

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.KEMAL PASHA

THURSDAY, THE 10TH DAY OF DECEMBER 2015/19TH AGRAHAYANA, 1937

WP(C).No. 9626 of 2015 (C)

PETITIONER(S):

**GEORGEKUTTY Y., AGED 46 YEARS,
S/O. YOHANNAN, AG HOUSE, KURICHILUVILA,
MALAYALAM P.O., THIRUVANANTHAPURAM, PIN - 695 571.**

BY ADV. SRI.M.REVIKRISHNAN

RESPONDENT(S):

- 1. STATE OF KERALA,
REPRESENTED BY PRINCIPAL SECRETARY TO GOVERNMENT,
HOME & VIGILANCE DEPARTMENT, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM - 695 001.**
- 2. DAVID LALY, AGED ABOUT 57 YEARS,
S/O.DAVID, CHERUVILA VEEDU, VIZHAVOOR,
MALAYAM P.O., MALAYAMKEEZHU,
THIRUVANANTHAPURAM, NOW RESIDING AT AF2-71, 6TH BLOCK,
VASANTH NAGAR, KALOOR, KOCHI - 682 017.**

R2 BY ADVS. SRI.MK.DAMODARAN (SR)

SRI.GRACIOUS KURIAKOSE (SR)

SRI.V.V.NANDAGOPAL NAMBIAR

R1 BY SRI.ASAF ALI, DIRECTOR GENERAL OF PROSECUTION

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
10-12-2015, ALONG WITH WPC. 7468/2015 & WPC. 25001/2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

msv/

APPENDIX

PETITIONER(S)' EXHIBITS

EXHIBIT P1 TRUE COPY OF THE JUDGMENT DATED 23-01-1990 IN C.C NO 130 OF 1988 OF THE COURT OF THE JUDICIAL MAGISTRATE OF THE FIRST CLASS, NEYYATTINKARA

EXHIBIT P2 TRUE COPY OF THE JUDGMENT DATED 02-02-1991 IN CRIMINAL APPEAL NO 43 OF 1990 PASSED BY THE COURT OF THE FIRST ADDITIONAL SESSIONS JUDGE, THIRUVANANTHAPURAM

EXHIBIT P3 TRUE COPY OF THE JUDGMENT DATED 07-04-1994 IN CRIMINAL R.P. NO 821 OF 1991 PASSED BY THIS HONOURABLE COURT

EXHIBIT P4 TRUE COPY OF THE ORDER DATED 04-10-2012 IN REVIEW PETITION (CRL) NO 353 OF 2012 IN SPECIAL LEAVE PETITION (CRL) NO 10048 OF 2011 PASSED BY THE HONOURABLE SUPREME COURT

EXHIBIT P5 TRUE COPY OF THE REPRESENTATION DATED 01-07-2013 SUBMITTED BY THE 2ND RESPONDENT BEFORE THE 1ST RESPONDENT UNDER SECTION 433 CR.P.C.

EXHIBIT P6 TRUE COPY OF THE G.O. (RT) NO 1591/2014/HOME DATED 09-06-2014 ISSUED BY THE 1ST RESPONDENT GOVERNMENT

EXHIBIT P7 TRUE COPY OF THE JUDGMENT DATED 23-12-2014 IN WPC (CRL) NO 520 OF 2014 OF THIS HONOURABLE COURT.

EXHIBIT P8 TRUE COPY OF THE FORWARDING LETTER NO.65963/B1/2013/HOME DTD.5.7.2013, ISSUED BY THE 1ST RESPONDENT TO THE DISTRICT POLICE CHIEF OF TRIVANDRUM (RURAL) AND ERNAKULAM CITY.

EXHIBIT P9 TRUE COPY OF THE LETTER NO.1075/GL/DCRB/13 EC DTD.1.8.2013 ISSUED BY THE DISTRICT POLICE CHIEF, KOCHI CITY.

EXHIBIT P10 TRUE COPY OF THE LETTER NO.G3(D)/26439/2013 T DTD.8.10.2013 OF THE DISTRICT POLICE CHIEF, TRIVANDRUM ISSUED TO THE 1ST RESPONDENT GOVERNMENT ALONG WITH THE REPORT OF THE DEPUTY SUPERINTENDENT, NEDUMANGAD AND REPORT OF SUB INSPECTOR OF POLICE, KATTAKADA.

EXHIBIT P11 TRUE COPY OF THE LETTER NO.65983/B1/2013/HOME DTD.16.11.2013 ISSUED BY THE 1ST RESPONDENT TO THE DISTRICT POLICE CHIEF, TRIVANDRUM (RURAL).

