AFR
In Chambers
Reserved on:-16.3.2021
Delivered on:-19.4.2021

Crl. M.W.P. No.8418 of 2020

Petitioner :- Satyavrat Rai

Respondent :- State of U.P. and others
Counsel for Petitioner :- Rajeev Chaddha
Counsel for Respondent :- G.A., Sudhir Mehrotra

Hon'ble Pankaj Naqvi,J.
Hon'ble Vivek Agarwal,J.

(Delivered by Pankaj Naqvi,J)

Heard Sri Rajeev Chaddha, learned counsel for the petitioner, Sri Manish Goyal, learned Addl. A.G. assisted by Sri A.K. Sand for the State and Sri Sudhir Mehrotra for the subordinate court.

1. The petitioner originally sought for quashing of an order dated 2.3.2020 (Annexure-4) passed by respondent no. 1 / State refusing to release the petitioner under Section 433 of the Code and also sought for quashing of order dated 29.1.2021 by way of an amendment application dated 01.02.2021 whereby request for release was again declined.

FACTUAL MATRIX

2. Admittedly the petitioner is in custody since 18.3.1998 in connection with Case Crime No. 1311/1997 under Sections 302/34/504/506 IPC, P.S. Cantt., Gorakhpur. He in above case was put on trial in S.T. No. 142/1988. During trial, he was bailed out by this Court on 9.7.2003 and released on 26.7.2003.

Further, he was convicted and sentenced to life imprisonment on 16.6.2007. He preferred an appeal before this Court and was released on bail on 1.10.2012. His appeal finally came to be dismissed on 23.5.2014. He surrendered before the court below on 23.8.2014 and since then he is in jail and as on date has undergone incarceration of more than 17 years.

3. Upon completing 16 years of custody, the mother of the petitioner staked a claim for release of her son under Section 433 of the Code on 27.7.2019 before the State Government. But as the claim was not decided, petitioner preferred Criminal Misc. Writ Petition No. 22178/2019 which came to be disposed on 30.9.2019 with a direction to decide the claim within 3 months. Pursuant thereto, the claim came to be rejected on 2.3.2020, impugned in the present petition.

4. The claim was rejected on the sole ground that the total detention period of the petitioner was only 12 years 10 months 29 days as against the requisite period of 16 years (without remission) under the G.O. dated 1.8.2018. It appears that the State Government while passing the order dated 2.3.2020 was misled as it did not have before it, the custody warrant of the petitioner taking him into the custody by the C.J.M., Gorakhpur on 18.3.1998 in Case Crime No. 1311/1997, under Sections 302/34/504/506 IPC, P.S. Cantt., Gorakhpur.

5. With a view to resolve the above discrepancy i.e. as to on what date the petitioner was actually taken into custody in Case Crime No.1311/1997 under Sections 302/34/504/506 IPC, P.S. Cantt., Gorakhpur, we called upon the C.J.M., Gorakhpur to submit a report in the light of our order dated 14.10.2020. Pursuant thereto, a report dated 12.11.2020 was submitted through Sri Sudhir Mehrotra, Advocate opining that the CJM,

Gorakhpur had taken the petitioner into custody in Case Crime No. 1311/1997 on 18.3.1998 then the period of custody is to be computed from the said date. Sri A.K. Sand, the learned AGA rightly submitted on 15.12.2020 that if a mistake has been committed by the CJM by not enclosing the custody warrant of the petitioner dated 18.3.1998 in his records, rights of the petitioner under Section 433 of the Code cannot be jeopardized. He also undertook on 15.12.2020 to place the matter before the competent authority to review its earlier decision dated 2.3.2020 in the light of above backdrop within 3 weeks. Matter was taken up on 13.1.2021 which records the following order:-

> **"Sri A.K. Sand, learned AGA states that he personally spoke to the Additional Chief Secretary, who has assured that orders for releasing petitioner shall be positively passed within 10 days.**
>
> **We have no reason to disbelieve his statement.**
>
> **List again in the additional cause list on 25.1.2021."**

6. The matter was again taken up on 25.1.2021 wherein following order was passed:-

> **"Heard Sri Rajeev Chaddha, learned counsel for the petitioner and Sri A.K. Sand, learned counsel for the respondents.**
>
> **Sri A.K. Sand prays for and is granted last opportunity to ensure that order passed by the Additional Chief Secretary on the intervention of this Court on 16.01.2021 is executed in letter and spirit so that petitioner is set at liberty, as the same is to be carried out by the instrumentalities of the State, else the Additional Chief Secretary, Prison Administration and Reforms, U.P., Lucknow shall remain personally present on 28.01.2021.**
>
> **List on 28.01.2021."**

7. We clarify that in the above order, 16.1.2021 be read as 13.1.2021. The matter was taken up on 28.1.2021 wherein following order was passed:-

"We have heard Sri Rajeev Chaddha, learned counsel for the petitioner, Sri Manish Goel, learned A.A.G. and Sri A.K.Sand, learned A.G.A.

An affidavit of compliance and an exemption on behalf of Additional Chief Secretary (Home) has been filed. We have perused both the affidavits but not satisfied with the alleged compliance or with the cause for exemption.

