REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 721 OF 2021
(ARISING OUT OF SLP (CRIMINAL) NO. 4407 OF 2020)

THE STATE OF HARYANA & ORS. .....APPELLANT(S)

VERSUS

RAJ KUMAR @ BITTU .....RESPONDENT(S)

W I T H

CRIMINAL APPEAL NO. 722 OF 2021
(ARISING OUT OF SLP (CRIMINAL) NO. 4634 OF 2020)

A N D

CRIMINAL APPEAL NO. 723 OF 2021
(ARISING OUT OF SLP (CRIMINAL) NO. 2350 OF 2021)

J U D G M E N T

HEMANT GUPTA, J.

1. The State and the writ petitioner before the High Court,[1] are aggrieved by an order passed by the learned Single Bench of the High Court of Punjab & Haryana at Chandigarh on 12.5.2020 whereby the policies of the State Government to grant remission to the prisoners were decided, *inter alia*, directing the State to consider the feasibility of drafting a fresh policy particularly in re-

1 Hereinafter referred to as the 'prisoner'

spect of exercise of powers conferred under Article 161 of the Constitution. It was also held that the State may also consider the feasibility of having a policy with retrospective operation, provided the same does not lead to discrimination amongst substantial number of identically situated prisoners. The Court further observed that till such time a decision is taken, the appropriate Government can exercise its powers under Sections 432 and 433 of the Code of Criminal Procedure, 1973[2] in terms of policy dated 13.8.2008, but while strictly adhering to the restrictions imposed under Section 433-A of the Code.

2. The learned Single Bench has referred to certain policies circulated by the State Government. First policy referred to was circulated on 23.4.1987 wherein the convicts on whom punishment of life imprisonment is imposed on conviction of an offence for which death is one of the punishments provided by law, or where the sentence of death imposed on a person had been commuted under Section 433 of the Code on or after 18.12.78, would be considered by the State Government for premature release after they have undergone 14 years of substantive sentence. Thereafter, policies dated 28.9.1988, 19.11.1991, 8.8.2000 and 12.4.2002 were issued contemplating that case of premature release would be considered on individual basis after review by the State Level Committee falling within the purview of Section 433 of the Code and cases thereafter shall be put up to the Hon'ble Governor. However, the policy dated 13.8.2008 did not contem-

2 For short, the 'Code'

plate that the individual cases will have to be placed before the Hon'ble Governor.

3. The relevant provisions of the Constitution and the Code read as thus:

Constitution of India

"Article 161 – Power of Governor to grant pardons etc., and to suspend, remit or commute sentences in certain cases. - The Governor 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.

Code of Criminal Procedure 1973

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) xxxx xxxx

(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) xxxx xxxx

(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.

433-A. 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."

4. The issue arising in the present appeals is regarding applicability of policy dated 12.4.2002 or the policy dated 13.8.2008 to the prisoner convicted on 25.3.2010. This Court in ***State of***

Haryana & Ors. v. ***Jagdish***[3] inter-alia held (para 52) that the policy dated 4.2.1993 refers to the exercise of powers under Article 161 of the Constitution whereas the policy dated 13.8.2008 is in exercise of the powers conferred under Section 432 read with Sections 433 and 433-A of the Code. The said policy is a rule of procedure, thus, subordinate to the Constitution. The power exercised under Article 161 is a mandate of the Constitution, therefore, the policy dated 13.8.2008 cannot override the policy dated 4.2.1993. It is the said finding which is required to be examined in the present appeals, though in the context of similar later policy dated 12.4.2002. The two polices are reproduced hereinbelow before the case of premature release can be considered. The two polices in juxtaposition read as thus:

