SCC OnLine SC 1201 ("Rashidul Jafar"); State of Haryana vs. Raj Kumar, (2021) 9 SCC 292 ("Raj Kumar")*** and ***Hitesh vs. State of Gujarat (Writ Petition(Crl.) No.467/2022)***("***Hitesh***") were pressed into service wherein it had been held that the policy as on the date of conviction would apply, and therefore, the 1992 Policy of the State of Gujarat will apply for the grant of remission in the present case.

iii) Learned senior counsel thereafter raised the plea that in India, a reformative/rehabilitative and penal sentencing policy is followed and not one which is punitive in nature. The same was reiterated when the Model Prison Act, 2023 was finalized which aims at *"reforming prison management and ensuring the transformation of inmates into law-abiding citizens and their rehabilitation in society."* Furthermore, in the case of ***Vinter vs. The United Kingdom (Applications Nos.66069/09, 130/10 and 3896/10), (2016) III ECHR 317***("***Vinter*** ") in the context of rehabilitation and reformation it was held by the European Court of Human Rights that, *"Moreover, if such a person is incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there is the risk that he can never atone for his offence: whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable."*Learned senior counsel submitted that respondent No.13 had exhibited unblemished behaviour in prison and there was no criminality attached to his conduct in prison.

iv) Sri Luthra refuted the argument of the petitioners that in the light of the grievous nature of the offence, the convicts herein do not deserve remission. At the stage of remission, the length of sentence or the gravity of the original crime cannot be the

sole basis for refusing premature release as held in ***Satish vs. State of UP*, *(2021) 14 SCC 580 ("Satish")***. Therefore, any argument regarding the factual nature of the crime or the impact it had on society are not relevant for consideration of remission was the submission of Sri Luthra.

v) That it is open for the High Court as well as this Court to modify the punishment by providing for a specific period of incarceration without remission, considering the purported heinous nature of the offence but neither the High Court nor this Court chose to exercise the said power to incarcerate the private respondents herein for a duration which was non-remittable. This shows that the aforesaid argument advanced by the petitioner is only a red herring.

vi) It was emphasized that an order of remission passed by an authority merely affects the execution of the sentence, without interfering with the sentence passed by the Court. Therefore, since the matter has already attained finality, it is not possible to question the validity of such an order on factual grounds alone, such as, the nature of crime, impact on society and society's cry for justice.

vii) Learned senior counsel submitted that the mere fact that fine had not been paid or that there was a default in payment of the fine imposed does not impact the exercise of the power of remission. The sentence is something which an offender must undergo unless it is set aside or remitted in part or in whole either in appeal, or in revision, or in other appropriate judicial proceedings or 'otherwise', whereas, a term of imprisonment ordered in default of payment of fine stands on a different footing *vide* ***Shantilal***;***Abdul Gani vs. State of Madhya Pradesh, (1950) SCC OnLine MP 119 ("Abdul Gani")*** and ***Shahejadkham Mahebubkham Pathan vs. State of Gujarat*, *(2013) 1 SCC 570 ("Shahejadkham Mahebubkham Pathan")***. Further, reliance was placed on ***Sharad Kolambe***, wherein it was observed by this Court that, "*If the term of imprisonment in default of payment of fine is a penalty which a person incurs on account of non-payment of fine and is not a sentence in strict sense, imposition of such default sentence is completely different and qualitatively distinct from a substantive sentence.*"

15. Learned senior counsel appearing for respondent No.7 Mrs. Sonia Mathur, while adopting the submissions of other senior counsel further contended as under:

15.1. That as per Section 432 (7)(b) of the CrPC and the judicial precedent set in ***Radheshyam Bhagwandas Shah***, the appropriate government would be the State of Gujarat. The said judgment has attained finality as the Review Petition filed against the said judgment was dismissed by this Court on 13.12.2022. Thus, the said judgment must be followed for the sake of judicial propriety.

15.2. As to the nature of the requirement under Section 432 (2) of the CrPC, i.e., whether mandatory or directory, it was submitted that as observed by this Court in ***Ram Chander*** the opinion so obtained is not to be mechanically followed and the government has the discretion to seek an opinion afresh. That the said view would demonstrate that the discretion vests with the concerned government as to whether or not to seek and rely upon the opinion of the Presiding Judge of the Trial Court.

15.3. As regards the contentions of the learned counsel for the petitioner-victim as to non-payment of fine, it was submitted that a fine of Rs.6,000/- was paid by respondent No.7 without any objection on 27.09.2019 before the Sessions Court, Greater Mumbai. However, without prejudice to the said payment, there is no provision in the Prison Manual of Gujarat, which bars remission from being granted if the fine is not paid. The grant of remission cannot be restricted just because a convict is not financially capable to bear the fine. The same would cause discrimination based on the economic and financial capacity of a convict to pay fine, resulting in the violation of Articles 14 and 21 of the Constitution.

15.4. We have heard learned counsel for the other respondents. With the aforesaid submissions, it was prayed that these writ petitions be dismissed.

Reply Arguments:

16. Ms. Shobha Gupta, learned counsel for the petitioner-victim submitted in her rejoinder on the point that the writ petition was maintainable under Article 32 of the Constitution as follows:

(i) that the order of grant of remission being an administrative order, there was neither a statutory nor substantive right of appeal available to the aggrieved parties. The only remedy available was to file a writ petition under Article 226 of the Constitution before the High Court of Gujarat, or to file a writ petition before this Court under Article 32 of the Constitution.

(ii) that this Court has on multiple occasions entertained writ petitions under Article 32 of the Constitution in those cases where there existed a "gross violation of fundamental rights", or when an executive or administrative decision "shocked the conscience of the public, the nation or of this Court". In this context, reliance was placed on the judgments of this Court in ***Epuru Sudhakar; Satpal vs. State of Haryana, (2000) 5 SCC 170 ("Satpal")*** and ***Mohammed Ishaq vs. S. Kazam Pasha, (2009) 12 SCC 748 ("Mohammed Ishaq").*** It was submitted that a similar issue of maintainability arose in ***Mohammed Ishaq***, wherein this Court observed that the mere existence of an alternative remedy in the form of Article 226 does not preclude an aggrieved person from approaching this Court directly under Article 32. The rule requiring the exhaustion of alternative remedies was described as being one of "convenience and discretion" as opposed to being absolute or inflexible in nature.

(iii) that this Court had in the past entertained writ petitions under Article 32 filed by convicts seeking intervention in matters of premature release or the issuance of appropriate directions. Reliance was placed on the judgments in ***Ram Chander, Laxman Naskar*** and ***Rajan.***

(iv) that this Court had earlier entertained a writ petition filed by none other than respondent No.3 himself and no question was raised as to the maintainability of that writ petition. All of the other private respondents are beneficiaries of the order dated 13.05.2022 passed by this Court in the aforesaid writ petition. It is thus incongruous to raise the objection of maintainability only against the writ petition filed by the petitioner-victim. That the petitioner-victim was totally unaware of Writ Petition (Crl.) No.135 of 2022 filed by respondent No.3 seeking premature release before this Court. The petitioner learnt about the release, like the general public did, from the news and social media.

That the petitioner had barely begun to recover from the shock of respondent Nos.3 to 13 being released when several PILs were filed, and this Court was already seized of the matter. This left the petitioner with no choice but to approach this Court.

(v) that the petitioner had also filed a Review Petition seeking review of the order dated 13.05.2022, wherein this Court held the State of Gujarat to be the appropriate government to consider the grant of remission, being the State in which the crime took place. The said order was *perincuriam* and contrary to the judgements of this Court. On this aspect, reliance was again placed on ***V.Sriharan, Rattan Singh, M. T. Khan*** and ***Hanumant Dass***. Hence, the petitioner was under the impression that the said Review Petition and this writ petition would be considered together by this Court. But the Review Petition has been dismissed. Hence, this writ petition has to be considered on its own merits.

(vi) that the challenge to the maintainability of this writ petition is fallacious in the context of the specific argument raised by respondent Nos.1 and 2, namely, that the direction given by this Court as on 13.05.2022 was a mandate that was merely being adhered to in the remission order and therefore the same would not be open to challenge. That this further exemplifies non-application of mind and a hasty and mechanical manner of granting remission by misrepresenting about the order dated 13.05.2022.

(vii) It was submitted that the 'right to justice' was recognized as an indispensable human and fundamental right in ***Anita Kushwaha vs. Pushap Sudan, (2016) 8 SCC 509 ("Anita Kushwaha")***, and that this writ petition was maintainable on that basis also.

In light of the aforementioned submissions, learned counsel contended that the filing of a writ petition under Article 32 before this Court is the most efficacious remedy available to the petitioner.

16.1. Reiterating her submissions regarding the non-consideration of the negative opinions of the investigating agency, namely the CBI as well as the Judge of the Special CBI Court,

Mumbai, learned counsel went on to refute the claim of the learned Additional Solicitor-General that the relevant opinion would be that of the Presiding Judge of the Godhra Court who was convinced of the merits of grant of remission. That this contention of learned ASG would contradict the plain language of Section 432(2) which specifies that the Presiding Judge should have been the one who awarded or confirmed the sentence. Reliance was again placed on the judgments of this Court in ***Sangeet, Ram Chander*** and ***V. Sriharan.*** Learned counsel further contended that the submission of the learned ASG that the use of the word 'may' in Section 432(2) would imply that there is no necessary requirement to seek the opinion of the Presiding Judge is erroneous in light of the dictum of this Court in ***V.Sriharan***.

16.2. It was next contended that a letter dated 17.11.2021 was filed along with the application dated 10.08.2022. The said letter by the State of Gujarat addressed to the State of Maharashtra detailed that the State of Gujarat possessed no powers of remission with respect to respondent No.3 and that the appropriate government in this respect would be the State of Maharashtra. Despite taking this view, which is in accordance with the position of law laid down by this Court in various cases, including ***V. Sriharan***, no review petition was filed by the State challenging the 13.05.2022 order.

16.3. It was next submitted that the learned Additional Solicitor-General had placed on record the opinion of the CBI dated 09.07.2022 wherein, after an apparent change of mind, grant of remission to respondent Nos.3 to 13 was recommended. That neither of the documents, namely, the letter of the State of Gujarat and the changed opinion of the CBI find any mention in the counter-affidavit filed by the State on 17.10.2022. It was further submitted that these additional documents establish the rapid timeline of the process adopted by the Central Government in affirming the orders of remission, as the State Government's communication was received on 06.07.2022, the opinion of the CBI was sought and received on 09.07.2022 and the Central Government expressed its concurrence on 11.07.2022.

16.4. It was further contended that respondent No.3 produced a document dated 18.06.2022 during the course of his arguments, stating that the same was the opinion of the Presiding Judge of the Mumbai Special Court (CBI). However, the veracity of the said document cannot be established as the State claimed to be not in possession of and is entirely unaware of the same.

16.5. Learned counsel reiterated that the above facts reveal non-application of mind and the mechanical manner in which the orders of remission were passed in the instant case.

16.6. Learned counsel for the petitioners next submitted that on 30.08.2023, the fine amounts owed were deposited by respondent Nos.3 to 13. That this is as an admission on their part of the non-payment of fine. It was contended that they would ordinarily have had to undergo a further period of six years of imprisonment. That non-consideration of this fact further proves the non-application of mind and a mechanical exercise of power by the State of Gujarat and Union of India in granting remission.

16.7. Learned counsel went on to submit that in Writ Petition (Crl.) No.135 of 2022 filed by respondent No.3, there was no mention of material particulars, such as, the name of the petitioner-victim and the nature of the crimes in question, i.e., gang rape and mass murder in the petition. Also the fact that his application for grant of remission before the State of Maharashtra had been negatively opined by all the concerned authorities. That respondent No.3 did not place on record the judgements and orders of the Trial Court, High Court, and this Court that had upheld his conviction. That he made "incorrect and misleading" statements with reference to the orders of the Bombay High Court dated 05.08.2013 and Gujarat High Court dated 17.07.2019, namely, that the two courts had given differing opinions, and this fact played a role in this Court's decision-making while passing the order dated 13.05.2022. Respondent No.3 made it seem like both High Courts were sending him to the other State and that there was a contradiction. However, the aforesaid order of the Bombay High Court was dealing with the transfer of convicts to another jail in their parent State and did not discuss the issue of remission, which could not have arisen in the year 2013.

16.8. It was reiterated that the investigating agency of the State of Gujarat had filed a closure report stating that the accused persons were not traceable. That the FIR contained erroneous recording of facts merely to hinder the investigative process. That the case was transferred by this Court to the State of Maharashtra as a consequence of the tainted nature of investigation. That the only reason the petitioner could get justice was because the investigation was conducted by the CBI. That this demonstrates the highly biased and partisan treatment of the petitioner by the State of Gujarat. That the State has been granting parole and furlough to the respondents in a liberal manner once they were transferred to the Godhra Jail. That in light of the highly diabolical and gruesome nature of the crimes, the treatment awarded to the respondents by the State indicates favouritism and leniency.

16.9. Learned counsel reiterated that the nature of the crimes committed by the respondent Nos.3 to 13 were unusual and egregious. That these crimes were very shocking to the society as a whole and the treatment of the respondents upon being granted remission invoked a common sense of pain in the nation. That in fact the Bombay High Court had described the brutal treatment of the victims by the respondent Nos.3 to 13, which was reflected in the condition of the dead bodies. These factors require that respondents Nos.3 to 13 be treated differently from other ordinary criminals.

17. Learned senior counsel, Ms. Indira Jaising, appearing for the petitioner in Writ Petition (Crl.) No.326 of 2022 in her rejoinder at the outset submitted that the State of Gujarat does not have a policy of any kind for the release of prisoners under Section 432 of the CrPC. That the 1992 Policy merely outlines the procedure to be followed when releasing convicts on remission. That the State must abide by the law laid down by this Court as well as the constitutional mandate to protect the fundamental rights of women, particularly when they are victims of sexual violence in relation to ethnic conflict.

17.1. Further, it was contended that the State of Gujarat is not the appropriate government and therefore the order of this Court dated 13.05.2022 is *per incuriam* by virtue of failing to follow the binding precedent in ***V. Sriharan***. That the impugning of the order of the Gujarat High Court that held the State of

Maharashtra to be the appropriate Government in Writ Petition (Crl.) No.135 of 2022, filed by respondent No.3, is completely contrary to the position of law laid down in ***Naresh Shridhar Mirajkar***, wherein it was held that no writ petition alleging the violation of fundamental rights would lie against the judgement or order of a court. That the respondent No.3 committed fraud on this Court by misrepresenting the order of the Bombay High Court dated 05.08.2013 in Writ Petition(Crl.) No.135 of 2022. That the question of two High Courts taking "dramatically different views" did not arise as the issue of appropriate Government was not in question before the Bombay High Court at all. That this amounts to *suppressio veri, expression falsi*. That this Court in ***Union of India vs. Ramesh Gandhi, (2012) 1 SCC 476 ("Ramesh Gandhi")***, has held that any judgement that is a consequence of misrepresentation of necessary facts would constitute fraud and would be treated as a nullity. That this error of the Court cannot lead to the deprivation of justice to the victims. While the criminal justice system must strive to adopt a reformative approach, proportionality of sentence must be treated as an equally important ideal. Reliance was placed on the judgements of this Court in ***Alister Anthony Pareira vs. State of Maharashtra, (2012) 2 SCC 648 ("Alister Anthony Pareira"), Ravji vs. State of Rajasthan, (1996) 2 SCC 175("Ravji")*** and ***Soman vs. State of Kerala, (2013) 11 SCC 382 ("Soman")***.

18. Ms. Vrinda Grover, learned counsel for the petitioner in Writ Petition(Crl.) No.352 of 2022 reiterated the contentions as to the centrality and non-optional nature of seeking the opinion of the Presiding Judge under Section 432(2) of the CrPC, the non-serving of the concurrent sentences for the non-payment of fine by the respondent Nos.3 to 13 as well as the need to consider the nature of the crimes and the impact on public welfare while considering the grant of remission. Reliance was placed on the judgment of this Court in ***Ram Chander, Sharad Kolambe, Devendra Kumar vs. State of Uttaranchal, (2013) 9 SCC 363 ("Devendra Kumar")*** and ***Abdul Gani.***

18.1. It was further submitted that the State of Gujarat has not considered the possibility of recidivism and whether there was any evidence of reformation of respondent Nos.3 to 13. That as per the record, respondent Nos.3 to 13 have not demonstrated

any sign of reform and have not expressed any remorse for the crimes they have committed. That their applications for remission do not contain reference to feelings of remorse felt by them for their actions. The non-payment of fine is further indication of the absence of remorse. Also fresh cases have been registered against two of the respondents, and this serves as proof of their non-reformation.

18.2. It was also contended that reliance cannot be placed on documents, such as, letter dated 09.07.2022 of the C.B.I, wherein an affirmative opinion on remission was expressed as well as a letter produced by respondent No.3 containing the affirmative opinion of the Special Judge (C.B.I), Civil and Sessions Court, Mumbai as these documents have not been listed among the documents relied upon by the State of Gujarat while granting remission to the respondent Nos.3 to 13.

19. Ms. Aparna Bhat, learned counsel for the petitioner in Writ Petition(Crl.) No.319 of 2022 in her rejoinder submitted that the remission granted by the State of Gujarat to respondent Nos.3 to 13 was violative of Article 14 of the Constitution of India. That prison statistics from the year 2021 reveal that 66.7% of the convicts in Gujarat are undergoing life imprisonment, at least a fraction of whom have completed fourteen years of incarceration. That no special case has been made out either by the State of Gujarat or the Union of India as to why respondent Nos.3 to 13 are singularly entitled to remission over all of the other convicts. Reliance was placed on judgements in ***S. G. Jaisinghani vs. Union of India, AIR 1967 SC 1427("S. G. Jaisinghani")*** and ***E.P. Royappa vs. State of T.N., (1974) 4 SCC 3 ("E.P. Royappa")***, wherein this Court held that arbitrary and *mala fide* exercise of power by the State would constitute a violation of Article 14 of the Constitution. That discretionary and *en-masse* remission on festive occasions was held to be impermissible in the case of ***Sangeet***.

19.1. It was further submitted that there is no right to remission that a convict can necessarily avail. That remission must be an exercise of discretion judiciously by the concerned authorities. Reliance was placed onthe judgments of this Court in***Sangeet, V. Sriharan, State of Haryana vs. Mahender Singh, (2007) 13 SCC 606 ("Mahender Singh"); Mohinder Singh, Maru Ram*** and ***Shri Bhagwan vs. State of Rajasthan, (2001) 6 SCC 296 ("Shri Bhagwan")***.

20. Mr.Mohammad Nizamuddin Pasha, learned counsel for the petitioner in Writ Petition(Crl.) No.403 of 2022 reiterated the contention that materials not relied upon by the State of Gujarat while deciding on the question of remission for respondent Nos.3 to 13 cannot be used to justify the decision retrospectively. Reliance was placed on the decision of this Court in ***OPTO Circuit India Ltd. vs. Axis Bank, (2021) 6 SCC 707 ("OPTO Circuit")***. That contrary to the submission of the learned ASG, the State has to consider the gravity of the offence while deciding whether to grant remission or not. That in cases, where the crimes are of a much less serious nature, remission has not been granted owing to the perceived seriousness of the offences by the State but in these cases of gruesome crime, remission has been simply granted. Further, there is a need to consider the fact that the victim and the convicts live in close proximity while granting remission, which fact has been considered in other cases but not in the impugned remission orders.

Points for consideration:

21. Having heard learned senior counsel and learned counsel for the respective petitioners as well as learned ASG, learned senior counsel and learned counsel for the respondents, the following points would arise for our consideration:-

    1) Whether the petition filed by one of the victims inWrit Petition (Crl.) No.491 of 2022 under Article 32 of the Constitution is maintainable?

    2) Whether the writ petitions filed as Public Interest Litigation (PIL) assailing the impugned orders of remission dated 10.08.2022 are maintainable?

    3) Whether the Government of the State of Gujarat was competent to pass the impugned orders of remission?

    4) Whether the impugned orders of remission passed by the respondent-State of Gujarat in favour of respondent Nos.3 to 13 are in accordance with law?

    5) What Order?

    The aforesaid points shall be considered *in seriatim*.

    A detailed narration of facts and contentions would not call for reiteration at this stage.

Re: Point No.1:"Whether the petition filed by one of the victims in Writ Petition (Crl.) No.491 of 2022under Article 32 of the Constitution is maintainable?"

22. Sri Rishi Malhotra, learned counsel for respondent No.3, while placing reliance on the decisions of this Court, made a specific plea regarding maintainability of Writ Petition (Crl.) No.491 of 2022 filed by the victim by contending that the said petitioner had filed a review petition challenging the order dated 13.05.2022 passed in Writ Petition (Crl.) No.135 of 2022 and the same was dismissed. Therefore, the only remedy open to the petitioner was to file a curative petition in terms of the judgment of this Court in ***Rupa Ashok Hurrah*** and not challenging the remission orders by filing a fresh writ petition. We shall answer this contention in detail while considering point No.3.