Matter involves life and liberty of the petitioner/detenue who is entitled for release under Section 433 of the Code.

We adjourn the matter on the assurance given by Sri Manish Goel, learned A.A.G. and Sri A.K.Sand, learned AGA that previous order of this Court dated 25.01.2021 shall be complied with, else the Additional Chief Secretary (Home) shall ensure his personal presence.

List on 01.02.2021 in the additional cause list at 2.00 pm."

8. On 1.2.2021, an affidavit of compliance dated 30.1.2021 was filed on behalf of the Addl. Chief Secretary (Home), U.P., Lucknow, annexing therewith a fresh order dated 29.1.2021, declining the request of the release of the petitioner. The petitioner challenged the order dated 29.1.2021 by an amendment application dated 1.2.2021.

9. We on 1.2.2021 directed the learned AGA to produce the entire original records. The original records were produced before us. We also directed the Addl. Chief Secretary to file his personal affidavit to the amendment application. However, neither any personal affidavit as desired above was filed nor was any time sought on his behalf and on the contrary Sri Manish Goyal, the learned Addl. A.G. assisted by Sri A.K. Sand, the learned AGA on 1.3.2021 and 9.3.2021 gave an impression that the matter is again under active consideration of the State Government. We were informed by the learned Addl. A.G. on 16.3.2021 that the request of the petitioner has been declined on 12.3.2021 for the third time. We refuse to take cognizance of

rejection dated 12.03.2021 as it is a mere reiteration of earlier order dated 29.01.2021. On 16.3.2021 Sri Ashutosh Mishra, holding brief of Ms. Swati Agrawal, learned counsel for the informant appeared for the 1st time contending that he has not been heard but we declined to hear him as according to us, the informant has no right in such matters that too at this stage.

RIVAL CONTENTIONS

10. Learned counsel for the petitioner challenges the impugned orders principally on the following grounds:-

(i) Once the State Government under its initial order dated 2.3.2020 rejected the claim of the petitioner on the sole custodial detention as envisaged in the G.O. dated 1.8.2018 which was wrongly calculated on account of an error committed by the C.J.M. concerned as he did not enclose the custodial warrant dated 18.3.1998 in his records which issue came to be resolved finally on 15.12.2020, calculating the detention as more than 17 years and there being nothing adverse under the order dated 2.3.2020, the subsequent impugned order dated 29.1.2021 rejecting the claim on the ground of criminal history and on vague allegations of threat perception is malafidely motivated.

(ii) The basis of rejection under the impugned order dated 29.1.2021 is two-fold, firstly, the petitioner is a habitual / professional killer and is a part of a gang and secondly the family of the victim has apprehensions that in the event of release of the petitioner, life and security of the family of the victim would be at severe risk,

while none of the above grounds could be the basis for rejection under Clause-3 of the G.O. dated 1.8.2018. Clause 3 (xiv) presupposes a conviction in respect of professional killings while petitioner stands acquitted in 2 cases (out of 4 murder cases) i.e. in Case Crime Nos. 796/2005 & 670/2013 and is a witness of charge-sheet in Case Crime No. 1539/2006 and in Case Crime No.1311/1997, has served more than 17 years of incarceration with no appeal either by State or by the family of the victim and in so far apprehension of the family of the victim is concerned that they would be at potential risk if the petitioner is released, is not a prescribed parameter for rejection of the claim under the G.O. dated 1.8.2018. Thus, it is submitted that the impugned order is not only based on irrelevant considerations but also suffers from the vice of absolute non-application of mind and this Court in exercise of its extraordinary power may direct the respondents to release the petitioner.

11. Per contra, Sri Manish Goyal, the learned Addl. A.G. assisted by Sri A.K. Sand, the learned AGA submitted that the power under Section 433 of the Code is an extraordinary power conferred on the State which is to be exercised on the parameters laid in the policy dated 1.8.2018. He would thus submits that the order dated 2.3.2020 by which the claim was rejected on the ground of incomplete detention period, would not prevent the State Government, considering other materials on record, while having a fresh relook under the order dated 29.1.2021. Alternatively, it was his submission that only when a

convict fulfills the period of requisite detention as laid down in G.O. dated 1.8.2018, the application for release under Section 433 of the Code becomes maintainable under law leaving it open for the State to consider the claim on merits as provided under the G.O. dated 1.8.2018. Sri Goyal in order to buttress his submission, placed reliance on multiple authorities which shall be considered at an appropriate place. He finally submitted that there are materials on record to indicate that the petitioner after release on bail by this Court, is alleged to have committed yet another murder which was registered as Case Crime No. 670/2013 and that acquittal in both cases is based on hostile testimony.

ANALYSIS

12. The appropriate Government under Section 433 of the Code is conferred with the power to commute various type of sentences for different punishment including payment of fine. Section 433-A inserted by Act No. 45 of 1978 w.e.f. 18.12.1978 provides restrictions on powers of remission or commutation in certain cases.