3 (2010) 4 SCC 216

12th April, 2002	13th August, 2008
In supersession of Haryana Government Memo No. 36/135/91-1JJ(II), dated 8-8-2000 which was further substituted bearing same number and date on 23-2-2001, the Government have decided to revise the policy regarding premature release of life convicts as follows:	No. 36/135/91-1JJ(II)- In exercise of the powers conferred by Sub-section (1) of Section 432 read with Section 433 of the Code of Criminal Procedure, 1973 (Act 2 of 1974) and *in supersession of Haryana Government Memo No. 36/135/91-1JJ(II), dated the 12th April, 2002 and all other earlier policies, the Governor of Haryana* hereby frames the following policy regarding premature release of life convicts, namely:
(aa) Convicts whose Death sentence has been Commuted to life imprisonment and convicts who have been imprisoned for life Having committed a heinous crime such as" — Their cases may be considered after completion of 20 years actual sentence and 25 years total sentence with remissions.	(a) Convicts whose death sentence has been commuted to life imprisonment and convicts who have been imprisoned for life having committed a heinous crime such as: — Their cases for pre-mature release may considered after completion of 20 years actual sentence and 25 years total sentence with remissions.
(i) Murder after rape repeated/chained rape/unnatural offences.	(i) Murder with rape/unnatural offences.
xxx xxx xxx	xxx xxx xxx
(a) Convicts who have been imprisoned for life having committed a heinous crime such as: — Their cases may be considered after completion of 14 years actual sentence including undertrial period provided that the total period of such sentence including remissions is not less than 20 years.	(b) Convicts who have been imprisoned for life having committed any crime which is defined in IPC and/or NDPS Act as punishable with death sentence. — Their cases for pre-mature release may be considered after completion of 14 years actual sentence including Undertrial period; provided that the total period of such sentence including remissions is not less than 20 years.
(i) Murder with wrongful confinement for extortion/robbery.	
(b) Adult life convicts who have been imprisoned for life but whose cases are not covered under (aa) and (a) above and who have committed crime which are not considered heinous as mentioned in clause — Their cases may be considered after completion of 10 years actual sentence including undertrial period provided that the total period of such sentence including remissions is not less than 14 years.	(c) Convicts who have been imprisoned for life having committed a crime which is defined in IPC as punishable with life imprisonment but not with death sentence. — Their cases may be considered after completion of 10 years actual sentence including undertrial period; provided that the total period of such sentence Including remissions is not less than 14 years.

(aa) & (a) above. xxx xxx xxx 5. The Director General of Prisons, Haryana shall put up all such premature release cases to the State Level Committee for consideration. The Committee will meet once in three months according to the convenience of the Minister for jails, Haryana so that cases of review under this policy are not delayed. The Director General of Prisons, Haryana further will forward a copy of the decision taken by the Committee alongwith the roll of each of the life convict to the State Government within one week for further action. Such cases will be put up to the Governor through the Minister for Jails and the Chief Minister, Haryana with full background of the prisoner and recommendations of the committee alongwith the copy of judgment etc. for orders under Article 161 of the Constitution of India.	xxx xxx xxx 8. The Director General of Prisons, Haryana shall put up all such premature release cases to the State Level Committee for consideration. The Committee will meet once in three months, so that cases of review under this policy are not delayed. The Director General of Prisons, Haryana will forward a copy of the decision taken by the Committee along with the commutation roll of each of the life convict to the State Government within one week for further action. Such cases will be put up to the Chief Minister, Haryana along with full background of the convicts and recommendations of the Committee and a copy of the Court judgement etc. for orders under Section 432 Cr.P.C. It is reiterated that no convict has fundamental right of remission or shortening of sentence. The State Government in exercise of its executive discretionary power of remission is to consider each individual case keeping in view all the relevant factors. This policy is issued in exercise of the power of the State in such a way that no discrimination is made while considering the case of life convicts for premature release. This policy shall be applicable to all premature release cases of life convicts with effect from date of notification irrespective of their date of conviction. The date for consideration of premature release of a convict would be the date of completion of his requisite sentence in the policy.

5. In ***Jagdish***, this Court did not approve the judgment of this Court in ***Sadhu Singh & Ors.*** v. ***State of Punjab***[4] wherein it was held that these policies are executive instructions. Instead, this Court approved the judgment of this Court reported as ***State of Haryana*** v. ***Mahender Singh & Ors.***[5] wherein it was held that these policies of remission are in exercise of the powers conferred under Section 59(5) of the Prisons Act, 1894, contemplating "for the award of marks and the shortening of sentences" and thus, they are statutory rules. Sections 401 and 402 of the Code were not empowering the appropriate Government to issue general or special orders and the conditions on which petitions for premature release should be presented and dealt with. The Sections 432 and 433 of the Code had corresponding provisions in Sections 401 and 402 of the Code but sub-section (5) of Section 432 empowers an appropriate Government to issue general or special orders. Therefore, after the commencement of the Code on 1.4.1974, the power to issue general or special orders allowing remissions is traceable to Section 432 of the Code. Hence, the policies issued thereafter are statutory in nature, having being framed in exercise of powers conferred on appropriate Government under Section 432 of the Code.