22.1. One of the contentions raised by learned Senior Counsel, Sri S. Guru Krishna Kumar appearing for one of the private respondents was that the petitioner inWrit Petition (Crl.) No.491 of 2022, Bilkis Bano, ought to have challenged the orders of remission before the Gujarat High Court by filing a petition under Article 226 of the Constitution rather than invoking Article 32 of the Constitution before this Court. In this regard, it was submitted that by straightaway filing a petition under Article 32 of the Constitution a right of approaching this Court by way of an appeal by an aggrieved party has been lost. It was submitted that if victims file petitions under Article 32 of the Constitution before this Court challenging orders of remission, floodgates would be opened and persons such as the petitioner would straightaway file writ petitions before this Court. That when an alternative remedy of filing a writ petition under Article 226 of the Constitution is available which is also a wider remedy than Article 32 of the Constitution, the petition filed by the writ petitioner in Writ Petition (Crl.) No.491 of 2022 must be dismissed reserving liberty to her to approach the High Court, if so advised.

Similar arguments were made by learned senior counsel Sri Chidambaresh.

22.2. At the outset, we state that Article 32 of the Constitution is a part of Part-III of the Constitution of India which deals with Fundamental Rights. The right to file a petition under Article 32

of the Constitution is also a Fundamental Right. In the instant case, the petitioner - Bilkis Bano has filed her writ petition under Article 32 of the Constitution in order to enforce her Fundamental Rights under Article 21 of the Constitution which speaks of right to life and liberty and Article 14 which deals with right to equality and equal protection of the laws. The object and purpose of Article 32 of the Constitution which is also recognised to be the "soul of the Constitution" and which is a Fundamental Right in itself is for the enforcement of other Fundamental Rights in Part-III of the Constitution. We think that the aforesaid constitutional remedy is also to enforce the goals enshrined in the Preamble of the Constitution, which speak of justice, liberty, equality and fraternity. Bearing in mind the expanded notion of access to justice which also includes speedy remedy, we think that the petition filed by the petitioner in Writ Petition (Crl.) No.491 of 2022 cannot be dismissed on the ground of availability of an alternative remedy under Article 226 of the Constitution or on the ground of its maintainability under Article 32 of the Constitution before this Court.

22.3. There is another stronger reason as to why the said petitioner has approached this Court by filing a petition under Article 32 of the Constitution rather than invoking Article 226 of the Constitution before the High Court. That is because earlier, one of the respondents, namely, respondent No.3 Radheshyam Bhagwandas Shah had preferred Writ Petition(Crl.) No.135 of 2022 invoking Article 32 of the Constitution before this Court by seeking a direction to the State of Gujarat to consider his case for remission under the Policy of 1992. This Court issued a categorical direction to that effect. In fact, the respondent-State has understood the said direction as if it was a command or a direction to grant remission within a period of two months. But, before this Court in the said proceedings, one of the serious contentions raised by the State of Gujarat was that it was not the appropriate Government to grant remission which contention was negatived by the order dated 13.05.2022. In fact, that is one of the grounds raised by the petitioner victim to assail the orders of remission granted to respondent Nos.3 to 13. That being so, the High Court of Gujarat would not have been in a position to entertain the aforesaid contention

in view of the categorical direction issued by this Court in Writ Petition (Crl.) No.491 of 2022 disposed on 13.05.2022. In the teeth of the aforesaid order of this Court, the contention regarding the State of Gujarat not being the competent State to consider the validity of the orders of remission in a petition filed under Article 226 of the Constitution, particularly, when the question of competency was raised, could not have been dealt with by the Gujarat High Court on the principle of judicial propriety. Therefore, for this reason also the petitioner in Writ Petition(Crl.) No.135 of 2022 has, in our view, rightly approached this Court challenging the orders of remission. The contentions of learned Senior Counsel, Sri S. Guru Krishna Kumar and Sri Chidambaresh are hence, rejected. Thus, we hold that Writ Petition (Crl.) No.491 of 2022 filed under Article 32 of the Constitution is clearly maintainable.

Re: Point No.2:"Whether the writ petitions filed as Public Interest Litigation (PIL) assailing the impugned orders of remission dated 10.08.2022 are maintainable?"

23. We now record the submissions made with regard to maintainability of the Public Interest Litigation (PIL) assailing the orders of remission in favour of respondent Nos.3 to 13 herein.

23.1. Learned ASG appearing for the State of Gujarat as well as Union of India submitted that the writ petitions filed as public interest litigations are not maintainable as the petitioners are strangers to the impugned orders of remission and they are in no way connected with the matter. In this context, reliance was placed on certain decisions referred to above including ***Rajiv Ranjan, Simranjit Singh***, and, ***Ashok Kumar***, to contend that there can be no third party interference in criminal matters in the garb of filing public interest litigations. It was also contended that the petitioners who have filed the public interest litigation are interlopers and busybodies and are not persons who are aggrieved. In the aforesaid context, reliance was placed on ***M.V. Dabholkar*** and ***Jasbhai Motibhai***.

23.2. Shri Sidharth Luthra, learned senior counsel has also voiced the arguments of the respondents by referring to certain decisions of this Court while contending that the grant of remission is in the exclusive domain of the State and although no convict

can seek remission as a matter of fundamental right has nevertheless the right to be considered for remission. That remission is a matter between the convict and the State and, therefore, there can be no third party inference in such a matter. The detailed submissions of the learned counsel have already been adverted to above and, therefore, it is unnecessary to reproduce the same once again.

23.3. Respondent No.3 has challenged the locus of the petitioners in Writ Petition (Crl.) No.319 of 2022 and connected writ petitions and contended that the petitioners therein are not related to the said case and are third-party/strangers to the case. If petitions filed by third- party strangers are entertained by this Court, then it would unsettle the settled position of law and would open floodgates for litigation. Learned counsel for respondent No.3 Sri Rishi Malhotra placed reliance on the decision of this Court in ***Janata Dal vs. H.S. Chowdhary, (1992) 4 SCC 305 ("Janata Dal")*** which was reiterated and followed in ***Simranjit Singh*** and in ***Subramanian Swamy vs. Raju, (2013) 10 SCC 465 ("Subramanian Swamy")*** where it has consistently been held that a third party, who is a total stranger to the prosecution has no *'locus standi'* in criminal matters and has no right whatsoever to file a petition under Article 32.

23.4. In ***Simranjit Singh***, this Court was faced with the situation where a conviction of some of the accused persons by this Court under the Terrorist and Disruptive Activities (Prevention) Act, (TADA Act) was sought to be challenged under Article 32 of the Constitution by the President of the Akali Dal (M), namely, Simranjit Singh Mann which was dismissed. In paragraph 5 of the judgment in ***Simranjit Singh***, this Court categorically dealt with the said issue and held that the petition under Article 32 of the Constitution was not maintainable for the simple reason that the petitioner therein did not seek to enforce any of his fundamental rights nor did he complain that any of his fundamental rights were being violated. This Court was of the view that a total stranger in a criminal case cannot be permitted to question the correctness of a decision.

24. *Per contra*, learned senior counsel, Ms. Indira Jaising, has made her submissions on the issue of locus standi of the petitioner in Writ Petition (Crl.) No.326 of 2022. According to her, even when no specific legal injury is caused to a person or to a determinate class or group of persons by an act or omission of the State or any public authority but when an injury is caused to public interest, a concerned citizen can maintain an action for vindicating the rule of law and setting aside the unlawful action or enforcing the performance of public duty. (*Vide* ***B.P Singhal).***

    24.1. She asserted that the writ petition raises questions of great public importance in that, in a democracy based on the rule of law, no authority has any unfeterred and unreviewable discretion. All powers vested in an authority, are intended to be used only for public good. The exercise of executive power must be informed by the finer canons of constitutionalism, *vide* ***Maru Ram.*** That the impugned decision of granting remission to the convicts violates rule of law, is arbitrary and not based on any relevant consideration. Therefore, the writ petition filed by the petitioner in public interest is maintainable. In this regard reliance was placed on ***S.P. Gupta****.*

    24.2. As regards respondents' contention that by entertaining the petition under Article 32 of the Constitution the convicts have been denied the right of appeal, it was submitted that there exists no statutory right of appeal against an order denying or permitting remission. Such an order can only be challenged under Article 226 or Article 32 of the Constitution. Further, a Constitution Bench of this Court in ***Kochuni*** observed that, "… the mere existence of an adequate alternative remedy cannot per se be a good and sufficient ground for throwing out a petition under Article 32, if the existence of a fundamental right and a breach, actual or threatened, of such right is alleged and is *prima facie* established on the petition."

    24.3. As regards the respondents' submission that a stranger to the criminal proceedings under any circumstance cannot file a petition under Article 32, it was contended that the instant proceedings are not criminal in nature, they fall within the realm of administrative law as they seek to challenge orders of remission which are administrative decisions. Learned

senior counsel brought to our notice the fact that this Court had entertained a petition filed by a DMK leader under Section 406 of the CrPC seeking the transfer of a pending criminal trial against his political opponent, J. Jayalalithaa, from the State of Tamil Nadu to the State of Karnataka *vide* ***K. Anbazhagan***.

25. Ms. Vrinda Grover, learned counsel for the petitioner in Writ Petition (Crl.) No.352 of 2022, at the outset, submitted that the said petition has been filed in the larger public interest by the petitioners who have vast knowledge and practical expertise on issues of public policy, governance and upholding the rule of law. Their petition challenges not only the arbitrary and *mala fide* exercise of executive prerogative under Section 432 of the CrPC, but also prays for a shift in practices related to the grant of remission by bringing in more accountability and transparency to the process of grant of remission. Thus, the writ petition is maintainable as a Public Interest Litigation.

25.1. Learned counsel contended that the petition does not constitute an intervention into criminal proceedings but is rather a challenge to arbitrary executive action, which is amenable to judicial review. That it is settled law that the exercise of power under Section 432 of the CrPC is an administrative act which neither retracts from a judicial order nor does it wipe out the conviction of the accused and is merely an executive prerogative exercised after the judicial function in a criminal proceeding has come to an end v*ide* ***Epuru Sudhakar*** and ***Ashok Kumar.***

25.2. It was further submitted that all the judgments cited by the respondents-convicts as also the respondent-State to argue that the petitioners have no locus standi in the matter refer to different stages of criminal proceedings, viz. petitions related to investigation, trial, sentencing or quashing of the FIR. However, the present petition is a challenge to the arbitrary and *mala fide* administrative action which has arisen after the criminal proceedings have attained finality in the eye of law.

25.3. Learned counsel submitted that it is trite that the exercise of executive discretion is subject to rule of law and fairness in State action as embodied in Article 14 of the Constitution. The exercise of such discretion under Section 432 of the CrPC which

is arbitrary or *mala fide* amounts to State action in violation of constitutional and statutory obligations and is detrimental to public interest. Learned counsel placed reliance on the decision of this Court in ***S. P. Gupta*** to submit that this Court has in many cases held that in case of public injury caused by an act or omission of the State which is contrary to the rule of law, any member of the public acting *bona fide* can maintain an action for redressal of a public wrong. In the case at hand, the *mala fide* and arbitrary grant of premature release to the respondents-convicts by State action is *de hors* constitutional mandate and abets immunity for violence against women. (*Vide* ***Sheonandan Paswan vs. State of Bihar, (1987) 1 SCC 288 ("Sheonandan Paswan")*** and ***Abdul Wahab K. vs. State of Kerala, (2018) 18 SCC 448 ("Abdul Wahab")***.

25.4. Learned counsel next submitted that this Court in ***Subramanian Swamy,*** while adjudicating on the locus of a public-spirited intervenor in a case requiring interpretation of the Juvenile Justice (Care and Protection of Children) Act, 2015, held that the intervenor had sought an interpretation of criminal law which would have a wide implication beyond the scope of the parties in that case and hence, allowed the same. Thus, when larger questions of law are involved, which include interpretation of statutory provisions for the purpose of grant of premature release/remission, public-spirited persons who approach the Court in a *bona fide* manner, ought not to be prevented from assisting the Court to arrive at a just and fair outcome.

25.5. Learned counsel Ms. Grover further submitted that in cases where offences have shocked the conscience of the society, spread fear and alarm amongst citizens and have impugned on the secular fabric of society, like in the instant case, this Court has allowed interventions by members of the public seeking to bring to the attention of the Court the inaction and apathy on the part of the State in discharging its duty within the criminal justice system. It has been held in some cases that the technical rule of locus cannot shield the arbitrary and illegal exercise of executive discretion in violation of constitutional and statutory principles, once the same have been brought to the attention of this Court.

26. Learned counsel for the petitioner in Writ Petition (Crl.) No.319 of 2022, Smt. Aparna Bhat submitted that the petitioner has locus standi to approach this Court against the remission orders dated 10.08.2022. It was submitted that upholding the constitutional values and protection of all citizens is the responsibility of the State and there is a legitimate expectation that the State conducts all its actions in accordance with constitutional values. That the aforesaid petition has been filed in public interest as the premature release of respondent Nos.3 to 13 cannot be permitted since the convicts pose a danger to society. That the petitioners in the connected matters fulfil the wide ambit of the expression "person aggrieved" as envisaged under PIL jurisdiction since they are challenging the release of convicts who have committed heinous and grave offences against society.

    26.1. On the issue of locus standi of the petitioners to approach this Court, the learned counsel relied on para 6 of ***A.R Antulay vs. Ramdas Sriniwas Nayak*, *(1984) 2 SCC 500 ("A.R Antulay").*** Further, it was submitted that in ***Sheonandan Paswan,*** this Court relied on ***A. R. Antulay*** and held that if a citizen can set the machinery of criminal law in motion, she is also entitled to oppose the unwarranted withdrawal of prosecution in an offence against society.

    26.2. Learned counsel further placed reliance on the dictum of this Court in ***Manohar Lal vs. Vinesh Anand*, *(2001) 5 SCC 407,*** wherein it was held that the doctrine of locus standi is totally foreign to criminal jurisprudence and that society cannot afford to have a criminal escape his liability. Also, in ***Ratanlal vs. Prahlad Jat*, *(2017) 9 SCC 340,*** this Court held that a crime is not merely an offence committed in relation to an individual but is also an offence against society at large and it is the duty of the State to punish the offender.

27. Although, we have recorded the detailed submissions made on behalf of the respective parties, we do not think it is necessary to answer the point regarding maintainability of the PILs in this case inasmuch as one of the victims, namely, Bilkis Bano has also filed a writ petition invoking Article 32 of the Constitution assailing the orders of remission which we have held to be maintainable. The consideration of that petition on its merits would suffice in the instant case. Hence, we are of the view that the question of maintainability of the PILs

challenging the orders of remission in the instant case would not call for an answer from us owing to the aforesaid reason. As a result, we hold that consideration of the point on the maintainability of the PILs has been rendered wholly academic and not requiring an answer in this case. Therefore, the question regarding maintainability of a PIL challenging orders of remission is kept open to be considered in any other appropriate case.

28. Before we consider point No.3, we shall deal with the concept of remission.

Remission : Scope & Ambit

29. Krishna Iyer, J. in ***Mohammad Giasuddin vs. State of A.P., (1997) 3 SCC 287***, quoted George Bernard Shaw the famous satirist who said, "*If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries*." According to him, humanity today views sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of social defence.

29.1. Further, quoting a British Buddhist-Christian Judge, it was observed that in the context of *karuna (compassion)* and punishment for *karma (bad deeds),* '*The two things are not incompatible. While an accused is punished for what he has done, a quality of what is sometimes called mercy, rather than an emotional hate against the man for doing something harmful must be deserved. This is what compassion is about.'*

30. Learned senior counsel Sri Sidharth Luthra, drew our attention to the principles covering grant of remission and distinguished it from concepts, such as commutation, pardon, and reprieve, with reference to a judgment of this Court in ***State (Govt. of NCT of Delhi) vs. Prem Raj, (2003) 7 SCC 121 ("Prem Raj").*** Articles 72 and 161 deal with clemency powers of the President of India and the Governor of a State, and also include the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentences in certain cases. The power under Article 72 *inter alia* extends to all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends and in all cases where the sentence

is a sentence of death. Article 161 states that the Government of a State shall have the 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 against any law relating to a matter to which the executive power of the State extends. It was observed in the said judgment that the powers under Articles 72 and 161 of the Constitution of India are absolute and cannot be fettered by any statutory provision, such as, Sections 432, 433 or 433-A of the CrPC or by any prison rule.

30.1. It was further observed that a pardon is an act of grace, proceeding from the power entrusted with the execution of the law, 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. But pardon has to be distinguished from "amnesty" which is defined as a "general pardon of political prisoners; an act of oblivion". An amnesty would result in the release of the convict but does not affect disqualification incurred, if any. 'Reprieve' means a stay of execution of a sentence, a postponement of a 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 something like a release on probation for good conduct under Section 360 of the CrPC. On the other hand, remission is reduction 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 change of a sentence to a lighter sentence of a different kind. Section 432 empowers the appropriate Government to suspend or remit sentences.

30.2. Further, a remission of sentence does not mean acquittal and an aggrieved party has every right to vindicate himself or herself. In this context, reliance was placed on ***Sarat Chandra Rabha vs. Khagendranath Nath*, AIR 1961 SC 334 ("Sarat Chandra Rabha"),** wherein a Constitution Bench of this Court while distinguishing between a pardon and a remission observed that an order of remission does not wipe out the offence; it also does not wipe out the conviction. All that it does is to have an effect

on the execution of the sentence; though ordinarily a convicted person would have to serve out the full sentence imposed by a court, he need not do so with respect to that part of the sentence which has been ordered to be remitted. An order of remission thus, does not in any way interfere with the order of the court; it affects only the execution of the sentence passed by the court and frees the convicted person from his liability to undergo the full term of imprisonment inflicted by the court even though the order of conviction and sentence passed by the court still stands as it is. The power to grant remission is an executive power and cannot have the effect which the order of an appellate or revisional court would have of reducing the sentence passed by the trial court and substituting in its place the reduced sentence adjudged by the appellate or revisional court. According to *Weater's Constitutional Law,* 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 the judgment.

30.3. Reliance was placed on ***Mahender Singh***, to urge that a right to be considered for remission, keeping in view the constitutional safeguards of a convict under Articles 20 and 21 of the Constitution of India, must be held to be a legal one. Such a legal right emanates from not only the Prisons Act but also from the Rules framed thereunder. Although no convict can be said to have any constitutional right for obtaining remission in his sentence, the policy decision itself must be held to have conferred a right to be considered therefor. Whether by reason of a statutory rule or otherwise if a policy decision has been laid down, the persons who come within the purview thereof are entitled to be treated equally, *vide* ***State of Mysore vs. H. Srinivasmurthy, (1976) 1 SCC 817 ("H. Srinivasmurthy").***

30.4. In ***Mahender Singh,*** this Court was considering the correctness of a judgment of the Punjab and Haryana High Court in which a circular/letter issued by the State of Haryana laying down criteria for premature release of the prisoners had been declared to be unconstitutional. In the above context, this Court considered the right of the convict to be considered for remission and not on what should be the criteria when the matter was taken up for grant thereof.

30.5. ***Satish*** was pressed into service to contend that the length of the sentence or the gravity of the original crime cannot be the sole basis for refusing premature release. Any assessment regarding a predilection to commit crime upon release must be based on antecedents as well as conduct of the prisoner while in jail, and not merely on his age or apprehensions of the victims and witnesses. It was observed that although, a convict cannot claim remission as a matter of right, once a law has been made by the appropriate legislature, it is not open for the executive authorities to surreptitiously subvert its mandate. It was further observed that where the authorities are found to have failed to discharge their statutory obligations despite judicial directions, it would then not be inappropriate for a constitutional court while exercising its powers of judicial review to assume such task onto itself and direct compliance through a writ of mandamus. Considering that the petitioners therein had served nearly two decades of incarceration and had thus suffered the consequences of their actions, a balance between individual and societal welfare was struck by granting the petitioners therein conditional premature release, subject to their continuing good conduct. In the said case, a direction was issued to the State Government to release the prisoners therein on probation in terms of Section 2 of the U.P. Prisoners Release on Probation Act, 1938 within a period of two weeks. The respondent State was reserved liberty with the overriding condition that the said direction could be reversed or recalled in favour of any party or as per the petitioner therein.

31. The following judgments of this Court are apposite to the concept of remission:

(a) In ***Maru Ram***, a Constitution Bench considered the validity of Section 433-A of the CrPC. Krishnalyer, J. speaking for the Bench observed, “Ordinarily, where a sentence is for a definite term, the calculus of remissions may benefit the prisoner to instant release at the point where the subtraction results in zero”. However, “when it comes to life imprisonment, where the sentence is indeterminate and of an uncertain duration, the result of subtraction from an uncertain quantity is still an uncertain quantity and release of the prisoner cannot follow except on some fiction of quantification of a sentence of uncertain duration.

(i) Referring to ***Gopal Vinayak Godse vs. State of Maharashtra*, *(1961) 3 SCR 440***, it was observed that the said judgment is an authority for the proposition that a sentence of imprisonment for life is one of "imprisonment for the whole of the remaining period of the convicted person's natural life", unless the said sentence is committed or remitted by an appropriate authority under the relevant provisions of law.

