

C. Balakrishna Vs. State of Andhra Pradesh and Others

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Court : Andhra Pradesh

Decided On : Nov-14-1997

Reported in : 1998(4)ALD349; 1998(2)ALD(Cri)142; 1997(6)ALT581

Judge : B. Subhashan Reddy, J.

Acts : [Constitution of India](#) - Articles 12, 21, 72, 141, 161 and 356; [Indian Penal Code \(IPC\), 1860](#) - Sections 324 and 342; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 321 and 360; [Probation of Offenders Act, 1958](#)

Appeal No. : WP No. 18627 of 1994

Appellant : C. Balakrishna

Respondent : State of Andhra Pradesh and Others

Advocate for Def. : Government Pleader for Home, ;Mr. C. Praveen Kumar, ;Mr. S. Raghuram and ;Mr. K. Srinivasamurthy, Adv.

Advocate for Pet/Ap. : Mr. I. Venkata Narayana, Adv.

Judgement :

ORDER

1. This writ petition raises important constitutional questions for consideration regarding the jurisdiction, extent and the mode of exercise of power of clemency by the Governor under Article 161 of the [Constitution of India](#).

2. The petitioner was working as a Deputy Special Commissioner in the office of the Special Commissioner, Government of Andhra Pradesh at New Delhi. He is a native of Tirupathi Town and while on leave, he was on a visit to that place on 8-6-1982. On the said date, he went to the Main Branch of the Andhra Bank, a Nationalised Bank, where he had Savings Bank Account No.6637 to encash a draft for Rs.1,800/-, which was his leave pay, issued by the Government of Andhra Pradesh. He was paid 18 one hundred rupee notes by the concerned Cashier and on receipt of the same, he left the Bank. 20 minutes after his exit, the Manager and the Cashier accompanied by some employees of the Bank came to the petitioner's house and alleged that the Cashier had paid Rs.8,100/- by mistake while the petitioner was entitled for only Rs.1,800/- and demanded the petitioner to refund the balance of the amount. The petitioner had refuted their allegations and asserted that he had received only Rs.1,800/- and as the amount was still in his pocket, he took-out the same and asked them to count. Even after counting, the above bank employees were in no mood to listen to him and forcibly took him to the Bank premises and confined him in the Manager's room from 12.00 noon to 4.30 p.m. He was also harassed by putting several questions and also threats. During the above period, the petitioner was not allowed to move and was not even given water or allowed to attend to the calls of nature. The Inspector of Police was called and after interrogation, the petitioner was allowed to go home. But, again, the above bank employees came to the house of the petitioner and took him back to the Bank and again confined him till 7.30 p.m. and threatened him with dire consequences. Again, the Sub-Inspector of Police came and when the Sub-Inspector asked for written complaint from the Manager of the Bank, he declined to give the same, then, the Sub-Inspector had permitted the petitioner to leave the bank premises. The petitioner met the Chairman of the Bank and complained to him expecting at least pardon, but that was not to be. Instead, the Chairman threatened the petitioner that the Bank employees will be saved at any cost. The consequence was that the petitioner was forced to file a criminal complaint for the offence of wrongful confinement punishable under Section 342 IPC. When the case was pending before the Court of Magistrate, Section 321 Cr.PC was sought to be applied and the case was allowed to be withdrawn by the prosecution. On a revision being filed to the Court of Sessions, the said withdrawal order was set

aside and the case proceeded. The same was challenged by the prosecution in the High Court by filing a revision, but that was dismissed on 24-4-1987. It is pertinent to mention that for the period from 1982 to 1987 (5 years), the case was dragged only on account of proceedings relating to the withdrawal of the prosecution, which was initiated at the instance of respondents 2 and 3. By judgment dated 26-8-1991, the Court of the Munsif Magistrate, Tirupathi, after trial had convicted the respondents 2 and 3 for wrongful confinement of the petitioner and sentenced them to undergo rigorous imprisonment for 6 months and also to pay a fine of Rs.500/- each. Appeal to the Court of Sessions failed as the Sessions Court by its judgment dated 10-9-1993 had affirmed the conviction recorded and sentence imposed by the Court of Magistrate. Even the revision to this Court met the same fate as this Court by judgment dated 4-7-1994 had affirmed the judgments rendered by the Courts below. Before this Court in the revision, after failing to persuade to set aside the judgments of the Courts below, invocation of powers of Probation Act was sought for; but that was rejected by this Court. It may be apt to extract what this Court said with regard to either to show leniency or to let off in Probation.

