Chavan/SM Patil

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
PIL-CJ-LD-VC- NO. 44 OF 2020

1. National Alliance for People's Movements
Through its National Convener,
Medha Patkar, Aged:65 Years, Occu. Social Service, Having its office at-Raghav Shri Raghuraj Sahnivas,
Sinhgad Road, Pune -411030.

2. Medha Patkar
Age:65 Years, Occu. Social Service,
Raghav Shri Raghuraj Sahnivas,
Sinhgad Road, Pune -411030.

3. Meera Sadanand Kamath
Age:74 years, Occu. Social Activist and Housewife, R/o. Flat No.2,
Ruchi Co-operative Housing Society Ltd.,
Chickoowadi Road, Shimpoli,
Boriwali(W), Mumbai-400092. … Petitioners

Vs

1. The State of Maharashtra
Through its Additional Chief Secretary,
Home Department, Mantralaya,
Mumbai -32.

2. The Director General of Prisons,
MS, Pune.

3. The High Powered Committee
Through its Member Secretary,
Mumbai. …Respondents

.....

Mr. S. B. Talekar i/b. Talekar and Associates for the Petitioners.

Mr. Deepak Thakare, Public Prosecutor a/w. Ms. S. D. Shinde, APP for the State.

.....

CORAM : DIPANKAR DATTA, CJ. &
MADHAV J. JAMDAR, J.

RESERVED ON : JULY 24, 2020
PRONOUNCED ON : AUGUST 5, 2020.

MADHAV J. JAMDAR, J. :

1. The petitioner No.1 claims to be an alliance of progressive people's organizations and movements and *inter alia* claims to stand against the infringement of human rights, civil liberties communalism, casteism, untouchability, corruption and discrimination of all kinds. However, the petitioner No. 1 is not registered body. The petitioner No.2 is the national convener of the petitioner No.1 and a social Worker. The petitioner No.3 is also a social activist. The petitioner Nos. 2 and 3 are the citizens of India.

2. This Public Interest Litigation has been filed seeking quashing of the decision of the High Powered Committee (hereafter "the HPC", for short) dated 25th March, 2020 to the extent of Clauses (iii), (iv) and

(vii) of paragraph 8, decision/minutes of the HPC meeting dated 11th May, 2020 excluding certain categories of offences provided in paragraph 5(i) and 5(ii) for the purpose of grant of interim bail and corrigendum dated 18th May, 2020 of the minutes of meeting of the HPC dated 11th May, 2020 to the extent of clarification that the class and/or category of cases determined by the HPC for temporary release be not read as a direction made by it for mandatory release of the prisoners falling in that category or class and a further clarification that case of every prisoner be considered on case to case basis for deciding the temporary release of such prisoner. In the PIL petition, a further relief has been sought seeking direction to the respondents to release the prisoners convicted with life imprisonment without insisting that they should have been released in the past at least twice, either on furlough or parole.

3. We have heard Mr. S. B. Talekar, the learned Advocate appearing for the petitioners and Mr. Deepak Thakare, the learned Public Prosecutor for the respondent Nos. 1 and 2.

4. Mr. S. B. Talekar pointed out the orders dated 23rd March, 2020 and 13th April, 2020 passed by the Supreme Court in suo motu **Writ Petition (C) No. 1 of 2020** (In Re: Contagion of COVID 19 Virus in prisons) and connected matters, minutes of the HPC dated 25th March, 2020 and 11th May, 2020 and corrigendum dated 18th May, 2020 to the minutes of the meeting of HPC dated 11th May, 2020. It is the contention of Mr. Talekar that the HPC has exceeded its jurisdiction and the classification made by the HPC is not reasonable classification. He submitted that the classification which the HPC has made fails to satisfy two conditions viz. the classification is required to be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others who are left out of the group, and that the differentia must have a rational relation to the object sought to be achieved; therefore, it violates Article 14 of the Constitution of India. He submitted that the HPC was constituted by an order dated 23rd March, 2020 of the Supreme Court for the purpose of ensuring maximum possible distancing among the prisoners including the under-

trials. Thus, he submitted that excluding certain categories of prisoners or under-trials for emergency release in view of the pandemic caused by COVID-19, is not reasonable classification as there is no nexus between the basis of classification and the object for which the HPC was constituted. Mr. Talekar further submitted that only convicts who are likely to abscond or having antecedents may not be released. Mr. Talekar further submitted that Clause 8(iii) of the HPC's minutes of meeting dated 25th March, 2020 requiring that the prisoners should have been released on two occasions earlier either on parole or furlough for the purpose of getting benefit of emergency parole is causing hardship, as there are several convicted prisoners who are otherwise entitled for emergency release but are deprived of the same in view of the said requirement. He relied on the judgment of this Court passed in **Criminal Writ Petition-ASDB-LD-VC No.65 of 2020** (Milind S. Patil & Ors. V/s. The State of Maharashtra & ors.) and stated that the said decision passed in favour of the three petitioners who have filed the said Criminal Writ Petition be made applicable to all the prisoners. Mr. Talekar relied on the judgment of the Supreme Court reported in

(1983) 2 SCC 277 (Mithu vs. State of Punjab) to support his submission that the classification made by the HPC is not reasonable as Section 303 of the Indian Penal Code (hereafter "the IPC", for short), although held to be unconstitutional, is also included in the excluded category. He relied on the judgment of the Supreme Court reported in **(2018) 11 SCC 1** (Nikesh Tarachand Shah V/s. Union of India and Another) by which Section 45(1) of the Prevention of Money Laundering Act, 2002 insofar as it imposes two further conditions for release on bail was declared unconstitutional. It is his contention that there is no necessity to exclude the offences arising out of Special Acts. He also relied on the Full Bench decision of this Court reported in **2019 (6) Mah. L.J. 186 (F.B.)** (Kantilal Nandlal Jaiswal V/s. Divisional Commissioner, Nagpur and Another) and the decision of the Division Bench reported in **2019 SCC Online Bom. 5111** (Hariom Vijay Pande V/s. State of Maharashtra, through Divisional Commissioner and Another) to contend that parole is a limited legal right available to the convict but is a statutory right. Lastly, he pointed out the decision of this Court passed in **PIL CJ-LD-VC- 2 of 2020** (People's Union for

Civil Liberties V/s. The State of Maharashtra and Ors.) and contended that as far as the aspect regarding the HPC's decision is concerned, the said decision is *per incuriam* in view of the aforesaid decisions in Kantilal Nandlal Jaiswal (supra) and Hariom Vijay Pande (supra).