(ii) In ***Gopal Vinayak Godse***, a distinction was drawn between remission, sentence and life sentence. Remission limited a time, helps computation but does not *ipso jure* operate as release of the prisoner. But, when the sentence awarded by the Judge is for a fixed term, the effect of remissions may be to scale down the term to be endured and reduce it to nil, while leaving the factum and quantum of sentence intact. However, when the sentence is a life sentence, remissions, quantified in time, cannot reach a point of zero. Since Section 433-A deals only with life sentences, remissions cannot entitle a prisoner to release. It was further observed that remission, in the case of life imprisonment, ripens into a reduction of sentence of the entire balance only when a final release order is made. If this is not done, the prisoner will continue in custody. The reason is, that life sentence is nothing less than life long imprisonment and remission vests no right to release when the sentence is life imprisonment. Nor is any vested right to remission cancelled by compulsory fourteen years jail life as a life sentence is a sentence for whole life.

(iii) Interpreting Section 433-A it was observed that there are three components in it which is in the nature of saving clause. Firstly, the CrPC generally governs matters covered by it. Secondly, if a special or local law exists covering the same area, the latter law will be saved and will prevail, such as short sentencing measures and remission schemes promulgated by various States. The third component is, if there is a specific provision to the contrary then, whether it would override the special or local law. It was held that Section 433-A picks out of a mass of imprisonment cases a specific class of life imprisonment cases and subjects it

explicitly to a particularized treatment. Therefore, Section 433-A applies in preference to any special or local law. This is because Section 5 of the CrPC expressly declares that specific provision, if any, to the contrary will prevail over any special or local law. Therefore, Section 433-A would prevail and escape exclusion of Section 5. The Constitution Bench concluded that Section 433-A is supreme over the remission rules and short-sentencing statutes made by various States. Section 433-A does not permit parole or other related release within a span of fourteen years.

(iv) It was further observed that criminology must include victimology as a major component of its concerns. When a murder or other grievous offence is committed the victims or other aggrieved persons must receive reparation and social responsibility of the criminal to restore the loss or heal the injury which is partof the punitive exercise which means the length of the prison term is no reparation to the crippled or bereaved.

(v) Fazal Ali, J. in his concurring judgment in ***Maru Ram*** observed that crime is rightly described as an act of warfare against the community touching new depths of lawlessness. According to him, the object of imposing deterrent sentence is three-fold. While holding that the deterrent form of punishment may not be a most suitable or ideal form of punishment yet, the fact remains that the deterrent punishment prevents occurrence of offence. He further observed that Section 433-A is actually a social piece of legislation which by one stroke seeks to prevent dangerous criminals from repeating offences and on the other hand protects the society from harm and distress caused to innocent persons. While opining that where section 433-A applies, no question of reduction of sentence arises at all unless the President of India or the Governor of a State choose to exercise their wide powers under Article 72 or Article 161 of the Constitution respectively which also have to be exercised according to sound legal principles as, any reduction or modification in the deterrent punishment would, far from reforming the criminal, be counter-productive.

(b) ***Mohinder Singh*** is a case which arose under Section 432 on remission of sentence in which the difference between the terms `bail', `furlough' and `parole' having different connotations were discussed. It was observed that furloughs are variously known as temporary leaves, home visits or temporary community release and are usually granted when a convict is suddenly faced with a severe family crisis such as death or grave illness in the immediate family and often the convict/inmate is accompanied by an officer as part of the terms of temporary release of special leave which is granted to a prisoner facing a family crisis. Parole is a release of a prisoner temporarily for a special purpose or completely before the expiry of the sentence or on promise of good behaviour. Conditional release from imprisonment is to entitle a convict to serve remainder of his term outside the confines of an institution on his satisfactorily complying all terms and conditions provided in the parole order.

(c) In ***Poonam Latha vs. M.L. Wadhwan, (1987) 3 SCC 347 ("Poonam Latha"),*** it was observed that parole is a professional release from confinement but it is deemed to be part of imprisonment. Release on parole is a wing of reformative process and is expected to provide opportunity to the prisoner to transform himself into a useful citizen. Parole is thus, a grant of partial liberty or lessening of restrictions to a convict prisoner but release on parole does not change the status of the prisoner. When a prisoner is undergoing sentence and confined in jail or is on parole or furlough his position is not similar to a convict who is on bail. This is because a convict on bail is not entitled to the benefit of the remission system. In other words, a prisoner is not eligible for remission of sentence during the period he is on bail or his sentence is temporarily suspended. Therefore, such a prisoner who is on bail is not entitled to get remission earned during the period he is on bail.

32. Apart from the constitutional provisions, there are also provisions of the CrPC which deal with remission of convicts. Sections 432, 433, 433A and 435 of the CrPC are relevant and read as under:

> **"432. Power to suspend or remit sentences**.— (1) When any person has been sentenced to punishment for an offence, the appropriate Government may, at any

time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

(2) 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 had 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.

(3) If any condition on which a sentence has been suspended or remitted is, in the opinion of the appropriate Government, not fulfilled, the appropriate Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer, without warrant and remanded to undergo the unexpired portion of the sentence.

(4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.

(5) The appropriate Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with:

Provided that in the case of any sentence (other than a sentence of fine) passed on a male person above the age of eighteen years, no such petition by the person sentenced or by any other person on his behalf shall be entertained, unless the person sentenced is in jail, and—

(a) where such petition is made by the person sentenced, it is presented through the officer in charge of the jail; or

(b) where such petition is made by any other person, it contains a declaration that the person sentenced is in jail.

(6) The provisions of the above sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law which restricts the liberty of any person or imposes any liability upon him or his property.

(7) In this section and in Section 433, the expression "appropriate Government" means,—

(a) 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 the Union extends, the Central Government;

(b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed.

433. Power to commute sentence.— The appropriate Government may, without the consent of the person sentenced, commute—

(a) a sentence of death, for any other punishment provided by the Indian Penal Code (45 of 1860);

(b) a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;

(c) a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced, or for fine;

(d) a sentence of simple imprisonment, for fine.

433A. Restriction on powers of remission or commutation in certain cases.— Notwithstanding anything contained in Section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments

provided by law, or where a sentence of death imposed on a person has been commuted under Section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment.

435. State Government to act after consultation with Central Government in certain cases.— (1) The powers conferred by Sections 432 and 433 upon the State Government to remit or commute a sentence, in any case where the sentence is for an offence—

(a) 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) which involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or

(c) which was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty,

shall not be exercised by the State Government except after consultation with the Central Government.

(2) No order of suspension, remission or commutation of sentences passed by the State Government in relation to a person, who has been convicted of offences, some of which relate to matters to which the executive power of the Union extends, and who has been sentenced to separate terms of imprisonment which are to run concurrently, shall have effect unless an order for the suspension, remission or commutation, as the case may be, of such sentences has also been made by the Central Government in relation to the offences committed by such person with regard to matters to which the executive power of the Union extends."

32.1. Sub-section (1) of Section 432 is an enabling provision which states that when any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without conditions or upon any condition which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced. The pertinent provision involved in this case is sub-section (2) which deals with an application made to the appropriate Government for the suspension or remission of a sentence and the appropriate Government may require the Presiding Judge of the Court before or by which the conviction was had 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. Sub-section (3) deals with cancellation of the suspension or remission in the event of there being any non-fulfilment of any condition imposed by the appropriate Government whereupon the person in whose favour the sentence has been suspended or remitted, may be arrested by the police officer, without warrant and remanded to undergo the unexpired portion of the sentence, if such a person is at large. Sub-section (4) states that the condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will. The appropriate Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with *vide* sub-section (5) of Section 432 of the CrPC. The proviso to sub-section (5) states that in the case of any sentence (other than a sentence of fine) passed on a male person above the age of eighteen years, no such petition by the person sentenced or by any other person on his behalf shall be entertained, unless the person sentenced is in jail, and it is presented through the officer in-charge of the jail; or where such petition is made by any other person, it contains a declaration that the person sentenced is in jail. Sub-section (6) of Section 432 states that the provisions of

this Section would apply to any order passed by a Criminal Court under any section of the CrPC or of any other law which restricts the liberty of any person or imposes any liability upon him or his property.

32.2. The expression "appropriate Government" used in Section 432 as well as in Section 433, is defined in sub-section (7) of Section 432. It expresses that 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 the Union extends, the Central Government; and in other cases, the Government of the State within which the offender is sentenced or the said order is passed.

32.3. Section 433-A is a restriction on the powers of remission or commutation in certain cases. It begins with a *non-obstante clause* and states that notwithstanding anything contained in Section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commuted under Section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment.

32.4. Section 434 states that the powers conferred by Sections 432 and 433 upon the State Government may in case of sentences of death also be exercised by the Central Government concurrently.

32.5. The necessity for the State Government to act in consultation with the Central Government in certain cases is mandated in Section 435. The powers conferred by Sections 432 and 433 upon the State Government to remit or commute a sentence, in any case where the sentence is for an offence (a) which was investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946, or by any other agency empowered to make investigation into an offence under any Central Act other than the CrPC, or(b) which involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or (c) which was committed by a person in the service of the

Central Government while acting or purporting to act in the discharge of his official duty, shall not be exercised by the State Government except after consultation with the Central Government. Sub-section (2) of Section 435 states that no order of suspension, remission or commutation of sentences passed by the State Government in relation to a person, who has been convicted of offences, some of which relate to matters to which the executive power of the Union extends, and who has been sentenced to separate terms of imprisonment which are to run concurrently, shall have effect unless an order for the suspension, remission or commutation, as the case may be, of such sentences has also been made by the Central Government in relation to the offences committed by such person with regard to matters to which the executive power of the Union extends.

With the above backdrop of provisions, we move to consider Point No.3.

Point No.3 : Whether the Government of State of Gujarat was competent to pass the impugned orders of remission?

33. The point for consideration revolves around the definition of the expression "appropriate Government". In other words, whether the first respondent – State of Gujarat was competent to pass the orders of remission in the case of respondent Nos.3 to 13 herein is the question. The meaning and import of the expression "appropriate Government" has to be discerned from the judgments of this Court in the light of sub-section (7) of Section 432 of the CrPC.

33.1. The contentions raised by the learned counsel for the petitioner in Writ Petition (Crl.) No.491 of 2022 as well as the arguments of learned ASG appearing for Union of India as well as State of Gujarat on this aspect need not be reiterated.

33.2. The expression "appropriate Government" no doubt has been defined in sub-section (7) of Section 432 to mean that 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 the Union extends, the Central Government; in other cases, the Government of the State within which the offender is sentenced or the said

order is passed. The expression "appropriate Government" also finds place in sub-section (1) of Section 432 which, as already discussed above, states that when any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without conditions or upon any condition which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

33.3. Sub-section (1) of Section 432 of the CrPC deals with a power vested with the appropriate Government which is an enabling power. The discretion vested with the appropriate Government has to be exercised judiciously in an appropriate case and not to abuse the same. However, when an application is made to the appropriate Government for the suspension or remission of a sentence such as in the instant case by a convict, the appropriate Government may seek the opinion of the Presiding Judge of the Court before or by which the conviction was had or confirmed and on considering the reasons for such opinion, may consider the application for remission *vide* sub-section (2) of Section 432 of the CrPC.

33.4. On a combined reading of sub-sections (1) and (2) of Section 432, it is apparent that the conviction and sentence of the Court which had tried the case assumes significance and the appropriate Government may have to seek the opinion of the Presiding Judge of the Court before which the conviction took place, before passing an order of remission. This is particularly so when an application is filed by or on behalf of a convict seeking remission. Therefore, logically the expression appropriate Government in clause (b) of sub-section (7) of Section 432 also states that the Government of the State within which the offender is sentenced or the said order is passed which is the appropriate Government. The aforesaid consistency is significant inasmuch as the intent of the Parliament is, it is only the Government of the State within which the offender was sentenced which is competent to consider an application for remission and pass an order remitting the sentence of a convict. This clearly means that the place of occurrence of the incident or place of imprisonment of the convict are not relevant considerations and the same have been excluded

from the definition of the expression appropriate Government in clause (b) of sub-section (7) of Section 432. If the intention of the Parliament was that irrespective of the Court before which the trial and conviction had taken place, the order of remission can be considered by the Government within whose territorial jurisdiction the offence has been committed or the offender is imprisoned, the same would have been indicated by the definition. On the contrary, the definition of appropriate Government is otherwise. The intention of the Parliament is that the Government of the State within which the offender was tried and sentenced, is the appropriate Government to consider either under sub-section (1) of Section 432 of the CrPC or on an application made by the convict for remission of the sentence under sub-section (2) of Section 432 of the CrPC. This places emphasis on the place of trial and sentence of the offender rather than the place or location where the crime was committed. Such an interpretation would also include a situation, such as in the present case, where not only the investigation but also the trial of respondents No.3 to 13 herein was transferred from the State of Gujarat to the State of Maharashtra and particularly to the Special Court at Mumbai. Thus, the aforesaid definition also takes within its scope and ambit a circumstance wherein the trial is transferred by this Court for reasons to be recorded and which is in the interest of justice from one State to another State.

33.5. There may be various reasons for transferring of a trial from a competent Court within the territorial jurisdiction of one State to a Court of equivalent jurisdiction in another State, as has been done in the instant case. But what is certain is that the transfer of the trial to a court in another State would be a relevant consideration while considering as to which State has the competency to pass an order of remission. Thus, the definition of appropriate Government in sub-section (7) of Section 432 clearly indicates that the Government of the State within which the offender is sentenced, is the appropriate Government to pass an order of remission.

33.6. In almost all cases, the court before which the offender was sentenced is located within the territory of a State Government wherein the offence occurred and, therefore, in such a case,

there can be no further doubt about the meaning of the expression appropriate Government. But according to us, even in a case where the trial has been transferred by this Court from a court of competent jurisdiction of a State to a court in another State, it is still the Government of the State within which the offender was sentenced which is the appropriate Government which has the jurisdiction as well as competency to pass an order of remission under Section 432 of the CrPC. Therefore, it is not the Government of the State within whose territory the offence occurred or the convict is imprisoned which can assume the power of remission.

33.7. In this regard, the following judgments of this Court may be relied upon:

(a) In ***Ratan Singh,*** on discussing Section 401 of the erstwhile CrPC (corresponding to Section 432 of the present CrPC) it was observed that the test to determine the appropriate Government is to locate the State where the accused was convicted and sentenced and the Government of that State would be the appropriate Government within the meaning of Section 401 of the CrPC. In the said case, it was observed that the accused was convicted and sentenced in the State of Madhya Pradesh and though he was discharging his sentence in a jail in Amritsar in the State of Punjab, the appropriate Government under section 401 (1) of the erstwhile CrPC to exercise the discretion for remission of the sentence was the State of Madhya Pradesh. It was further observed that even under the new Code i.e. CrPC, 1973 as per sub-section (7) of Section 432 thereof, the phrase appropriate Government had the same meaning as the latter provision had been bodily lifted from Section 402(3) of the erstwhile CrPC. On a review of the case law and the statutory provisions of the CrPC the following propositions were culled out:

"9. …(1) that a sentence of imprisonment for life does not automatically expire at the end of 20 years including the remissions, because the administrative rules framed under the various Jail Manuals or under the Prisons Act cannot supersede the statutory provisions of the Indian

Penal Code. A sentence of imprisonment for life means a sentence for the entire life of the prisoner unless the appropriate Government chooses to exercise its discretion to remit either the whole or a part of the sentence under Section 401 of the Code of Criminal Procedure;

(2) that the appropriate Government has the undoubted discretion to remit or refuse to remit the sentence and where it refuses to remit the sentence no writ can be issued directing the State Government to release the prisoner.

(3) that the appropriate Government which is empowered to grant remission under Section 401 of the Code of Criminal Procedure is the Government of the State where the prisoner has been convicted and sentenced, that is to say, the transferor State and not the transferee State where the prisoner may have been transferred at his instance under the Transfer of Prisoners Act; and

(4) that where the transferee State feels that the accused has completed a period of 20 years it has merely to forward the request of the prisoner to the concerned State Government, that is to say, the Government of the State where the prisoner was convicted and sentenced and even if this request is rejected by the State Government the order of the government cannot be interfered with by a High Court in its writ jurisdiction."

(b) The aforesaid decision was reiterated in ***Hanumant Dass.*** In the said case, the incident had occurred in Dharmshala and when the matter was pending before the Sessions Court, Dharmshala in Himachal Pradesh at the instance of the complainant, on an application moved before this Court, the case was transferred from Himachal Pradesh to the Sessions Court at Gurdaspur in Punjab.

(c) Insofar as clemency power of a Governor of a State under Article 161 of the Constitution to grant remission to prisoners convicted by courts outside the State but undergoing sentences in jails in the State is concerned, this Court in ***M.T. Khan*** observed that the appropriate government on whose advice the Governor has to act

while granting remission to such a prisoner was to be decided on the basis of the aid and advice of the Council of Ministers of the State which had convicted the accused and not the State where the accused/convict is transferred to be lodged in the jail. In this case it was held that since the judgment of conviction had been passed in the States of Madhya Pradesh and Maharashtra and the convict was lodged in the State of Andhra Pradesh, the appropriate Governments were the States of Madhya Pradesh and Maharashtra even under Article 161 of the Constitution. Hence, the appeals filed by the Government of Andhra Pradesh were allowed.

(d) ***V. Sriharan*** is a judgment of a Constitution Bench of this Court wherein the Government of Tamil Nadu had proposed to remit the sentence of life imprisonment to release seven convicts who were convicted in the Rajiv Gandhi assassination case –***State, through Superintendent of Police, CBI vs. Nalini, (1999) 5 SCC 253 ("Nalini")***. While discussing the phrase "appropriate Government", it was observed that barring cases falling under Section 432(7)(a), in all other cases where the offender is sentenced or the sentence or order is passed within the territorial jurisdiction of the State concerned, that State Government would be the appropriate Government. Following the earlier decisions it was observed that even if an offence is committed in State-A, but, the trial takes place and the sentence is passed in State-B, it is the latter State which shall be the appropriate Government.

33.8. In our view, on a plain reading of sub-section (7) of Section 432 of the CrPC and considering the judgments of this Court, it is the State of Maharashtra, which had the jurisdiction to consider the application for remission *vis-à-vis* respondent Nos.3 to 13 herein as they were sentenced by the Special Court, Mumbai. Hence the applications filed by respondent Nos.4 to 13 seeking remission had to be simply rejected by the State of Gujarat owing to lack of jurisdiction to consider them. This is because Government of Gujarat is not the appropriate Government within the meaning of the aforesaid provision. The High Court of Gujarat was therefore right in its order dated 17.07.2019.

33.9. When an authority does not have the jurisdiction to deal with a matter or it is not within the powers of the authority i.e. the State of Gujarat in the instant case, to be the appropriate Government to pass orders of remission under Section 432 of the CrPC, the orders of remission would have no legs to stand. On the aspect of jurisdiction and nullity of orders passed by an authority, the decision of the House of Lords in ***Anisminic vs. Foreign Compensation Commission, (1969) 2 WLR 163 : (1969) 1 All ER 208 ("Anisminic"),*** is of significance and the same can be cited by way of analogy. The House of Lords in the said case held that the Foreign Compensation Commission had committed an error which was a jurisdictional error as its decision was based on a matter which it had no right to take into account and so its decision was a nullity and subject to judicial review. Although in ***Anisminic***, the scope and ambit of the concept of *"jurisdictional error"* or "*error of jurisdiction*" was very much extended, and of a very broad connotation, in the instant case we are primarily dealing with a narrower concept i.e. when an authority, which is the Government of State of Gujarat in the instant case, was lacking jurisdiction to consider the applications for remission. Just as an order passed by a Court without jurisdiction is a nullity, in the same vein, an order passed or action taken by an authority lacking in jurisdiction is a nullity and is *non est* in the eye of law.

33.10. On that short ground alone the orders of remission have to be quashed. This aspect of competency of the Government of State of Gujarat to pass the impugned orders of remission goes to the root of the matter and the impugned orders of remission are lacking in competency and hence a nullity. The writ petition filed by the victim would have to succeed on this reasoning. But the matter does not rest at that.

34. Learned ASG appearing for respondent Nos.1 and 2, has placed strong reliance on the order of this Court dated 13.05.2022 to contend that in view of the directions issued by this Court in Writ Petition No.135 of 2022, respondent No.1 – State of Gujarat had to consider the applications for remission filed by respondents No.3 to 13 herein. Further, the consideration had to be made as per the 1992 Policy of Remission of the State of Gujarat. Hence, the appropriate Government in the case of respondent Nos.3 to 13 was

the Government of Gujarat in terms of the order of this Court dated 13.05.2022. It was further contended that the offences had also occurred within the State of Gujarat. Therefore, the first respondent – State of Gujarat had no option but to consider the applications filed by respondent Nos.3 to 13 herein and pass the orders dated 10.08.2022 granting remission to them.