EXHIBIT P12 TRUE COPY OF THE LETTER NO.G3(d)-26439/2013 T DTD.3.4.2014 SUBMITTED BY THE DISTRICT POLICE CHIEF THIRUVANANTHAPURAM (RURAL), TO THE 1ST RESPONDENT GOVERNMENT.

Msv/

WP(C).No. 9626 of 2015 (C)

**EXHIBIT P13 TRUE COPY OF THE RPORT NO.2355/2013 DTD.5.12.2013 SUBMITTED BY
THE VILLAGE OFFICER VILAVOORKAL TO THE DEPUTY
SUPERINTENDENT OF POLICE NEDUMANGAD.**

**EXHIBIT P14 TRUE COPY OF THE REPORT OF THE PRISON MEDICAL BOARD,
MEDICAL COLLEGE HOSPITAL, THIRUVANNATHAPURAM.**

**EXHIBIT P15 TRUE COPY OF THE ADMINISTRATIVE NOTES OF THE HOME (B)
DEPARTMENT IN FILE NO.65963/B1/13/HOME IN RESPECT OF THE
REQUEST FOR COMMUTATION OF SENTENCE OF THE 2ND
RESPONDENT.**

**EXHIBIT P16 TRUE COPY OF THE NON-BAILABLE WARRANT ISSUED BY THE COURT
OF THE JUDICIAL MAGISTRATE OF THE FIRST CLASS, LUDHIANA
AGAINST THE 2ND RESPONDENT IN A CASE AGAINST HIM.**

RESPONDENT(S)' EXHIBITS:

EXT.R2(a): A TRUE COPY OF THE ORDER IN WA.NO.1543/2015 DTD.17.7.2015.

CMA.NO.5913/2015 IN WP(C) 9626/2015

EXT.R2(a): TRUE COPY OF THE JUDGMENT DTD.13.8.2015 IN WP(C) NO.22553/2015

//TRUE COPY//

P.S.TO JUDGE

Msv/

[CR]

B. KEMAL PASHA, J.

.....
W.P.(C) Nos.9626, 25001 & 7468 of 2015
.....

Dated this the 10th day of December, 2015

J U D G M E N T

Ext.P6 order dated 09.06.2014 in W.P.(C) No.9626 of 2015, issued by the Government of Kerala, which is subsequently corrected through order dated 12.11.2014, is under challenge in these writ petitions. W.P.(C) No.9626 of 2015 is treated as the main case. The petitioner in W.P.(C) No.9626/2015 is the de facto complainant/injured in C.C.No.130/1988 of the Judicial First Class Magistrate's Court, Neyyattinkara.

2. The 2nd respondent in W.P.(C) No.9626/2015, who was the accused in C.C.No.130/1988 of the Judicial First Class Magistrate's Court, Neyyattinkara, for the offence

punishable under Section 326 IPC, was convicted by the said court. A sentence of rigorous imprisonment for two years and to pay a fine of ₹1,000/-, in default, to undergo rigorous imprisonment for three more months, was imposed, through Ext.P1 judgment produced in W.P.(C) No.9626/2015. Challenging the conviction and sentence, the accused preferred Criminal Appeal No.43 of 1990 before the Sessions Court, Thiruvananthapuram. The 1st Additional Sessions Court, Thiruvananthapuram, to which it was made over, dismissed the same through Ext.P2, thereby confirming the conviction and sentence passed by the trial court. Challenging the appellate judgment, the 2nd respondent herein preferred Crl.R.P. No.821 of 1991 before this Court. Vide Ext.P3 judgment, this Court confirmed the conviction and the substantive sentence of imprisonment for two years imposed by the trial court, which was confirmed by the appellate court. This Court has set aside the sentence of fine and the consequent default sentence.

3. Thereafter, for 17 years, the 2nd respondent kept mum and was roaming around. After 17 years, SLP No.10048/2011 was preferred by the 2nd respondent before the Apex Court. The said SLP was dismissed. Thereafter, he preferred a Review Petition before the Apex Court and the same was dismissed through Ext.P4 order dated 04.10.2012. While dismissing the Review Petition, the Apex Court has made the following observations: *“In the entire Review Petition, the petitioner has not expressed any desire to surrender even now. In the circumstances, no ground is made out for review of the said order”*.

4. There was even a delay of 204 days in filing the Review Petition. The Review Petition was dismissed on the ground of delay as well as on merits, as is evident from Ext.P4. Thereafter, wisdom prevailed upon the 2nd respondent to have recourse to file an application for getting the powers of the Government exercised under Section 433 Cr.P.C., for which he filed Ext.P5 application on 01.07.2013.