5. On the other hand, Mr. Deepak Thakare contended that the orders of the HPC are not arbitrary. He referred to the decision of the Supreme Court in suo motu **Writ Petition (C) No. 1 of 2020** dated 23rd March, 2020 and 13th April, 2020 and submitted that the Supreme Court has specifically clarified that the Supreme Court has not directed the State/Union Territories to compulsorily release the prisoners from their respective prisons and the only purpose of those directions was to ensure the State/Union Territories to assess the situation in their respective prisons having regard to the outbreak of the present pandemic in the country and release certain prisoners and for that purpose, to determine the category of prisoners to be released. He submitted that the Supreme Court has left it open to the HPC to determine the category of prisoners to be released. He relied on the aforesaid judgment of this Court in the case of People's Union for Civil

Liberties (supra) and submitted that the HPC has not made any transgression of the prisoners' rights and therefore, the PIL petition be dismissed.

6. Before considering the rival submissions, it is necessary to see the circumstances in which the HPC was constituted and took the decisions.

7. COVID-19 has affected the entire world. The State of Maharashtra and the Union of India announced the lock down on 22nd March, 2020 and 24th March, 2020 respectively and till date, the lock down is continued from time-to-time with modified restrictions. To contain the spread of COVID-19, various precautionary measures have been suggested by the experts which *inter alia* include physical distancing. In view of these circumstances, the Supreme Court by order dated 23rd March, 2020 passed certain directions to ensure maximum possible distancing among the inmates of the correctional homes including the under-trials. Each State/Union Territory was directed to constitute a high-powered committee comprising of (i) the Chairman of the State Legal Services Committee, (ii) the Principal Secretary (Home/

Prison) and (iii) the Director General of Prison. The Supreme Court in the said order specifically directed that it is for the HPC to determine the category of prisoners who should be released depending upon the nature of offence, the number of years to which he or she has been sentenced or the severity of the offence with which he/she is charged and is facing trial or any other relevant factor which it may consider appropriate.

8. Pursuant to the aforesaid order dated 23rd March, 2020 of the Supreme Court, the HPC was constituted by the Maharashtra Government vide GR No.JLM0320/CR58/Prison-2 dated 24th March, 2020. The HPC, *inter alia,* took various decisions as reflected in paragraph No.8 of the minutes of its meeting held on 25th March, 2020. Clause Nos. 1 and 2 of the said decision mentions that the HPC decided to consider favourably release on interim bail/emergency parole of under-trial prisoners or convicted prisoners who have been booked/charged/convicted for such offences for which maximum punishment is 7 years or less. Clause No. (iii) mentions that the HPC further decided that the convicted prisoners whose maximum sentence

is above 7 years shall on their application be appropriately considered for release on emergency parole, if the convict has returned to prison on time on last 2 releases (whether on parole or furlough). Clause No. (iv) as modified by further decisions of HPC mentions that the aforesaid directions shall not apply to under-trial prisoners or convicted prisoners booked for serious economic offences/bank scams and offences under the Special Acts [other than the IPC] like the Maharshtra Control of Organised Crime Act (hereafter "the MCOC Act", for short), the Terrorists and Disruptive Activities Act (hereafter "the TADA", for short) the Prevention of Money Laundering Act (hereafter "the PMLA", for short), the Maharashtra Protection of Interest of Depositors (In Financial Establishments) Act (hereafter "the MPID Act", for short), the Narcotics Drugs and Psychotropic Substances Act (hereafter "the NDPS Act", for short), the Prevention of Terrorism Act (hereafter "the POTA", for short), the Unlawful Activities (Prevention) Act (hereafter "the UAPA", for short), the Protection of Children from Sexual Offences Act (hereafter "the POCSO Act", for short), etc. Clause No. (v) provides that the decision shall apply to only such prisoners, which in the

opinion of the concerned jailer, keeping in view the overall infrastructure available at the concerned jail and the number of prisoners, it is not practically possible to maintain the required social-distance between the prisoners. Clause No. (vii) further clarifies that the prisoners who fall in the 'class' or the 'category' spelt out by this decision will be entitled to be released in accordance with law. It is also provided that in considering every case for such release, the "nature of the offence" and the "severity of the offence" shall be considered, the possibility of the prisoners committing offence in case of temporary release (such as habitual offenders) or likelihood of his/her absconding should also be considered as an important test to decline such requests for temporary release.

9. The Supreme Court, thereafter passed further directions dated 13th April, 2020 in the aforesaid suo motu Writ Petition (C) No. 1 of 2020 and clarified as follows :

> "*We make it clear that we have not directed the States/ Union Territories to compulsorily release the prisoners from their respective prisons. The purpose of our aforesaid order was to ensure the State/Union Territories to assess the situation in their prisons having regard to the outbreak of the present pandemic in the country and release certain*

prisoners and for that purpose to determine the category of prisoners to be released.
We make it clear that aforesaid order is intended to the implemented fully in letter and spirits."

10. Thereafter, the HPC in the meeting dated 11th May, 2020 read with corrigendum dated 18th May, 2020, *inter alia,* directed that the *decision of the High Power Committee dated 25th March, 2020 shall be applicable to all undertrial prisoners booked/charged for such offences for which maximum sentence is above 7 years and they shall be favourably considered for release on interim bail except to the following category of offences:*

(1) Indian Penal Code
a) IPC-Chapter VI-Offences against State-IPC 121 to 130
b) IPC-303 (though held unconstitutional, these accused are hardened repeat offenders)*
c) IPC-364(a), 366, 366(A), 366(B), 367 to 373
d) IPC-376, 376(A), C,D,E
e) IPC-396
f) IPC-489A, B, D
g) Bank Frauds and Major Financial Scams

(2) Special Acts
a) MCOC, TADA, POTA, UAPA, PMLA, Explosives Substances Act, Anti Hijacking Act
b) NDPS (Other than personal consumption)
c) MPID

d) POCSO
e) Foreigner's in Prison.

11. The HPC further recorded and directed that the data shows that there are 1340 prisoners who are above the age of 60 years. Out of these 1340 prisoners, majority of them would be able to avail the benefit of the directions of the HPC and as far as remaining prisoners above 60 years are concerned and/or those prisoners with underlying medical conditions which puts them at higher risk for severe illnesses from COVID-19, all concerned Authorities, including the concerned Superintendent of Prison shall take appropriate measures including their isolation. The HPC further clarified that notwithstanding the decisions of the Committee, it would be open to such prisoners to apply for interim bail on the same terms as mentioned in the decision of this Committee dated 25th March, 2020 to the concerned Court and orders may be passed after considering the facts and circumstances of the case and examining the medical reports and other relevant records.

12. The main contention of Mr. Talekar is that the HPC has exceeded its jurisdiction and classification made by the HPC does not satisfy the requirement of Article 14 of the Constitution of India.