13. Section 433 and 433-A of the Code are quoted hereunder:-

> **433. Power to commute sentence. The appropriate Government may, without the consent of the person sentenced, commute-**
>
> **(a) a sentence of death, for any other punishment provided by the Indian Penal Code;**
>
> **(b) a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;**
>
> **(c) a sentence of rigorous imprisonment, for simple**

imprisonment for any term to which that person might have been sentenced, or for fine;

(d) a sentence of simple imprisonment, for fine.

433-A. Restriction on powers of remission or Commutation in certain cases- Notwithstanding anything contained in section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commuted under section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment.

14. Section 433 of the Code confers power on the State Government to commute a sentence of death for any other punishment under the IPC; a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine; a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced, or for fine; a sentence of simple imprisonment, for fine.

15. Section 433-A begins with a non-obstante clause qua Section 432 by providing a restriction that where life imprisonment is awarded for an offence for which death is one of the punishment or where death is commuted under Section 433 for life imprisonment, such person shall not be released unless he had served at least 14 years of imprisonment. To put it differently, incarceration of 14 years is a must for a premature release where a convict is awarded life imprisonment for whch death is one of the punishment provided or where death is commuted to life under Section 433 of the Code.

16. The State in exercise of its powers under Section 433 of the Code has framed a policy dated 1.8.2018 for release of

life convicts. We deem appropriate to quote the entire text of policy as under:

संख्या–564/2018/1106/22.2.2018–07जी/2018

प्रेषक

अरविन्द कुमार,

प्रमुख सचिव,

उत्तर प्रदेश शासन।

सेवा में,

महानिरीक्षक,

कारागार प्रशासन एवं सुधार सेवायें,

उत्तर प्रदेश, लखनऊ।

कारागार प्रशासन एवं सुधार अनुभाग–2 लखनऊः दिनांक 01 अगस्त, 2018

विषयः– आजीवन कारावास से दण्डित बंदियों की प्रत्येक वर्ष गणतंत्र दिवस (26 जनवरी) के अवसर पर समयपूर्व मुक्ति के सम्बन्ध में स्थाई नीति।

महोदय,

आजीवन कारावास से दण्डित होने की दशा में बंदियों के लंबी अवधि से कारागार में निरूद्वि के कारण न केवल प्रदेश की कारागारों में ओवर क्राउडिंग की स्थिति उत्पन्न होती है, वरन बंदियों में हताशा व कुण्ठा भी पनपती है जिससे आपराधिक न्याय व्यवस्था, बंदी सुधार एवं पुनर्वास का उद्देश्य प्रभावित होता है।

राष्ट्रीय मानवाधिकार आयोग एवं मा0 न्यायालयों द्वारा आजीवन कारावास से दण्डित बंदियों की समयपूर्व रिहाई किये जाने के सम्बन्ध में समय–समय पर समीक्षा करने व स्थाई नीति बनाये जाने के निर्देश दिये गये है। मा0 उच्च न्यायालय इलाहाबाद द्वारा रिट याचिका संख्या– 6041/2018, चन्द्रासी एवं अन्य बनाम उत्तर प्रदेश राज्य एवं अन्य में दिनांक 16.04.2018 को दिये गये अपने निर्णय में सिद्वदोष बंदियों की समयपूर्व मुक्ति के सम्बन्ध में स्पष्ट नीति बनाने की अपेक्षा राज्य सरकार से की है। अतः आजीवन कारावास की सजा से दण्डित सिद्वदोष बंदियों की समयपूर्व रिहाई के सम्बन्ध में स्थाई

नीति बनाये जाने की आवश्यकता है।

कारागार विभाग के आदेश संख्या– 491/22.2.2018–7 जी/2018 दिनांक 03.04.2018 द्वारा इस सम्बन्ध में गठित समिति की अनुशंसा के आधार पर उ0प्र0 के न्यायालयों द्वारा आजीवन कारावास की सजा से दण्डित सिद्वदोष बंदियों की समयपूर्व रिहाई के सम्बन्ध में निम्नवत स्थाई नीति निर्धारित की जाती है।

1. श्री राज्यपाल महोदय भारत के संविधान के अनुच्छेद–161 में प्रदत शक्तियों का प्रयोग करते हुये एतद्द्वारा प्रत्येक वर्ष गणतंत्र दिवस के अवसर पर उत्तर प्रदेश के न्यायालयों द्वारा आजीवन कारावास की सजा से दण्डित प्रदेश अथवा अन्य प्रदेशों की कारागारों में निरूद्व सिद्वदोष बंदियों के दण्ड को निम्नानुसार लघुकृत करते हुये रिहा किये जाने हेतु निम्नानुसार नीति बनाये जाने की सहर्ष स्वीकृति प्रदान करते हैः–

2. (क) आजीवन कारावास की सजा से दण्डित समस्त महिला सिद्वदोष बन्दी जिनका अपराध आगे धारा–3 में वर्णित प्रतिवर्धित श्रेणी में इंगित किसी भी उपनियम से आच्छादित नहीं है तथा जिनके द्वारा विचाराधीन अवधि सहित 14 वर्ष की अपरिहार तथा 16 वर्ष की सपरिहार सजा व्यतीत कर ली गयी हो।

