

Before S. S. Grewal, J.

GURMAIL KAUR,—*Petitioner.*

versus

THE STATE OF PUNJAB THROUGH THE SECRETARY HOME,
PUNJAB & ANOTHER,—*Respondents.*

Criminal Writ Petition No. 1911 of 1988.

September 4, 1989.

Constitution of India, 1950—Arts. 20, 21, 74 and 161—Premature release of detenu—Detention undergone over 15 years—Actual sentence about 9 years—Prayer for remission of unexpired sentence—Minister Incharge and Chief Minister approving recommendation of Home Department for Premature release—Governor rejecting mercy Petition under Art. 161 during President's Rule—Governor whether bound by the advice of the Government.

Held, that the State had duly recommended the case of the detenu for grant of pre-mature release while exercising its power under Article 161 of the Constitution, and, the Governor was bound to act on the said advice. The fact that the case was sent back to the State Government for reconsideration of the case of the detenu on the objections, referred to above, indicates that the Governor did not agree, to act according to the advice of the State Government in this case, even though the said advice, was, legally and, constitutionally binding on him. Hence, it has to be held that the detenu is entitled to his premature release and to be set at liberty forthwith.

(Paras 9 and 10)

Criminal Writ Petition Under Articles 226/227 of the Constitution of India praying that this Hon'ble Court may be pleased to:—

- (i) *grant a writ in the nature of habeas corpus to set the detenu at liberty forthwith;*
- (ii) *grant any other writ, order or direction as deemed fit and proper in the circumstances of the case;*
- (iii) *grant the detenu ad-interim bail during the pendency of the writ petition.*

R. S. Bains, Advocate, for the *Petitioner.*

S. K. Bhatia, A.A.G., Punjab, for the *Respondents.*

ORDER

(1) This petition under Article 226/227 of the Constitution of India relates to the release of Harnek Singh detenu, as his detention is said to be violative of Articles 14, 19, 20 and 21 of the Constitution of India.

(2) Brief facts relevant for the disposal of this petition, are, that Harnek Singh detenu after his arrest on 2nd November, 1979 was convicted and sentenced to undergo imprisonment for life on 9th June, 1980 by Sessions Judge, Faridkot. He has undergone detention for a period of 15 years 3 months and 23 days which includes 8 years 11 months and 8 days of actual sentence undergone (including undertrial period) and period of remissions to the extent of 7 years 1 month and 25 days. The detenu has been a convict-teacher for more than 5 years. He imparted education to a large number of convicts, and, also got Master's degree in English and Philosophy during the period he was undergoing sentence. He has availed of temporary release on parole and furlough 16 time, and, his conduct outside the jail was also good. The detenu moved his mercy petition under Article 161 of the Constitution of India on 15th February 1985 for remission of his unexpired sentence. The case of the detenu for his pre-mature release was recommended by 23 Panchayats, District Police, District Magistrate, Faridkot, Superintendent Central Jail, Patiala, Superintendent District Jail, Faridkot, Inspector General of Prisons, Punjab, and the Chief Minister. His case was finally submitted to the Governor on 29th September, 1986. However, the latter did not pass formal order for grant of premature release of the detenu, even though it was obligatory for the Governor to act upon the advice of the Chief Minister under Article 161 of the Constitution of India. Thereafter, the detenu filed Criminal Writ Petition No. 416 of 1987 in the High Court, which,—*vide* its order dated 12th August, 1987 directed the State Government to decide the mercy petition of the detenu within a period of one month. The mercy petition was again declined and the information in this regard was sent to the detenu,—*vide* letter dated 15th September, 1987 copy whereof is Annexure P-2, on the ground that there are no extenuating circumstances, or, compassionate grounds warranting the exercise of powers of mercy under Article 161 of the Constitution of India, and, consequential remission of the un-expired sentence.

(3) The State in its reply admitted that the detenu had been convicted on 9th June, 1980 under Section 302 I.P.C. and sentenced to undergo imprisonment for life. He was also convicted under section 25/27 of the Arms Act. Upto 1st January, 1989 the detenu had already undergone actual sentence of imprisonment for a period of 9 years 4 months (including undertrial period of 7 months 7 days) as well as the period of remissions to the extent of 7 years 4 months and 20 days. It was pleaded that the mercy petition

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was rightly rejected under the orders of the Governor on 9th September, 1987, on the ground that the same could not be considered as the detenu had not undergone $7\frac{1}{2}$ years of sentence, and, at that time there was no elected Government in the State of Punjab.

Counsel for the parties were heard.

(4) It was rightly submitted on behalf of the detenu that in view of the authority in *Maru Ram v. Union of India* (1) the State Government can advise and act under Article 161, the Governor being bound by that advice. The action of commutation and release can thus be pursuant to a Governmental decision and the order may issue even without the Governor's approval although, under the Rules of Business and as a matter of constitutional courtesy, it is obligatory that the signature of the Governor should authorise the pardon, commutation or release. In the aforesaid authority it was also held that, in the matter of exercise of the powers under Articles 72 and 161, the two highest dignitaries in our constitutional scheme, act, and, must act not on their own judgment, but in accordance with the aid and advice of the Ministers. Article 74, after the 42nd Amendment silences speculation and obligates compliance. The Governor vis-a-vis his Cabinet is no higher than the President save in a narrow area which does not include Article 161.