13. The contention of Mr. Talekar that the HPC exceeded its jurisdiction by classifying the prisoners is without any basis. A perusal of the order of the Supreme Court in suo motu **Writ Petition (C) No. 1 of 2020** by which the HPC was directed to be constituted clearly shows that complete discretion was given to the HPC to determine the category of prisoners who should be released to reduce overcrowding in prisons. The Supreme Court has directed that the prisoners can be categorized depending upon the nature of offence, the number of years to which he/she has been sentenced or the severity of the offence, which he/she is charged with and is facing trial or any other relevant factor, which the HPC may consider appropriate. The Supreme Court by order dated 13th April, 2020 further clarified that there was no direction for compulsory release of the prisoners from their respective prisons and the purpose of the directions was to assess the situation by the State/Union Territory in their prisons having regard to the outbreak of the present pandemic in the country and release certain prisoners and for that purpose to determine the category of prisoners to be released. It is very clear that the HPC was dealing with the question of prisoners to

be released for reducing overcrowding and the Supreme Court has not directed release of all the prisoners. It is to be noted that the Supreme Court has left it open at the entire discretion of the HPC to determine the category of prisoners who can be released on emergency bail/parole. Pursuant to the direction of Supreme Court, the HPC took decision as set out hereinabove. Thus, there is no substance in the contention of the petitioners that the HPC exceeded its jurisdiction.

14. Now we will examine the second contention of the learned advocate for the petitioners that the classification of the offences made by the HPC does not satisfy the requirement of Article 14 of the Constitution of India. The Supreme Court in its decision reported in **AIR (39) 1952 SC 75** (The State of West Bengal v/s. Anwar Ali Sarkar and Another), held that equality before the law or the equal protection of laws does not mean identity or abstract symmetry of treatments. Distinctions have to be made for different classes and groups of persons and a rational or reasonable classification is permitted. The Supreme Court in the said decision quoted with approval following passage from Willis on Constitutional Law (1936 Edition, at page 579):-

> *"The guarantee of the equal protection of the laws means the protection of equal laws. It forbids class legislation, but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited either in the objects to which it is directed or by the territory within which it is to operate. 'It merely requires that all persons subject to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred and in the liabilities imposed.' 'The inhibition of the amendment was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation.' It does not take from the states the power to classify either in the adoption of police laws, or tax laws, or eminent domain laws, but permits to them the exercise of a wide scope of discretion, and nullifies what they do only when it is without any reasonable basis. Mathematical nicety and perfect equality are not required. Similarity, not identity of treatment, is enough. If any state of facts can reasonably be conceived to sustain a classification, the existence of that state of facts must be assumed. One who assails a classification must carry the burden of showing that it does not rest upon any reasonable basis."*

15. In the aforesaid decision, the seven principles formulated by Hon'ble Fazl Ali, J. (as His Lordship then was) read as follows:-

> *"1. The presumption is always in favour of the constitutionality of an enactment, since it must be assumed that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and its discriminations are based on adequate grounds.*

2. The presumption may be rebutted in certain cases by showing that on the face of the statute, there is no classification at all and no difference peculiar to any individual or class and not applicable to any other individual or class, and yet the law hits only a particular individual or class.

3. The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position, and the varying needs of different classes of persons often require separate treatment.

4. The principle does not take away from the State the power of classifying persons for legitimate purposes.

5. Every classification is in some degree likely to produce some inequality, and mere production of inequality is not enough.

6. If a law deals equally with members of a well defined class, it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to other persons.

7. While reasonable classification is permissible, such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the object sought to be attained, and the classification cannot be made arbitrarily and without any substantial basis."

16. Yet again, the Hon'ble Supreme Court in its decision in Arun Kumar and Others V/s. Union of India and Ors. reported in

(2007)1 SCC 732 held as follows:

> *"95. It is no doubt true that Article 14 guarantees equality before the law and confers equal protection of laws. It is also true that it prohibits the State from denying persons or class of persons equal treatment provided they are equals and are similarly situated. But, it is equally well established that Article 14 seeks to prevent or prohibit a person or class of persons from being singled out from others situated similarly. If two persons or two classes are not similarly situated or circumstanced, they cannot be treated similarly. To put it differently, Article 14 prohibits dissimilar treatment to similarly situated persons, but does not prohibit classification of persons not similarly situated, provided such classification is based on intelligible differentia and is otherwise legal, valid and permissible.*
>
> *96. Very recently in Confederation of Ex-Servicemen Associations v. Union of India, (2006) 8 SCC 399, the Constitution Bench had an occasion to consider a similar question. Referring to State of W.B. v. Anwar Ali Sarkar and several others cases, one of us (C.K. Thakker, J.) observed that:*
>
> *".....it is clear that every classification to be legal, valid and permissible, must fulfill the twin-test, namely;*
>
> *(i) the classification must be founded on an intelligible differentia which must distinguish persons or things that are grouped together from others leaving out or left out; and*
>
> *(ii) such a differentia must have rational nexus to the object sought to be achieved by the statute or legislation in question".*

17. A few years prior to the above referred decision, the Supreme

Court in its decision in K.R. Lakshman and Others v/s. Karnataka Electricity Board and Ors. reported in (2001)1 SCC 442, held as follows:

> **"4. …….**
>
> *…….The concept of equality before law means that among equals the law should be equal and should be equally administered and that the likes should be treated alike. All that Article 14 guarantees is a similarity of treatment and not identical treatment. The guarantee of equal protection of law and equality before the law does not prohibit reasonable classification. Equality before law does not mean that things which are different shall be treated as though they were the same. The principle of equality does not absolutely prevent the State from making differentiation between the persons and things. The State has always the power to have a classification on a basis of rational distinctions relevant to the particular subject to be dealt with but such permissible classification must satisfy the two conditions namely the classification to be founded on intelligible differentia which distinguishes persons or things that are grouped from others who are left out of the group and that the differentia must have a rational relation to the object sought to be achieved by the legislation. In other words, there must be a nexus between the basis of classification and the object of the legislation. So long as the classification is based on rational basis and so long as all persons falling in the same class are treated alike, there can be no question of violating the equality clause. If there is equality and uniformity within each group, the law cannot be condemned as discriminatory, though due to some fortuitous circumstances arising out of a peculiar situation, some included in the class get an advantage over others, so*

> *long as they are not singled out for special treatment. When a provision is challenged as violative of Article 14, it is necessary in the first place to ascertain the policy underlying the statute and the object intended to be achieved by it and having ascertained the policy and object of the Act,, the Court has to apply a dual test namely whether the classification is rational and based upon an intelligible differentia which distinguished persons or things that are grouped together from others that are left out of the group and whether the basis of differentiation has any rational nexus or relation with its avowed policy and objects. The power to make classification can be exercised not only by the legislature but also by the Administrative Bodies acting under an Act."*

18. Thus, it is clear that as per the settled legal position the principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position, and the varying needs of different classes of persons often require separate treatment. The principle of equality does not take away from the State the power of classifying persons for legitimate purposes. It is settled legal position that the concept of equality before law means that among equals the law should be equal and should be equally administered and that the likes should be treated alike. Equality before law does not mean that things which are different shall be treated as though they were the same. The State

has always the power to have a classification on the basis of rational distinctions relevant to the particular subject to be dealt with but such permissible classification must satisfy the two conditions, namely the classification should be founded on intelligible differentia which distinguishes persons or things that are grouped from others who are left out of the group and that the differentia must have a rational relation to the object sought to be achieved by the legislation.