After filing the said application, the petitioner/2nd respondent rushed to this Court by filing CrI.M.C. No.3142/2013, seeking an order to get all the coercive steps against him stayed during the pendency of Ext.P5 application. On coming to know about it, the petitioner in W.P.(C) No.9626/2015 got himself impleaded in it. Realising the consequences, the said CrI.M.C. was withdrawn. As such, there is no order of stay in respect of any coercive steps against the 2nd respondent. Through Ext.P6 order, the Government has chosen to exercise the powers conferred on it under Section 433(c) Cr.P.C. Even though Ext.P6 order shows that the Government has exercised the power under Section 433(d) Cr.P.C., the same has not been corrected so far.

5. Heard the learned counsel for the petitioners Sri.M.Revikrishnan, Sri.Nagaraj Narayanan and Sri.K.G.Muralidharan Unnithan, the learned Director General of Prosecutions Sri.Asaf Ali for the 1st respondent

and the learned Senior Counsel Sri.M.K. Damodaran for the 2nd respondent.

6. Relying on the decision in ***Mohammed Ishaq v. S. Kazam Pasha and another*** [(2009) 12 SCC 748], the learned counsel for the petitioner Sri.Revikrishnan has argued that Ext.P6 has to be subjected to judicial review in a case like this. The learned counsel for the petitioners have taken the view that through Ext.P6, the Governor has exercised the powers conferred under Article 161 of the Constitution of India and in such case, the Governor should have obtained the specific advice of the Council of Ministers. It is also argued that the power has been exercised in the matter by the Government in an arbitrary manner, without considering the relevant materials, and by considering irrelevant materials and, therefore, the said order is liable to be quashed. Petitioners are not challenging the powers conferred on the Governor under Article 161 of the Constitution of India or the powers of the

appropriate Government under Section 433 Cr.P.C. in commuting the sentence. At the same time, what is under challenge is the inappropriate, illegal and arbitrary exercise of power by the Government.

7. *Per contra*, the learned Senior Counsel Sri.M.K. Damodaran has argued that the scope of judicial review is very limited in cases like this. It is argued that the scope of judicial review is very limited in cases falling under Article 161 of the Constitution of India as well as Section 433 Cr.P.C. It is further argued that in cases falling under Section 433 Cr.P.C., any recommendation of the Council of Ministers is not required; whereas the recommendation of the Chief Minister of the State or the concerned Minister is sufficient. It is also argued that it was on adequate grounds that the Government has chosen to commute the sentence imposed on the 2nd respondent.

8. The learned Director General of Prosecutions Sri.Asaf Ali has argued that this is not a case wherein the

Governor has exercised the powers conferred on the Governor under Article 161 of the Constitution of India; whereas the power has been exercised by the appropriate Government under Section 433 Cr.P.C. and, therefore, it is independent of the powers conferred on the Governor under Article 161 of the Constitution of India, even though the order has been issued in the name of the Governor.

9. The position of law, that judicial review is possible even in cases wherein the powers are exercised by the President of India under Article 72 and the Governor under Article 161 of the Constitution of India, is well settled through the three Constitution Bench decisions of the Apex Court. The celebrated decision on the subject is ***Maru Ram v. Union of India*** [(1981) 1 SCC 107]. In paragraph 65 of **Maru Ram**(*supra*), **V.R. Krishna Iyer, J.** had observed:

“Political vendetta or party favouratism cannot but be interlopers in this area. The order which is the product of extraneous

or mala fide factors will vitiate the exercise. While constitutional power is beyond challenge, its actual exercise may still be vulnerable. Likewise, capricious criteria will void the exercise. For example, if the Chief Minister of a State releases every one in the prisons in his State on his birthday or because a son has been born to him, it will be an outrage on the Constitution to let such madness survive. We make these observations because it has been brought to our notice that a certain Home Minister's visit to a Central Jail was considered so auspicious an omen that all the prisoners in the jail were given substantial remissions solely for this reason. Strangely enough, this propitious circumstance was discovered an year later and remission order was issued long after the Minister graced the penitentiary. The actual order passed on July 18, 1978 by the Haryana Government reads thus: "In exercise of the powers conferred under Article 161, the Constitution of India, the

Governor of Haryana grants special remissions on the same scale and terms as mentioned in Government of India, Ministry of Home Affairs letter No. U. 13034/59/77 dated June 10, 1977 to prisoners who happened to be confined in Central Jail, Tihar, New Delhi on May 29, 1977, at the time of the visit of Home Minister, Government of India, to the said Jail and who have been convicted by the Civil Courts of Criminal Jurisdiction in Haryana State.