2. (ख) आजीवन कारावास की सजा से दण्डित सभी पुरूष सिद्वदोष बन्दी जिनका अपराध आगे धारा–3 में वर्णित प्रतिबंधित श्रेणी में इंगित किसी भी उपनियम से आच्छादित नहीं है तथा जिनके द्वारा विचाराधीन अवधि सहित 16 वर्ष की अपरिहार तथा 20 वर्ष की सपरिहार सजा व्यतीत कर ली गयी हो।

2. (ग) आजीवन कारावास की सजा में दण्डित ऐसे सिद्वदोष बंदी जिनका अपराध आगे धारा–3 में वर्णित प्रतिबंधित श्रेणी में इंगित किसी भी उपनियम में आच्छादित नहीं है तथा जो निम्न में से किसी बीमारी से ग्रसित हो एवं जिनके संबंध में उ0प्र0 जेल मैनुअल के प्रस्तर संख्या–195 में प्रावधानित मेडिकल बोर्ड द्वारा उक्त बीमारी से ग्रसित होने का प्रमाण पत्र दिया गया हो और जिनके द्वारा विचाराधीन अवधि सहित 10 वर्ष की अपरिहार सजा तथा 12 वर्ष की सपरिहार सजा व्यतीत कर ली गयी होः–

1- **Advanced bilaterial pulmonary tuberculosis**

2- **incurable malignancy**

3- **Incurable Blood diseases**

4- **Congestive heart failure**

5- **Chronic epilepsy with mental degeneration**

6- Advanced leprosy with deformities and trophic ulcer

7- Total blindness of both eyes

8- Incurable paraplegias and herniplegics

9- Advanced Parkinsonism

10- Brain Tumor

11- Incurable Aneurysms

12- Irreversible Kidney failure

2. (घ) आजीवन कारावास की सजा से दण्डित समस्त सिद्वदोष बन्दी जिनका अपराध आगे– धारा–3 में वर्णित प्रतिबंधित श्रेणी में इंगित किसी भी उपनियम से आच्छादित नहीं है, उनके द्वारा 70 वर्ष की आयु पूर्ण कर ली गयी है विचाराधीन अवधि सहित 12 वर्ष की अपरिहार तथा 14 वर्ष की सपरिहार सजा व्यतीत कर ली गयी है।

2. (ड) आजीवन कारावास की सजा से दण्डित समस्त सिद्वदोष बन्दी जिनका अपराध आगे धारा–3 में वर्णित प्रतिबंधित श्रेणी में इंगित किसी भी उपनियम से आच्छादित नहीं है, उनके द्वारा 80 वर्ष की आयु पूर्ण कर ली गयी है विचारीधीन अवधि सहित 10 वर्ष अपरिहार तथा 12 वर्ष की सपरिहार सजा व्यतीत कर ली गयी है।

2. (च) आजीवन कारावास की सजा से दण्डित समस्त सिद्वदोष बन्दी जिनका अपराध आगे धारा–3 में वर्णित प्रतिबंधित श्रेणी के उपनियम **Xiii** में वर्णित अपराध के अतिरिक्त अन्य किसी भी उपनियम से आच्छदित नहीं है तथा जिनके द्वारा विचाराधीन अवधि सहित 20 वर्ष की अपरिहार तथा 25 वर्ष की सपरिहार सजा व्यतीत कर ली गयी हो।

3. <u>प्रतिबन्धित श्रेणी</u>

(i) आजीवन कारावास से दण्डित ऐसे समस्त सिद्वदोष बन्दी जिनके द्वारा रिहाई के सम्बन्ध में कोई प्रार्थना पत्र नहीं दिया गया है।

(ii) आजीवन कारावास से दण्डित ऐसे समस्त सिद्वदोष बन्दी जिन्हें उत्तर प्रदेश राज्य के बाहर स्थित न्यायालयों द्वारा दोषसिद्व कर दण्डित किया गया हो।

(iii) आजीवन कारावास से दण्डित ऐसे समस्त सिद्वदोष बन्दी जिनके निर्णय में मा0 न्यायालय द्वारा विशिष्टि रूप से जीवन–पर्यनत कारागार में निरिद्व हेतु आदेशित किया है अथवा आजीवन कारावास से दण्डित समस्त ऐसे सिद्वदोष बन्दी जिनके निर्णण में मा0 न्यायालय द्वारा विशिष्टि समय निर्धारित कर निरूद्वि हेतु आदेशित किया गया है।

(iv) आजीवन कारावास से दण्डित ऐसे समस्त सिद्वदोष बन्दी जिनके वाद का अन्वेषण, दिल्ली विशेष पुलिस स्थापना अधिनियम, 1946(1946 का सं0 25) के अधीन गठित दिल्ली विशेष पुलिस स्थापना द्वारा या दण्ड प्रकिया संहिता 1973(1974 का सं0 2) से भिन्न किसी केन्द्रीय अधिनियम के अधीन अपराध का अनवेषण करने के लिए सशक्त अन्य अभिकरण द्वारा किया गया था।