19. We will examine the decisions of the HPC in the light of the above referred settled legal position as requirements of Article 14 will also apply to the decisions of HPC.

20. The Supreme Court by order dated 23rd March, 2020 directed formation of HPC for determining class of prisoners who can be released on parole or on interim bail for such period as may be thought appropriate. The said direction was passed with the object of ensuring maximum possible distancing among the prisoners including undertrials. However, the Supreme Court specifically directed to determine the category of the prisoners who should be released depending upon, *inter alia,* the nature of offence and severity of the

offence and any other relevant factor as deemed appropriate by the HPC. It is also to be noted that the Supreme Court has not imposed any restrictions on the power of the HPC and it is the complete discretion of the HPC to determine the category of the prisoners to be released.

21. The HPC in Clause 8 (iv) clarified that its decision will not apply to under-trial prisoners booked for serious economic offences/bank scam or offences under Special Acts like TADA, MCOC Act, PMLA, MPID Act, NDPS Act, UAPA, POCSO Act, etc. or prisoners convicted thereunder. The HPC further clarified that in considering every case for such release, the nature of the offence and the severity of the offence shall be considered and the possibility of the prisoners committing offence in case of temporary release (such as habitual offender) or likelihood of his/her absconding should also be considered while dealing with an application for temporary release.

22. For the purpose of examining whether the classification of offences under the Special Acts satisfies the requirement of reasonable classification, it is necessary to see the purposes for which some of such

Special Acts were enacted.

(i) The MCOC Act was enacted to make special provisions for prevention and control of, and for coping with, criminal activity by organized crime syndicate or gang.

(ii) The TADA was enacted to make special provisions for the prevention of, and for coping with, terrorist and disruptive activities.

(iii) The POTA was enacted to make provisions for the prevention of, and for dealing with, terrorist activities and for matters connected therewith.

(iv) The UAPA was enacted to provide for the more effective prevention of certain unlawful activities of individuals and associations and for dealing with terrorist activities.

(v) The PMLA was enacted to prevent money laundering and to provide for confiscation of property derived from, or involved in, money laundering. Section 3 thereof provides that whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or

activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering.

(vi) The Explosive Substances Act *inter alia* provides punishment for causing or attempt to cause explosion likely to endanger life or property. The explosive substance/special category explosive substance mentioned in the said enactment includes RDX, PETN, HMX, TNT, NTP, CE etc.

(vii) The Anti-Hijacking Act, 2016 was enacted for dealing with the unlawful acts of seizure or exercise of control of aircraft which jeopardize safety of persons and property.

(viii) The NDPS Act was enacted to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances to provide for the forfeiture of property derived from, or used in illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Conventions on Narcotic Drugs and Psychotropic

Substances and for matters connected therewith.

(ix) The MPID Act was enacted to protect the interest of depositors in the Financial Establishments and matter relating thereto.

(x) The POCSO Act was enacted to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto.

23. We have set out hereinabove the purpose for which the said Special Acts were enacted as the same clearly justifies their classification as category to which the benefit of the emergency bail/parole is denied, as done by the HPC. These offences are totally different from offences punishable under the IPC, and commission of the said offences affects the entire nation.

24. It is true that acts of commission/omission amounting to crime in terms of the extant laws are regarded as offences against the society;

however, it is to be noted that the offences under Special Acts like MCOC Act, TADA, POTA, UAPA, PMLA, Explosive Substances Act, Anti Hijacking Act etc. all are against the nation and affects the very foundation of the State. Offences, which are sought to be checked by these Special Acts, cripple the economy of the State as well as the nation and affect the economic interest of the citizens. The said Special Acts excluded by the HPC from giving benefit from the emergency parole/bail are enactments relating to terrorist activities, relating to economic offences, socio-economic offences, crimes against women and children etc. The purposes for which the said Special Enactments were enacted as set out hereinabove clearly shows that the nature of offence and severity of the offence contemplated by these special enactments is totally different from the IPC offences. The submission of Mr. Talekar that there are no special provisions made to deal with the bail applications for the offences falling under some of the Special Acts and the provisions of the Cr.P.C. are applicable, is not at all relevant aspect as what is contemplated by the Supreme Court is, classification of prisoners for giving benefit of emergency parole/bail *inter alia* on the

basis of nature of offence and/or severity of the offence. Therefore, the submission that the classification or the categorization of these offences separately from other offences and labelling them as not eligible for release on emergency bail/parole is contrary to the rights of prisoners guaranteed by Article 14, is without any substance.

25. The HPC also categorized certain offences under the IPC and held that the benefit of emergency bail/parole is not applicable to them. Sections 121 to 130 of the IPC are offences against the State. Section 303 of the IPC, although held unconstitutional, contemplates a situation where murder is committed by a convict while undergoing a sentence of imprisonment for life. Such a convicted prisoner is seen as a habitual offender and, therefore, is denied the benefit of release. The offences punishable under Sections 364(A), 366, 366(A), 366(B), and 367 to 373 are relating to kidnapping for ransom etc. Sections 376, 376(A), (C), (D) and (E) are relating to rape. Section 396 is concerning dacoity with murder. Offences under Sections 489A, 489B and 489D are concerning counterfeit currency notes or bank notes, etc. Thus, the

nature of offences under the IPC, categorized by the HPC for not giving benefit of emergency bail/parole, clearly show that the nature of offence as contemplated by these statutory provisions are totally different than the offences contemplated by the other provisions of the IPC and rightly categorized by the HPC for denial of benefit.

26. It is the contention of Mr. Talekar that the categorization of the offences as directed by the order of the Supreme Court is to be made on the basis of the punishment imposed or provided under the relevant provisions of the IPC or the Special Acts. That the orders of the Supreme Court passed in suo motu **Writ Petition (C) No. 1 of 2020** conferring unrestricted and unbridled powers on the HPC to determine the category of prisoners who should be released depending upon various factors mentioned therein together with the clarification that not all but only "certain prisoners" are to be released, have been noticed above. Therefore, when the Supreme Court has specifically mentioned the factors to be taken into consideration while the HPC categorizes the various offences which *inter alia* includes the nature of offence and severity of the offence and it has done so, there is no substance in the

contention of Mr. Talekar and we reject the same.

27. It is also significant to note that although the HPC excluded under-trials as well as convicts *qua* offences under the Special Acts as well as certain offences under the IPC from getting the benefit of emergency bail/parole, still as far as prisoners aged in excess of 60 years the HPC has not placed the said restrictions as chances of people of advanced age getting affected by COVID-19 are more. The HPC in this behalf has specifically mentioned that the concerned court may pass orders after considering the facts and circumstances of the case and examining the medical reports and other relevant records. Thus, it is clear that the HPC while categorizing various prisoners to reduce overcrowding in prisons has taken into consideration various aspects including age of the prisoners and therefore, the contentions raised by the petitioners are without any basis.

