Before K. S. Tiwana and M. M. Punchhi, JJ.

HARBANS SINGH—*Petitioner.*

versus

STATE OF PUNJAB AND OTHERS,—*Respondents.*

Criminal Writ Petition No. 363 *of* 1986

November 14, 1986.

Code of Criminal Procedure (II of 1974)—Section 432—Power and functions of the appropriate Government in remission of sentence of a convict under Section 432 of the Code—Such power— whether executive and administrative in nature—Appropriate Government—Whether required to follow principles of natural justice and the rules of audi-alteram-partem *in considering the question of remission—Convict—Whether has a right to be heard in the matter of remission of his sentence.*

Held, that the nature and power of the appropriate government under Section 432 of the Code of Criminal Procedure, 1974, even if meant to be exercised in a reasonable manner does not mean that it has a quasi judicial element and the administrative tint in it justifies the invocation of principles of natural justice and of audio-alteram partem. The power of the appropriate Government is and remains executive in nature and consequently the principles of natural justice and audi alteram partem cannot be grafted thereon by means of judicial innovations and activism. The government cannot turn itself into a quasi judicial tribunal since enjoining the executive Government to assume such a role would obviously be requiring it to do something which the basics of our law and the constitution prohibits. Therefore, it has to be held that in the matter of remission of sentence of a convict the appropriate government is not bound to follow the principles of natural justice and of audi alteram partem and that a convict does not have the right to be heard in the matter of remission of his sentence.

(Paras 9 and 10)

Baljit Singh *vs.* State of Punjab 1986 Cr. L.J. 1037.

(*Over-ruled*).

R. Raghupathy *vs.* State of Tamil Nadu, 1984 Cr. L.J. NOC 117 (Madras). (*Dissented from*).

Case referred by Hon'ble Mr. Justice M. M. Punchhi to the Division Bench for the decision of an important question of law involved in this case on 16th July 1986. The Division Bench consisting Hon'ble Mr. Justice Kulwant Singh Tiwana and the Hon'ble Mr. Justice M. M. Punchhi, after deciding the relevant question and again referred the case to the learned Single Judge for decision of the case on merits.

PETITION UNDER ARTICLE 226 of the Constitution of India read with Section 482 Cr. P. C. praying that Habeas Corpus may please be accepted and to pass :—

(i) *a writ of Habeas Corpus may be issued directing the respondents to consider the case of the petitioner for premature release.*

(ii) *the impugned order dated 3rd January, 1986 may kindly be quashed and in the meantime the petitioner may kindly be released on bail.*

(iii) *the petitioner may kindly be exempted from filing the certified copies of Annexures P/1 and P/2 and affidavit.*

(iv) *any other suitable order or direction which this Hon'ble Court may deem fit and proper in the circumstances of the case.*

(v) *cost of the petition may kindly be awarded to the petitioner.*

D. D. Sharma, Advocate, *for the petitioner.*

S. K. Syal, A.A.G. Punjab, *for the respondent.*

JUDGMENT

M. M. Punchhi, J.

(1) We are called upon to test the correctness of the rule laid down by an Hon'ble Single Judge of this Court in *Baljit Singh* v. *State of Punjab* (1). The facts which justify placement of this matter before this Bench are apparent from the referring order prepared by one of us and do not bear repetition.

(1) 1986 Cr. L. J. 1037.

(2) *In Baljit Singh's case* (supra) the priciples of natural justice and *audi alteram partem* were introduced in the governmental functions of granting remissions under section 432, Code of Criminal Procedure, and requiring the Government to reconsider the cases of the then petitioners and passing a speaking order after giving opportunity to the affected prisoners to make their representations, if any. Now the point to be seen is whether the principles of natural justice and *audi alteram partem* have any such place in the context of the power conferred on the appropriate government under section 432, Code of Criminal Procedure? The answer to it would emerge by first discovering the nature of the power conferred under the said provision on the appropriate government, for seemingly in *Baljit Singh's* case (supra) the Hon'ble Single Judge was apparently led to the view that such function of the government was not merely administrative but quasi judicial.