'Considering the entire material, I am fully convinced that the evidence on record establishes an offence under Section 342IPC against the two accused. The convictions and the sentences are perfectly justified. Considering the high handed conduct of A1 and A2 and their co-employees I do not find any justification for invoking the powers of the Court under Section 360 Cr.PC. The fact that the accused faced the ordeal for nearly 12 years is no justification for letting off people, who behaved in a most high handed manner, leniently. It should also be remembered that a man holding a responsible position in Government Service as Deputy Commissioner in the office of the Special Commissioner to the Government of Andhra Pradesh at New Delhi was harassed. If an Officer holding such a position could be treated in this manner, it is to be imagined how a common man without any official position would have been harassed by the Bank employees in such a situation. There is no justification for applying the provisions of Section 360 Cr.PC or the provisions under the Probation of Offenders Act.'

The above judgment rendered by this Court had become final.

3. Then, respondents 2 and 3 invoked the power of clemency of the Governor under Article 161 of the [Constitution of India](#). The Governor had exercised his power of clemency and granted remission of sentences passed against respondents 2 and 3. It is apt to extract the said order dated 27-8-1994 of the Governor:

'1. S/Sri M. Jagannadha Saslry and R. Subrahmanyam, Employees of Andhra Bank were convicted in a case under Section 342 IPC and they were sentenced to undergo six months rigorous imprisonment and also to pay a fine of Rs.500/- each by the II Additional Munsif Magistrate, Tirupathi in its judgment first read above. The appeals filed by the above individuals before III Additional District and Sessions Judge, Chittoor and also before the Hon'ble High Court of AndhraPradcsh were dismissed in their orders second and third read above.

2. The accused S/Sri M. Jagannadha Sastry and R. Subrahmanyam, in their representation, have represented that inspite of ordering for withdrawal of the case filed by them, by the trial Magistrate as requested by the Collector, Chittoor, the Court in its order first read above passed sentence to undergo six months rigorous imprisonment and a fine of Rs.500/- each that too after thirteen years. Further, they have represented that they have been undergoing mental torture for the past 12 years inspite of recouping Rs.8,100/- being the deficit amount in the cash and if the sentence awarded by the Court is allowed to stand, they will suffer irreparable loss and damage and their families would be ruined and thrown on the streets. They have, therefore, requested the Governor to exercise the power conferred under Article. 161 of the [Constitution of India](#) and suspend the sentence passed by the Court.

3. Government have examined the matter carefully and they observe that in this case, the Collector, Chittoor had already requested the Public Prosecutor to file an application for withdrawal of prosecution against both the accused and the trial Magistrate had also ordered the withdrawal of the case, but the Sessions Judge has set aside the order on some technical objection. Further, it is observed that the alleged offence in this particular case was committed not to gain any personal or monetary gains but to protect the interests of the Bank, which is a Nationalised

one and that no moral turpitude is involved and that the sentence passed against the accused will have bad repercussions to the accused as well as the reputation of a nationalised bank. It has, therefore, been decided to remit the sentence on the accused as a special case on humanitarian grounds.

4. In exercise of the powers conferred under Article 161 of the [Constitution of India](#), the Governor of Andhra Pradesh hereby remits the sentence passed on S/Sri M. Jagannadha Sastry S/o. M. Subrahmanyam and R. Subrahmanyam S/o. S. Rajagopal, employees of Andhra Bank, by the II Additional Munsif Magistrate, Tinipathi through his judgment first read above.'

This writ petition has been filed questioning the above order of clemency by the Governor.