(v) ऐसे सिद्वदोष बंदी जिन्हे ऐसे अपराधों के लिये दोषसिद्व किया गया है जिनमें से कुछ उन विषयों से सम्बन्धित है जिन पर संघ ीय सरकार की कार्यपालिका शक्ति का विस्तार है, और जिसे साथ–साथ भोगे जाने वाली पृथक–पृथक अवधि के कारावास का दण्डादेश दिया गया है, उसके सम्बन्ध में दण्डादेश के निलंबन परिहार या लघुकरण का राज्य सरकार द्वारा परित कोई आदेश तभी प्रभावी होगा जब किये गये अपराधों के सम्बन्ध में ऐसे दण्डादेशों के, यथास्थिति, परिहार, निलंबन या लघुकरण का आदेश केन्द्रीय सरकार द्वारा भी कर दिया गया है।

(vi) आजीवन कारावास से दण्डित ऐसे समस्त सिद्वदोष बन्दी जिन्हे सामूहिक नरसंहार (तीन या तीन से अधिक हत्याएं) की घ ाटनाओं से सम्बन्धित अपराधों में दोषसिद्व किया गया हो।

(vii) आजीवन कारावास से दण्डित ऐसे समस्त सिद्वदोष बन्दी जो निरूद्वि की अवधि में विगत 02 वर्ष के दौरान उ0प्र0 जेल मैनुअल के प्रस्तर– 814 के अन्तर्गत चेतावनी से भिन्न किसी भी लघु दण्ड से और विगत 05 वर्षों के दौरान उ0प्र0 जेल मैनुअल के प्रस्तर–815 के अन्तर्गत किसी भी वृहद दण्ड से कारागार प्रशासन द्वारा दण्डित किए गये हो।

(viii) आजीवन कारावास से दण्डित ऐसे सिद्वदोष बन्दी जिन्हे पैरोल/गृह अवकाश के दौरान किसी अपराध के लिये दोषी ठहराया गया हो।

(ix) आजीवन कारावास से दण्डित ऐसे समस्त सिद्वदोष बन्दी जिन्होने निरूद्वि अवधि के दौरान जेल से पलायन किया हो।

(x) ऐसे सिद्वदोष बंदी जिन्हे एक से अधिक अपराधिक प्रकरणों में आजीवन कारावास के दण्ड से दण्डित किया गया है।

(xi) ऐसे सिद्वदोष बन्दी जो भारतीय नागरिक नहीं है।

(xii) आजीवन कारावास से दण्डित ऐसे समस्त सिद्वदोष बन्दी जिन्हे निम्न अधिनियमों के तहत दोषसिद्व किया गया होः–

– नारकोटिक ड्रग्स एण्ड साइकोट्रोपिक सबस्टेंस एक्ट, 1985

– आतंकवादी और विध्यंशकारी क्रियाकलाप अधिनियम 1997

– आतंकवादी गतिविधि प्रतिषेध अधिनियम, 2002

– स्वापक औषधि और मनः प्रभावी पदार्थ अधिनियम, 1985(1985 का सं0 61)

– स्वापक औषधि और मन प्रभावी पदार्थ अवैध व्यापार निवारण अधिनियम 1988(1988 का सं0 42)

– सीमा शुक्ल अधिनियम 1962(1962 का सं0 52)

– शासकीय गुप्त वार्ता अधिनियम 1923

– विदेशियों विषयक अधिनियम 1946

– विदेशी मुद्रा संरक्षण एंव तस्करी निवारण अधिनियम 1974

– लैंगिक उत्पीडन से बच्चो के संरक्षण का अधिनियम 2012(**POCSO ACT 2012**)

(**xiii**) ऐसे समस्त सिद्वदोष बन्दी जो भारतीय दण्ड संहिता, 1960 की धारा– 363 ए (भीख मांगने के प्रयोजनों के लिये अप्रासवय का व्यपहरण या विकलांगीकरण), 364 (हत्या करने के लिये व्यपहरण या अपरहण), 364 ए (मुक्ति–धन आदि के लिये व्यपहरण), 366 (विवाह आदि के करने को विवष करने के लिये किसी स्त्री को व्यपहृत करना अपहृत करना या उत्प्रेरित करना), 366 ए (अप्रासवय लडकी का उपापन), 366 ब (विदेश से लडकी का आयात करना), 367 (व्यक्ति को घोर उपहति, दासत्व आदि का विषय बनाने के उद्देश्य से व्यपहरण या अपहरण), 368 (व्यपहृत या अपहृत व्यक्ति को सदोष छिपाना या परिरोध में रखना),369 (दस वर्ष से कम आये के शिशु के शरीर पर से चोरी करने के आषय से उसका व्यपहरण या अपहरण), 372 (वेश्यावृति आदि के प्रयोजन के लिये अप्रासयय को वेचना), 373 (वेश्यावृति आदि के प्रयोजन के लिये अपाप्तवय का खरीदना) एवं 376 (बलात्संघ के लिये दण्ड) के अन्तर्गत अपराधों क लिए आजीवन कारावास की सजा से दण्डित किये गये हो।