(3) Way-back in *K. M. Nanavati* v. *The State of Bombay* (2) the Supreme Court while exploring the area of 'mercy power', which includes power to remit sentences, left historical touches in its decision but switched on to a different question without formally pronouncing on the matter. Those extracts are :

> "..... Pardon is one of the many prerogatives which have been recognised since time immemorial as being vested in the sovereign, wherever the sovereignty might lie. Whether the sovereign happened to be an absolute monarch or a popular republic or a constitutional king or queen, sovereignty has always been associated with the source of power .... (page 118 of the report column 1).
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> As a result of historical processes emerged a clear cut division of governmental functions into executive, legislative and judicial. Thus was established the "Rule of Law" which has been the pride of Great Briton and which was highlighted by Prof. Dicey. The Rule of Law, in contradistinction to the rule of man, includes within its wide connotation the absence of arbitrary power, submission to the ordinary law of the land, and

(2) A.I.R. 1961 S.C. 112.

the equal protection of the laws. As a resul of the historical process aforesaid, the absolute and arbitrary power of the monarch came to be canalised into three distinct wings of the Government. ....

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This dispersal of the Sovereign's absolute power amongst the three wings of Government has now become the norm of division of power; and the prerogative is no greater than what the law allows."

(4) Then again in *Gopal Vinayak Godse* v. *The State of Maharashtra and others* (3) the Supreme Court in the context of section 401 of the old Code of Criminal Procedure (now section 432 of the new Code) observed as follows:

"..... The question of remission is exclusively within the province of the appropriate Government; and in this case it is admitted that, though the appropriate Government made certain remissions under Section 401 of the Code of Criminal Procedure, it did not remit the entire sentence. We, therefore, hold that the petitioner has not yet acquired any right to release.

(9) The petitioner made an impassioned appeal to us that if such a construction be accepted, he would be at the mercy of the appropriate Government and that the said Government, out of spite, might not remit the balance of his sentence, with the result that he would be deprived of the fruits of remissions earned by him for sustained good conduct, useful service and even donation of blood. The Constitution as well as the Code of Criminal Procedure *confer the power to remit a sentence on the executive Government and it is in its exclusive province.* We cannot assume that the appropriate Government will not exercise its jurisdiction in a reasonable manner. (emphasis supplied)."

So in view of the *Gopal Vinayak Godse's case* (supra) the power to remit a sentence is within the exclusive domain of the executive Government contradistinct to the powers which the legislative and judicial wings of the State in its governmental functions have.

(3) 1961 S.C. 600.

(5) Side by side the quality of power of pardon, reprieve and remission, as it appears, has been engaging attention of the various High Courts in the country, In re : *Maddela Yerra Chonnuqadu and others* (4) two Hon'ble Judges of that Court while writing separate notes traced the history of such power with admirable clarity and took into account almost all the reported English and American cases on the subject to conclude that the power to grant pardon was in essence an executive function to be exercised by the Head of the State after taking into consideration various factors which may not be germane for consideration before a Court of law enquiring into the offences. It was further held that in Republican countries, like India, where, under a written Constitution, the Head of the State is given authority to tender pardons and reprieves, the power is exercised by means of an executive act.

(6) A Full Bench of this Court in *Hukam Singh* v. *State of Punjab and another* (5) took note of the afore-referred Madras case but on its own came to the following conclusion:—

> "16. From what has been stated above, it is clear that the powers vested in the President of India under Article 72, in the Governor under Article 161 of the Constitution and in the State Government under Section 401 of the Code of Criminal Procedure are essentially executive powers of mercy which operate in a completely different field. The trial of criminals and the passing of sentences is purely in the domain of the judiciary whereas the execution of sentences is purely with the Executive Government. Thus it is clear that the order passed by the State Government under Section 401 of the Code of Criminal Procedure in this case is essentially and basically an executive order and the same has to operate in a completely different field."

(7) The afore-referred illuminating precedents lead to only one conclusion that the power of the appropriate Government to remit sentence of a convict is an executive function performed in the exercise of its executive power vested in it under the Code of Criminal Procedure. It is all the more nakedly clear when it is known that remitting a sentence is nothing but exempting the convict from

(4) I.L.R. (Madras volume—1, page 92).

(5) A.I.R. 1975 P & H 148.

undergoing the sentence or any part of it, notwithstanding the decision of a Court imposing the sentence.

(8) The decision in Baljit Singh's case (supra) obviously was influenced by the following observations of a Division Bench of the Madras High Court reported in *R. Raghupathy* v. *State of Tamil* Nadu (6):

> "The act of granting remission is, no doubt, an executive act, but is more quasi-judicial than administrative in nature and effect. Therefore, in the fitness of things, the Government has to set out the reasons which influence its mind for passing an order either granting remission or refusing to grant remission to life convicts. Even if it is so held that the order of Government is purely administrative in character, the order should contain reasons which would enlighten the mind of anyone, and more so of the concerned persons as to what factors were taken into consideration and the reasons which weighed with the Government for granting or not granting premature release to lifers."