4. Four contentions have been raised by Mr. I. Venkatanarayana, learned Counsel for the petitioner :

(i) that the matter relates to the power of the Union of India to legislate under Item 45 of List 1 of the 7th Schedule and as such, the Governor had no jurisdiction to invoke his clemency power;

(ii) that mode of exercise of power by the Governor is arbitrary and unconstitutional;

(iii) that the petitioner was entitled for a notice and in not issuing notice to the petitioner and not hearing him, the Governor had violated the principles of natural justice; and

(iv) that the petitioner is also entitled for compensation for the wrongful confinement apart from the redressal of setting aside the impugned G.O. granting remission.

The impugned order of clemency has been supported by the learned Government Pleader for the 1st respondent, Mr. C. Padmanabha Reddy, learned Counsel appearing for the 2nd respondent, Mr. G. Raghti Ram, learned Counsel appearing for the 3rd respondent and Mr. K. Srinivasa Murthy, learned Counsel appearing for

the 4th respondent. The plea of the respondents, concisely speaking, is to the effect that the clemency power possessed by the Governor is plenary power and that it is not susceptible for any judicial scrutiny. The claim to compensation is resisted particularly by respondent No.4 on the ground that earlier, writ petition for appointment of Commission and impleadment in the suit for damages against respondent Nos.2 and 3 were dismissed and that he had also raised a dispute before the National Consumer Forum, New Delhi seeking for damages and made a representation to the Honourable President of India, to, mean to say that no compensation is payable.

5. It may be pertinent to mention that respondents 2 and 3 were the Manager and Cashier, respectively, working in the main branch of Andhra Bank at Tirupathi at the relevant point of time i.e. detention of the petitioner in the bank premises in two spells on 8-6-1982.

6. I will now take-up the first contention of Mr. I. Venkatanarayana. According to him, the matter relates to the power of Union of India to legislate under Item 45 of List 1 of VIII Schedule of Indian Constitution. Item 45 deals with 'banking'. Even applying the pith and substance theory, the said legislative item does not cover the act of wrongful confinement. There is no special legislation with regard to offences by the bankers within the bank premises so as to be tried under special law. Criminal acts done by the bankers even within their premises do not attract any legal provisions enacted touching upon Item 45 of List I of Schedule VIII. The act of wrongful confinement complained of is purely a penal act traceable to Section 342 of Indian Penal Code. As it is an offence punishable under the provisions of Indian Penal Code, the Court of Magistrate was entitled to try the said offence. It is to be noted that legislation relating to Indian Penal Code falls under Item I of Concurrent List which reads :

'Criminal law, including all matters included in the Indian Penal Code at the commencement of this Constitution but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union and of the Civil power.'

It may be relevant to state that Code of Criminal Procedure is also legislative Item No.2 in the Concurrent List which reads :

'Criminal procedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution.'

Mr. I. Venkatanamyana then contends that inasmuch as the Parliament has power to enact the penal laws and as the Indian Penal Code and also the Code of Criminal Procedure have been enacted by the Parliament, it is the President who has got powers of clemency under Article 72 and not the Governor. This contention also is fit to be rejected for the reason that even though Indian Penal Code and also Code of Criminal Procedure, are Central enactments, the said legislative items are found in List III - Concurrent List. While items in List I are within the exclusive purview of the Parliament for legislation, List II is the exclusive domain of the State Legislatures. Insofar as List III is concerned, both the Union and the States are entitled to legislate and may be, if the Union legislates, it is applicable in the States, but if the States enact their own law and obtain assent of the President, the said law will prevail over the Central law and if any amendment is effected, the said amendment is operative in the State. The criterion is the extent of the power of legislation, be it Union or the States and not the legislation itself. If the Union legislates a law operative in States also, it does not mean to say that the Governor is precluded from exercising his clemency powers under Article 161 of the Constitution, subject to the condition that the said legislation is traceable to items in Concurrent List. The criterion is not the legislation itself, but the existence of the power of enacting law to a matter to which the executive power of the State extends. Merely because, Section 342 of the Indian Penal Code has not been legislated by the State, it did not cease to be a matter to which the executive power of the State extends, Mr. I. Venkatanarayana drew my attention to a judgment in *G. V. Ramanaiah v. Supdt. of Central Jail*, : 1974 CriLJ150 . The said case pertained to counterfeiting of currency, which is traceable to specific Item 36 of List I and this is dealt with as a separate Chapter in the Indian Penal Code. The provisions relating to Indian Penal Code may contemplate punishment for several kinds of crimes and some crimes enumerated may relate to some law enacted pursuant to the legislative power of the Union in List I and