28. The submission of Mr. Talekar that Section 303 is held to be unconstitutional and, therefore, classifying the same for not considering such prisoners for release on emergency parole is also without any substance as by corrigendum dated 18th May, 2020, the HPC has

specifically clarified that although Section 303 of the IPC is held to be unconstitutional, the accused who are under going sentence of imprisonment for life are charged of subsequent offence of committing murder; hence, are habitual offenders and therefore, shall not be considered for emergency bail/parole.

29. The contention of Mr. Talekar relying on the Full Bench decision of this Court in Kantilal Nandlal Jaiswal (supra) and the Division Bench decision in Hariom Vijay Pande (supra), that grant of emergency parole in view of COVID-19 pandemic is right conferred on the convicted prisoners, is also misconceived. Mr. Talekar has raised the said contention as it is held by the Division Bench in People's Union for Civil Liberties (supra) that determination of the categories by the HPC to release certain prisoners does not confer any right on the other prisoners to contend that similar indulgence may be shown to them or similar such concession be extended to them and, therefore, they cannot claim any legal right on the basis of categorization made by the HPC. It is further held in the said decision that concession cannot be claimed as a matter of right and, therefore, a writ of mandamus cannot be issued.

30. For examining the contention of the petitioners that the said decision in People's Union for Civil Liberties (supra) is *per incuriam* as the aforesaid Full Bench and Division Bench decisions were not placed before the coordinate Bench, it is necessary to see the controversy involved in the said cases and what have been held therein and whether the same are applicable to the present case.

31. It is to be noted that following two questions were referred to the Full Bench:-

> *(i) Whether parole is a right or a concession offered by the State or a mere administrative decision of the State dictated by its administrative policy or a special right of a prisoner in special circumstances or something else?*
>
> *(ii) Whether proviso to Rule 19 (2) introduced in terms of notification dated 16th April, 2019 is violative of Article 14 and Article 21 of the Constitution of India and if yes, what treatment must it be given?*

The said questions are answered by the Full Bench in the following manner:-

> *"(i) Question (I) referred to this Bench is answered by holding that parole is not a mere administrative decision dictated only by the administrative policy of the State but it is a limited legal right available to the convict or prisoner subject to satisfaction of the requirements specified in the Rules of 1959 for grant of parole, with*

the avowed objectives to be achieved as specified in Rule1(A) of the said Rules."

"(ii) It is found that the proviso to Rule 19(2) of the Rules of 1959 introduced in terms of Notification dated 16-4-218 violates Article 14 and 21 of the Constitution of India and thereby question (ii) is answered against the State. Accordingly, the said proviso to Rule 19(2) of the Rules of 1959 introduced in terms of Notification dated 16-4-2018 is struck down as violative of Articles 14 and 21 of the Constitution of India and it is found to be ultra vires even to the objectives stated in Rule 1(A) of the Rules of 1959."

32. The Division Bench of this Court in the judgment reported in Hariom Vijay Pande (supra) held as follows:-

"Parole leave is recognized as a statutory right as per Rule 19 of the Maharashtra Prisons (Mumbai Furlough and Parole) Rules, 1959 (hereinafter referred to as 'Rules of 1959' for short) and the convicts are entitled for parole leave, if the circumstances as referred in Rule 19 exist. Of course, it is not the absolute right of the convict to seek parole leave and the right is circumscribed by various other considerations including the objective satisfaction of the jail authorities and the authority competent to consider the application made by the convict for grant of parole leave."

33. The aforesaid Full Bench and Division Bench decisions are not applicable to the report of the HPC as well as consequent amended Rule 19(1) (C) (i) and (ii) of the Maharashtra Prisons (Bombay

Furlough and Parole) Rules, 1959, as the said amended Rules are providing for temporary release of prisoners on temporary parole leave till the Notification under the Epidemic Diseases Act, 1897 is in operation. The objectives of releasing of prisoner on furlough and parole leave are set out in Rule 1(A) of the Rules of 1959 and the same are as follows:-

> *(a) To enable the inmate to maintain continuity with his family life and deal with family matters,*
>
> *(b) To save him from evil effects of continuous prison life,*
>
> *(c) To enable him to maintain and develop his self-confidence,*
>
> *(d) To enable him to develop constructive hope and active interest in life.*

34. This Court in Kantilal Nandlal Jaiswal (supra) and Hariom Vijay Pande (supra) were examining the nature of furlough and parole leave in the light of above referred objectives for releasing the convicts on furlough or parole leave.

35. In the present case, we are dealing with the release on emergency parole for short period till the State Government withdraws the

notification under the Epidemic Diseases Act, 1897 for the purpose of reducing overcrowding in the prison. Therefore, the decisions of this Court on which Mr. Talekar has relied on are not at all applicable to the present case. Thus, the contention that the decision in People's Union for Civil Liberties (supra) is *per incuriam* is without any basis.

36. However, it is to be noted that pursuant to the decision of the HPC dated 25th March, 2020, by exercising powers under clauses 5 and 28 of Section 59 of the Prisoners Act, 1894, Clause Nos. C (i) and (ii) were inserted in Rule 19 of the Maharashtra Prisons (Mumbai Furlough and Parole) Rules, 1959 *inter alia* providing that the prisoners whose maximum sentence is above 7 years shall on their application be appropriately considered for release on emergency parole by the Superintendent, if the convict has returned to prison on time on last 2 releases (whether on parole or furlough). A coordinate Bench of this Court in its decision in Milind Ashok Patil (supra) held that if such convicts are never released either on furlough or parole previously or not released on 2 occasions either on furlough or parole and therefore, there was no occasion for them to return back within time on 2

occasions and are thus deprived of the said benefit of emergency parole, such literal interpretation may lead to absurdity and in that event, there is no occasion to invoke the condition imposed under the said amended Parole Rule. It is further held in the said judgment that if the convicts are not released on 2 occasions either on furlough or parole and/or their previous applications are not rejected either on the ground that they are habitual offenders or likely to abscond, then the authorities can still consider their applications for release on emergency parole. In the said judgment it is further made clear that if the convicts are released on 2 (two) occasions or on 1 (one) occasion, either on parole or furlough previously and they are late in surrendering then they are not entitled for the benefit of the emergency parole. It is further clarified that the authorities can impose suitable stringent conditions on the convicts who were never released on parole or furlough or released on 1 (one) occasion and returned back within time, if they are otherwise entitled for the benefit of emergency parole. We make it clear that the said observations made in the judgment in Milind Ashok Patil (supra) are applicable to the convicts whose cases falls in the criteria laid down

therein.

37. It is very clear that the recommendation of the HPC are not fetters on the competent Court for considering regular bail applications. The HPC was only considering classes of prisoners who can be released on temporary bail/parole for the purposes of de-congesting the prisons.