35. Learned counsel for the petitioner in Writ Petition (Crl.) No.491 of 2022 has countered the above submission contending that one of the convicts-Radheshyam Bhagwandas Shah, respondent No.3 herein, had initially approached the High Court of Gujarat by filing Criminal Application No.4573 of 2019 for a direction to consider his application for remission by the State of Gujarat. By order dated 17.07.2019 the High Court disposed of Criminal Application No.4573 of 2019 by observing that he should approach the appropriate Government being the State of Maharashtra. His second such application before the Gujarat High Court was also dismissed *vide* order dated 13.03.2020. That when the said prisoner filed Writ Petition (Crl.) No.135 of 2022 before this Court, he did not disclose the following facts:

(i) that within fourteen days of the order dated 17.07.2019, he had approached the Government of Maharashtra vide application dated 01.08.2019;

(ii) that the CBI had given a negative recommendation vide its letter dated 14.08.2019;

(iii) that the Special Judge (CBI), Mumbai had given a negative recommendation vide his letter dated 03.01.2020;

(iv) that the Superintendent of Police, Dahod, Gujarat had given a negative recommendation vide his letter dated 03.02.2020; and,

(v) that the District Magistrate, Dahod, Gujarat had given a negative recommendation vide his letter dated 19.02.2020.

35.1. Further, the writ petitioner also made a misleading statement by referring to the order dated 05.08.2013 of the Bombay High Court in juxtaposition to the order of the Gujarat High Court dated 17.07.2019 to contend that there was a divergent opinion between the two High Courts, which aspect constrained him to file Writ Petition (Crl.) No.135 of 2022 before this Court. That the order dated 05.08.2013 passed by the Bombay High Court was dealing with transfer of the convicts in Maharashtra

jail to their parent State (State of Gujarat) that too, in the year 2013,when the issue of remission did not arise at all. But the said writ petitioner projected as if the two High Courts had contradicted themselves in their orders and, therefore, he was constrained to file the writ petition invoking the jurisdiction of this Court under Article 32 of the Constitution.

35.2. It was contended that on account of the suppression of facts as well as misleading this Court with erroneous facts, the order dated 13.05.2022 is vitiated by fraud and is hence a nullity and the same cannot be binding on the parties to the said order or to the petitioner Bilkis Bano who, in any case, was not arrayed as a party in the said writ petition.

36. It is necessary to highlight the salient aspects of the order passed by this Court in the case of ***Radheshyam Bhagwandas Shah*** dated 13.05.2022 in Writ Petition (Crl.) No.135 of 2022. That was a petition filed by one of the convicts, respondent No.3 herein, seeking a direction to consider his application for premature release under the policy dated 09.07.1992 of the State of Gujarat which was existing at the time of his conviction. The relevant pleadings in the said writ petition are extracted as under:

> "Question of Law:
>
> A. Whether the policy dated 9.7.92, which was existing at the time of the conviction will prevail for considering the case of the petitioner for premature release?
>
> B. Whether in view of *'State of Haryana Vs. Jagdish, (2010) 4 SCC 216',* a policy which is more liberal and prevailing would be given preference as compared to the policy which is sought to be made applicable at the time of consideration of the cases of premature release?
>
> × × ×
>
> FACTS OF THE CASE:
>
> × × ×
>
> That at this juncture it would be pertinent to mention herein that one of the co-accused Ramesh Rupabhai had approached the Bombay High Court by way of Crl. W.P.

No.305/2013. In the said order, the Bombay High Court clarified that the undertrials in this case were lodged in Maharashtra Jail only because of the fact that at that time the Trial was pending in the State of Maharashtra (transferred from Gujarat to Maharashtra by the Supreme Court). The High Court further clarified that once the Trial has concluded and the prisoner has been convicted, the appropriate prison would be the State of Gujarat and accordingly, the said prisoners were transferred to the State of Gujarat from the State of Maharashtra...

At this juncture, the petitioner had approached the Gujarat High Court on the ground that despite he having undergone more than actual sentence of 14 years, his case was not being considered by the respondent/authorities for premature release. The Gujarat High Court vide its order dated 17.7.19 with great respect took a completely a diametrically opposite view as that of Bombay High Court and erroneously held that since the petitioner's case was tried in the State of Maharashtra, therefore, his case for premature release has to be considered by the State of Maharashtra and not by the State of Gujarat.

Hence the instant Writ Petition under Article 32 of the Constitution issuing a writ of Mandamus or any other similar direction to the State of Gujarat praying *inter alia* that the case of the petitioner may be considered as per the policy dated 9.7.92 (i.e. policy existing at the time of conviction of the petitioner) in the light of settled decision in *"State of Haryana Vs. Jagdish, (2010) 4 SC 216".*

× × ×

PRAYER:

In the light of the above-mentioned facts and circumstances, the petitioner through this instant writ petition prays before this Hon'ble Court as under:

A. Issue a writ, order or direction in the nature of *Mandamus* to the Respondent/State of Gujarat to consider the case of the petitioner for premature release under the policy dated 9.7.92 i.e. the policy which was existing at the time of conviction.

B. Or in the alternative, issue a writ, order or direction in the nature of *Mandamus* to the respondent/Union of India to consider the case of the petitioner in light of *"UOI Vs. V. Sriharan, (2016) 7 SCC 1."* and

C. *Pass any such further Order(s)/direction(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."*

36.1. The aforesaid pleadings do not indicate that State of Gujarat had no jurisdiction to consider his application for remission. Also, there was no pleading that he had filed any application before the Government of Gujarat. Thirdly, there is no mention that the policy of 09.07.1992 had been cancelled. Moreover, the said policy was not at all applicable as the writ petitioner was convicted in Maharashtra State and therefore, Government of Gujarat was not the appropriate Government.

36.2. On the above basis, this Court passed the order dated 13.05.2022,the relevant portion of which reads as under:

"6. The present petitioner filed his petition for pre-mature release under Sections 433 and 433A of the Code of Criminal Procedure, 1973 (hereinafter being referred to as the "CrPC") stating that he had undergone more than 15 years 4 months of custody but his petition filed in the High Court of Gujarat came to be dismissed taking note of Section 432(7) CrPC and placing reliance on the judgment of this Court in ***Union of India vs. V. Sriharan alias Murugan and Others*, (2016) 7 SCC 1,** on the premise that since the trial has been concluded in the State of Maharashtra, the application for pre-mature release has to be filed in the State of Maharashtra and not in the State of Gujarat, as prayed by the petitioner by judgment impugned dated 17th July 2019.

××× ××× ×××

10. Learned counsel for the respondents has placed reliance on the judgment of this Court in ***Union of India vs. V. Sridharan alias Murugan and Others*** (supra) and submits that since the trial has been concluded in the

State of Maharashtra, taking assistance of Section 432(7) CrPC, the expression 'appropriate government' as referred to under Section 433 CrPC in the instant case, would be the State of Maharashtra and accordingly no error has been committed by the High Court in the order impugned.

11. In our considered view, the submission made by learned counsel for the respondents is not sustainable for the reason that the crime in the instant case was admittedly committed in the State of Gujarat and ordinarily, the trial was to be concluded in the same State and in terms of Section 432(7) CrPC, the appropriate Government in the ordinary course would be the State of Gujarat but the instant case was transferred in exceptional circumstances by this Court for limited purpose for trial and disposal to the neighbouring State (State of Maharashtra) by an order dated 06th August, 2004 but after the conclusion of trial and the prisoner being convicted, stood transferred to the State where the crime was committed remain the appropriate Government for the purpose of Section 432(7) CrPC.

12. Indisputedly, in the instant case, the crime was committed in the State of Gujarat which is the appropriate Government competent to examine the application filed for pre-mature release and that is the reason for which the High Court of Bombay in Criminal Writ Petition No.305 of 2013 filed at the instance of co-accused Ramesh Rupabhai under its Order dated 5th August, 2013 declined his request to consider the application for pre-mature release and left the application to be examined according to the policy applicable in the State of Gujarat by the concerned authorities.

13. The judgment on which the learned counsel for the respondents has placed reliance may not be of any assistance for the reason that under Section 432(7) CrPC, the appropriate Government can be either the Central or the State Government but there cannot be a concurrent jurisdiction of two State Governments under Section 432(7) CrPC.

14. In the instant case, once the crime was committed in the State of Gujarat, after the trial been concluded and judgment of conviction came to be passed, all further proceedings have to be considered including remission or pre-mature release, as the case may be, in terms of the policy which is applicable in the State of Gujarat where the crime was committed and not the State where the trial stands transferred and concluded for exceptional reasons under the orders of this Court.

15. Consequently, the petition is allowed. The judgment impugned dated 17th July, 2019 is set aside.

16. The respondents are directed to consider the application of the petitioner for pre-mature release in terms of its policy dated 9th July, 1992 which is applicable on the date of conviction and may be decided within a period of two months. If any adverse order is passed, the petitioner is at liberty to seek remedy available to him under the law."

36.3. The following aspects are noted by this Court in the order dated 13.05.2022:

(i) that the crime was committed in the State of Gujarat but this Court in Transfer Petition (Crl.) No.192 of 2004 had considered it appropriate to transfer Sessions Case No.161 of 2004 pending before the learned Additional Sessions Judge, Dahod, Ahmedabad to the competent court in Mumbai for trial and disposal by order dated 06.08.2004.

(ii) that the trial court, Mumbai in Sessions Case No.634 of 2004, on completion of the trial held the said respondent as well as the other accused guilty and sentenced them to undergo rigorous imprisonment for life by judgment and order dated 21.01.2008.

(iii) that one of the co-accused Ramesh Rupabhai had approached the Bombay High Court by filing Writ Petition (Crl.) No.305 of 2013 seeking premature release but his application was dismissed by order 05.08.2013 on the premise that the crime was committed in the state of Gujarat and his trial was transferred to the competent

court in Maharashtra and once the trial had concluded and sentence has been passed, the appropriate Government would be the State of Gujarat and accordingly, the application filed by the said co-accused for premature release was to be examined as per the policy applicable in the State of Gujarat.

(iv) that the judgment on which learned counsel for the State of Gujarat had placed reliance (***V.Sriharan***) was not of any assistance for the reason that under Section 432 (7) of the CrPC, the appropriate Government can be either Central or State Government but there cannot be a concurrent jurisdiction of two State Governments under the said provision.

(v) that once the crime was committed in the State of Gujarat, after the trial has been concluded and the judgment of conviction came to be passed, all further proceedings had to be considered including remission or pre-mature release, as the case may be, in terms of the policy which is applicable in the State of Gujarat where the crime was committed and not the State where the trial stood transferred and concluded for exceptional reasons under the order of this Court.

(vi) Consequently, the writ petition was allowed. Further even in the absence of there being any challenge, the order dated 17.07.2019 passed by the Gujarat High Court in a petition filed by the same petitioner (respondent No.3) under Article 226 of the Constitution was set aside by this Court in the writ petition filed by him under Article 32 of the Constitution.

(vii) Further, it was not brought to the notice of this Court that the policy dated 09.07.1992 had been cancelled and was no more effective. In the absence of the same, direction was issued to the State of Gujarat to consider the case of the petitioner therein for pre-mature release in terms of the said policy within a period of two months.

36.4. Our inferences on the Order of this Court dated 13.05.2022 passed on the aforesaid writ petition are as under:

(i) that the convict who approached this Court, namely, Radheshyam Bhagwandas Shah respondent No.3 herein had stated that he had undergone about 15 years 4 months of custody;

(ii) that respondent No.3 herein had not stated that his writ petition filed in the High Court of Gujarat had been dismissed by taking note of Section 432 (7) of the CrPC and on the basis of the decision in ***V.Sriharan*** as the trial had been concluded in the State of Maharashtra;

(iii) that respondent No.3 had not stated that the application for premature release had been filed by him in the State of Maharashtra and not in the State of Gujarat as directed by the judgment of the Gujarat High Court dated 17.07.2019;

(iv) Respondent No.3 herein who had filed the writ petition had not disclosed that he had acted upon the order dated 17.07.2019 passed by the Gujarat High Court inasmuch as–

  (a) he had approached the Government of Maharashtra *vide* application dated 01.08.2019;

  (b) the CBI had given a negative recommendation *vide* its letter dated 14.08.2019;

  (c) the Special Judge (CBI), Mumbai had given a negative recommendation *vide* his letter dated 03.01.2020;

  (d) the Superintendent of Police, Dahod, Gujarat had given a negative recommendation *vide* his letter dated 03.02.2020; and,

  (e) the District Magistrate, Dahod, Gujarat had given a negative recommendation *vide* his letter dated 19.02.2020.

(v) that the respondent No.3 had not assailed the order dated 17.07.2019 passed by the Gujarat High Court as there is a bar in law to assail an order passed by High Court under Article 226, under Article 32 of the Constitution.

(vi) Interestingly, in the writ petition, the respondent State of Gujarat placed reliance on the judgment in ***V.Sriharan*** and contended that the trial had been concluded in the State of Maharashtra and therefore the expression appropriate

government under section 432 of the CrPC would be the State of Maharashtra and that no error had been committed by the High Court in its order dated 17.07.2019.

(vii) Strangely, this Court held that the aforesaid submission on behalf of the State of Gujarat was not sustainable as the crime had been committed in the State of Gujarat and *"ordinarily, the trial was to be concluded in the same State and in terms of Section 432 (7) of the Code of Criminal Procedure, the appropriate Government in the ordinary course would be the State of Gujarat but the instant case, was transferred in exceptional circumstances by this Court for limited purpose for trial and disposal to the neighbouring State (State of Maharashtra) by an order dated 06.08.2004 but after the conclusion of trial and the prisoner being convicted, stood transferred to the State where the crime was committed remain the appropriate Government for the purpose of Section 432(7) Code of Criminal Procedure."* This portion of the order of this Court is contrary to the judgments of this Court discussed above. This implies that the said order is *per se per incuriam*.

(viii) This Court went on to hold that the High Court of Bombay had declined to interfere in Criminal Writ Petition No.305 of 2013 filed by the co-accused Ramesh Rupabhai by its order dated 05.08.2013 without realising what the prayer in the said writ petition was, which was filed in the year 2013, as at that point of time, the issue of remission had not arisen at all. The Bombay High Court had declined to entertain the Writ Petition filed by one of the convicts by holding to consider his plea for transfer to a jail in State of Gujarat.

(ix) Interestingly, no review petition was filed against the order of this Court dated 13.05.2022 by the State of Gujarat for seeking a review of the said order but the victim – petitioner in Writ Petition (Crl.) No.491 of 2022 – had filed a review petition which has been rejected by this Court.

(x) that although the respondent No.3 who approached this Court as well as the State of Gujarat had termed the order of the Gujarat High Court dated 17.07.2019 as "impugned

Order", the said order was not at all impugned or assailed in the proceedings before this Court. What was filed by the convict i.e., respondent No.3 before this Court was a writ petition under Article 32 of the Constitution seeking a direction to the State of Gujarat to consider his remission application;

(xi) More significantly, while a reference has been made to Criminal Writ Petition No.305 of 2013 filed by one of the co-accused Ramesh Rupabhai in the year 2013 before the Bombay High Court seeking a direction for transfer of the convicts from Maharashtra Jail to Gujarat Jail, the reference to the Order of the Gujarat High Court dated 17.07.2019 dismissing the writ petition filed by respondent No.3 herein directing him to approach the Maharashtra State for remission was only in the context of the said order being "diametrically opposite" to the view of the Bombay High Court without explaining and by suppression of the backgrounds under which the two writ petitions were filed before the respective High Court.

(xii) In fact, there was no pleading or prayer for seeking setting aside of the Gujarat High Court Order dated 17.07.2019 nor was there any challenge to the said Order. That said Order had attained finality as no Special Leave Petition as against the said Order was filed by the writ petitioner, Radheshyam Bhagwandas Shah respondent No.3 herein before this Court; rather he had acted upon it. Curiously, in the writ petition filed under Article 32 of the Constitution, the Order dated 17.07.2019 has been set aside even in the absence of there being any prayer thereto nor any discussion of the same.

(xiii) Further, contrary to Section 432 (7) and the judgements of the Constitution Bench and other benches of this Court, a writ of mandamus was issued to the State of Gujarat to consider the prayer of the writ petitioner for premature release in terms of its policy dated 09.07.1992. It was not brought to the notice of this Court by any party that the said policy had been cancelled and had been substituted by another policy in the year 2014. What was the effect of

cancellation of the policy dated 09.07.1992 was not brought to the notice of this Court either by the writ petitioner or by the State of Gujarat.

(xiv) In ***Sangeet & Another vs. State of Haryana*, *(2013) 2 SCC 452***, this Court speaking through Lokur, J., observed that a convict undergoing a sentence does not have right to get a remission of sentence but he certainly does have a right to have his case considered for the grant of remission. The term of sentence spanning the life of the convict can be curtailed by the appropriate Government for good and valid reasons in exercise of its powers under Section 432 of the CrPC. The said Section provides for some procedural and substantive checks on the arbitrary exercise of this power. While observing that there is no decision of this Court detailing the procedure to be followed for the exercise of power under Section 432 of the CrPC, it was stated that sub-section (2) to sub-section (5) of Section 432 of the CrPC lay down the basic procedure, which is making of an application to the appropriate Government for the suspension or remission of a sentence, either by the convict or someone on his behalf. Thus, the representation has to be made to the appropriate Government in terms of the provisions under Section 432 of the CrPC. It was further observed that the exercise of power by the appropriate Government under sub-section (1) of Section 432 of the CrPC cannot be *suo motu* for the simple reason that this sub-section is only an enabling provision. In other words, the appropriate Government is enabled to "override" a judicially pronounced sentence, subject to fulfillment of certain conditions. Those conditions are found either in the jail manual or in statutory rules. Therefore, sub-section (1) of Section 432 of the CrPC cannot be read to enable the appropriate Government to "further override" the judicial pronouncement over and above what is permitted by the jail manual or the statutory rules. On such an application being made, the appropriate Government is required to approach the Presiding Judge of the Court before or by which the conviction was made or confirmed to opine (with reasons) whether the application should be granted or

> refused. Thereafter, the appropriate Government may take a decision on the remission application and pass orders granting remission subject to some conditions, or refusing remission. There has to be an application of mind to the issue of grant of remission and the power of remission cannot be exercised arbitrarily. It was further observed that a convict undergoing life imprisonment is expected to remain in custody till the end of his life, subject to any remission granted by the appropriate Government under Section 432 of the CrPC which in turn is subject to the procedural checks in that Section and the substantive check in Section 433-Aof the CrPC.

Pursuant to the judgment in ***Sangeet***, the Government of India *vide* its communication dated 01.02.2013 made to all the Home Secretaries of the States and Union Territories, stated that there is a need to relook at the manner in which remissions of sentence are made with reference to Section 432 read with Section 433-A of the CrPC and hence requested that there should be scrupulous compliance of the aforesaid provisions and not to grant remission in a wholesale manner. Thereafter, on 08.05.2013, the Home Department, Government of Gujarat issued a Circular referring to the decision of this Court dated 20.11.2012 in ***Sangeet*** and in order to implement the same and also taking note of the communication of the Government of India dated 01.02.2013, the Circular dated 09.07.1992 was cancelled in following manner:

> "… Therefore, the provisions of circular No.JLK/3390/CM/16/part/2/J dated 09.07.1992 of the Home Department hereinabove referred to in Srl. No.1, hereby stand cancelled."

Thereafter, on 23.01.2014, the State Government constituted a Committee headed by the Additional Chief Secretary (Home) for considering the policy and guidelines to be followed for the purpose of remission and pre-mature release of the prisoners. After careful consideration, the State Government issued guidelines/policy for consideration of cases of remission and premature release of the prisoners. In the said policy, it was categorically mentioned that "the prisoners who are convicted for

the crimes" as mentioned in Annexure-I, shall not be considered for remission. Annexure-I contained the classes of prisoners who shall not be granted state remission as well as for premature release. Clause IV (a) and (d) read as follows:

(a) A prisoner or prisoners sentenced for group murder of two or more persons.

x x x

(d) Prisoners convicted for murder with rape or gang rape.

(xv) Realising that respondent Nos.3 to 13 would not be released under the Remission Policy dated 23.01.2014, which had substituted the earlier Policy dated 09.07.1992, which had been cancelled, the writ petition was filed by respondent No.3 herein before this Court seeking a specific direction to the State of Gujarat to consider his case as per the Policy dated 09.07.1992 which had by then been cancelled and substituted by another Policy dated 23.01.2014.

(xvi) What is the effect of cancellation of the said policy by the State of Gujarat in light of the judgement of this Court in ***Sangeet*** and the communication of Union of India issued to each of the states including the State of Gujarat? Does it mean that the said policy of 09.07.1992 had stood cancelled and therefore got effaced and erased from the statute book and substituted by a new policy of 2014 which had to be considered. There was no pleading or discussion to that effect.

36.5. Thus, by suppressing material aspects and by misleading this Court, a direction was sought and issued to the respondent State of Gujarat to consider the premature release or remission of the writ petitioner, i.e., respondent No.3 on the basis of the policy dated 09.07.1992.

37. More pertinently, respondent No.3 had suppressed the fact that on the basis of the judgment of the Gujarat High Court in the writ petition that he had filed, the convict had acted upon it and had made an application to the State of Maharashtra for remission on 01.08.2019 and the said application was being processed inasmuch as the stakeholders had given their opinion on the application, such as, the Presiding Judge of the court which had convicted the accused;

the Director - CBI as well as the Director General and Inspector General of Police, State of Maharashtra who were all unanimous in their opinion inasmuch as they had all negatived grant of remission to the convict – Radheshyam Bhagwan Das. Suppressing all this, the writ petition was filed by respondent No.3 invoking Article 32 of the Constitution and the same was allowed by also setting aside the Order of the Gujarat High Court dated 17.07.2019 and thereby setting at naught the steps taken pursuant to the said Order of the Gujarat High Court.