then the President alone will have jurisdiction to exercise the powers of clemency under Article 72. But, with regard to the matters which are crimes under the Indian Penal Code relating to the legislative power of the State in List II or List III, the Governor has got jurisdiction of exercising his clemency power under Article 161 of the Constitution. May be, with regard to the crimes which are traceable to the Concurrent List - legislation, both the President and the Governor are having concurrent jurisdiction; but, this is a question apart in the instant case. What is need to be determined is the power of the Governor to invoke clemency under Article 161 of the Constitution with regard to law traceable to Entry No.I of Concurrent List and as the State has also got power to legislate with regard to the said Item 1 i.e. IPC, the Governor has got power and his power is not excluded merely because it is a Central enactment. As such, the above judgment of the Supreme Court does not govern the situation and in fact, my view that the Governor has got power is fortified by a 5 Judge Bench judgment of Bombay High Court in *State v. K.N. Nawvathy*, AIR 1960 Bom. 502. As such, I reject this contention with regard to jurisdiction and hold that the Governor had jurisdiction to exercise his powers of clemency.

7. The next contention of Mr. I. Venkatanarayana, is that the Governor had exercised the power of clemency in granting remission in an arbitrary and unconstitutional manner. His submission is that at every step, there was an obstacle caused to see that the prosecution did not proceed and firstly influence was exerted to invoke Section 321 of Cr.PC to withdraw the prosecution. The Collector and District Magistrate, Chittoor had directed the Public Prosecutor conducting the case and he had obliged by filing a Memo of withdrawal and the Court of Magistrate had acceded to the same. But, the said order did not become final and in fact, was reversed by the Court of Sessions, which was affirmed by the High Court. Then the trial proceeded and the Court of Magistrate had recorded conviction for the offence punishable under Section 324 IPC and also imposed a fine, which was upheld by the Court of Session and confirmed by the High Court and this Court has even negatived the plea to invoke the probation provision contemplated under Section 360 of Cr.PC. The learned Counsel for the petitioner stresses that after crossing all these hurdles and when the judicial adjudication became final and even holding that the case on hand did not warrant invocation of

power under Section 360 of Cr.PC to let-off respondents 2 and 3 on probation, the Governor ought not to have exercised the power and that the reasons stated in the impugned order of clemency granting remission of sentence are extraneous and are not germane to public welfare and public interest and as such, the said order is fit to be set aside as arbitrary and unconstitutional.

8. The power of clemency is traceable to monarchical days. It was just sheer grace of monarch and was unchallengible for any reasons. The relevancy and germaneness were immaterial. Monarch was above the law and grant of clemency even if it was not in the welfare of public or public interest was saved under the belief 'King can do no wrong'. But, the days have changed and ours is neither a monarchy nor a monarchical democracy. It is people's democracy where we have adopted Constitution. It confers the power of clemency on the President under Article 72 and under Article 161 on the Governor. To the extent of powers conferred, the above authorities can exercise their powers of clemency which include pardon, remission, commutation and reprieve of the offences. Pardon power wipes out the effects of the offence itself and even the conviction recorded becomes non est. In the case of commutations and remissions, it is a relief with regard to sentence while the conviction remains intact. Reprieve is a temporary relief from the sentence. Now, it cannot be said that the power of clemency is by way of grace. It is part of our Constitutional scheme. As such, it has to be exercised in the way the Constitution contemplates. It is needless to mention that a power is conferred under the Constitution, but not enumerating the circumstances under which it can be exercised. But, those circumstances have been stated and restated by the High Courts and particularly, the Supreme Court and I need not mention the plethora of precedents and suffice it to refer only to some important decisions of the Supreme Court in this regard.