(**xiv**) पेशेवर हत्यारे जो भाडे पर हत्या करने के दोषी पाये गये हों।

(**xv**) आजीवन कारावास की सजा से दण्डित ऐसे समस्त सिद्वदोष बन्दी जो भारतीय दण्ड संहिता की धारा– 121 से 130 के अन्तर्गत राज्य के खिलाफ युद्व करने या युद्व का प्रयास करने या दुष्प्रेरण करने के दोषी पाये गये हों।

(**xvi**) आजीवन कारावास की सजा से दण्डित ऐसे समस्त सिद्वदोष बन्दी जो सरकारी सेवक का कर्तव्य पालन के दौरान उसकी हत्या के

दोषी हों।

4. समस्त वरिष्ठ अधीक्षक/अधीक्षक/प्रभारी अधीक्षक कारागारों में निरूद्व आजीवन कारावास से दण्डित ऐसे समस्त सिद्वदोष बंदियों की उपरोक्त प्रस्तर के अन्तर्गत निर्धारित नीति/निर्देशों के अनुसार पात्रता का परीक्षण करेंगें एवं पात्र समस्त बंदियों के सम्बन्ध में संलग्न प्रारूप में उनको समयपूर्व रिहाई का प्रस्ताव परिक्षेत्रीय उप महानिरीक्षक कारागार को प्रत्येक वर्ष दिनांक 31 अक्टूबर तक उपलब्ध करायेगे।

5. बंदियों की आयु एवं सजा की गणना आगामी वर्ष की 26 जनवरी के अनुसार की जायेगी।

6. परिक्षेत्रीय उप महानिरीक्षक कारागार समस्त प्रस्तावों का नीति के आलोक में परिक्षण करेंगे तथा यह सुनिश्चित कराते हुए कि कोई पात्र व्यक्ति छूटा नहीं है, प्रस्ताव दिनांक 15 नबम्बर तक महानिरीक्षक कारागार को उपलब्ध करायेगें।

7. महानिरीक्षक कारागार द्वारा बंदियों की रिहाई के सम्बन्ध में प्राप्त प्रस्ताव को उपरोक्त नीति के आलोक में परीक्षण करते हुये प्रस्ताव शासन को प्रत्येक वर्ष दिनांक 30 नवंबर तक प्रत्येक दशा में प्रेषित कर दिया जायेगा।

8. शासन स्तर पर बंदियों की रिहाई के सम्बन्ध में प्रस्ताव प्राप्त होने के उपरान्त प्राप्त संस्तुतियेां के निस्तारण हेतु समिति का गठन निम्नवत किया जाता हैः–

(क) प्रमुख सचिव कारागार प्रशासन एवं सुधार विभाग, उत्तर प्रदेश शासन– अध्यक्ष

(ख) सचिव, गृह विभाग, उत्तर प्रदेश शासन–
सदस्य

(ग) महानिरीक्षक, कारागार प्रशासन एवं सुधार सेवायें, उ0प्र0– सदस्य सचिव

(घ) प्रमुख सचिव, न्याय एवं विधि परामर्थी, उत्तर प्रदेश शासन द्वारा नामित विशेष सचिव, न्याय एंव अपर विधि परामर्शी, उत्तर प्रदेश शासन–सदस्य

समिति द्वारा आजीवन कारावास की सजा से दण्डित सिद्वदोष बंदियों की समयपूर्व मुक्ति के सम्बन्ध में अपनी संस्तुति शासन को प्रत्येक वर्ष दिनांक 15 दिसम्बर तक प्रस्तुत की जायेगी और जिस पर यथा प्रकिया शासन द्वारा निर्णय लिया जा सकेगा।

9. उपरोक्त आदेशों के अन्तर्गत आजीवन कारावास की सजा से

दण्डित सिद्वदोष बंदियों को इस शर्त पर कारागार से मुक्त किया जायेगा कि वह विधि सम्मत आचरण बनाये रखने के लिये रूपया 50,000.00 (रू पचास हजार मात्र) से अनधिक धनराशि का एक निजी मुचलका अपनी मुक्ति से पूर्व संबंधित कारागार के वरिष्ठ अधीक्षक/अधीक्षक के समक्ष प्रस्तुत करेगें।

10. उपरोक्त आदेशों के अन्तर्गत यदि त्रुटिवश कोई ऐसा बंदी रिहा हो जाता है, जिसका अपराध राज्य सरकार की दृष्टि में ऐसी श्रेणी का है, जिसके लिये न्यायालय द्वारा दी गयी सजा उसे पूर्ण रूप से भुगतान चाहिये, तो शासन ऐसे बंदी की सजा में दी गयी छूट निरस्त कर शेष सजा भुगतने के लिये उसे पुनः कारागार में निरूद्व कर सकेगा।

भवदीय
अरविन्द कुमार
प्रमुख सचिव

17. The policy dated 1.8.2018 as indicated above, has been formulated, keeping in view the overcrowding of jails with life convicts, giving rise to not only issues relating to human rights but also creates a deep sense of frustration amongst the convicts which has a deleterious effect in adopting a reformist approach and in rehabilitation as highlighted by the NHRC and the Constitutional courts. Thus the object of the policy indeed is to release those life convicts who fall within the criteria / norms prescribed in the policy, provided they are not within the prohibited category. Once the State has formulated a policy for release of convicts under Section 433 as described in the policy dated 1.8.2018, it is always open for the State to either grant commutation to a class of convicts falling within a common denominator or to an individual on a case to case basis. In the considered opinion of the Court, life convict can only seek consideration for premature release in the light of Section 433 of the Code and the policy of the day. Thus even though power under Section 433 of the Code may be a discretionary / sovereign, yet once the State has conceived a policy to release convicts then it is obliged to consider a request for premature

release on the basis of the policy.