6. None of the policies framed after 1974, except the one which

4 (1984) 2 SCC 310
5 (2007) 13 SCC 606

was published in the State Government Gazette on 13.8.2008, referred to any provision of law under which such decisions have been communicated to the Director General of Prisons. The Constitution Bench judgment of this Court reported as ***L. Hazari Mal Kuthiala*** v. ***Income Tax Officer, Special Circle, Ambala Cantt.***[6] held that exercise of powers will be referrable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory. This Court held as under:

> "5. ...The Commissioner, when he transferred this case, referred not to the Patiala Income Tax Act, but to the Indian Income Tax Act, and it is contended that if the Patiala Income Tax Act was in force for purposes of reassessment, action should have been taken under that Act and not the Indian Income Tax Act. This argument, however, loses point, because the exercise of a power will be referable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory. This principle is well-settled. See *Pitamber Vajirshet* v. *Dhandu Navlapa* [ILR 12 Bom 486, 489] ."

7. Such principle of law was reiterated in a three-Judge Bench judgment of this Court reported as ***N. Mani*** v. ***Sangeetha Theatre & Ors.***[7] wherein it was held as under:

> "9. It is well settled that if an authority has a power under the law merely because while exercising that power the source of power is not specifically referred to or a reference is made to a wrong provision of law, that by itself does not vitiate the exercise of power so long as the power does exist and can be traced to a source available in law."

8. Therefore, even if there is no specific reference to the statutory power under which such policies have been issued or even if a

6 AIR 1961 SC 200
7 (2004) 12 SCC 278

wrong provision is mentioned, the policy instructions would continue to be statutory instructions framed either under the Prisons Act, 1894 or under Section 432 of the Code.

9. In ***Maru Ram*** v. ***Union of India & Ors.***[8], a Constitution Bench considering the scope of Article 161 of the Constitution and the provisions of the Code held as under:

> "54. …. The second plea, revolves round 'pardon jurisprudence", if we may coarsely call it that way, enshrined impregnably in Articles 72 and 161 and the effect of Section 433-A thereon. The power to remit is a constitutional power and any legislation must fail which seeks to curtail its scope and emasculate its mechanics. Thirdly, the exercise of this plenary power cannot be left to the fancy, frolic or frown of government, State or Central, but must embrace reason, relevance and reformation, as all public power in a republic must. On this basis, we will have to scrutinize and screen the survival value of the various remission schemes and short-sentencing projects, not to test their supremacy over Section 433-A, but to train the wide and beneficent power to remit life sentence without the hardship of fourteen fettered years.
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> xxx xxx xxx
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> 57. We now move on to the second contention which deals with the power of remission under the Constitution and the fruits of its exercise vis-à-vis Section 433-A. Nobody has a case – indeed can be heard to contend – that Article 72 and 161 must yield to Section 433-A……………………..
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> xxx xxx xxx
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> 59. It is apparent that superficially viewed, the two powers, one constitutional and the other statutory, are coextensive. But two things may be similar but not the same. That is precisely the difference. We cannot agree that the power which is the creature of the Code can be equated with a high prerogative vested by the

8 (1981) 1 SCC 107

Constitution in the highest functionaries of the Union and the States. The source is different, the substance is different, the strength is different, although the stream may be flowing along the same bed. We see the two powers as far from being identical, and, obviously, the constitutional power is ‘untouchable’ and ‘unapproachable’ and cannot suffer the vicissitudes of simple legislative processes. Therefore, Section 433-A cannot be invalidated as indirectly violative of Articles 72 and 161. What the Code gives, it can take, and so, an embargo on Sections 432 and 433(a) is within the legislative power of Parliament.

60. Even so, we must remember the constitutional status of Articles 72 and 161 and it is common ground that Section 433-A does not stand and cannot affect even a wee bit the pardon power of the Governor or the President. The necessary sequel to this logic is that notwithstanding Section 433-A the President and the Governor continue to exercise the power of commutation and release under the aforesaid articles.