9. In *State of Rajasthan v. Union of India*, : [1978]1SCR1 , it was held that so long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court and indeed, it would be its constitutional obligation to do so. The said judgment was quoted with approval in *Minerva Mills Ltd v. Union of India*, : [1981]1SCR206 , which was to the effect :

'..... the question arises as to which authority must decide what are the limits on the power conferred upon each organ or instrumentality of the State and whether such limits are transgressed or exceeded.The Constitution, has, therefore, created an independent machinery for resolving these disputes and this independent machinery is the judiciary, which is vested with the power of judicial review. '

In *Maru Ram v. Union of India*, : 1980 CriLJ1440 , a 5 Judge Constitution Bench of the Supreme Court dealing with the Pardon held :

'Pardon, using this expression in the amplest connotation ordains fair exercise, as we have indicated above. Political vendetta or party favouritism cannot but be interlopers in this area. The order, which is the product of extraneous or mala fide factors will vitiate the exercise. While constitutional power is beyond challenge, its actual exercise may still be vulnerable. Likewise, capricious criteria will void the exercise..... No constitutional power can be vulgarised by personal vanity of men in authority.'

In *Kehar Singh v. Union of India*, : 1989 CriLJ941 , 5 Judge Constitution Bench of the Supreme Court dealing with the power of pardon vis-a-vis Articles 72 and 161 of the Indian Constitution impinging upon the fundamental right to life and liberty under Article 21 of the Constitution, has held that the order of the President cannot be subjected to judicial review on its merits, but to test when needed as to whether the said function is vitiated by self-denial on an erroneous appreciation of the full amplitude of the scope of the power is a matter for the Court; that the Courts are the constitutional instrumentalities to go into the scope of clemency power. The principle laid down with regard to clemency power and the scope, ambit and the purpose stated by the constitutional Bench in *Mam Ram v. Union of India*, (supra) had been approved by the Supreme Court in *Kehar Singh's* case. In *S.R. Bommai v. Union of India*, : [1994]2SCR644 , imposition of President rule by dissolving legislative bodies in exercise of the constitutional power under Article 356 was assailed and one of the important questions which fell for consideration was as to whether the said action of the President is justiciable. Answering the said question in affirmative, the Supreme Court has held that such an action of the President is justiciable. The said judgment was rendered by Nine Judge Bench

and majority of seven learned Judges have held that the action of the President is justiciable by objective standards while the minority view was : one learned Judge saying that President's action can be annulled only if it is shown to be mala fide and not on other grounds on the ground that the President being high constitutional functionary is expected to take right decisions on the sufficient material, another learned Judge held that the action of the President is justiciable, but only subjectively. The majority view is, thus, that though the President is the high constitutional authority and can exercise his powers of imposition of President's rule by even dissolving the legislative bodies, the said action is amenable to judicial review by the constitutional Courts like the Supreme Court and the High Courts and the view of the Supreme Court expressed earlier in *Kehar Singh v. Union of India*, (supra) with regard to justiciability of the actions of the constitutional authorities, be it the President or the Governor under Articles 72/161 of the Constitution was approved. Thus, the law of the land laid down by the Supreme Court under Article 141 of the Indian Constitution, concisely speaking, is that the exercise of the power of clemency by the Governor under Article 161 of the Indian Constitution is amenable to judicial review by this Court in exercise of its power under Article 226 of the [Constitution of India](#) and this Court is, thus, entitled to examine the correctness or otherwise of the impugned order of clemency within the limits set by the Supreme Court.

10. The reasons stated in the impugned order for granting remission are (i) that the application for withdrawal of prosecution, though ordered by the trial Magistrate, was reversed by the Sessions Judge on technical objection; (ii) that the offence of wrongful confinement was committed not to make any personal or monetary gains, but to protect the interests of the nationalised bank; (iii) that no moral turpitude is involved; (iv) that the sentence passed will have bad repercussions on the accused as well as the reputation of the nationalised bank. Now, I deal with the above reasons as to whether they are within the scope of the powers of the Governor for granting remission.