38. Both Mr. Thakare and Mr. Talekar have submitted information regarding the present position of the prisons. The said information reveals that as on 24th July, 2020, total number of prisoners released on emergency bail/parole to prevent spread of COVID-19 is 10,338 and presently 26,279 prisoners are in prison. The chart produced by Mr. Talekar shows that the official capacity of the prisons is 23,217. The chart produced by Mr. Thakare shows that the State Government for the purpose of reducing overcrowding have opened temporary prisons at about 36 locations and presently about 2,597 prisoners are occupying such temporary prisons and the process of transferring some more prisoners to the temporary prisons is in progress. Thus, it is clear that the respondents have already taken various steps as well as they are taking steps for reducing overcrowding in the prisons.

39. After examining the various recommendations/directions of the HPC and the directions of the Supreme Court and the nature of offences and the severity of the offences which are contemplated under the Special Acts mentioned by the HPC as well as offences under the IPC, which were excluded by the HPC from getting benefit of emergency parole/bail, it is clear that the HPC balanced the rights of the prisoners to maintain maximum possible distancing to contain the spread of COVID-19 as well as the rights of the society.

40. For the reasons discussed above, this PIL petition stands disposed of granting limited relief as indicated in paragraph 36 above.

MADHAV J. JAMDAR, J.

DIPANKAR DATTA, CJ :

1. Having read the detailed judgment prepared by my learned brother Justice Jamdar, I unhesitatingly record my concurrence therewith.

However, regard being had to some of the contentions debated at the Bar by Mr. Talekar, learned advocate for the petitioners relying upon the relevant orders of the Supreme Court dated March 23 and April 13, 2020, I wish to pen my views too.

2. The first question arising for consideration is, whether the inmates of correctional homes have a right to claim release on interim bail/emergency parole in view of the prevailing pandemic?

2.1. For answering this question, one has to take a few steps backwards in point of time. The World Health Organisation declared the COVID-19 outbreak a pandemic on March 12, 2020. It was on that fateful day that COVID-19 took its first toll in India. People were largely unsure of how to tackle it. The unprecedented pandemic became a national challenge, requiring adequate measures to be put in place by the executive Government(s) to prevent an outbreak. In due course, avoidance of congregation and social distancing emerged as precautionary measures. To borrow from its decision delivered not too long ago, the Supreme Court perceived that the rigours of the rough edges of the law need to be softened for law to retain its humane and

compassionate face. Anticipating that the highly packed correctional homes in the country would be a potential risk for the inmates thereof, the Court even before the national lockdown was announced adopted an extra-ordinary approach to deal with an extra-ordinary situation. To ensure what is just in the circumstances, *suo motu* cognizance of the fact of overcrowding in correctional homes was taken to decongest the same. Consequently, Writ Petition (C) No. 1 of 2020 (hereafter the said writ petition) came to be registered. By its order dated March 16, 2020, the Court issued notice to all the States/Union Territories and sought for responses as to how the problem of overcrowding in correctional homes was being dealt with by them. Upon consideration of the responses that were placed on record, an order dated March 23, 2020 followed *to ensure that the spread of the Corona Virus within the prisons is controlled.* Directions were issued to each State/Union Territory to constitute a High Powered Committee (for short, the HPC). The HPC was conferred power to examine and determine the classes of home inmates, who are either under-trial prisoners or convicts, deserving of release for temporarily either on interim bail or

parole for such period as may be thought appropriate. Keeping an eye on the health and welfare of the inmates of correctional homes, the object of the order was to restrict and control the contagion. The subsequent order dated April 13, 2020 of the Supreme Court in no uncertain terms made it clear that the Court had not directed the States/ Union Territories *to compulsorily release the prisoners from their respective prisons*. The purpose of the order, it is recorded, had been to enable the States/Union Territories to assess the situation in their prisons having regard to the pandemic and to *release certain prisoners and for that purpose to determine the category of prisoners to be released*.

2.2. While making its aforesaid orders, the Supreme Court indicated some broad guidelines. In view of the guidelines forming part of its relevant orders, it is clear as crystal that the Court permitted determination of classes of home inmates to be released and such determination was left to the sole wisdom of the members constituting the HPC bearing in mind the essence of decongestion of the correctional homes.

2.3 It is indeed true, as contended by Mr. Talekar, that the Supreme Court invoked its power under Article 32 of the Constitution of India looking at the rights of home inmates guaranteed by Article 21. It is truism that once in custody, the individual under detention loses his right to free movement without, however, sacrificing his right to life and that failure of the State to protect the right to life of the detainee could lead to consequences for the State, not too palatable. The judiciary being an organ of the State, reaction of the Supreme Court to rise to the occasion reminds me of the maxim *salus populi est suprema lex*, meaning that regard for the public welfare is the supreme law. This principle would seem to authorize a State instrumentality to serve society as a whole without granting unwarranted favours to a particular class of people, unless justified, at the cost of others. It needs no reiteration that at all times and by all quarters, sincere efforts have to be made to maintain and sustain the safety of the people. Although not expressly referred to in its orders, the Court might have called in aid such maxim. Having read the orders of the Supreme Court passed in the

said writ petition, a justice-oriented approach appreciating the safety of the home inmates is indeed discernible leading to directions requiring decongestion of the correctional homes. I am, however, of the firm opinion that the orders passed by the Court on the said writ petition, targeted as it were to do proper justice to the cause before it, reflect the exercise of equitable power under Article 142 of the Constitution of India, rather than such orders declaring any law under Article 141 constituting a binding precedent.

2.4. Mr. Talekar claimed that an entitlement to temporary release on interim bail or emergency parole is a facet of right to life and personal liberty. According to him, the Supreme Court has time and again held that if a person commits a crime, it does not mean that by committing such crime he ceases to be a human being and that he can be deprived of those aspects of life which constitutes human dignity. A prisoner enjoys all fundamental rights, notwithstanding the restrictions brought about by his incarceration. He further contended that a coordinate Bench of this Hon'ble Court held that parole leave is recognized as a statutory right and the convicts are entitled for parole leave. Rule 19 of

the Maharashtra Prisons (Bombay Furlough and Parole) Rules, 1959 were referred to by him, for highlighting that a convict/prisoner could be released on emergency parole during the period the notification issued under the Epidemics Diseases Act, 1897 continues to be in operation. In any case, he submitted that an entitlement for interim bail or emergency parole is a fundamental right or a statutory right which flows from Article 21 of the Constitution of India and not a concession as held by this Court in People's Union for Civil Liberties (supra).

2.5. I am afraid, I cannot persuade myself to agree with Mr. Talekar. The coordinate Bench in People's Union for Civil Liberties (supra) viewed the temporary release as a concession and held that a Mandamus would not lie to enforce a concession. Mr. Talekar's contention that release on parole being a right traceable to statutory rules which the decision in People's Union for Civil Liberties (supra) overlooked and is, thus, *per incuriam,* is unacceptable because such contention fails to notice that in the present case, grant of parole under statutory rules is not in issue; what is under consideration is whether the orders of the Supreme Court have created any right in favour of home inmates to be

released or is it a privilege, concession or exemption granted in the special facts and circumstances.