38. At this stage, we may point out that if respondent No.3 had felt aggrieved by the order of the Gujarat High Court dated 17.07.2019, it was open to him to have challenged the said order before this Court by filing a special leave petition, but he did not do so. Rather, he complied with the order of the Gujarat High Court by filing remission application dated 01.08.2019 before the Government of Maharashtra where, not only the process for consideration of the remission prayer was initiated, but opinions of various authorities were also obtained. When the opinions were found to be negative, respondent No.3 filed Writ Petition(Crl.) No.135 of 2022 before this Court seeking a direction to the State of Gujarat to consider his remission application suppressing the above material facts. This he could not have done, thereby misrepresenting and suppressing relevant facts, thus playing fraud on this Court.

39. We have no hesitation in holding that neither the order of the Gujarat High Court dated 17.07.2019 could have been challenged by respondent No.3 or for that matter by anybody else before this Court in a writ proceeding under Article 32 of the Constitution of India nor the said order of the High Court could have been set aside in a proceeding under Article 32 thereof. This proposition of law has been settled long ago by a nine-Judge bench decision of this Court in ***Naresh Shridhar Mirajkar vs. State of Maharashtra*, *AIR 1967 SC 1***, which is binding on us.

39.1. When an oral order of the learned Judge passed in the original suit of the Bombay High Court was challenged by the petitioner therein by way of a writ petition under Article 226 of the Constitution of India before the Bombay High Court, the writ petition was dismissed by a division bench of the Bombay High Court on the ground that the impugned order was a

judicial order of the High Court and was not amenable to writ jurisdiction under Article 226. Thereafter, the petitioner therein moved this Court under Article 32 of the Constitution of India for enforcement of his fundamental rights under Article 19(1)(a) and (g) of the Constitution of India. This Court observed that the impugned order was passed by the learned Judge in the course of trial of a suit before him after hearing the parties. This Court took the view that the restraint order was passed to prohibit publication of evidence in the media during the progress of the trial and could not be construed as imposing a permanent ban on the publication of the said evidence.

39.2. The question which fell for consideration before this Court was whether a judicial order passed by the High Court prohibiting the publication in newspapers of evidence given by a witness pending the hearing of the suit, was amenable to be corrected by a Writ of Certiorari of this Court under Article 32 of the Constitution of India. In the above context, this Court first held that a judicial verdict pronounced by a court in a matter brought before it for its decision cannot be said to affect the fundamental rights of citizens under Article 19(1) of the Constitution of India. Thereafter, this Court proceeded to hold that if any judicial order was sought to be attacked on the ground that it was inconsistent with Article 14 or any other fundamental rights, the proper remedy to challenge such an order would be by way of an appeal or revision as may be provided by law. It would not be open to the aggrieved person to invoke the jurisdiction of this Court under Article 32 of the Constitution and to contend that a Writ of Certiorari should be issued to quash such an order. This Court observed that it would be inappropriate to allow the petitioners to raise the question about the jurisdiction of the High Court to pass the impugned order in a proceeding under Article 32. Rejecting the argument of the petitioners, this Court held that judicial orders passed by High Courts in or in relation to proceedings pending before the High Courts are not amenable to be corrected by this Court exercising jurisdiction under Article 32 of the Constitution of India. This being the law of the land, it is binding on all the courts including benches of lesser coram of this Court.

40. Before proceeding further, it may also be mentioned that it was only respondent No.3 who had approached this Court by filing a writ petition under Article 32 of the Constitution of India being Writ Petition(Crl.) No.135 of 2022, seeking a direction to the State of Gujarat to consider his pre-mature release. None of the other convicts, i.e. respondent Nos.4 to 13 had approached this Court or any High Court seeking such a relief. Therefore, in so far these respondents are concerned, there was no direction of this Court or any court to the State of Gujarat to consider their pre-mature release.

41. We are of the considered view that the writ proceedings before this Court is pursuant to suppression and misleading of this Court and a result of *suppressio veri suggestio falsi*. Hence, in our view, the said order was obtained by fraud played on this Court and hence, is a nullity and *non est* in law. In view of the aforesaid discussion, we hold that consequently the order dated 13.05.2022 passed by this Court in Writ Petition (Crl.) No.135 of 2022 in the case of ***Radheshyam Bhagwandas Shah*** is hit by fraud and is a nullity and *non est* in the eye of law and therefore cannot be given effect to and hence, all proceedings pursuant to the said order are vitiated.

42. It is trite that fraud vitiates everything. It is a settled proposition of law that fraud avoids all judicial acts. In ***S.P. Chengalvaraya Naidu vs. Jagannath (Dead) through LRs, (1994) 1 SCC 1 ("S.P. Chengalvaraya Naidu")***, it has been observed that "fraud avoids all judicial acts, ecclesiastical or temporal." Further, "no judgment of a court, no order of a minister would be allowed to stand if it has been obtained by fraud. Fraud unravels everything" *vide* ***Lazarus Estates Ltd. vs. Beasley, (1956) 1 ALL ER 341 ("Lazarus Estates Ltd.")***.

43. It is well-settled that writ jurisdiction is discretionary in nature and that the discretion must be exercised equitably for promotion of good faith *vide* ***State of Maharashtra vs. Prabhu, (1994) 2 SCC 481 ("Prabhu")***. This Court has further emphasized that fraud and collusion vitiate the most solemn precedent in any civilized jurisprudence; and that fraud and justice never dwell together *(fraus et jus nunquam cohabitant*). This maxim has never lost its lustre over the centuries. Thus, any litigant who is guilty of inhibition before the Court should not bear the fruit and benefit of the court's orders. This Court has also held that fraud is an act of deliberation with a desire to secure something which is otherwise not due. Fraud is practiced with an intention to secure undue advantage. Thus, an act of fraud on courts must be viewed seriously.

43.1. Further, fraud can be established when a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii), recklessly, being careless about whether it be true or false. While suppression of a material document would amount to a fraud on the Court, suppression of material facts vital to the decision to be rendered by a court of law is equally serious. Thus, once it is held that there was a fraud in judicial proceedings all advantages gained as a result of it have to be withdrawn. In such an eventuality, doctrine of *res judicata* or doctrine of binding precedent would not be attracted since an order obtained by fraud is *non est* in the eye of law.

43.2. In ***K.D. Sharma vs. Steel Authority of India Limited*, (2008) 12 SCC 481 ("K.D. Sharma")**, this Court held that the jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution is extraordinary, equitable and discretionary and it is imperative that the petitioner approaching the Writ Court must come with clean hands and put forward all the facts before the Court without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the Court, his petition may be dismissed at the threshold without considering the merits of the claim. It was held thus:

> "38. The above principles have been accepted in our legal system also. As per settled law, the party who invokes the extraordinary jurisdiction of this Court Under Article 32 or of a High Court Under Article 226 of the Constitution is supposed to be truthful, frank and open. He must disclose all material facts without any reservation even if they are against him. He cannot be allowed to play "hide and seek" or to "pick and choose" the facts he likes to disclose and to suppress (keep back) or not to disclose (conceal) other facts. The very basis of the writ jurisdiction rests in disclosure of true and complete (correct) facts. If material facts are suppressed or distorted, the very functioning of writ courts and exercise would become impossible. The Petitioner must disclose all the facts having a bearing on the relief sought without any qualification. This is because "the court knows law but not facts".

> 39. … Suppression or concealment of material facts is not an advocacy. It is a jugglery, manipulation, maneuvering or misrepresentation, which has no place in equitable and prerogative jurisdiction. If the applicant does not disclose all the material facts fairly and truly but states them in a distorted manner and misleads the court, the court has inherent power in order to protect itself and to prevent an abuse of its process to discharge the Rule nisi and refuse to proceed further with the examination of the case on merits. If the court does not reject the petition on that ground, the court would be failing in its duty. In fact, such an applicant requires to be dealt with for contempt of court for abusing the process of the court."

43.3. In ***K. Jayaram vs. Bangalore Development Authority, 2021 SCC OnLine SC 1194 ("K. Jayaram"),*** a bench of this Court headed by Sri Nazeer, J. noticed that the appellants therein had not come to the Court with clean hands. The appellants in the said case had not disclosed the filing of a suit and its dismissal and also the dismissal of the appeal against the judgment of the Civil Court. This Court stressed that the parties have to disclose the details of all legal proceedings and litigations either past or present concerning any part of the subject matter of dispute which is within their knowledge in order to check multiplicity of proceedings pertaining to the same subject-matter and more importantly to stop the menace of soliciting inconsistent orders through different judicial forums by suppressing material facts either by remaining silent or by making misleading statements in the pleadings in order to escape the liability of making a false statement. This Court observed that since the appellants therein had not disclosed the filing of the suit and its dismissal and also the dismissal of the appeal against the judgment of the civil court, the appellants had to be non-suited on the ground of suppression of material facts. They had not come to the court with clean hands and they had also abused the process of law, therefore, they were not entitled to the extraordinary, equitable and discretionary relief.

43.4. A Division Bench of this Court comprising Justice B. R. Gavai and Justice C.T. Ravikumar placing reliance on the dictum in ***S.P. Chengalvaraya Naidu*****,** held in ***Ram Kumar vs. State of***

Uttar Pradesh*, *AIR 2022 SC 4705, that a judgment or decree obtained by fraud is to be treated as a nullity.

44. We wish to consider the case from another angle. The order of this Court dated 13.05.2022 is also *per incuriam* for the reason that it fails to follow the earlier binding judgments of this Court including that of the Constitution Bench in ***V. Sriharan*** *vis-à-vis* the appropriate Government which is vested with the power to consider an application for remission as per sub-section (7) of Section 432 of the CrPC and that of the nine Judge Bench decision in ***Naresh Shridhar Mirajkar*** that an order of a High Court cannot be set aside in a proceeding under Article 32 of the Constitution.

44.1. In ***State of U.P. vs. Synthetics and Chemicals Ltd.*, *(1991) 4 SCC 139 ("Synthetics and Chemicals Ltd.")***, a two Judge Bench of this Court (speaking through Sahai J. who also wrote the concurring judgment along with Thommen, J.) observed that the expression *per incuriam* means *per ignoratium.* This principle is an exception to the rule of *stare decisis*. The 'quotable in law' is avoided and ignored if it is rendered, '*in ignoratium* of a statute or other binding authority'. It would result in a judgment or order which is *per incuriam*. In the case of ***Synthetics and Chemicals Ltd.,*** the High Court relied upon the observations in paragraph 86 of the judgment of the Constitution Bench in ***Synthetics and Chemicals Ltd.,*** namely, "sales tax cannot be charged on industrial alcohol in the present case, because under the Ethyl Alcohol (Price Control) Orders, sales tax cannot be charged by the State on industrial alcohol" and struck down the levy.

In ***Synthetics and Chemicals Ltd.,*** before the two-judge bench, it was categorically argued by the learned Advocate General appearing for the appellant State of Uttar Pradesh that the reference to "sales tax" in the judgment of this Court in the earlier round of the litigation was accidental and did not arise from the judgment. This was because the levy of sales tax was not in question at any stage of the arguments nor was the question considered as it was not in issue. The Court gave no reason whatever for abruptly stating that "sales tax was not leviable by the State by reason of the Ethyl Alcohol (Price Control) Orders." In fact, the question which arose for consideration in the earlier litigation was in regard to the validity of "vend fee and other

fees" charged by the States. The argument was that such impost, to the extent that it fell on industrial alcohol, encroached upon the legislative field reserved for Parliament in respect of a controlled industry coming under Entry 52 of List I (read with Entry 33 of List III). Vend fee or transport fee and similar fees, unless supported by *quid pro quo*, this Court held, interfered with the control exercised by the Central Government under the Industries (Development and Regulation) Act, 1951 (for short "IDR Act, 1951") and the various orders made thereunder with respect to prices, licences, permits, distribution, transport, disposal, acquisition, possession, use, consumption, etc., of articles related to a controlled industry, industrial alcohol being one of them. But none of the observations in the judgment warranted the abrupt conclusion, to which the court came, that the power to levy taxes on sale or purchase of goods referable to Entry 54 of List II was curtailed by the control exercised by the Central Government under the IDR Act. The casual reference to sales tax in the concluding portion of the judgment was accidental and *per incuriam* was the submission.

While considering the said plea, this Court observed that "the only question which had to be determined between the same parties reported in ***(1990) 1 SCC 109 (Synthetics and Chemicals Ltd. vs. State of U.P.***) was "whether intoxicating liquor in Entry 8 in List II was confined to potable liquor or includes all liquors." Answering this question, this Court categorically held that intoxicating liquor within the meaning of Entry 8 of List II was confined to potable liquor and did not include industrial liquor. This Court did not deal with the taxing power of the State under Entry 54 of List II which deals with 'taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92-A of List I'. The power of the State to levy taxes on sale or purchase of goods under that entry was not the subject matter of discussion by this Court although in paragraph 86 of the leading judgment of this Court, there was a reference to sales tax.

Therefore, the only question that was considered by the seven-judge bench of this Court was whether the State could levy "excise duty" or "vend fee" or "transport fee" and the like by recourse to Entry 51 or 8 in List II in respect of industrial alcohol. Entry 52 List II was not applicable to fee or charges in question. Entry 52 List II refers to "Taxes on the entry of goods into a local area for consumption, use

or sale therein". Further, the observation that sales tax cannot be charged by the State on industrial alcohol was an abrupt observation without a preceding discussion, and inconsistent with the reasoning adopted by this Court in earlier decisions from which no dissent was expressed on the point. However, the aforesaid observation with reference to Entry 52 of List II in connection with excise duty and sales tax when neither falls under that entry, was held to be *per incuriam*.

This was because this Court by a detailed discussion in the seven-judge bench decision had observed that the impugned statutory provisions purportedly levying fees or enforcing restrictions in respect of industrial alcohol were impermissible in view of the control assumed by the Central Government in exercise of its power under Section 18-G of the IDR Act in respect of a declared industry falling under Entry 52 of List I, read with Entry 33 of List III.

It was in the above background that this Court considered the question whether or not the power of the State to levy tax on the sale or purchase of goods falling under Entry 54 of List II would comprehend industrial alcohol. This was because the taxing power under Entry 54 of List II was subject to taxing power of the Parliament under Entry 92-A of List I. Therefore, it was observed that the provisions in question by which sales tax could be levied within the scope and ambit of Entry 54 List II was contrary to what had been stated (in paragraph 86) by the seven-judge bench decision between the same parties. It was observed that the aforesaid decision of this Court was not an authority for the proposition canvassed by the assessee in challenging the provision. This Court could not have intended to say that the Price Control Orders made by the Central Government under the IDR Act imposed a fetter on the legislative power of the State under Entry 54 of List II to levy taxes on the sale or purchase of goods. The reference to sales tax in paragraph 86 of that judgment was merely accidental or *per incuriam* and therefore, had no effect.

In the earlier litigation of ***Synthetics and Chemicals Ltd.,*** the question was whether the State Legislature could levy vend fee or excise duty on industrial alcohol. The seven-Judge Bench answered in the negative as industrial alcohol being unfit for human consumption, the State legislature was incompetent to levy any duty of excise either under Entry 51 or Entry 8 of List II of the Seventh Schedule.

While doing so, the Bench recorded the above conclusion. It was not preceded by any discussion. No reason or rationale could be found in the judgment. Therefore, it was held by the two-Judge Bench that the same was *per incuriam* and was liable to be ignored in a subsequent matter between the same parties. The courts have taken recourse to this principle for relieving from injustice being perpetrated by unjust precedents. It was observed that uniformity and consistency are core of judicial discipline. But, if a decision proceeds contrary to the law declared, it cannot be a binding precedent. It was further observed that the seven-Judge Bench in ***Synthetics and Chemicals Ltd.*** did not discuss the matter and had observed that the State cannot levy sales tax on industrial alcohol. In the subsequent matter which arose from the High Court between the same parties, it was held by this Court that the conclusion of law by the Constitution Bench that no sales or purchase tax could be levied on industrial alcohol was *per incuriam* and also covered by the rule of *sub-silentio* and therefore, was not a binding authority or precedent.

Thus, although it is the *ratio decidendi* which is a precedent and not the final order in the judgment, however, there are certain exceptions to the rule of precedents which are expressed by the doctrines of *per incurium* and *sub silentio*. *Incuria* legally means carelessness and *per incurium* may be equated with *per ignorantium*. If a judgment is rendered *in ignorantium* of a statute or a binding authority, it becomes a decision *per incurium.* Thus, a decision rendered by ignorance of a previous binding decision of its own or of a court of coordinate or higher jurisdiction or in ignorance of the terms of a statute or of a rule having the force of law is *per incurium*. Such a *per incurium* decision would not have a precedential value. If a decision has been rendered *per incurium*, it cannot be said that it lays down good law, even if it has not been expressly overruled *vide* ***Mukesh K. Tripathi vs. Senior Divisional Manager, LIC, (2004) 8 SCC 387*** **(para 23).** Thus, a decision *per incurium* is not binding.

44.2. Another exception to the rule of precedents is the rule of *sub-silentio*. A decision is passed *sub-silentio* when the particular point of law in a decision is not perceived by the court or not present to its mind or is not consciously determined by the court and it does not form part of the *ratio decidendi* it is not binding *vide* ***Amrit Das vs. State of Bihar, (2000) 5 SCC 488***.

45. One of the contentions raised in the present case was that since this Court in the order dated 13.05.2022 had directed that the State of Gujarat was the appropriate Government, the same was binding on the parties even though it may be contrary to the earlier decisions of this Court. We cannot accept such a submission having regard to what has been observed above in the case of ***Synthetics and Chemicals Ltd.*** which was also with regard to the application of the same doctrine between the very same parties inasmuch as when a judgment has been delivered *per incuriam* or passed *sub-silentio*, the same cannot bind either the parties to the judgment or be a binding precedent for the future even between the same parties. Therefore, for this reason also, the order dated 13.05.2022 would not bind the parties thereto and particularly, to the petitioner in Writ Petition (Crl.) No.491 of 2022 who was in any case not a party to the said writ proceeding.

46. Having regard to the above discussion and in light of the provisions of the CrPC, the judgments of this Court and our own understanding of the order dated 13.05.2022 passed by a coordinate Bench of this Court in Writ Petition No.135 of 2022, we hold as follows:

    (i) that the Government of State of Gujarat (respondent No.1 herein) had no jurisdiction to entertain the applications for remission or pass the orders of remission on 10.08.2022 in favour of respondent No.3 to 13 herein as it was not the appropriate Government within the meaning of sub-section (7) of Section 432 of the CrPC;

    (ii) that this Court's order dated 13.05.2022 being vitiated and obtained by fraud is therefore a nullity and *non est* in law. All proceedings taken pursuant to the said order also stand vitiated and are *non est* in the eye of law.

47. Point No.3 is accordingly answered.

Point No.4 : Whether the impugned order of remission passed by the respondent - State of Gujarat in favour of respondent Nos.3 to 13 are in accordance with law?

48. We have perused the original record which is the English translation from Gujrati language.

48.1. Even according to the respondent State of Gujarat Radheshyam Bhagwandas Shah has not made any application seeking remission before the Superintendent, Godhra Sub-Jail or the State of Gujarat on 01.08.2019.

48.2. All the other applications were made even prior to the order of this Court made in Writ Petition (Crl.) No.135 of 2022 on 13.05.2022. Within next few days i.e. on 26.05.2022, the Jail Advisory Committee gave its opinion recommending grant of remission. The recommendation of ADG and IG of Jails was received in almost cases on 09.06.2022. In two cases, (i) the recommendation of the ADG and IG was received on 18.08.2021 and 09.06.2021 [in the case of ***Govind Bhai Akham Bhai Nai (Raval)]*** and (ii) on 18.08.2021 [in the case of ***Radheyshyam Bhagwandas Shah***].

48.3. The communication of the State Government to the Central Government was made on 28.06.2022; the second respondent Union of India gave its concurrence on 11.07.2022; and, the order of remission was made on 10.08.2022.

48.4. We extract one of the orders of remission dated 10.08.2022 in the case of respondent No.3 as under:

"GOVERNMENT OF GUJARAT
Order Number JLK/83202/2978/J
Secretariat House, Gandhinagar,
Dated: 10/08/2022.

Reference:

(1) Order of the Hon'ble Supreme Court date:13/05/2022, Writ Petition (Criminal) No.135/2022.

(2) The Additional Director General of Police and Inspector General of Prisons, State of Gujarat, Ahmedabad/letter dated:17/06/2022 No:- JUD/14 Year/2/4754/2022.

(3) Department Circular Date: 09/7/1992, No.JLK/3390/ CM/16/Part-2/J.