11. The role of the Governor comes in only after the judicial proceedings attain finality. He cannot interfere during the adjudicatory process by the judiciary. If the withdrawal of the prosecution under Section 321 Cr.PC is executive in nature

and is a matter of course, then it may be correct to state that the prosecution ought to have been allowed to be withdrawn. But, the legal position is otherwise. The act of withdrawal of the prosecution and granting of the same is a judicial function and not an executive one. The Public Prosecutor, without any extraneous pressure or considerations had to independently apply his mind and only when he feels that public interest subserves the withdrawal of prosecution, he has to make an application and that application has to be scrutinised by the Court for the same considerations of public interest and not otherwise. In the State of Bihar v. Ram Naresh, : 1957 CriLJ567 , it was held by a three Judge Bench of the Supreme Court that the function of the Court in granting its consent for withdrawal is a judicial function and in granting consent, the Court must exercise judicial discretion. It was also held that it was only the Public Prosecutor who has to exercise his power independently. The said proposition of law was approved by the Supreme Court in MN. S. Nair v. P. V. Balakrishnan, : 1972 CriLJ301 . In the above case, the action of withdrawing the prosecution which was confirmed by the High Court was set aside by the Supreme Court and the trial was directed to be continued. Same was the case in Bansi Lal v. Chandan Lal, : 1976 CriLJ328 and even there, the order of withdrawal which was granted by the Court below, but set aside by the High Court was confirmed by the Supreme Court and trial was directed to go on. The said proposition of law was further reiterated in Balwant Singh v. State of Bihar, : 1977 CriLJ1935 . There too, the action of withdrawal was deprecated and the trial was ordered to go on. The said proposition was further reiterated by the Supreme Court in Subhash Chander v. State, : 1980 CriLJ324 , and it is apt to extract what Justice Krishna Iyer said speaking for the Supreme Court :

'The function of administering justice, under our constitutional order, belongs to those entrusted with judicial power. One of the few exceptions to the uninterrupted flow of the Court's process is Section 321 Cr.PC. But, even here, it is the Public Prosecutor and not any executive authority, who is entrusted with the power to withdraw from a prosecution, and that also with the consent of the Court. The consent of the Court under Section 321 as a condition for withdrawal is imposed as a check on the exercise of that power. Consent will be given only if public justice in the larger sense is promoted rather than subverted by such

withdrawal..... The decision to withdraw must be of the Public Prosecutor, not of other authorities, even of those where displeasure may affect his continuance in office.

The even course of criminal justice cannot be thwarted by the Executive, however, high the accused, however sure Government feels a case is false, however unpalatable the continuance of the prosecution to the powers-that-be who wish to scuttle Court justice because of hubris, affection or other noble or ignoble consideration.'

In the instant case, the application for withdrawal of prosecution under Section 321 Cr.PC was filed by the Public Prosecutor at the behest of the Collector and District Magistrate and the same was ordered by the Court of Magistrate. But, on revision to the Court of Sessions in Crl.RP No.35/83, the said order of withdrawal was set aside not on technical grounds, but on merits holding that the facts of the case did not warrant the permission to be accorded for withdrawing the prosecution. A glance at the said order dated 28-10-1985 makes it abundantly clear. What is more, the accused had filed a Criminal Revision Case No.37 of 1986 before the High Court against the said reversing order of the Court of Sessions and the High Court after thorough examination of the facts and law situation has upheld the order of the Sessions Judge holding that it was not in the interests of justice that prosecution should be withdrawn. As such, it is evident that the prosecution was not permitted to be withdrawn by the Court of Sessions and this Court, on merits and not on technical grounds, that it was not in the interests of justice that prosecution was allowed to be withdrawn and the trial was ordered to go on. Apart from the fact that the order of the Court of Sessions setting aside the order granting consent for withdrawal of prosecution by the Magistrate is not technical in nature, but has been adjudicated on merits, the impugned order does not even take-note of the order of this Court in Crl.RC No.37 of 1986 where elaborately the fact and legal situation was discussed and it was held that it is not a case warranting sanction for withdrawal of prosecution. It has to be noted that Governor may have power of clemency, but such power does not clothe the power with adjudication with regard to merits of withdrawal proceedings under Section 321 Cr.PC which had attained finality in view of this Court's order. Apart from the fact