2.6. Concession, in legal parlance, is a Government grant for specific privileges. It is, thus, a form of privilege. An exemption is a concession allowed to a class or individual from general burden for valid and justifiable reason. It is a freedom from an obligation which the class or individual exempted is otherwise liable to discharge. Exemption is also a form of privilege. The terms are capable of being used interchangeably. Privilege, concession, exemption, ~ by whatever name one calls it, are generally advantages or benefits specially made available to a class, and not to others, in given situations and for valid reasons. Law is well settled that the recipient of a privilege, concession or exemption has no legally enforceable right against the Government except to enjoy the benefits during the period of its grant. This right to enjoy is defeasible, in the sense that it is not independent of any contingency and may be taken away in exercise of the very power under which the privilege, concession or the exemption were granted.

2.7 It is fallacious to contend that home inmates can claim an absolute right for release in a situation like the prevailing pandemic as if it were flowing either from Part III of the Constitution or any other statute. An exception has been made to the rule requiring confinement in terms of an extant law. In my opinion, relief by way of release of home inmates for a temporary period contemplated by the order dated March 23, 2020 is in the nature of a special privilege conferred on them by the Supreme Court amid the looming crisis, whereby a class of inmates (to be determined by the HPC) would enjoy an exemption from continuing to remain in the correctional homes till such time the lockdown continues and the pandemic is not brought under complete control but subject to determination made by the HPC. Such special, Court ordered, privilege conferred on the home inmates, which is equitable in nature, is not a vested right since the benefit of release can be taken away by the Court without the consent of the home inmates; hence one cannot complain of breach unless of course the determination of the HPC suffers from fundamental flaws vitally affecting rights guaranteed by Article 14 of the Constitution. If indeed

release for a temporary period on interim bail or emergency parole could have been claimed as a matter of right by every inmate of a correctional home citing the uncertainties of the prevailing pandemic, such a right ought to have had the sanction of law traceable either to a legislation of the competent legislature, or to an order having the force of law which the executive has authority to make or to a law declared by the Supreme Court binding on all Courts under Article 141 of the Constitution. In the absence of any such law, no right did crystallise for the inmates of the correctional homes to seek release on interim bail or emergency parole as a matter of entitlement as contended by Mr. Talekar. Restricted to the determination made by the HPC, an inmate could raise a grievance if he were to suffer a legal injury thereby and not otherwise.

2.8. The decisions in Kantilal Nandlal Jaiswal (supra) and Hariom Vijay Pande (supra) relied on by Mr. Talekar have no relevance to the present case. The rules under consideration before the relevant Benches for release on parole, does also seem to suggest that none can claim an absolute right of release after spending certain years in the correctional

homes; it is only upon fulfillment of conditions, as specified, that a legitimate claim for being considered for release on parole could arise for enforcement which is quite different from claiming a right to be released on parole. A convict, not fulfilling the conditions for release, has no right to claim release; it is only a limited right of consideration that one has which can be enforced in an appropriate situation.

2.9. The first question is, therefore, answered against the petitioners by holding that there is no right or entitlement that a home inmate may claim to seek temporary release during the pandemic merely based on the order dated March 23, 2020 of the Supreme Court; however, if the offence with which he has been charged or convicted is included in the 'qualifying category' by the HPC, he has a right to claim the benefit of temporary release by the appropriate court/authority in the light of the HPC's determination as well as the overriding object of such release.

3. Did the HPC exceed its jurisdiction, is the next question which would call for an answer.

3.1. Mr. Talekar pointed out that the HPC owes its existence to the order of the Supreme Court dated March 23, 2020 and not to any

statute; therefore, the powers of the HPC are limited to what is provided for by the Supreme Court. According to him, the jurisdiction of the HPC came to an end with the determination of the class or category of prisoners entitled for release on application of the parameters laid down by the Supreme Court and others factors considered by the HPC to be appropriate. An argument has been advanced that the HPC ought not to have imposed restrictions as well as sounded caution that its recommendations are not to be considered as directions for release of prisoners falling in a particular class or category, which is otherwise qualified for release. It has also been argued that the clarification made by the HPC that case of every prisoner has to be considered on its own merits so as to decide the desirability of temporary release of such a prisoner and on a case to case basis, has made it impossible for the prisoners to get interim bail or emergency parole, even if they were otherwise entitled to be released on interim bail or emergency parole, and thereby the object for which the HPC was constituted stands frustrated.

3.2. This argument too is not of much substance. It cannot be ignored

that the HPC determined a broad class of home inmates qualifying for release without, however, having the benefit of the criminal antecedents of each particular inmate. Some amount of discretion to be exercised had to be reserved for the judiciary as well as the authority competent to grant parole without any of them being fazed by the presence of the senior most puisne Judge of this Court as the Chairperson of the HPC and two senior officers of the administrative executive as members thereof, and without having full confidence in their own existence so that the process of decision making leading to the decision for release itself were not, in any way, affected. Since the Supreme Court made it clear that only "certain prisoners" were required to be released, a vital point here and there which would otherwise be significant in deciding the fate of an applicant for temporary release on bail/parole could not have been excluded from consideration by an administrative direction to release particular classes of under-trial prisoners and convicts. I am, thus, of the view that the HPC did not exceed its jurisdiction in sounding the caution with which Mr. Talekar has joined issue.

3.3. This question is, thus, answered against the petitioners.

4. Did the HPC act in an arbitrary manner, thereby infringing the guarantee of equality in Article 14 of the Constitution? This is the most important question that needs to be answered now.

4.1. Mr. Talekar has taken strong exception to the HPC carving out certain offences which, according to it, would not qualify for interim bail and emergency parole during the pandemic. It is his contention that such determination is manifestly arbitrary, thus violating Article 14 of the Constitution, and contrary to tests of rationality and proportionality applied by the Supreme Court.

4.2. Having regard to the composition of the HPC and vesting in it of wide powers by the Supreme Court, it is apparent that the Court reposed complete faith and confidence in the members thereof insofar as determination of classes of under-trial prisoners or convicts is concerned who could be released on bail or parole, respectively, during the pandemic. The HPC, owing its origin to the order dated 23rd March, 2020 of the Supreme Court, had an onerous duty of ensuring that rights of home inmates are not transgressed while it embarked on a determination of the class of inmates who could be identified for

temporary release. There can also be no dispute that the HPC, being essentially a committee constituted to discharge functions administrative in nature, and despite having wide discretion in such determination, its members were expected to proceed not in an arbitrary manner but consistent with the principles of equality as well as keeping an eye on societal needs.

4.3. The orders of the Supreme Court dated March 23, 2020 and April 13, 2020 are clear. Determination, as required, in terms of the orders of the Court would necessarily lead to a classification of inmates of correctional homes for the purpose of release and there can be no gainsaying that such classification ought also to be reasonable by all standards. The test of reasonable classification, propounded by Hon'ble S.R. Das, J. (as the Chief Justice of India then was) in Anwar Ali Sarkar (supra), of there being an intelligible differentia, which distinguishes those grouped together from others, and such differentia having a rational relation with the object to be achieved, is by now the final word in the judicial firmament of this country for examining a challenge to a classification on the ground that it is unreasonable.