(4) Ministry of Home, The Government of India, Letter dated: 11/07/2022, No.15/05/2022/JC-II

::FORWARD::

Mr. Radheshyam Bhagwandas Shah, From Godhra Sub Jail filed Writ Petition in the Hon'ble Supreme Court as per reference No.1 and Hon'ble Supreme Court passed order to take decision as per policy mentioned in reference No.3 within two months regarding Pre-mature release application of Mr. Shah. The premature release proposal was prepared and sent by the Additional Director General of Police and Inspector General of Prisons as per the letter of reference No.2. The provision under Section 432 of CrPC the State Government has power for pre-mature release, however provision under Section 435(1)(A) of CrPC. Indicates that any case investigated by any agency which is established by Union Government Rules, in those cases it is need to be consulted with Central Government is required. This case was investigated by CBI, therefore the State Government of Gujarat in consultance with Central Government letter dated 28/06/2022. Pursuant to which the Ministry of Home Affairs of the Government of India has given a positive opinion regarding the release of the prisoner from the letter reference (4), considering all the details, the release of Mr. Radheshyam Bhagwandas Shah was under consideration.

::ORDER::

Provision under Criminal Procedure Code, 1973 Section 443(A), power given to State Government under Section 432 of Criminal Procedure Code, 1973, the convict prisoner Radheshyam Bhagwandas Shah's life sentence remitted under the following conditions and taken decision by Government to release him from immediate effect.

::CONDITIONS::

(1) He shall to furnish surety of two gentlemen about after releasing him, he will behave good up to two years and also given undertaking he will not breach public peace and harass parties and witnesses.

(2) After being released from prison if he commits cognizable offense causing grievous hurt to anyone or property then he may be re-arrested and shall serve the remaining of his sentence.

(3) After released from jail he must give his attendance in nearest police station, once in a month till one year.

The jail authority shall read and explain above conditions to him and before releasing him, prior to his release from prison, the jail authority must keep a written record indicating that he has understood the said conditions and that he agrees to these conditions of release from prison.

By order of the Governor of Gujarat and in his name.

---sd---
(Mayursinh Vaghela)
Under Secretary
Home Department."

48.5. Though we have extracted one of the remission orders, we observe that having given our categorical finding on Point No.3, it may not be necessary to dilate on certain aspects of Point No.4, though it is quite evident that the said order is a non-speaking one reflecting complete non-application of mind. All orders dated 10.08.2022 are a stereotyped and cyclostyled orders.

48.6. Be that as it may, it would be useful to refer to the following judgments in the context of passing an order of remission in terms of Section 432 read with Section 435 of the CrPC.

(a) ***V. Sriharan*** is a judgment of this Court wherein the Constitution Bench answered seven questions out of which the following questions are relevant for the purposes of this case:

"××× ××× ×××

8.3. (iii) Whether the power under Sections 432 and 433 of the Criminal Procedure Code by the appropriate Government would be available even after the constitutional power under Articles 72 and 161 by the President and the Governor is exercised as well as the power exercised by this Court under Article 32?

8.4. (iv) Whether the State or the Central Government have the primacy under Section 432(7) of the Criminal Procedure Code?

8.5. (v) Whether there can be two appropriate Governments under Section 432(7)?

8.6. (vi) Whether power under Section 432(1) can be exercised *suo motu* without following the procedure prescribed under Section 432(2)?

8.7. (vii) Whether the expression "consultation" stipulated in Section 435(1) really means "concurrence"?"

(i) This Court observed that the procedure to be followed under Section 432(2) is mandatory and that *suo moto* power of remission cannot be exercised under Section 432(1) and it can only be initiated by an application of the person convicted as provided under Section 432(2) and the ultimate order of suspension of sentence or remission should be guided by the opinion to be rendered by the Presiding Officer of the Court concerned. In this case the earlier judgement of this court in ***Sangeet*** was approved.

(b) In ***Sangeet***, it was observed that a convict undergoing a sentence does not have a right to get remission of sentence, however, he certainly does have a right to have his case considered for the grant of remission as held in ***Mahender Singh*** and ***Jagdish***. It was further observed in the said case that there does not seem to be any decision of this Court detailing the procedure to be followed for the exercise of power under Section 432 of the CrPC which only lays down the basic procedure i.e. by making an application to the appropriate Government for the suspension or remission of a sentence, either by the convict or someone on his behalf. It was observed that sub-section (1) of Section 432 of the CrPC is only an enabling provision to override a judicially pronounced sentence, subject to the fulfilment of certain conditions. These conditions are found either in the Jail Manual or in statutory rules. It was pertinently observed that when an application for remission is made the appropriate Government may take a decision on the remission application and pass orders granting remission subject to certain conditions or, refuse remission. But there has to be an application of mind on the remission application so as to eliminate discretionary *en-masse* release of convicts on "festive" occasions, since each release requires a case by case scrutiny. It was observed that

the power of remission cannot be exercised arbitrarily and the decision to grant remission has to be well informed, reasonable and fair to all concerned. The statutory procedure under Section 432 of the CrPC provides a check on the possible misuse of power of the appropriate Government.

(i) It was further observed that there is a misconception that a prisoner serving a life sentence has an indefeasible right to be released on completion of fourteen years or twenty years of imprisonment; however, in reality, the prisoner has no such right. A convict undergoing life imprisonment is expected to remain in custody till the end of his life, subject to any remission granted by the appropriate Government under Section 432 of the CrPC which, in turn, is subject to the procedural checks in that section and the substantive check in Section 433-A of the CrPC. That the application of Section 432 of the CrPC to a convict is limited inasmuch as, a convict serving a definite term of imprisonment is entitled to earn a period of remission under a statutory rule framed by the appropriate Government or under the Jail Manual. The said period is then offset against the term of punishment given to him. Thus, upon completion of the requisite period of incarceration, a prisoner's release is automatic. However, Section 432 of the CrPC will apply only when a convict is to be given an "additional" period of remission for his release i.e., the period to what he has earned as per the Jail Manual or the statutory rules. That in the case of convict undergoing life imprisonment, the period of custody is indeterminate. Remissions earned or awarded to such a life convict are only notional and Section 432 of the CrPC reduces the period of incarceration by an order passed by an appropriate Government which cannot be reduced to less than fourteen years as per Section 433-A of the CrPC. This Court after a detailed discussion came to the following conclusions on the aspect of grant of remissions:

> "77.5. The grant of remissions is statutory. However, to prevent its arbitrary exercise, the legislature has built in some procedural and substantive checks in the statute. These need to be faithfully enforced.

77.6. Remission can be granted under Section 432 Cr.P.C. in the case of a definite term of sentence. The power under this section is available only for granting "additional" remission, that is, for a period over and above the remission granted or awarded to a convict under the Jail Manual or other statutory rules. If the term of sentence is indefinite(as in life imprisonment), the power under Section 432 Cr.P.C. can certainly be exercised but not on the basis that life imprisonment is an arbitrary or notional figure of twenty years of imprisonment.

77.7. Before actually exercising the power of remission under Section 432 Cr.P.C. the appropriate Government must obtain the opinion(with reasons) of the Presiding Judge of the convicting or confirming Court. Remissions can, therefore, be given only on a case-by-case basis and not in a wholesale manner."

(c) ***Ram Chander*** was a case of a writ petition being filed before this Court under Article 32 of Constitution seeking a direction to the respondent-State therein to grant him premature release. This Court speaking through Dr. D.Y. Chandrachud., J., (presently the learned Chief Justice) considered the aspect of judicial review of power of remission and referred to ***Mohinder Singh*** to observe that the power of remission cannot be exercised arbitrarily and the decision to grant remission should be informed, reasonable and fair. In this context, reliance was placed on ***Laxman Naskar*** wherein this Court, stipulated the factors that govern the grant of remission namely:

i. Whether the offence is an individual act of crime without affecting the society at large?

ii. Whether there is any chance of future recurrence of committing crime?

iii. Whether the convict has lost his potentiality in committing crime?

iv. Whether there is any fruitful purpose of confining this convict any more?

v. Socio-economic condition of the convict's family."

(i) That while grant of remission is the exclusive prerogative of the executive, the Court cannot supplant its view. The Court can direct the authorities to reconsider the representation of the convict *vide* ***Rajan.*** Therefore, while there can be no direction to release a prisoner forthwith or to remit the remaining sentence, at best there can only be a direction issued to the State to consider the representation made for remission expeditiously on its own merits and in accordance with law. In this case, reliance was placed on Halsbury's Law of India (Administrative Law) to observe that sufficiency of reasons, in a particular case, depends on the facts of each case while considering an application for remission. It was further observed that mechanical or stereo typed reasons are not adequate as also, a mere repetition of the statutory language in the order will not make the order a reasoned one. In the aforesaid case, the application for remission was directed to be reconsidered with adequate reasoning and taking into consideration all the relevant factors that govern the grant of remission as laid down in ***Laxman Naskar***.

(d) ***Epuru Sudhakar*** is also a case where a writ petition was filed under Section 32 of the Constitution challenging an order of Government of Andhra Pradesh, whereby a convict (respondent No.2 therein) was granted remission of unexpired period of about seven years' imprisonment. The petition was filed by the son of the murdered persons while the convict was on bail in the murder case of petitioner No.1's father therein. In the writ petition it was alleged, *inter alia,* that the grant of remission was illegal as relevant materials were not placed before the Governor and the impugned order was made without application of mind and based on irrelevant and extraneous materials and therefore, liable to be set aside. That was a case where remission or grant of pardon was under Article 161 of the Constitution by the Governor of the State of Andhra Pradesh. This Court, while considering the philosophy underlining the power of pardon or the power of clemency observed that the said power exercised by a department or functionary of the Government is in the context of its political morality. Reliance was placed on ***Biddle, Warden vs. Perovich, 274 US 480 (1927) ("Biddle")*** in which case, Holmes, J of the United States Supreme Court had observed on the rationale of pardon in the following words:

"…a pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed…"

(i) It was observed that the prerogative of mercy exercised by a State as a prerogative power of a Crown as in England (U.K.) or of the President of India or Governor of a State in India is reviewable as an administrative action incase there is an abuse in the exercise of the prerogative power. That the prerogative power to pardon or grant clemency or for that matter remission of sentence being a discretionary power, it must be exercised for the public good and the same can be examined by the Courts just as any other discretionary power which is vested with the executive. Therefore, judicial review of the exercise or non-exercise of the power of pardon by the Presidentor Governor is available in law. That any exercise of public power, including constitutional power, shall not be exercised arbitrarily or *mala fide vide* ***Maru Ram***. It was observed in the said case that, considerations of religion, caste, colour or political loyalty are totally irrelevant and fraught with discrimination. The function of determining whether the act of a constitutional or statutory functionary falls within the constitutional or legislative conferment of power or is vitiated by self-denial or an erroneous appreciation of the full amplitude of the power, is a matter for the Court to decide *vide* ***Kehar Singh vs. Union of India, (1989) 1 SCC 204 ("Kehar Singh").***

(ii) In ***Epuru Sudhakar,*** two other aspects were also considered: one relating to the desirability of indicating reasons in the order granting pardon/remission and the other, relating to the power to withdraw the order of granting pardon/remission, if subsequently, materials are placed to show that certain relevant materials were not considered or certain materials of extensive value were kept out of consideration. It was observed that the affected party need not be given the reasons but that does not mean that there

should not be legitimate or relevant reasons for passing the order. It was also observed that in the absence of any specific reference under Articles 72 or 161 of Constitution with regard to withdrawal of an order of remission, there is no bar for such power being exercised.

(iii) On a consideration of the facts of the said case, it was observed that, irrelevant and extraneous materials had entered into the decision-making process, thereby vitiatingit. The order granting remission impugned in the writ petitions was set aside being unsustainable and directed to be reconsidered and the writ petition was allowed to that extent. Kapadia, J., as the learned Chief Justice then was, in his concurring opinion observed that, exercise of executive clemency is a matter of discretion and yet subject to certain standards. The discretion has to be exercised or public considerations allowed. Therefore, the principle of exclusive cognizance would not apply when the decision impugned is in derogation of a constitutional provision. It was further stated that granting of pardon has the effect of eliminating conviction without addressing the defendant's guilt or innocence.

(iv) The exercise of the prerogative power is subject to judicial review and rule of law which is the basis for evaluation of all decisions. Rule of law cannot be compromised on the grounds of political expediency as "*to go by such consideration would be subversive of the fundamental principles of rule of law and it would amount to setting a dangerous precedent.*"

(e) In ***Mansukhlal Vithaldas Chauhan vs. State of Gujarat, (1997) 7 SCC 622,*** the basis on which the legality of an administrative decision could be reviewed was stated. It could be on whether, a decision making authority exceeding its powers committed an error of law; committed a breach of rules of natural justice; reached a decision which no reasonable tribunal would have reached or abused its powers. In other words, the judicial review of the order of the President or the Governor under Article 72 or Article 161 of the Constitution, as the case may, is available and such order scan be impugned on the following grounds:

i. that the order has been passed without application of mind;

ii. that the order is *mala fide*;

iii. that the order has been passed on extraneous or wholly irrelevant considerations;

iv. that relevant materials have been kept out of consideration;

v. that the order suffers from arbitrariness.

(f) Further, in ***Swamy Shraddananda*****,** it was observed that judicial notice has to be taken of the fact that remission, if allowed to life convicts in a mechanical manner without any sociological or psychiatric appraisal of the convict and without any proper assessment as to the effect of early release of a particular convict on the society. It was further observed that, the power of executive clemency is not only for the benefit of the convict but what has to be borne in mind is the effect of the decision on the family of the victims, society as a whole and the precedent which it sets for the future. Thus, the exercise of power depends upon the facts and circumstances of each case and has to be judged from case to case. Therefore,one cannot draw the guidelines for regulating exercise of power. Further, the exercise or non-exercise of power of pardon or remission is subject to judicial review and a pardon obtained by fraud or granted by mistake or granted for improper reasons would invite judicial review and the vindication of the rule of law being the main object of judicial review, the mechanism for giving effect to that justification varies. Thus, rule of law should be the over arching conditional justification for judicial review.

(g) In ***Rajan***, it was observed that where a person has been convicted on several counts for different offences in relation to which life imprisonment has been granted, the convict may succeed in being released prematurely only if the competent authority passes an order of remission concerning all the life sentences awarded to the convict on each count which is a matter to be considered by the competent authority.

48.7. With regard to the remission policy applicable in a given case, the following judgments are of relevance:

(a) In ***Jagdish,*** a three Judge Bench of this Court considered the conflicting opinions expressed in ***State of Haryana vs. Balwan, (1999) 7 SCC 355 ("Balwan")*** on the one hand and ***Mahendar Singh,*** and ***State of Haryana vs. Bhup Singh, (2009) 2 SCC 268*** (***"Bhup Singh")*** on the other. The question considered by the three-Judge bench was, whether, the policy which provides for remission and sentence should be that which was existing on the date of the conviction of the accused or should it be the policy that existed on date of consideration of his case for premature release by the appropriate authority. Noting that remission policy would be changed from time to time and after referring to the various decisions of this Court, including ***Gopal Vinayak Godse*** and ***Ashok Kumar***, this Court observed that, liberty is one of the most precious and cherished possessions of a human being and he would resist forcefully any attempt to diminish it. Similarly, rehabilitation and social reconstruction of a life convict, as an objective of punishment become a paramount importance in a welfare State. The State has to achieve the goal of protecting the society from the convict and also rehabilitate the offender. The remission policy manifests a process of reshaping a person who, under certain circumstances, has indulged in criminal activities and is required to be rehabilitated. Thus, punishment should not be regarded as the end but only a means to an end. Relevancy of circumstances to an offence such as the state of mind of the convict when the offence was committed, are factors to be taken note of. It was further observed as under:

> "46. At the time of considering the case of premature release of a life convict, the authorities may require to consider his case mainly taking into consideration whether the offence was an individual act of crime without affecting the society at large; whether there was any chance of future recurrence of committing a crime; whether the convict had lost his potentiality in committing the crime; whether there was any fruitful purpose of confining the convict any more; the socio-economic condition of the convict's family and other similar circumstances."

(i) That the executive power of clemency gives an opportunity to the convict to reintegrate into the society. However, the power of clemency must be pressed into service only in appropriate cases. Ultimately, it was held that the case for remission has to be considered on the strength of the policy that was existing on the date of conviction of the accused. It was further observed that in case no liberal policy prevails on the date of consideration of the case of a convict under life imprisonment for premature release, he should be given the benefit thereof subject of course to Section 433-A of the CrPC.

48.8. At this juncture, it is relevant to refer to the following decisions of this Court, wherein orders of remission have been quashed and set aside by this Court on various grounds:

(a) In ***Swaran Singh vs. State of Uttar Pradesh, (1998) 4 SCC 75***, a three-Judge Bench of this Court considered the question as to scope of judicial review of an order of a Governor under Article 161 of the Constitution of India. In the said case, a Member of the Legislative Assembly of the State of Uttar Pradesh had been convicted of the offence of murder and within a period of less than two years, he was granted remission from the remaining long period of his life sentence. The son of the deceased moved the Allahabad High Court challenging the aforesaid action of the Governor and the same having been dismissed, the matter had been brought to this Court. This Court noticed that the Governor exercised the power to grant remission, without being appraised of material facts concerning the prisoner, such as, his involvement in five other criminal cases of serious nature, the rejection of his earlier clemency petition and the report of the jail authority that his conduct inside the jail was far from satisfactory and that out of the two years and five months he was supposed to have been in jail, he was in fact out on parole during the substantial part thereof. The Court further held that when the Governor was not in the know of material facts, the Governor was deprived of the opportunity to exercise the power to grant remission in a fair and just manner and that the order granting remission fringed on arbitrariness. Therefore, the order of the Governor granting remission, was quashed, with a direction to

re-consider the petition of the prisoner in light of the materials which the Governor had no occasion to know earlier. As regards the question as to the power of judicial review over an order passed by the Governor under Article 161 of the Constitution, the following observations were made:

"10. A Constitution Bench of this Court has considered the scope of judicial review of exercise of powers under Articles 72 and 161 of the Constitution of India in ***Kehar Singh v. Union of India*** ***(1989) 1 SSC 204***. The bench after observing that the Constitution of India is a constitutive document which is fundamental to the governance of the country under which people of India have provided a constitutional polity consisting of certain primary organs, institutions and functionaries to exercise the powers provided in the Constitution, proceeded to add thus:

> "All power belongs to the people and it is entrusted by them to specified institutions and functionaries with the intention of working out, maintaining and operating a constitutional order."

The Constitution Bench laid down that judicial review of the Presidential order cannot be exercised on the merits except within the strict limitations defined in ***Maru Ram v. Union of India*** ***(1981) 1 SCC 107***. The limitations of judicial review over exercise of powers under Articles 72 and 161 of the Constitution have been delineated in the said decision by the constitution Bench. It has been observed that "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 valid play of power." The bench stressed the point that the power being of the greatest moment, cannot be a law unto itself but it must be informed by the finer canons of constitutionalism.

11. It was therefore, suggested by the bench to make rules for its own guidance in the exercise of the pardon power keeping a large residuary power to meet special situations or sudden developments.

12. In view of the aforesaid settled legal position, we cannot accept the rigid contention of the learned counsel for the third respondent 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."

(underlining by us)

(b) In ***Joginder Singh vs. State of Punjab, (2001) 8 SCC 306*** the facts were that the respondents-convicts therein were convicted for offences punishable under Sections 324, 325 and 326 read with Section 34 of the IPC and had been awarded a sentence of one year and six months which was challenged upto the High Court of Punjab and Haryana and was confirmed. On the dismissal of the Revision Petition by the High Court, the convicts surrendered before the Superintendent of the concerned jail and on the same day were released by the jail authorities on being granted the benefit of remission. It is of importance to note that during the period of trial ending with confirmation of conviction in the Revision Petition by the High Court, the convicts (earlier accused) were almost all at the time out on bail except for a period of about 2 months and 25 days when they were in jail, serving part of their sentence. The appellant before this Court, who was the complainant, unsuccessfully challenged the remission order before the High Court and thereafter approached this Court by way of a Special Leave Petition. The primary ground of challenge before this Court was that the periods of remission permissible under successive notifications issued between 13.07.1988 and 29.07.1998 (period between date of conviction by the Chief Judicial Magistrate and the date on which the conviction and sentence was upheld by the High Court) were cumulatively allowed to the convicts. That is to say that the maximum period of remission permissible under each of the seven notifications issued between the said dates was to be cumulatively taken into account to grant a total remission of 17 and a half months. It was contended before this Court

that the said approach was erroneous in construing successive policies of remission. It was further contended that while applying the period of remission granted by the Government under any remission notification, the period during which an accused person was out on bail cannot be taken into account.

(i) This Court while allowing the appeal of the appellant therein-complainant held that the High Court fell in error in holding that the convicts were entitled to the benefit of the period of remission given by the various notifications cumulatively to be counted against the period during which they were out on bail.

(c) In ***Satpal***, the order of the Governor granting remission to convicts therein, in the exercise of power conferred by Article 161 of the Constitution of India read with Section 132 of the Code of Criminal Procedure was assailed by the brother and widow of the deceased. The primary ground raised before this Court was that the power to grant remission was exercised without application of mind, and that the said power was exercised by the Governor having regard to extraneous considerations and even without the aid and advice of the Government, namely, the concerned Minister. This Court examined the said case having regard to the parameters of judicial review in relation to an order granting remission by the Governor. It was noted that the Governor had proceeded to grant remission of sentence without any knowledge as to the period of sentence already served by the convicts and if at all they had undergone any period of imprisonment. It was noted that an order granting remission would be arbitrary and irrational if passed without knowledge or consideration of material facts.