61. … The upshot is that the State Government, whether the Governor likes it or not, can advice 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…………....The Governor vis-à-vis his Cabinet is no higher than the President save in a narrow area which does not include Article 161. The constitutional conclusion is that the Governor is but a shorthand expression for the State Government and the President is an abbreviation for the Central Government.

xxx xxx xxx

69. …. We have no hesitation to reject the notion that Articles 72/161 should remain uncanalised. We have to direct the provisional acceptance of the remission and short-sentencing schemes as good guide-lines for exercise of pardon power – a jurisdiction meant to be used as often and as systematically as possible and *not to be abused*, much as the temptation so to do may press upon the pen of power.

70. The learned Solicitor-General is right that these Rules are plainly made under the Prisons Act and not under the constitutional power, the former fail under the pressure of Section 433-A. But that, by no means, precludes the States from adopting as working rules the same remission schemes which seem to us to be fairly reasonable. After all, the government cannot meticulously study each prisoner and the present praxis of marks, until a more advanced and expertly advised scheme is evolved, may work. Section 433-A cannot forbid this method because it is immunized by Article 161. We strongly suggest that, without break, the same rules and schemes of remission be continued as a transmigration of soul into Article 161, as it were, and benefits extended to all who fall within their benign orbit – save, of course, in special cases which may require other relevant consideration. The wide power of executive clemency cannot be bound down even by self-created rules.

xxx xxx xxx

72. We conclude by formulating our findings:

(1) xxx xxx
(2) We affirm the current supremacy of Section 433-A over the Remission Rules and short-sentencing statutes made by the various States.
(3) xxx xxx
(4) We hold that Section 432 and Section 433 are not a manifestation of Articles 72 and 161 of the Constitution but a separate, though similar power, and Section 433-A, by nullifying wholly or partially these prior provisions does not violate or detract from the full operation of the constitutional power to pardon, commute and the like.
(5) xxx xxx
(6) We follow *Godse case* to hold that imprisonment for life lasts until the last breath, and whatever the length of remissions earned, the prisoner can claim release only if the remaining sentence is remitted by government.
(7) xxx xxx
(8) The power under Articles 72 and 161 of the Constitution can be exercised by the Central and State Governments, not by the President or Governor on their own. The advice of the appropriate Government binds the Head of the State. No

separate order for each individual case is necessary but any general order made must be clear enough to identify the group of cases and indicate the application of mind to the whole group.

(9) xxx xxx

(10) Although the remission rules or short-sentencing provisions proprio vigore may not apply as against Section 433-A, they will override Section 433-A if the government, Central or State, guides itself by the self-same rules or schemes in the exercise of its constitutional power. We regard it as fair that until fresh rules are made in keeping with experience gathered, current social conditions and accepted penological thinking – a desirable step, in our view – the present remission and release schemes may usefully be taken as guide-lines under Articles 72/161 and orders for release passed. We cannot fault the government, if in some intractably savage delinquents, Section 433-A is itself treated as a guide-line for exercise of Articles 72/161. These observations of ours are recommendatory to avoid a hiatus, but it is for Government, Central or State, to decide whether and why the current Remission Rules should not survive until replaced by a more wholesome scheme.

(11) The U.P. Prisoners' Release on Probation Act, 1938, enabling limited enlargement under licence will be effective as legislatively sanctioned imprisonment of a loose and liberal type and such licensed enlargement will be reckoned for the purpose of the 14-year duration. Similar other statutes and rules will enjoy similar efficacy.

xxx xxx"

10. The Constitution Bench in ***Union of India*** v. ***V. Sriharan & Ors.***[9] *inter alia* examined the provisions of Articles 161 and 162 of the Constitution. It was held as under:

"22. Therefore, the resultant position would be that the Executive Power of the Union and its authorities in relation to grant of remission, commutation, etc. are available and can be exercised by virtue of the implication of Article 73(1)(a) read along with its proviso and the exercise of

9 (2016) 7 SCC 1

> such power by the State would be controlled and limited as stipulated in the proviso to Article 162 to the extent to which such control and limitations are prescribed in the Criminal Procedure Code."