that the reasoning touching the withdrawal aspect is not correct in saying that the order of Court of Sessions is technical, this Court's order approving the said order of Sessions Judge was not even taken cognizance of and that alone is sufficient to hold that important factor relating to the order of this Court in CrI.RC No.37 of 1986 was not taken into consideration and .that the reasoning is unsustainable. Further, the Governor in exercise of the powers under Article 161 of the Constitution cannot sit in judgment over the order under Section 321 Cr.PC which had attained finality, as, if such a power is conceded, it only amounts to executive encroaching into judicial power of the Courts which is impermissible in our constitutional scheme. As such, this reasoning impinging upon Section 321 of Cr.PC is not germane for exercising the clemency powers, as consideration of that order is not within the scope of the Governor under Article 161 of the [Constitution of India](#). Likewise, the reasoning that the sentence passed will have bad repercussions on the accused as well as the reputation of the nationalised bank is not germane for consideration and as such, it is outside the scope of exercise of power of clemency.

12. The other two reasons are that the offence of wrongful confinement was committed not to make any personal or monetary gains, but to protect the interests of the nationalised bank and that no moral turpitude is involved. It is pertinent to mention that the power of clemency is not akin to the power of sitting in appeal over the judicial verdict. It is not even to substitute its opinion on the points at issue which arise for judicial decision. The considerations which arise for exercise of the clemency power are totally different than those decisions arrived at by the judicial authority. The judicial authority in Criminal Justice System decides the case on the basis of criminal acts attracting the penal laws. If the acts attract the penal laws, then the Court has got no option but to record conviction. May be, there is discretion in the degree of sentence awarded. Take the case of poor, helpless and hapless woman unable to feed her child and in despair to end her life and also of her child too, but she survives and child dies, she is liable for punishment for attempt to commit suicide in so far as she is concerned and for the act of murder of her child. There may be another instance of the mother along with her child trying to commit suicide, but escapes the death and then rendering herself for punishment for the offence of attempt to commit suicide and murder. In

both these cases proof of facts in a Criminal Justice System of ours, conviction has got to be recorded and so also the awarding of sentence. It is pertinent to mention that lack of malice or mens rea is no defence in an offence of wrongful confinement and as such, the pleas of respondents 2 and 3 that the said offence was committed not to make any personal or monetary gain and was done to protect the interests of the respondent No.4-Bank were not at all available as defence in the criminal case and as such, the Courts below including this Court in its revisional jurisdiction were not entitled to take those pleas into consideration, as such considerations fell outside the limits set by the Criminal Justice System. The same was correctly described by Justice Krishna Iyer in *Mam Ram v. Union of India*, (supra) 'But Judges themselves are prisoners of the law and are not free to free a prisoner save through the open sesame of Justice according to law.' It is also apt to quote the statement of Lord Diplock in *De Freitas v. Benny*, 1976 AC 239, that mercy is not the subject of legal rights but begins where legal rights ended. As such, in exercise of clemency power, the constitutional functionaries, be it President or Governor, can always take into consideration the economic and other social factors driving the poor lady to end her life and also of her child and find a genuine cause for such an extreme step and in those cases, it can never be said that the power of clemency is exercised for extraneous reasons. Likewise, murder by accident and unintentional can be pardoned in exercise of the clemency power, but not a cold-blooded murder. Instances need not be multiplied and applying the above standards and approach which are within the scope and permissible limits of clemency power, it cannot be said that the above two reasons do not fall within the scope of clemency power of the Governor as per the limits set by the Supreme Court in *Kehar Singh v. Union of India*, (supra). In the circumstances, the remission of main sentence granted to respondents 2 and 3 in the impugned G.O. sustains.