49. On a reading of the aforesaid judgments what emerges is that the power to grant remission on an application filed by the convict or on his behalf, is ultimately an exercise of discretion by the appropriate Government. It is trite that where there is exercise of legal power coupled with discretion by administrative authorities, the test is, whether, the authority concerned was acting within the scope of its powers. This would not only mean that the concerned authority and in the instant case, the appropriate Government had not only the jurisdiction and authority vested to exercise its powers but it exercised

its powers in accordance with law i.e., not in an arbitrary or perverse manner without regard to the actual facts or unreasonably or which would lead to a conclusion in the mind of the Court that there has been an improper exercise of discretion. If there is improper exercise of discretion, it is an instance of an abuse of discretion. There can be abuse of discretion when the administrative order or exercise of discretion smacks of *mala fides* or when it is for any purpose based on irrelevant consideration by ignoring relevant consideration or it is due to a colourable exercise of power; it is unreasonable and there is absence of proportionality. There could also be an abuse of discretion where there is failure to apply discretion owing to mechanical exercise of power, non-application of mind, acting under dictation or by seeking assistance or advice or there is any usurpation of power.

49.1. It is not necessary to dilate upon each of the aforesaid aspects of abuse of discretion in the instant case, as we have observed that the consideration of the impugned orders or manner of exercise of powers is unnecessary, having regard to the answer given by us to Point No.3.

50. However, it would be relevant to refer to one aspect of abuse of discretion, namely, usurpation of power. Usurpation of power arises when a particular discretion vested in a particular authority is exercised by some other authority in whom such power does not lie. In such a case, the question whether the authority which exercised discretion was competent to do so arises.

50.1. Applying the said principle to the instant case, we note that having regard to the definition of "appropriate Government" and the answer given by us to Point No.3, the exercise of discretion and the passing of the impugned orders of remission in the case of respondent Nos.3 to 13 herein was an instance of usurpation of power. It may be that this Court by its order dated 13.05.2022 passed in Writ Petition No.135 of 2022 had directed the first respondent State of Gujarat to consider the case of respondent No.3 under the 1992 Policy of the State of Gujarat, by setting aside the order of the High Court of Gujarat dated 17.07.2019. What is interesting is that in the said writ petition, the State of Gujarat had correctly submitted before this Court that the appropriate Government in the instant case was State of Maharashtra and not the State of Gujarat. The said

contention was in accordance with the definition of appropriate Government under clause (b) of sub-section (7) of Section 432 of the CrPC. However, the said contention was rejected by this Court contrary to several judgments of this Court including that of the Constitution Bench in ***V. Sriharan.*** But the State of Gujarat failed to file a review petition seeking correction of the order of this Court dated 13.05.2022,(particularly when we have now held that the said order is a nullity). Complying with the said order can also be said to be an instance of usurpation of power when the provision, namely, clause (b) of sub-section (7) of Section 432 states otherwise.

50.2. We fail to understand as to, why, the State of Gujarat, first respondent herein, did not file a review petition seeking correction of the order dated 13.05.2022 passed by this Court in Writ Petition No.135 of 2022 in the case of respondent No.3 herein. Had the State of Gujarat filed an application seeking review of the said order and impressed upon this Court that it was not the "appropriate Government" but the State of Maharashtra was the "appropriate Government", ensuing litigation would not have arisen at all. On the other hand, in the absence of filing any review petition seeking a correction of the order passed by this Court dated 13.05.2022, the first respondent-State of Gujarat herein has usurped the power of the State of Maharashtra and has passed the impugned orders of remission on the basis of an order of this Court dated 13.05.2022 which, in our view, is a nullity in law.

50.3. In this regard it is necessary to dilate on the background to this case and refer to the previous orders passed by this Court as under:-

The first order is dated 16.12.2003, referring the matter to the CBI for investigation; the second is an order of transfer of the trial from the competent Court in Gujarat to the Special Court at Mumbai and the third is an order passed by this Court granting compensation to the petitioner in Writ Petition (Crl.) No.491 of 2022. The relevant portions of the aforesaid orders read as under:-

W.P.(Crl.) No.118 of 2003, dated 16.12.2003 – referring matter to the CBI for investigation;

"**ORDER**

"Considering the nature of the allegations made, Shri Mukul Rohtagi learned Additional Solicitor General appearing for the respondents accepts that further investigation in this case may be done by the CBI, though he does not concede that the Gujarat Police is incompetent to investigate the matter. Hence, we direct the CBI to take over further investigation of this case and report to this Court from time to time.

Let a report be filed by the CBI within eight weeks.

List after report is filed."

Transfer Petition (Crl.) No.192 of 2004, dated 06.08.2004 – transfer of the trial from the competent Court in Gujarat to the Special Court at Mumbai;

ORDER

"We are of the view that on account of the nature and the allegations of the case, session case No.161 of 2004 before the Additional Sessions Judge, Dahod now transferred to Additional Sessions Judge of IVth Court of the City Civil Sessions Court Ahmedabad (CBI Case No.RCZ/S/2004, SCB Mumbai) title CBI vs. Jaswantbhai Chaturbhai &Others be transferred to any competent Court in Mumbai for trial and disposal. This order be placed before the Chief Justice of Bombay High Court who shall designate the competent Court as he may deem fit. The transfer petition is accordingly allowed.

This order is based on the perceptions of the CBI as recorded in its report and should not be taken as a reflection on the competence or impartiality of the judiciary in the State of Gujarat.

Having regard to the peculiar facts of this case the State of Gujarat shall bear the expenditure of the defence of the accused in accordance with the provisions of the Section 304 of the Code of Criminal Procedure.

It is made clear that for the purpose of this case the Central Government will appoint the public prosecutor."

Bilkis Yakub Rasool v. Union of India & Others

Criminal Appeal Nos.727-733 of 2019, order dated 23.04.2019 - compensation

ORDER

"The appellant, Bilkis Yakub Rasool, is a victim of riots which occurred in the aftermath of the Godhra train burning incident in the State of Gujarat on February 27, 2002. While eventually, the perpetrators of the crime including the police personnel stand punished, the appellant, who was aged twenty-one years and pregnant at that time, having lost all members of her family in the diabolical and brutal attacks needs to be adequately compensated. Additional facts which we must note are that the appellant was repeatedly gangraped and was a mute and helpless witness to her three-and-a-half-year-old daughter being butchered to death. This factual position is undisputed and unchallenged in light of the findings of the trial court upheld by the High Court and this Court.

The appellant, we are informed, is presently about forty years of age and is without any home and lives with her daughter who was born after the incident. She has been coerced to live life of a nomad and as an orphan, and is barely sustaining herself on the charity of NGOs, having lost company of her family members. The gruesome and horrific acts of violence have left an indelible imprint on her mind which will continue to torment and cripple her.

We do not have to search and elaborate upon principles of law to come to the conclusion that the appellant deserves to be adequately compensated. It is only the quantum of compensation that needs to be worked out by the Court. Time and again this Court has held that the compensation so awarded must be just and fair, and the criteria objective. However, this case has to be dealt with differently as the loss and suffering evident from the facts stated above surpass normal cases. Taking into account the totality of the facts of the case, we are of the view that compensation of Rs.50,00,000/- (Rupees fifty lakh only) to be paid by the State Government within two weeks from today, on proper identification, would meet the ends

of justice. Coupled with the aforesaid relief, we deem it proper to further direct the State Government to provide the appellant with an employment under the State, if she wishes so and is inclined, and also to offer her government accommodation at a place of her choice, if she is willing to live in such accommodation.

With the aforesaid direction, the appeals relating to compensation are disposed of."

The aforesaid orders clearly indicate why this Court had transferred the investigation and trial to the CBI and to the State of Maharashtra respectively.

50.4. Such being the case, it was the State of Maharashtra which was the appropriate Government which had to consider the appellant for remission *vis-à-vis* respondent Nos.3 to 13 herein. Instead, being unsuccessful before the High Court of Gujarat, respondent No.3 surreptitiously filed the writ petition before this Court seeking a direction to consider his case for remission without disclosing the full and material facts before this Court. Relief was granted by this Court by conferring jurisdiction on State of Gujarat which it did not possess as per Section 432 (7) of the CrPC, in the guise of consideration for remission on the basis of the 09.07.1992 policy, which had also stood cancelled in the year 2013. Taking advantage of this Court's order dated 13.05.2022, all other convicts also sought consideration of their case by the Government of Gujarat for remission even in the absence of any such direction in their cases by this Court. Thus, the State of Gujarat has acted on the basis of the direction issued by this Court but contrary to the letter and spirit of law. We have already said that the State of Gujarat never sought for the review of the order of this Court dated 13.05.2022 by bringing to the notice of this Court that it was contrary to Section 432 (7) and judgments of this Court.

50.5. Instead, the State of Gujarat has acted in tandem and was complicit with what the petitioner-respondent No.3 herein had sought before this Court. This is exactly what this Court had apprehended at the previous stages of this case and had intervened on three earlier occasions in the interest of truth and

justice by transferring the investigation of the case to the CBI and the trial to the Special Court at Mumbai. But, in our view, when no intervention was called for in the writ petition filed by one of the convicts /respondent No. 3 herein, this Court was misled to issue directions contrary to law and on the basis of suppression and misstatements made by respondent No. 3 herein. We have held that order of this Court dated 13.05.2022 to be a nullity and *non est* in the eye of law. Consequently, exercise of discretion by the State of Gujarat is nothing but an instance of usurpation of jurisdiction and an instance of abuse of discretion. If really State of Gujarat had in mind the provisions of law and the judgments of this Court, and had adhered to the rule of law, it would have filed a review petition before this Court by contending that it was not the appropriate Government. By failing to do so, not only are the earlier orders of this Court in the matter have been vindicated but more importantly, rule of law has been breached in usurping power not vested in it and thereby aiding respondent Nos. 3 to 13. This is a classic case where the order of this Court dated 13.05.2022 has been used for violating the rule of law while passing orders of remission in favour of respondent Nos. 3 to 13 in the absence of any jurisdiction by respondents – State of Gujarat. Therefore, without going into the manner in which the power of remission has been exercised, we strike down the orders of remission on the ground of usurpation of powers by the State of Gujarat not vested in it. The orders of remission are hence quashed on this ground also.

Section 432(2)of the CrPC: Opinion of the Presiding Judge of the convicting court:

51. Sub-section (2) of Section 432 of the CrPC states that when an application is made to the appropriate Government, *inter alia,* for remission of a sentence, the appropriate Government may require the Presiding Judge of the Court before or by which the conviction was had 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.

52. Learned ASG Sri S.V. Raju submitted that the expression "*appropriate Government may require the opinion of the Presiding Judge of the Court*" indicates that this is not a mandatory requirement, therefore, in the instant case the opinion of the Presiding Judge of the Court by which respondent Nos. 3 to 13 were convicted, namely, the Special Judge, Mumbai, was unnecessary. It was further submitted that since the State of Gujarat was considering the applications for remission filed by respondent Nos. 3 to 13, the opinion of local Sessions Judge at Dahod was obtained as a member of the Jail Advisory Committee and there was a positive opinion for grant of remission to respondent Nos. 3 to 13 herein.

52.1. This contention was however refuted by the learned counsel Ms. Shobha Gupta by reiterating her submission that the expression "may require" in sub-section (2) of Section 432 of the CrPC ought to be read as "shall require". This is evident from the dicta of this Court. In this regard, reliance was placed on certain judgments of this Court which we shall advert to in the first instance as under:

(i) In ***Sangeet,*** it was observed that before actually exercising the power of remission under Section 432 of the CrPC, the appropriate Government must obtain the opinion (with reasons) of the Presiding Judge of the convicting or confirming Court. Remissions can, therefore, be given only on a case-by-case basis and not in a wholesale manner.

(ii) Further, in ***V. Sriharan,*** it was observed that the declaration of law made by this Court in ***Sangeet*** referred to above, is correct and further the procedure to be followed under Section 432(2) of the CrPC is mandatory. The manner in which the opinion is to be rendered by the Presiding Judge can always be regulated and settled by the concerned High Court and the Supreme Court by stipulating the required procedure to be followed as and when any such application is forwarded by the appropriate Government. Therefore, it was observed that the *suo motu* power of remission cannot be exercised under Section 432(1) of the CrPC and it can only be initiated based on an application of the person convicted under Section 432(2) of the CrPC and the ultimate order of remission should be guided by the opinion to be rendered by the Presiding Officer of the Court concerned.

(iii) This Court, in ***Ram Chander,*** has specifically dealt with the value of the opinion of the Presiding Judge with reference to paragraph 61 of ***Sangeet*** and paragraphs 148 and 149 of ***V. Sriharan*** referred to above and observed in paragraphs 25 and 26 as under:

> *"25*. In ***Sriharan (supra)***, the Court observed that the opinion of the presiding judge shines a light on the nature of the crime that has been committed, the record of the convict, their background and other relevant factors. Crucially, the Court observed that the opinion of the presiding judge would enable the government to take the *'right'* decision as to whether or not the sentence should be remitted. Hence, it cannot be said that the opinion of the presiding judge is only a relevant factor, which does not have any determinative effect on the application for remission. The purpose of the procedural safeguard under Section 432 (2) of the CrPC would stand defeated if the opinion of the presiding judge becomes just another factor that may be taken into consideration by the government while deciding the application for remission. It is possible then that the procedure under Section 432 (2) would become a mere formality.
>
> 26. However, this is not to say that the appropriate government should mechanically follow the opinion of the presiding judge. If the opinion of the presiding judge does not comply with the requirements of Section 432 (2) or if the judge does not consider the relevant factors for grant of remission that have been laid down in ***Laxman Naskar v. Union of India (supra),*** the government may request the presiding judge to consider the matter afresh."

(iv) In paragraph 27, it was further observed that the Presiding Judge in the said case had not taken into account the factors which have been laid down in ***Laxman Naskar*** and that the opinion was a mechanical one bereft of reasons and therefore, inadequate and not in accordance with law. Consequently, the petitioner's application for remission was

directed to be considered afresh with a direction to the Special Judge, Durg to provide an opinion on the application afresh accompanied with adequate reasoning, taking into account all the relevant factors that govern the grant of remission as laid down in ***Laxman Naskar.*** A direction was issued to State of Chhattisgarh in the said case to take a final decision on the application for remission afresh within a month after receiving the opinion of the Special Judge, Durg. Consequently, the petition filed under Article 32 was allowed in the aforesaid terms.

52.2. Thus, the consistent view of this Court which emerges is that the expression "may" has to be interpreted as "shall" and as a mandatory requirement under sub-section (2) of Section 432 of the CrPC. The said provision has sufficient guidelines as to how the opinion must be provided by the Presiding Judge of the Court which has convicted the accused inasmuch as –

(i) the opinion must state as to whether the application for remission should be granted or refused and for either of the said opinions, the reasons must be stated;

(ii) naturally, the reasons must have a bearing on the facts and circumstances of the case;

(iii) the reasons must be in tandem with the record of the trial or of such record thereof as exists;

(iv) the Presiding Judge of the Court before or by which the conviction was had or confirmed, must also forward along with the statement of such opinion granting or refusing remission, a certified copy of the record of the trial or of such record thereof as exists.

52.3. Having regard to the requirements which the Presiding Judge must comply with while stating his opinion to the appropriate Government on an application for remission of sentence made by a convict, it cannot be held that the expression "may" in the said provision is not mandatory nor can it be left to the whims and fancies of the appropriate Government either to seek or not to seek the opinion of the Presiding Judge or the Court before which the conviction had taken place.

52.4. In the instant case, what is interesting is that when respondent No.3 - Radheshyam Bhagwandas Shah filed his application for remission before the State of Maharashtra pursuant to the order of the Gujarat High Court dated 17.07.2019, the State of Maharashtra sought the opinion of the Special Judge at Mumbai who gave a negative opinion. This was one of the reasons for respondent No.3 to file the Writ Petition (Crl.) No.135 of 2022 before this Court. However, subsequently, when a direction was issued by this Court to the first respondent State of Gujarat to consider the application for remission, the opinion of the local Sessions Court at Dahod was obtained and the opinion of the Special Judge, Mumbai where the trial had taken place was ignored. The Sessions Court at Dahod obviously had not complied with the mandatory requirements noted above under sub-section (2) of Section 432 of the CrPC inasmuch as the opinion was not forwarded along with reasons having regard to the record of the trial as no trial had taken place before the Sessions Court, Dahod. Further, the Presiding Judge of the Sessions Court, Dahod also did not forward any certified copy of the record of the trial. Moreover, learned Sessions Judge at Dahod was also a member of the Jail Advisory Committee.

52.5. We further observe that the Presiding Judge of the Court before which the conviction happens can never be a Member of the Jail Advisory Committee, inasmuch he is an independent authority who should give his opinion on the application seeking remission which is a mandatory requirement as per the requirements of sub-section (2) of Section 432. In the instant case, the opinion given by the District & Sessions Judge at Dahod is vitiated for two reasons: firstly, because he was not the Presiding Judge before which the conviction of respondent Nos.3 to 13 took place; and, secondly, if the Presiding Judge of the Court where the conviction occurred is an independent authority which must be consulted by the appropriate Government then he could not have been a Member of the Jail Advisory Committee as in the instant case.

52.6. On perusal of the counter affidavit of the respondent-State of Gujarat, it is noted that pursuant to the applications filed by respondent Nos.4 to 13(respondent No.3 had filed his application before State of Maharashtra on 01.08.2019) seeking

pre-mature release or remission, opinion of the Special Judge (CBI), City Civil & Sessions Court, Greater Mumbai was taken by the State of Gujarat and in respect of all the respondent Nos.3 to 13 the categorical opinion was that having regard to the Government's Resolution dated 11.04.2008, issued by the State of Maharashtra, said prisoners should not be released pre-maturely. Had the State of Maharashtra considered the applications of respondent Nos.3 to 13 for remission, this vital opinion of the Presiding Judge of the Court which had convicted them would have carried weight in the mind of the Government of the State of Maharashtra as well as the terms of the Government's Resolution dated 11.04.2008 which was the applicable policy for remission. In fact, the first respondent, namely, the Government of the State of Gujarat, which usurped the power of the Government of the State of Maharashtra, simply brushed aside the opinion of the Special Judge (CBI), Greater Mumbai. Instead the opinion of the Sessions Judge, Godhra, District Panchmahal within whose jurisdiction the offences had occurred and who was a member of the Jail Advisory Committee was highlighted by Sri S.V. Raju, learned ASG appearing for the State of Gujarat. Although this opinion is also a negative opinion, the same is not in accordance with sub-section (2) of Section 432 of the CrPC and, therefore, is of no consequence except when viewed from the prism of being an opinion of one of the members of the Jail Advisory Committee, Dahod Jail.

53. As we have held, in the first place, the first respondent State of Gujarat was not at all the appropriate Government, therefore, the proceedings of the Jail Advisory Committee of Dahod Jail, which had recommended remission is itself vitiated and further, there is no compliance of sub-section (2) of Section 432 of the CrPC in the instant case in as much as the said opinion was not considered by the appropriate Government. On that score also, the orders of remission dated 10.08.2022 are vitiated.

Sentence in default of fine:

54. Learned counsel Mrs. Shobha Gupta contended that respondent Nos.3 to 13 had not paid the fine and therefore, in the absence of payment of fine, the default sentence ought to have been undergone

by the said respondents. This aspect of the matter has been lost sight of or ignored while granting the orders of remission and therefore, the orders of remission are vitiated on that score.

54.1. In response to the above arguments, learned senior counsel, Sri Sidharth Luthra, at the outset, submitted that although applications for payment of fine have been filed and are pending consideration before this Court, nevertheless respondent Nos. 3 to 13 have now on their own tendered the fine and the same has been accepted by the Special Court at Mumbai.

54.2. In this regard, following judgments were referred to at the bar:

(a) In ***Shantilal vs. State of Madhya Pradesh, (2007) 11 SCC 243 ("Shantilal")***, the contention was that the term of imprisonment in default of payment of fine is not a sentence. It is a penalty which a person incurs on account of non-payment of fine. This sentence must be undergone by the offender unless it is set-aside or remitted in part or in whole, either in appeal or in revision or in other appropriate judicial proceedings or otherwise. However, a term of imprisonment ordered in default of payment of fine stands on a different footing. A person is required to undergo imprisonment for default in payment of fine either because he is unable to pay the amount of fine or refuses to pay such amount. He, therefore, can always avoid to undergo imprisonment in default of payment of fine by paying such amount. It is, therefore, not only the power, but the duty of the Court to keep in view the nature of offence, and circumstances under which it was committed, the position of the offender and other relevant considerations before ordering the offender to suffer imprisonment in default of payment of fine.

(i) The further question considered was, whether, a Court of law can order a convict to remain in jail in default of payment of fine. It was observed that even in the absence of a specific provision in the law empowering a Court to order imprisonment in default of payment of fine, such power is implicit and is possessed by a Court administering criminal justice. In this regard, reference was made to Sections 40 to 42 and Sections 63 to 70 IPC as well as Section 30of the CrPC which deals with a sentence of imprisonment in default of payment of fine and Section 25 of the General

Clauses Act, 1897 which deals with recovery of fine. It was observed that even in the absence of a provision to the contrary viz. that no order of imprisonment can be passed in default of payment of fine, such power is explicit and can always be exercised by a court having regard to Section 30 of the CrPC.