11. Thus, the power under Article 161 of the Constitution can be exercised by the State Governments, not by the Governor on his own. The advice of the appropriate Government binds the Head of the State. No separate order for each individual case is necessary but any general order made must be clear enough to identify the group of cases and indicate the application of mind to the whole group. Therefore, the policies of the State Government are composite policies encompassing both situations under Article 161 of the Constitution and Sections 432, 433 and 433-A of the Code. The remission under Article 161 of the Constitution will override Section 433-A of the Code, if the State Government decides to be governed of its constitutional power.

12. In ***State of Haryana*** v. ***Nauratta Singh & Ors.***[10], this Court referred to ***Maru Ram's*** case holding that period of 14 years as specified in Section 433-A of the Code is the actual period of imprisonment undergone by the prisoner without including any period of remission. This Court was examining the case where the accused was acquitted by the trial court but was convicted by the High Court. He was on bail during the pendency of the appeal before the High Court. The claim of the prisoner was that

10 (2000) 3 SCC 514

the period of bail in terms of the order of the High Court has to be included in the period of 14 years of imprisonment. The Court held as under:

> "5. We may point out that Section 433-A of the Code was introduced in the statute-book on 8-12-1978 by which the power of a State Government to release a person (who has been convicted and sentenced to life imprisonment of any offence punishable with death or imprisonment for life) has been curtailed by introducing the rider that such convicted person should have served at least 14 years of imprisonment. A Constitutional Bench of this Court has held in *Maru Ram v. Union of India* that the period of 14 years envisaged in the new provision is the actual period of imprisonment undergone by the prisoner without including any period of remission."

9. In ***Jagdish***, the question raised was as to whether the policy which makes a provision for remission of sentence should be the one which was existing on the date of the conviction of the accused or the one which existed on the date of consideration of his case for premature release by the appropriate authority. The Court held that the amendment inserting Section 433-A in the Code would apply prospectively. The life convicts who had been sentenced prior to 18.12.1978 i.e., date of enforcement of amendment would not come within the purview of the provisions of Section 433-A of the Code. The remission rules/short-sentencing policies could be taken as guidelines for exercise of powers under Article 72 or 161 of the Constitution and in such an eventuality, remission rules would override Section 433-A of the Code. This Court held that Section 433-A of the Code cannot and does not in any way affect the constitutional power conferred on

the President/Governor under Articles 72/161 of the Constitution.

It was held as under:

> "26. This Court in *Ashok Kumar* [(1991) 3 SCC 498 : 1991 SCC (Cri) 845 : AIR 1991 SC 1792] considered the matter elaborately taking into consideration a large number of its earlier judgments including *Maru Ram* [(1981) 1 SCC 107 : 1981 SCC (Cri) 112] , *Bhagirath* v. *Delhi Admn.* [(1985) 2 SCC 580 : 1985 SCC (Cri) 280 : AIR 1985 SC 1050] ; *Kehar Singh* v. *Union of India* [(1989) 1 SCC 204 : 1989 SCC (Cri) 86 : AIR 1989 SC 653] and came to the following conclusions:
>
> (*i*) Section 433-A CrPC denied premature release before completion of actual 14 years of incarceration to only those limited convicts convicted of a capital offence i.e. exceptionally heinous crime;
>
> (*ii*) Section 433-A CrPC cannot and does not in any way affect the constitutional power conferred on the President/Governor under Articles 72/161 of the Constitution;
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> (*iii*) Remission Rules have a limited scope and in case of a convict undergoing sentence for life imprisonment, it acquires significance only if the sentence is commuted or remitted subject to Section 433-A CrPC *or* in exercise of constitutional power under Article 72/161 of the Constitution; and
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> (*iv*) Case of a convict can be considered under Articles 72 and 161 of the Constitution treating the 1958 Rules.
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> xx xx xx
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> 28. Nevertheless, we may point out that the power of the sovereign to grant remission is within its exclusive domain and it is for this reason that our Constitution makers went on to incorporate the provisions of Article 72 and Article 161 of the Constitution of India. This responsibility was cast upon the executive through a constitutional mandate to ensure that some public purpose may require fulfilment by grant of remission in appropriate cases. This power was never intended to be used or utilised by the executive as an unbridled power of reprieve. Power of clemency is to be exercised cautiously and in appropriate cases, which in effect, mitigates the sentence of punishment awarded and which does not, in any way, wipe out the convic-

> tion. It is a power which the sovereign exercises against its own judicial mandate. The act of remission of the State does not undo what has been done judicially. The punishment awarded through a judgment is not overruled but the convict gets benefit of a liberalised policy of State pardon. However, the exercise of such power under Article 161 of the Constitution or under Section 433-A CrPC may have a different flavour in the statutory provisions, as short-sentencing policy brings about a mere reduction in the period of imprisonment whereas an act of clemency under Article 161 of the Constitution commutes the sentence itself. as guidelines."