AND further :

> "The principles of natural justice do require an opportunity being given to the person concerned to make whatever representations he wants to make before the Government passes its final order. Even if the orders of Government refusing to accept the recommendation of the Advisory Board and granting remission is considered to be administrative in nature, yet the concerned prisoners are entitled to notice of the proposed action of the Government so that they may have an opportunity of putting forth whatever representations they want to make against the proposed view taken by the Government. Thus whenever the Government is of the view that the Advisory Board's recommendation for premature release is not worthy of acceptance and that the case should be taken up for consideration at a later point of time, the Government should give notice of its view to the affected prisoners and afford them an opportunity to make whatever representations they want to make and thereafter pass the final orders."

(5) 1984 Cri. L.J. Noc 117 (Mad)

(9) The view expressed in the aforesaid Madras case appears to us to cut at the very basics of the prerogative right of the executive Government in the exercise of its executive functions. The nature of power of the appropriate Government under section 401, Code of Criminal Procedure, even if meant to be exercised in a reasonable manner (as said so in Gopal Vinayak Godse's case (supra) does not mean that it has a quasi judicial element in it and the administrative tint in it justifies the invocation of principles of natural justice and audi alteram partem. The power of the appropriate Government is and remains executive in nature and in our considered view the principles of natural justice and audi alteram partem cannot be grafted thereon by means of judicial innovations and activism. Thus, we hold it accordingly and declare it so.

(10) Even on the practical side, the rule laid down in Baljit Singh's case (supra) when applied would lead to flood gates of litigation and unnecessary wastage of public time and effort. On practical application it means that the Government shall in the first instance pass a proposed speaking order and serve the same on the prisoner inviting his representation. This means that the Government is obliged to cause inroads on its sovereign or constituent power as conferred under the Constitution and its laws. Assuming that the prisoner can be asked to make time-bound representation, inevitably the time would be extended if asked for, material would have to be supplied if asked for, legal advice would have to be provided if asked for and a variety of other imponderables will step in. Then the final order to be passed by the Government would necessarily have to contain consideration of all what has been projected in the representation and the supportive material. So the Government in a way turns itself into a quasi judicial Tribunal, if not a Court, taking on it the burden-some load of writing judgments so as to 'enlighten the mind of anyone' as the expression goes in *R. Raghupathy's case* (supra). Enjoining the executive Government to assume such a role would obviously be requiring it to do something which the basics of our laws and the Constitution prohibit. When the Supreme Court in Gopal Vinayak Godse's case (supra) has specifically ruled that it cannot be assumed that the appropriate Government would not exercise its jurisdiction in a reasonable manner, now asking the appropriate Government to regulate its executive jurisdiction so as to conform to quasi judicial standards and observe principles of natural justice and audi alteram partem would be a clear inroad on the dictim of the Supreme Court. But this should not be taken that the order of the Government is not

justiciable. Of course it is, if it falls under any of the following three grounds as ruled by the Full Bench of this Court in Hukam *Singh's* case (supra) :

1. That the authority, which purported to have exercised the power, had no jurisdiction to exercise the same.
2. That the impugned order goes beyond the extent of the power conferred by the provisions of law under which it is purported to be exercised.
3. That the order has been obtained on the ground of fraud or that the same having been passed taking into account extraneous considerations, not germane to the exercise of the power conferred or, in other words, that the order is a result of mala fide exercise of power.

(11) The upshot of the above discussion is that we have been led to respectfully disagree with the view expressed in R. Raghupathy's case (supra) of the Madras High Court and inevitably have to overrule the decision in Baljit Singh v. State of Punjab (supra). The matter may now be placed before the learned Single Judge for disposal of the petition.

R.N.R.

Before R. N. Mittal and D. V. Sehgal, JJ.

ISHWAR CHAND JAIN,—*Petitioner.*

versus

High Court of Punjab and Haryana at Chandigarh and another,—*Respondents.*

Civil Writ Petition No. 2213 *of* 1986.

December 9, 1986.

Constitution of India, 1950—*Articles* 235 *and* 311(2)—*Punjab Superior Judicial Service Rules,* 1963, *as applicable to the State of Haryana—Rule* 10(3)—*Petitioner appointed to the service on probation by direct recruitment from the Bar against one of permanent vacancies—Preliminary fact finding enquiry held against the probationer by a sitting Judge of the High Court on the basis*