(b) In ***Sharad Hiru Kolambe vs. State of Maharashtra, (2018) 18 SCC 718 ("Sharad Hiru Kolambe"),*** the point for consideration was regarding quantum of fine that was imposed by way of a default sentence in case of non-payment of fine. It was contended that though the substantive sentence stood remitted and the appellant was directed to be released on completion of fourteen years of actual sentence, the appellant would still be inside till he completes twenty-four years. This was because the trial court in the said case directed "all sentences shall run concurrently", therefore, all default sentences must also run concurrently *inter se*. It was contended that the default sentences so directed was unconscionable and excessive.

(i) This Court speaking through Lalit, J. (as the learned Chief Justice then was) observed that if the term of imprisonment in default of payment of fine is a penalty which a person incurs on account of non-payment of fine and is not a sentence in a strict sense, imposition of such default sentence is completely different and qualitatively distinct from a substantive sentence. Theoretically, if the default sentences awarded in respect of imposition of fine in connection with two or more offences are to be clubbed or directed to run concurrently, there would not be any occasion for the persons so sentenced to deposit the fine in respect of the second or further offences. It would effectively mean imposition of one single or combined sentence of fine. Such an exercise would render the very idea of imposition of fine with a deterrent stipulation while awarding sentence in default of payment of fine to be meaningless. If imposition of fine and prescription of mandatory minimum is designed to achieve a specific purpose, the very objective will get defeated if the default sentences were directed to run concurrently. Therefore, the contention regarding concurrent running of default

sentences was rejected. It was observed that there is no power of the Court to order the default sentences to run concurrently but if a prisoner does not pay the fine or refuses to pay the fine then he must undergo the default sentences so imposed.

(c) In ***Shahejadkhan Mahebubkhan Pathan vs. State of Gujarat, (2013) 1 SCC 570 ("Shahejadkhan Mahebubkhan Pathan"),*** this Court speaking through Sathasivam, J. (as the learned Chief Justice then was) held that the term of imprisonment in connection with a fine is not a sentence but a penalty which a person incurs on account of non-payment of fine. But on the other hand, if a sentence is imposed, an offender must undergo the same unless it is modified or varied in part or whole in the judicial proceedings or by way of remission. But the imprisonment order in default of fine stands on different footing. When such a sentence on default of payment of fine is imposed, the person is required to undergo imprisonment either because he is unable to pay the fine or refuses to do so. The only way he can avoid to undergo imprisonment in default of payment of fine is by paying such amount.

54.3. The aforesaid dicta would therefore clearly indicate that the sentence of imprisonment awarded to a person for committing an offence is distinct than the imprisonment ordered to be undergone in default of payment of fine. The latter is not a substantive sentence for commission of the offence but is in the nature of penalty for default in payment of fine.

54.4. In the instant case, while considering the applications for remission, the Jail Advisory Committee did not take into consideration whether respondent Nos. 3 to 13 convicts had tendered the fine which was imposed by the Special Court and affirmed by the High Court as well as by this Court. Therefore, this is an instance of leaving out of a relevant consideration from the gamut of facts which ought to have been considered by the Jail Advisory Committee. Had the respondent State of Gujarat considered the opinion from the Presiding Judge of the Court which had convicted, respondent Nos.3 to 13 herein, the aspect regarding non-payment of fine would have surfaced. In the absence of non-compliance with the direction to pay

fine, there would be default sentence which would be in the nature of penalty. The question whether the default sentence or penalty had to be undergone by these respondents, was a crucial consideration at the time of recommending remission to the State Government by the Jail Advisory Committee. This aspect of the matter has also not been taken into consideration by the State Government while passing the impugned orders of remission. Realising this, during the pendency of these writ petitions, applications were filed seeking permission to tender the fine amount. However, even before the said applications could be considered and orders passed thereon, the respondents convicts have paid the fine amount and have produced receipts in that regard. This fact would not alter the consideration of the case of respondent Nos. 3 to 13 herein inasmuch the fact of payment of fine ought to have been a point which had to be taken into consideration prior to the passing of the orders of remission as there could be no relaxation in the sentence with regard to payment of fine. There can only be reduction in the substantive sentence to be undergone by way of imprisonment for which the application seeking remission is filed. Remission of sentence, which is for reduction of the period of imprisonment, cannot however relate to the payment of fine at all. Since there was non-application of mind in this regard, the impugned orders of remission are contrary to law and are liable to be quashed on this count as well.

In view of the above, the other contentions based on Wednesbury principles do not require consideration in the present case and hence all contentions on the said aspect are left open.

55. We however would like to indicate the factors that must be taken into account while entertaining an application for remission under the provisions of the CrPC, which are however not exhaustive of the tests which we have discussed above. They can be adumbrated as under:

(a) The application for remission under Section 432 of the CrPC could be only before the Government of the State within whose territorial jurisdiction the applicant was convicted (appropriate Government) and not before any other Government within whose territorial jurisdiction the applicant may have been transferred on conviction or where the offence has occurred.

(b) A consideration for remission must be by way of an application under Section 432 of the CrPC which has to be made by the convict or on his behalf. In the first instance whether there is compliance of Section 433A of the CrPC must be noted inasmuch as a person serving a life sentence cannot seek remission unless fourteen years of imprisonment has been completed.

(c) The guidelines under Section 432(2) with regard to the opinion to be sought from the Presiding Judge of the Court which had convicted the applicant must be complied with mandatorily. While doing so it is necessary to follow the requirements of the said Section which are highlighted by us, namely,

  (i) the opinion must state as to whether the application for remission should be granted or refused and for either of the said opinions, the reasons must be stated;

  (ii) the reasons must have a bearing on the facts and circumstances of the case;

  (iii) the opinion must have a nexus to the record of the trial or of such record thereof as exists;

  (iv) the Presiding Judge of the Court before or by which the conviction was had or confirmed, must also forward along with the statement of such opinion granting or refusing remission, a certified copy of the record of the trial or of such record thereof as exists.

(d) The policy of remission applicable would therefore be the Policy of the State which is the appropriate Government and which has the jurisdiction to consider that application. The policy of remission applicable at the time of the conviction could apply and only if for any reason, the said policy cannot be made applicable a more benevolent policy, if in vogue, could apply.

(e) While considering an application for remission, there cannot be any abuse of discretion. In this regard, it is necessary to bear in mind the following aspects as mentioned in ***Laxman Naskar***, namely, -

  (i) Whether the offence is an individual act of crime without affecting the society at large?

(ii) Whether there is any chance of future recurrence of committing crime?

(iii) Whether the convict has lost his potentiality in committing crime?

(iv) Whether there is any fruitful purpose of confining this convict any more?

(v) Socio-economic condition of the convict's family.

(f) There has also to be consultation in accordance with Section 435 of the CrPC wherever the same is necessitated.

(g) The Jail Advisory Committee which has to consider the application for remission may not have the District Judge as a Member inasmuch as the District Judge, being a Judicial Officer may coincidently be the very judge who may have to render an opinion independently in terms of sub-section (2) of Section 432 of the CrPC.

(h) Reasons for grant or refusal of remission should be clearly delineated in the order by passing a speaking order.

(i) When an application for remission is granted under the provisions of the Constitution, the following among other tests may apply to consider its legality by way of judicial review of the same.

(i) That the order has been passed without application of mind;

(ii) that the order is *mala fide*;

(iii) that the order has been passed on extraneous or wholly irrelevant considerations;

(iv) that relevant materials have been kept out of consideration;

(v) that the order suffers from arbitrariness.

Summary of Conclusions:

56. On the basis of the aforesaid discussion, we arrive at the following summary of conclusions:

a) We hold that the Writ Petition (Crl.) No.491 of 2022 filed under Article 32 of the Constitution before this Court is maintainable and that it was not mandatory for the petitioner therein to have filed a writ petition under Article 226 of the Constitution before the Gujarat High Court.

b) Since Writ Petition (Crl.) No.491 of 2022 has been filed by one of the victims invoking Article 32 of the Constitution before this Court which has been entertained by us, the question, whether, the writ petitions filed as public interest litigation assailing the impugned orders of remission dated 10.08.2022 are maintainable, is kept open to be raised in any other appropriate case.

c) In view of Section 432 (7) read with Section 432 (1) and (2) of the CrPC, we hold that the Government of the State of Gujarat had no jurisdiction to entertain the prayers seeking remission of respondent Nos.3 to 13 herein as it was not the appropriate Government within the meaning of the aforesaid provisions. Hence, the orders of remission dated 10.08.2022 made in favour of respondent Nos.3 to 13 herein are illegal, vitiated and therefore, quashed.

d) While holding as above, we also hold that the judgment dated 13.05.2022 passed by this Court is a nullity and is *non est* in law since the said order was sought by suppression of material facts as well as by misrepresentation of facts (*suppressio veri, suggestio falsi*) and therefore, fraudulently obtained at the hands of this Court.

    i) Further, the petitioner in Writ Petition (Crl.) No.491 of 2022 not being a party to the said writ proceeding, the same is not binding on her and she is entitled in law to question the orders of remission dated 10.08.2022 from all angles including the correctness of the order dated 13.05.2022.

    ii) In addition to the above, the said order, being contrary to the larger bench decisions of this Court,(holding that it is the Government of the State within which the offender is sentenced which is the appropriate Government which can consider an application seeking remission of a sentence) is *per incuriam* and is not a binding precedent. Hence, the impugned orders of remission dated 10.08.2022 are quashed on the above grounds.

e) Without prejudice to the aforesaid conclusions, we further hold that the impugned orders of remission dated 10.08.2022 passed by the respondent-State of Gujarat in favour of respondent Nos.3 to 13 are not in accordance with law for the following reasons:

i) That the Government of the State of Gujarat had usurped the powers of the State of Maharashtra which only could have considered the applications seeking remission. Hence, the doctrine of usurpation of powers applies in the instant case.

ii) Consequently, the Policy dated 09.07.1992 of the State of Gujarat was not applicable to the case of respondent Nos. 3 to 13 herein.

iii) That opinion of the Presiding Judge of the Court before which the conviction of respondent Nos.3 to 13 was made in the instant case i.e. Special Court, Mumbai (Maharashtra) was rendered ineffective by the Government of the State of Gujarat which in any case had no jurisdiction to entertain the plea for remission of respondent Nos.3 to 13 herein. The opinion of the Sessions Judge at Dahod was wholly without jurisdiction as the same was in breach of sub-section (2) of the Section 432 of the CrPC.

iv) That while considering the applications seeking remission, the Jail Advisory Committee, Dahod and the other authorities had lost sight of the fact that respondent Nos.3 to 13 herein had not yet paid the fine ordered by the Special Court, Mumbai which had been confirmed by the Bombay High Court. Ignoring this relevant consideration also vitiated exercise of discretion in the instant case.

56.1. Having declared and held as such, we now move to point No.5.

Point No.5: What Order?

57. Respondent Nos.4 to 13, who had made applications to the first respondent-State of Gujarat seeking remission of their sentences, have been granted remission by the impugned orders dated 10.08.2022, while it is not known whether respondent No.3 had made any application to seek remission to the State of Gujarat as the same is not adverted to in the counter affidavit. The application seeking remission by respondent No. 3 before the State of Gujarat has not been brought on record as he had filed his application before the State of Maharashtra. Respondent Nos. 3 to 13 have been released pursuant to the orders of remission dated 10.08.2022 and

set at liberty. We have now quashed the orders of remission. Since 10.08.2022, respondent Nos. 3 to 13 have been the beneficiaries of the orders passed by an incompetent authority inasmuch as the impugned orders are not passed by the appropriate Government within the meaning of Section 432 of the CrPC. So long as the said orders impugned were not set-aside, they had carried the stamp of validity and hence till date the impugned orders of remission were deemed to have been valid. Respondent Nos. 3 to 13 are out of jail. Since we have quashed the orders of remission, what follows?

58. In our view, the most important constitutional value is personal liberty which is a fundamental right enshrined in Article 21 of our Constitution. It is in fact an inalienable right of man and which can be deprived of or taken away only in accordance with law. That is the quintessence of Article 21. But, this is a case where respondent Nos. 3 to 13 have been granted liberty and have been released from imprisonment by virtue of the impugned orders of remission dated 10.08.2022 which we have declared and quashed as wholly without jurisdiction and *non est*. Having quashed the orders of remission made in favour of respondent Nos. 3 to 13, should they be sent back to prison? Whether respondent No. 3 to 13 must have the benefit of their liberty despite obtaining the same from an incompetent authority with the aid of an order of this Court obtained fraudulently and therefore, the same being illegal and carry a stamp of being a nullity and *non est* in the eye of law? This has been a delicate question for consideration before us.

59. Learned counsel for the petitioner in Writ Petition (Crl.) No.491 of 2022 has vehemently contended that there being failure of rule of law in the instant case, justice would be done by this Court only when respondent Nos. 3 to 13 are returned to the prison. They can be granted remission only in accordance with law. On the other hand, respective learned senior counsel and counsel for the respondents Nos. 3 to 13 who have appeared have pleaded that they have been enjoying liberty since 10.08.2022 and in spite of there being any error in the orders of remission, although the orders of remission may be quashed, by exercising jurisdiction under Article 142 of the Constitution, these respondents may not be subjected to imprisonment once again and they may remain out of jailas free persons. In other words, their liberty may be protected.

60. We have given our anxious thought to the aforesaid divergent contentions. The primary question that now arises for our consideration is this: when is liberty of a person protected? Article 21 of the Constitution states that no person shall be deprived of his liberty except in accordance with law. Conversely, we think that a person is entitled to protection of his liberty only in accordance with law. When a person's liberty cannot be violated in breach of a law, can a person's liberty be protected even in the face of a breach or violation of law? In other words, should rule of law prevail over personal liberty of a person or *vice-versa*? Further, should this Court weigh in favour of a person's freedom and liberty even when it has been established that the same was granted in violation of law? Should the scales of justice tilt against rule of law? In upholding rule of law are we depriving respondent Nos. 3 to 13 their right to freedom and liberty? We wish to make it clear that only when rule of law prevails will liberty and all other fundamental rights would prevail under our Constitution including the right to equality and equal protection of law as enshrined in Article 14 thereof. In other words, whether liberty of a person would have any meaning at all under our Constitution in the absence of rule of law or the same being ignored or turned a blind eye? Can rule of law surrender to liberty earned as a consequence of its breach? Can breach of rule of law be ignored in order to protect a person's liberty that he is not entitled to?

61. Before we proceed further, we wish to reiterate what this Court has spoken on the concept of rule of law through its various judgments.

62. Rule of law means wherever and whenever the State fails to perform its duties, the Court would step in to ensure that the rule of law prevails over the abuse of the process of law. Such abuse may result from, *inter alia*, inaction or even arbitrary action of protecting the true offenders or failure by different authorities in discharging statutory or other obligations in consonance with the procedural and penal statutes. Breach of the rule of law, amounts to negation of equality under Article 14 of the Constitution.

63. More importantly, rule of law means, no one, howsoever high or low, is above the law; it is the basic rule of governance and democratic polity. It is only through the courts that rule of law unfolds its contours and establishes its concept. The concept of rule of law is closely

intertwined with adjudication by courts of law and also with the consequences of decisions taken by courts. Therefore, the judiciary has to carry out its obligations effectively and true to the spirit with which it is sacredly entrusted the task and always in favour of rule of law. There can be no rule of law if there is no equality before the law; and rule of law and equality before the law would be empty words if their violation is not a matter of judicial scrutiny or judicial review and relief and all these features would lose their significance if the courts don't step in to enforce the rule of law. Thus, the judiciary is the guardian of the rule of law and the central pillar of a democratic State. Therefore, the judiciary has to perform its duties and function effectively and remain true to the spirit with which they are sacredly entrusted to it.

In our view, this Court must be a beacon in upholding rule of law failing which it would give rise to an impression that this Court is not serious about rule of law and, therefore, all Courts in the country could apply it selectively and thereby lead to a situation where the judiciary is unmindful of rule of law. This would result in a dangerous state of affairs in our democracy and democratic polity.

64. Further, in a democracy where rule of law is its essence, it has to be preserved and enforced particularly by courts of law. Compassion and sympathy have no role to play where rule of law is required to be enforced. If the rule of law has to be preserved as the essence of democracy, it is the duty of the courts to enforce the same without fear or favour, affection or ill-will.

65. The manner of functioning of the court in accord with the rule of law has to be dispassionate, objective and analytical. Thus, everyone within the framework of the rule of law must accept the system, render due obedience to orders made and in the event of failure of compliance, the rod of justice must descend down to punish. It is mainly through the power of judicial review conferred on an independent institutional authority such as the High Court or the Supreme Court that the rule of law is maintained and every organ of the State is kept within the limits of the law. Thus, those concerned with the rule of law must remain unmindful and unruffled by the ripples caused by it. Rule of law does not mean protection to a

fortunate few. The very existence of the rule of law and the fear of being brought to book operates as a deterrent to those who have no scruples in killing others if it suits their ends. In the words of Krishna Iyer, J., "the finest hour of the rule of law is when law disciplines life and matches promise with performance". In ***ADM, Jabalpur vs. Shivakant Shukla***, H.R. Khanna, J. in his dissenting judgment said, "rule of law is the antithesis of arbitrariness".

66. In this context, it would also be useful to refer to the notion of justice in the present case. It is said that justice should remain loyal to the rule of law. In our view, justice cannot be done without adherence to rule of law. This Court has observed "the concept of "justice" encompasses not just the rights of the convict, but also of the victims of crime as well as of the law abiding section of society who look towards the courts as vital instruments for preservation of peace and the curtailment or containment of crime by punishing those who transgress the law. If the convicts can circumvent the consequences of their conviction, peace, tranquility and harmony in society will be reduced to chimera." (*vide* ***Surya Baksh Singh vs. State of UP, (2014) 14 SCC 222***)

67. This Court has further observed that the principle of justice is an inbuilt requirement of the justice delivery system and indulgence and laxity on the part of the law courts would be an unauthorized exercise of jurisdiction and thereby, put a premium on illegal acts. Courts have to be mindful of not only the spelling of the word "justice" but also the content of the concept. Courts have to dispense justice and not justice being dispensed with. In fact, the strength and authority of courts in India are because they are involved in dispensing justice. It should be their life aim.

68. The faith of the people in the efficacy of law is the saviour and succour for the sustenance of the rule of law. Justice is supreme and justice ought to be beneficial for the society. Law courts exist for the society and ought to rise to the occasion to do the needful in the matter. Respect for law is one of the cardinal principles for an effective operation of the Constitution, law and the popular Government. The faith of the people is the source to invigorate justice intertwined with the efficacy of law. Therefore, it is the primary duty and the highest

responsibility of this Court to correct arbitrary orders at the earliest and maintain the confidence of the litigant public in the purity of the fountain of justice and thereby respect rule of law.

69. In the same vein, we say that Article 142 of the Constitution cannot be invoked by us in favour of respondent Nos.3 to 13 to allow them to remain out of jail as that would be an instance of this Court's imprimatur to ignore rule of law and instead aid persons who are beneficiaries of orders which in our view, are null and void and therefore *nonest* in the eye of law. Further, we cannot be unmindful of the conduct of respondent Nos.3 to 13, particularly respondent No.3 who has abused the process of law and the court in obtaining remission. In such a situation, arguments with an emotional appeal though may sound attractive become hollow and without substance when placed in juxtaposition with our reasoning on the facts and circumstances of this case. Therefore, in complying with the principles of rule of law which encompasses the principle of equal protection of law as enshrined in Article 14 of the Constitution,we hold that 'deprivation of liberty' *vis-à-vis* respondent Nos.3 to 13 herein is justified in as much as the said respondents have erroneously and contrary to law been set at liberty. One cannot lose sight of the fact that the said respondents were all in prison for a little over fourteen years (with liberal paroles and furloughs granted to them from time to time). They had lost their right to liberty once they were convicted and were imprisoned. But, they were released pursuant to the impugned remission orders which have been quashed by us. Consequently, the status *quo ante* must be restored. We say so for another reason in the event respondent Nos.3 to 13 are inclined to seek remission in accordance with law,they have to be in prison as they cannot seek remission when on bail or outside the jail. Therefore, for these reasons we hold that the plea of 'protection of the liberty' of respondent Nos.3 to 13 cannot be accepted by us.

70. We wish to emphasize that in the instant case rule of law must prevail. If ultimately rule of law is to prevail and the impugned orders of remission are set-aside by us, then the natural consequences must follow. Therefore, respondent Nos.3 to 13 are directed to report to the concerned jail authorities within two weeks from today.

Conclusion:

71. Consequently, we pass the following orders:

    a. Writ Petition (Crl.) No.491 of 2022 is allowed in the aforesaid terms.

    b. Other Writ Petitions stand disposed of.

    c. Pending applications, if any, stand disposed of.

72. Before parting, we place on record our appreciation of all learned senior counsel, learned ASG and learned counsel appearing for the respective parties for their effective assistance in the matter.

Headnotes prepared by: Nidhi Jain

Result of the case:
WP(Crl) No. 491 of 2022 allowed;
Other writ petitions disposed of.