13. Thus, a prisoner has to undergo a minimum period of imprisonment of 14 years without remission in the case of an offence, the conviction of which carries death sentence, to take benefit of policy of remission framed by an appropriate government under Section 432 of the Code in view of the overriding provision of Section 433-A of the Code. However, the power of the Hon'ble Governor to commute sentence or to pardon is independent of any such restriction or limitation. The State Government can frame a policy of grant of remissions either under Section 432 of the Code or under Article 161 of the Constitution. The Governor continues to exercise the power of commutation and release under Article 161 of the Constitution, notwithstanding Section 433-A of the Code. The action of commutation and release can thus be pursuant to a governmental decision and the order may be issued even without the Governor's approval. However, under the Rules of Business and as a matter of constitutional courtesy, it may seek approval of the Governor, if such release is under Article 161 of the Constitution.

14. Still further, it is the consistent view of this Court that the policy prevalent at the time of conviction shall be taken into consideration for considering the premature release of a prisoner. In ***Jagdish,*** while determining the policy which would be applicable for the remission of sentence, this Court held as under:

> "27. In Mahender Singh, this Court as referred to hereinabove held that the policy decision applicable in such cases would be which was prevailing at the time of his conviction. This conclusion was arrived on the following ground: (SCC p. 619, para 38)
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> > 38. 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."

15. The policy of premature release dated 13.8.2008 was issued in the name of the Governor and was published in the official Gazette. Such notification is said to have been issued in exercise of the powers conferred under sub-section (1) of Sections 432 and 433 of the Code. Keeping in view the principles of law enunciated above, such policy is in exercise of the powers conferred on the appropriate Government in terms of the provisions of the Code and is thus statutory in nature. The other policy dated 12.4.2002 is in fact a memo issued by the Financial Commissioner and Secretary to Government, Haryana, Jails Department, Chandigarh to the Director General of Prisons,

Haryana, Chandigarh. Such policy of premature release would again be traceable to the provisions of the Code.

16. Mr. Nikhil Goel, learned Additional Advocate General for the State of Haryana, submitted that different policies have been issued from time to time and the later policy has superseded the earlier one, so there was no hiatus when a policy of premature release was not in operation or at any given point of time, the two polices were operational. The argument of Mr. Goel merit acceptance inasmuch as the policy dated 12.4.2002 is in supersession of earlier policy circulated on 8.8.2000 substituted later on 23.2.2001. The policy dated 13.8.2008 has substituted the earlier policy dated 12.4.2002 and such policy has been published on behalf of the Governor of the State. The policy dated 13.8.2008 has been issued in exercise of powers conferred by sub-section (1) of Section 432 read with Section 433 of the Code and in supersession of Government Memorandum dated 12.4.2002 and all other policies. The policy dated 13.8.2008 is a statutory policy. The said policy cannot and has not tried to take over the discretion vested in the Hon'ble Governor to grant pardons, remissions or commute sentence in exercise of powers conferred under Article 161 of the Constitution but it is the policy issued under a Statute and therefore, such policy has a statutory force. The policy dated 12.4.2002 is again a statutory policy and cannot be put at a higher pedestal than the policy dated 13.8.2008 for the reason that it seeks approval from the Hon'ble

Governor. Such policy has been specifically superseded on 13.8.2008, ceases to be operative for the convicts who are convicted after 13.8.2008.

17. Section 433-A of the Code starts with a non-obstante clause restricting the right of the appropriate Government, to suspend the sentence of imprisonment for life imposed on conviction of a person for an offence for which death is one of the punishments provided by law, that such person shall not be released from prison unless he has served at least 14 years of imprisonment. Therefore, the power of the appropriate Government to release a prisoner after serving 14 years of actual imprisonment is vested with the State Government. On the other hand, the power conferred on the Governor, though exercised on the aid and advice of the State, is without any restriction of the actual period of imprisonment undergone by the prisoner. Thus, if a prisoner has undergone more than 14 years of actual imprisonment, the State Government, as an appropriate Government, is competent to pass an order of premature release, but if the prisoner has not undergone 14 years or more of actual imprisonment, the Governor has a power to grant pardons, reprieves, respites and remissions of punishment or to suspend, remit or commute the sentence of any person *de hors* the restrictions imposed under Section 433-A of the Constitution. Such power is in exercise of the power of the sovereign, though the Governor is bound to act on the aid and advice of the State Government.