18. Clause – 2(B) of the policy provides that those life convicts who do not fall within the prohibited category as provided under Clause 3, would be considered for premature release, provided they have undergone incarceration of 16 years (without remission) and 20 years (with remission). The State is competent to prescribe a higher period of detention as what is prescribed under Section 433-A of the Code is the minimum. Doubt, if any, in this regard stands settled with the decision of the Apex court in **State of Rajasthan and Others vs. Mukesh Sharma (2019) 14 SCC 273** wherein it was held that the State is empowered to fix a period of detention over and above 14 years as provided under Section 433-A of the Code.

19. We revert to the policy and in particular to clause -3 thereof. One of the basis for rejection of the claim for release is alleged to be premised under Clause 3(xiv) which relates to professional killers who resort to contract killings and stand convicted for said offences.

20. We in the light of above backdrop examined the entire records and do not find any conviction of the petitioner as a hired assassin for contract killing as it is alleged by the petitioner in his amendment application dated 1.2.2021 that out of 4 murder cases registered against him, he stands convicted in S.T. No.142/1998, arising out of Case Crime No.1311/1997 on the premise that murders of two deceased were committed in broad day light in view of previous enmity, in which he undisputedly has undergone incarceration for more than 17 years; in Case Crime No.1539/2006; he is enlisted as witness of charge-sheet and in other two cases i.e. 796/2005 and

670/2013, he stands acquitted with no appeal either by the State or by the victim. The application/affidavit dated 01.02.2021 stands unrebutted.

21. The alleged second ground for rejection is of apprehension of threat by the family of the victim in the event of the release of the petitioner. We reject this plea for the reason that neither this plea is enlisted as a prohibition under Clause 3 of the policy from consideration under Section 433 of the Code and rightly so as otherwise it would become a convenient ploy for the family of the victim to defeat the claim for release of the convict under Section 433 of the Code in every case. We have the advantage of the entire original records before us and do not find any material to indicate that while the petitioner was on bail he ever threatened the family of the victim with dire consequences.

SCOPE OF JUDICIAL REVIEW

22. The Apex Court in **Epuru Sudhakar vs. Government of Andhra Pradesh (2006) 8 SCC 161** reiterated in **State of U.P. vs. Sanjay Kumar (2012) 8 SCC 537** has held as under:

> **"The position, therefore, is undeniable that judicial review of the order of the President or the Governor under Article 72 or Article 161, as the case may be, is available and their orders can be impugned on the following grounds:**
>
> **(a) that the order has been passed without application of mind;**
>
> **(b) that the order is mala fide;**
>
> **(c) that the order has been passed on extraneous or wholly irrelevant considerations;**
>
> **(d) that relevant materials have been kept out of consideration;**
>
> **(e) that the order suffers from arbitrariness"**

23. A perusal of the same would reflect that an order under Articles 72 & 161 of the Constitution being a sovereign power of pardon are open to judicial review on parameters such as non-application of mind, malafides, extraneous and wholly irrelevant consideration, relevant materials kept out of consideration and arbitrariness, etc. There is no justifiable reason as to why an order under Section 433 of the Code be also not circumscribed for judicial review to same limits.

ALLEGATIONS OF MALAFIDES

24. It is well established that malafides can be tested on twin considerations i.e. malice in fact or malice in law as propounded by the Apex Court in **Rajneesh Khajuria vs. M/s Wockhardt Limited and Another, (2020) 3 SCC 86.** We at the cost of repetition reiterate that after going through the original records, we find that there were letters of the family of victim dated 23.12.2020 and 28.12.2020, expressing apprehensions of life threats as communicated by the District Magistrate, Gorakhpur in his communication dated 26.1.2021 to the State Government. We cannot examine as to how and under what circumstances, these letters were obtained and brought on record. We, therefore, proceed on the premise that the aforesaid letters were already on record prior to the passing of the impugned order dated 29.1.2021. Thus the plea of the petitioner that the said letters were surreptitiously brought on record in order to reject the premature release of the petitioner malafidely, is liable to be repelled. The competent authority while considering the premature release of the petitioner, was statutorily obliged to consider the issue within the prescribed parameters of the policy dated 1.8.2018. The competent authority rejected the claim under the impugned order on

absolutely non-existent grounds displaying absolute non-application of mind which cannot be countenanced in law.

BRIEF RESUME OF THE CITATIONS RELIED BY THE LEARNED ADDL. A.G.