4.4. The HPC while proceeding to comply with the orders of the Supreme Court, as of necessity, had to create groups ~ one group including classes of home inmates who could be considered for temporary release on bail/parole and the other, not entitled to such release ~ or else all the inmates of the correctional homes would have to be released in view of the pandemic. The intelligible differentia is provided by classification of alleged offenders charged with offences that could be characterised as anti-national ~ those aiming to destabilize the economy of the country and/or forming a potential threat to the unity, integrity and sovereignty of the nation and/or by their criminal acts making themselves liable to be proceeded under the special enactments. In the opinion of the HPC, these inmates form part of the 'excepted category' who should continue to remain behind the bars despite the object of decongestion of correctional homes that the Supreme Court had in mind as well as to deny them the benefit of release looking at the object of prevention of activities directed towards causing economic loss, questioning and disrupting the sovereignty and territorial integrity of India and the nature of aggravated offence

towards women and children. Manifestation of a fine balance is, thus, conspicuous by its presence.

4.5. To my mind, it could not have been and was never the intention of the Supreme Court that the pandemic notwithstanding, those awaiting trial because of their involvement in serious economic offences/socio-economic offences, offences aimed at subverting the unity, integrity and sovereignty of India, offences against women and children, etc. or those convicted for such offences should be temporarily released, ignoring the nature and the gravity of the offences with which they have either been charged or convicted. That is precisely the reason as to why the HPC was guided to bear in mind the nature of the offence and the severity of the offence. The order dated April 13, 2020 is eloquent that "certain prisoners" are to be released. In that view of the matter, the contention that unreasonable classification has been made is thoroughly misconceived.

4.6. The attack to the determination made by the HPC on the ground that it fails the test of proportionality is equally unmeritorius. The doctrine of proportionality requires the Court to judge whether an

action taken was really needed as well as whether it was within the range of course of action which could reasonably be followed. Applying such test, I see no reason to hold that the HPC acted in a manner warranting interference.

4.7. I, accordingly, hold that the recommendations made by the HPC are not arbitrary and do not offend the equality clause in Article 14.

5. The next question arising for decision is, has there been a non-application of mind by the HPC while considering the issue of restrictions on grant of bail imposed by the Special Acts?

5.1. Much has been argued by Mr. Talekar by referring to a stray observation of the HPC in the minutes of meeting dated March 25, 2020 that there has been non-application of mind. The emphasis is that not all the Special Acts referred to therein contain restrictions on grant of bail, in addition to those under the Code of Criminal Procedure, and thus the HPC, labouring under a misconception, proceeded to deny the benefit of release to a large cross-section of prisoners.

5.2. It is true that such an observation appears in the minutes of meeting dated March 25, 2020 but the decision taken that day has since been modified as it appears from the subsequent minutes of meeting dated May 11, 2020, since corrected further on May 18, 2020. No such observation appears therein and I find no good reason to find fault with the recommendations on the specious ground that in one of the first minutes that were drawn up, there might have been some slip which went unnoticed.

5.3. Application of mind being writ large over the proceedings of the HPC, there is obviously no reason to interfere.

6. Is the recommendation of the HPC operating harshly against those under-trial prisoners charged with offences under the Maharashtra Protection of Interests of Depositors (in Financial Establishments) Act, 1999 (hereafter "the MPID Act") which provide for a maximum punishment of six years, and therefore, contrary to the orders of the Supreme Court passed in the said writ petition? Also, whether irrespective of the nature and/or severity of offences, all crimes carrying punishment of 7 (years) or less ought to have been included in

the 'qualifying category'?

6.1. The offences which are triable under the MPID Act, would in all likelihood attract section 409 of the IPC since the common ingredient is criminal breach of trust. Although seldom an accused is sentenced to the maximum punishment prescribed under section 409 of the IPC, the possibility thereof in future can never be ruled out. To view the offence committed of duping or defrauding investors as punishable only under the MPID Act in isolation and in ignorance of a cognate offence punishable under the IPC, would not have been appropriate. Additionally, the offence triable under the MPID Act being a socio-economic offence, excluding those charged thereunder for humane and compassionate treatment in terms of the orders passed in the said writ petition does not call for any interference.

6.2. It is true that some of the offences which carry a punishment upto 7 (seven) years have been included in the 'excepted category'. But that, by itself, does not afford ground to hold that the recommendation of the HPC is flawed. The nature of the offence as well as its severity is what would tilt the balance in favour of or against release and the HPC

having taken a decision that is plausible, it is not for the writ court to sit in judgment as if it were a court of appeal and substitute the decision of the HPC.

6.3. The contentions of Mr. Talekar, though attractive at first blush, on deeper examination pale into insignificance.

6.4. The questions are answered against the petitioners.

7. Does the decision in Mithu (supra) afford any aid to the petitioners for holding that the HPC faltered in including section 303 of the Indian Penal Code in the 'excepted category'?

7.1. The decision in Mithu (supra) declared section 303 unconstitutional since death was provided as the mandatory sentence for commission of murder by a person while being under a sentence of life in prison. The Court considered various situations, some even hypothetical, reference to which here is not considered necessary. Ultimately, it was held that the impugned provision deprives the court of the use of its wise and beneficent discretion in the matter of life and death. However, such declaration of unconstitutionality, in my view,

does not take away the authority of the HPC to deny the benefit of release to a convict who, while under a sentence of life in prison, commits a murder. Inclusion of section 303 in the 'excepted category' gives the impression that the HPC was not inclined to extend the benefit of release to a convict, who is a repeat offender and would have faced death but for the declaration in Mithu (supra) that section 303 is unconstitutional.

7.2. This question is, thus, also answered in the negative.

8. The concern expressed by the petitioners with regard to the plight of inmates of the correctional homes during the prevailing pandemic does not require any further deliberation in view of the coordinate Bench decision of this Court in People's Union for Civil Liberties (supra). Comprehensive guidelines have been framed for implementation by the authorities of the correctional homes which would be adequate and sufficient to cater to the needs of such inmates, who would stand deprived of temporary release on interim bail/emergency parole.

9. The last question pertains to the relief that could be afforded to the petitioners. I am *ad idem* with my learned brother Justice Jamdar that the petitioners are entitled to no more than the observations in paragraph 36 of His Lordship's judgment. The authorities shall, therefore, act in terms thereof.

10. This Judgment will be digitally signed by the Sr. Private Secretary of this Court. All concerned will act on production by fax or e-mail of a digitally signed copy of this order.

Pravin D. Pandit

Digitally signed by Pravin D. Pandit
Date: 2020.08.05 17:09:06 +0530

CHIEF JUSTICE