(5) Applying the aforesaid principle laid down in *Maru Ram's case* (supra) it was urged on behalf of the detenu that since Minister Incharge Jails on 15th September 1976 and the Chief Minister on 29th September, 1986 had approved the recommendation of Special Secretary, Home, dated 10th September, 1986 for premature release of the detenu after completion of $7\frac{1}{2}$ years of actual sentence, it was obligatory for the Governor to pass formal order for grant of pre-mature release of the petitioner under Article 161 of the Constitution of India. The advice of the Chief Minister referred to above was binding on the Governor, and, no separate order for grant of pre-mature release of the detenu was necessary.

(6) On behalf of the State it was urged that the petitioner had not undergone minimum period of $7\frac{1}{2}$ years of actual sentence as per guidelines provided by the State Government,—*vide* Memo

(1) AIR 1980 S.C. 2147.

No. 12/152/83-6J/32987, dated 12th December, 1985 (hereinafter referred to as 1985 instructions) and as such the advice given by the State Government in September, 1986 to the Governor was not binding. Secondly, it was submitted that the Governor had asked the Chief Minister to reconsider his advice as the convict was very well educated and comparatively a rich, yet he committed murder, and put up a false *alibi*.

(7) There is no doubt that the existing rules or instructions of the State Government can legally provide guidelines to the State to exercise its power under Article 161 of the Constitution of India 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, concerning which the executive power of the State extends. Perusal of the 1985 instructions referred to above clearly indicates that minimum period of 7½ and 8½ years for adult male prisoners can be taken as one of the guidelines for release on mercy petition. It is quite patent that the said guidelines do not create any legal bar for the State to reconsider the case of the present petitioner, before he had actually undergone 7½ years of actual sentence. Nor sphere of the State Government to exercise its powers under Article 161 of the Constitution of India can be curtailed so as to refuse even consideration of the case for grant of premature release of the petitioner, before undergoing minimum period of 7½ years of actual sentence. The said power cannot be permitted to be diluted by the Government instructions which merely provide guidelines for exercise of such power. The first limb of the argument advanced by the learned State Counsel that the State Government could not exercise its powers under Article 161 of the Constitution of India for considering the case of the detenu for grant of pre-mature release, before he had actually undergone 7½ years of actual sentence, or, that such advice was not binding, it hardly tenable.

(8) The second limb of the argument advanced by the State counsel that the Governor had merely suggested to the Chief Minister to reconsider the case of the detenu, because the said convict was very well educated and comparatively rich, and, yet committed murder and put up false *alibi*, too, cannot prevail, as far as the facts and circumstances of the present case are concerned.

(9) As already discussed above, the State had duly recommended the case of the detenu for grant of pre-mature release while

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exercising its power under Article 161 of the Constitution, and, the Governor was bound to act on the said advice. The fact that the case was sent back to the State Government for reconsideration of the case of the detenu on the objections, referred to above, indicates that the Governor did not agree, to act according to the advice of the State Government in this case, even though the said advice, was, legally and, constitutionally binding on him.

(10) The detenu was not granted parole till 30th June, 1987 as suggested by the Governor to the Chief Minister, while, returning the case of the detenu for grant of pre-mature release, to the State Government. The case was resubmitted to the Governor in August, 1987 and the mercy petition was rejected on 9th September, 1987, when, there was no elected Government in the State, as by then the State had already been placed under the President's Rule. Mere fact that subsequent mercy petitions moved on behalf of the detenu through his mother Smt. Gurmail Kaur on some additional grounds were rejected by the Governor would not make any material difference, as far as the recommendation by the State Government dated 29th September, 1986 for grant of pre-mature release is concerned. The said order which is legally valid and had been passed by the State Government in due exercise of its powers under Article 161 of the Constitution of India, still subsists, and, the same is binding on the State Government. Since the detenu has already undergone more than 8½ years of actual sentence and fulfills all other conditions of the order of the State Government dated 29th September 1986 concerning his premature release, he is directed to be set at liberty forthwith subject to normal safeguards and conditions. This petition is accordingly allowed.

R.N.R.

Before : A. P. Chowdhri, J.

MISS VIMLA MERHA,—Petitioner.

versus

THE STATE OF PUNJAB THROUGH EXECUTIVE MAGISTRATE,
AMRITSAR, AND OTHERS,—Respondents.

Criminal Misc. No. 5986 of 1989.

8th September, 1989

*Criminal Procedure Code (II of 1974) Ss. 482, 145, 146(1)—
Delivery of Possession to Petitioner by Competent Court—Respon-
dents obtaining orders of temporary injunction and filing complaint—
Executive Magistrate ordering petitioner to hand over the possession
to respondent—Such Order—Legality of.*