25. **Maru Ram vs. Union of India, (1981) 1 SCC 107** was a case where constitutional validity of Section 433-A of the Code was held to be valid which is not in issue in the present case. In ***Sanaboina Satyanarayana vs. Government of Andhra Pradesh and others, (2003) 10 SCC 78,*** the Apex Court upheld the classification under a remission policy, not extending the benefit of remission of sentence of life convicts for crime against woman and that power to grant remission under Article 161 is a discretionary power which is not disputed but once the State in its wisdom has formulated a policy as to in what class of cases the benefit of premature release is to be given or not, the State has to evaluate either as a class or on a case to case basis, in the light of the policy of the day. ***Swami Shraddananda @ Murali Manohar Mishra vs. State of Karnataka, (2008) 13 SCC 767*** was a matter where the Apex Court held that death can be commuted to life and that punishment for life means the rest of prisoners life, which has no relevance in the present case. ***Krishnan and others vs. State of Harayana and Others, (2013) 14 SCC 24*** is a reference order holding that no suspension / remission / commutation under the NDPS Act. ***Pyare Lal vs. State of Haryana, (2020) 8 SCC 680*** is also a referring order, holding that Section 433-A does not control the sovereign power and also enumerates the ground of challenge to an order under Articles 72 & 161. ***Rajan vs. Home Secretary, Home Department of Tamil Nadu and others, (2019) 14 SCC 114*** is

an authority for the proposition that power of remission is of the State and not of the Court which we do not dispute.

26. A Constitution Bench of the Apex Court in ***Union of India vs. V. Sriharan @ Murugan and others, (2016) 7 SCC 1*** commonly known as Rajiv Gandhi assassination case, inter alia held as under:-

> **259. The convict undergoing the life imprisonment can always apply to the authority concerned for obtaining remission either under Articles 72 or 161 of the Constitution or under Section 432 Cr.P.C. and the authority would be obliged to consider the same reasonably. This was settled in *Godse* which view has since then been followed consistently in State of Haryana v. Mahender Singh (supra), State of Haryana Vs. Jagdish (supra), Sangeet Vs. State of Haryana (supra) and Laxman Naskar Vs. Union of India and others. The right to apply and invoke the powers under these provisions does not mean that he can claim such benefit as a matter of right based on any arithmetical calculation as ruled in *Godse*. All that he can claim is a right that his case be considered. The decision whether remissions be granted or not is entirely left to the discretion of the concerned authorities, which discretion ought to be exercised in a manner known to law. The convict only has right to apply to competent authority and have his case considered in a fair and reasonable manner.**
>
> (emphasis supplied)

27. Based on above proposition, the contention of the learned Addl. A.G. was that at the end of the day, a convict is only entitled to a right of consideration for pre-mature release either under Article 72 & 161 of the Constitution or under Sections 432/433 of the Code.

28. We do not dispute the above contention but with a

firm caveat that such discretion must be exercised in a fair and reasonable manner. Once the State in its wisdom has framed a policy to confer the benefit of premature release to either a class of convicts or an individual convict, provided their cases do not fall within the prescribed prohibited category as laid in the policy, then it is expected of the State to consider such cases in a manner known to law within the prescribed parameters. Consideration of premature release of a convict must be in a reasonable and fair manner. Such consideration is not beyond pale of judicial challenge and it is open to judicial review within the permissible limits. We further wish to add that what has been said in Paragraph-259 of the above judgement, would not and cannot mean that premature release of a convict be considered on wholly irrelevant consideration rather it must always be considered in a reasonable and fair manner known to law.

29. We, in the light of above discussion, are of the considered view that the impugned order dated 29.1.2021 has been passed mechanically, without any application of mind on irrelevant considerations, which is liable to be set aside.

30. The writ petition is **allowed**. The order dated 29.1.2021 is set aside/quashed. The matter is remanded to the Competent Authority to consider the release of the petitioner afresh under Section 433 of the Code, in the light of the above observations, in accordance with law, positively within a month.

Pending applications stand **disposed of** accordingly.

We, before parting, have noticed a glaring discrepancy in sub-clause (I) of Clause-3 of the policy dated 1.8.2018 which prohibits the consideration of premature release, if the same is

not accompanied by any application / request while Section 433 of the Code does not lay down any such embargo, rather the State is obliged to consider the premature release without the consent of the convict. The said condition is in teeth of the statute. We could have quashed the said condition but as the same was neither noticed by us nor was an issue involved, we deem appropriate to direct the State Government to consider the deletion of the said condition.

We direct the Bench Secretary to seal the envelop containing the original records. He is further directed to hand over the sealed original records to the Registrar General personally and obtain endorsement of receipt on the order sheet. The Registrar General is further directed to open the seal and hand over the original records to Sri A.K. Sand, the learned A.G.A, personally or to any other duly authorized person, with a letter of authorization to be submitted before the Registrar General.

This order is digitally signed by us. The office is directed to keep a copy of this order on record.

Order Date: 19.4.2021
Chandra/ N.S. Rathour

Justice Vivek Agarwal
Digitally signed by Justice Vivek Agarwal
Date: 2021.04.19 14:17:17 +05'30'

Justice Pankaj Naqvi
Digitally signed by Justice Pankaj Naqvi
Date: 2021.04.19 14:17:59 +05'30'