18. The policy of 12.4.2002 is applicable in the cases of the prisoners who have undergone actual sentence of 14 years of imprisonment and also the prisoners who have not completed 14 years of actual imprisonment. Therefore, the cases of the prisoners who have completed 14 years of actual imprisonment can be decided by the State Government in terms of Sections 432 and 433 of the Code unless the State Government choses to seek the approval of the Hon'ble Governor. There is nothing illegal or improper to seek approval of the Hon'ble Governor in all cases but in the cases where the prisoner has not undergone 14 years of actual imprisonment falling within scope of Section 433-A of the Code, it is for the Hon'ble Governor to exercise the power conferred under Article 161 of the Constitution, though on the aid and advice of the State Government. We find that clause (b) of the policy dated 12.4.2002 provided for the cases of the prisoners to be considered after completion of 10 years of actual sentence including undertrial period provided the total period of such sentence including remission is not less than 14 years. The remissions not contemplated by Section 433-A of the Code, the power to remit or commute sentence can be exercised by the Governor in exercise of the power conferred under Article 161 of the Constitution. This explains the last line in the policy that such cases will be put up before the Governor with full background of the prisoner and recommendation of the Committee including copy of the judgment for orders under

Article 161 of the Constitution.

19. The Notification dated 13.8.2008 published in exercise of the powers conferred upon an appropriate Government under Section 432(5) of the Code, provides that 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. Therefore, all the polices issued from time to time are under Section 432 of the Code, though no reference is made to such provisions in any of the policies except the last one dated 13.8.2008. The source of power to frame guidelines or the policies for remission etc. was earlier in Section 59(5) of the Prisons Act, 1894 and now in terms of Section 432(5) of the Code. Therefore, such policies are statutory in nature, framed in exercise of power conferred upon appropriate government under Section 432(5) of the Code.

20. The clause 2(c) of the policy dated 13.8.2008 deals with the convicts who have been imprisoned for life having committed a crime which is defined in the Indian Penal Code, 1860 (IPC) as punishable for life imprisonment but not with death sentence. The cases of such prisoners can be considered after completion of 10 years of actual sentence including undertrial period provided the total period of such sentence including remission is not less than 14 years. The distinction is that in such cases, the remission is taken into consideration whereas, the remissions

earned by a prisoner convicted for an offence under Section 302 IPC, an offence punishable with death, cannot be considered for premature release. If such a prisoner is to be considered for premature release in the cases of life imprisonment for an offence under IPC, the bar under Section 433-A of the Code would not apply. The judgment in ***Jagdish*** has to be read in the light of the distinction which we have drawn between the power exercised by the Hon'ble Governor and the power to be exercised by the State Government.

21. Therefore, we find that the directions issued by the High Court are not sustainable for the reason that the policies have to be read keeping in view the period of imprisonment undergone by a prisoner. The power of remission is to be exercised by the State Government, as an appropriate Government, if the prisoner has undergone 14 years of actual imprisonment in the cases falling within the scope of Section 433-A of the Code and in case the imprisonment is less than 14 years, the power of premature release can be exercised by the Hon'ble Governor though on the aid and advice of the State Government.

22. Consequently, the directions issued by the learned Single Bench are not sustainable and are hereby set aside.

23. The prisoner herein has completed 12 years and 25 days as on 6.7.2021 as per the custody certificate produced by the State. The case for premature release of the prisoner in terms of the policy of the State Government dated 13.8.2008, the policy which was applicable on the date of his conviction, can be considered only after he completes 14 years of actual imprisonment. However, the State Government can consider the prisoner in question for premature release after undergoing imprisonment for less than 14 years only under Article 161 of the Constitution.

24. The appeals are disposed of accordingly.

...J.
(HEMANT GUPTA)

...J.
(A.S. BOPANNA)

NEW DELHI;
AUGUST 03, 2021.