13. Dealing with the last contention i.e. the need for observance of Principles of Natural Justice in exercise of the clemency power, it cannot be said as an absolute proposition that in each and every case, the authority exercising the clemency power should issue notice to the victim. Perhaps, in some cases issuance of such notice -is necessary to hear the victim where fresh facts which were not stated before are stated for consideration for exercise of clemency power. Take the case

when the accused seeks clemency on the ground that either he has got old parents or minor children to take care of them, but really his parents were no more surviving and he was unmarried. In such cases and cases of similar nature, the observance of Principles of Natural Justice may be necessary. A rape victim may have to be heard as to what trauma she underwent and whether penalty outweighs the victimology or otherwise. Suffice it to say that as the Principles of Natural Justice cannot be precisely stated, they can be invoked only in cases where hearing is necessary. But, in the instant case, the facts and circumstances do not warrant observance of the Principles of Natural Justice and as such, the impugned G.O. stands.

14. Now I take-up the other claim with regard to compensation. Personal liberty of a person can be deprived by taking recourse to law and that is what the petitioner has done. The respondents 2 and 3 have been convicted for the offence punishable under Section 342 of IPC and sentenced to undergo imprisonment and they are liable to serve out the sentence. For the said term of imprisonment, the personal liberty of respondent 2 and 3 is legally and constitutionally taken away and the respondents 2 and 3 cannot complain of violation of the fundamental right under Article 21. Now that they are granted remission under Article 161 of the [Constitution of India](#), they need not serve the sentence of imprisonment and their personal liberty is secured because of clemency. In a marked contrast, the petitioner was wrongfully confined by the respondents 2 and 3 as employees of the 4th respondent violating the fundamental right of liberty of the petitioner, thus, infracting Article 21 of the Constitution. See the difference where the law violators who are liable to be jailed are going scot-free and the law-abider standing remediless. But, really, is he remediless is the question to be considered. It cannot be said that the clemency power will take-away the fundamental right of the petitioner guaranteed under Article 21 of the Constitution, even if it acts as an exception to jail sentence so far as respondents 2 and 3 are concerned. In spite of the remission of sentence being granted to respondents 2 and 3, they cannot be absolved of their liability in public law remedy in view of the deprivation of personal liberty of the petitioner. There is so-much evolution of law on the fundamental right to life and liberty guaranteed under Article 21 of the [Constitution of India](#) and plethora of precedents need not be discussed, Suffice it to refer to the latest

judgment of Dr.A.S. Anand, J speaking for the Supreme Court in D.K. Basu v. State of West Bengal, : 1997 CriLJ743 , which 'dealt with the fundamental right to life and liberty very comprehensively in which the previous decisions on the subject also were adverted to. It was held that personal liberty is a sacred and cherished right under the Constitution and that the State is vicariously liable for the acts of their servants and the claim of a person who is deprived of the said right is based on the principle of strict liability to which the defence of sovereign immunity is not available and that person deprived of the personal liberty is entitled to receive the amount of compensation from the State, which if wishes, can ask the wrongdoer to indemnify. It was held that in public law remedy, a person deprived of his personal liberty is entitled to claim damages in addition to the right under private law and may be, the damages which are awarded under public law remedy may have to be adjusted by giving set off from the quantum of damages if awarded in private law remedy. Andhra Bank-the 4th respondent-is also a State within the meaning of Article 12 of the Constitution and even if it is not a State, as it is defending the actions of respondents 2 and 3 that the respondents 2 and 3 had detained the petitioner only in the interests of the bank, it is liable to pay the damages. Of course, it is its choice either to claim indemnity or not from the respondents 2 and 3. The petitioner had been pursuing his legal remedies for prosecuting the respondents 2 and 3 and had been successful in the same, warding off all legal obstacles created and had spent considerable time, energy, labour and money apart from suffering physical discomfort of unlawful detention and mental anguish of humiliation and insult. In this regard, his status as high-ranked officer can also be considered as a relevant factor. Having regard to all these factors, I award the damages at the rate of Rs.1,00,000/- (Rupees one lakh only) each against respondents 2 and 3 (total being Rs.2,00,000/-) payable by the 4th respondent to the petitioner within a period of one month from the date of the receipt of a copy of this-order. It is for the 4th respondent to choose as to whether indemnification of the same has to be sought against the respondents 2 and 3.

15. The writ petition is partly allowed to the extent indicated above. No costs.