A. BANERJEE Secretary to Govt. of Haryana Jails Department Dated: Chandigarh, the 18th July, 1978."

Push this logic a little further and the absurdity will be obvious. No Constitutional power can be vulgarised by personal vanity of men in authority. Likewise, if an opposition leader is sentenced, but the circumstances cry for remission such as that he is suffering from cancer or that his wife is terminally ill or that he has completely reformed himself,

the power of remission under Articles 72/161 may ordinarily be exercised and a refusal may be wrong-headed. If, on the other hand, a brutal murderer, bloodthirsty in his massacre, has been sentenced by a court with strong observations about his bestiality, it may be arrogant and irrelevant abuse of power to remit his entire life sentence the very next day after the conviction merely because he has joined the party in power or is a close relation of a political high-up. The court, if it finds frequent misuse of this power may have to investigate the discrimination. The proper thing to do, if Government is to keep faith with the founding fathers, is to make rules for its own guidance in the exercise of the pardon power keeping, of course, a large residuary power to meet special situations or sudden developments. This will exclude the vice of discrimination such as may arise where two persons have been convicted and sentenced in the same case for the same degree of guilt but one is

released and the other refused, for such irrelevant reasons as religion, caste, colour or political loyalty.”

10. The crux of the matter from the aforesaid observation is that Constitutional power vested with the authorities to exercise such power is beyond challenge. At the same time, the manner in which such power has been exercised can be subjected to judicial review, in a case wherein its exercise is vulnerable.

11. The learned Senior Counsel Sri.M.K. Damodaran has pointed out that the scope of judicial review has been explained in paragraph 72, under items (4), (8) and (9) of **Maru Ram**(*supra*), which says:

“(4) We hold that Section 432 and Section 433 are not a manifestation of Articles 72 and 161 of the Constitution but a separate, though similar power, and Section 433-A, by nullifying wholly or partially these prior provisions does not violate or detract from the full operation of the constitutional

power to pardon, commute and the like.

(8) The power under Articles 72 and 161 of the Constitution can be exercised by the Central and State Governments, not by the President or Governor on their own. The advice of the appropriate Government binds the Head of the State. No separate order for each individual case is necessary but any general order made must be clear enough to identify the group of cases and indicate the application of mind to the whole group.

(9) Considerations for exercise of power under Articles 72/161 may be myriad and their occasions protean, and are left to the appropriate Government, but no consideration nor occasion can be wholly irrelevant, irrational, discriminatory or mala fide. Only in these rare cases will the court examine the exercise.”

12. It is evident that in cases wherein such powers are exercised even by the President of India or the Governor, as the case may be, by considering irrelevant

matters in an irrational, discriminatory or *mala fide* manner, such action can be subjected to judicial review.

13. In ***Mohammed Ishaq*** (*supra*), the Apex Court has relied on ***Epuru Sudhakar v. Government of A.P.*** [(2006) 8 SCC 161], wherein it was held:

“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.

Granting of pardon is in no sense an overturning of a judgment of conviction, but rather it is an executive action that mitigates or sets aside the punishment for a crime. It eliminates the effect of conviction without addressing the defendant's guilt or innocence. The controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject-matter. It can no longer be said that prerogative power is ipso facto immune from judicial review. An undue [and unjustified] exercise of this power is to be deplored. Considerations of religion, caste or political loyalty are irrelevant and fraught with discrimination. These are prohibited grounds. The rule of law is the basis for evaluation of all decisions. The supreme quality of the rule of law is fairness and legal certainty. The principle of legality occupies a central place in the rule of law. Every prerogative has to be subject to the rule of law. That rule cannot

be compromised on the grounds of political expediency. To go by such considerations would be subversive of the fundamental principles of the rule of law and it would amount to setting a dangerous precedent. The rule of law principle comprises a requirement of 'Government according to law'. The ethos of 'Government according to law' requires the prerogative to be exercised in a manner which is consistent with the basic principle of fairness and certainty. Therefore, the power of executive clemency is not only for the benefit of the convict, but while exercising such a power the President or the Governor, as the case may be, has to keep in mind the effect of his decision on the family of the victims, the society as a whole and the precedent it sets for the future."

14. It was held that the ethos of 'Government according to law' requires the prerogative to be exercised in a manner which is consistent with the basic principle of

fairness and certainty. Therefore, the appropriate Government, which is exercising such a power conferred on the Government under Section 433 Cr.P.C., has to exercise such a prerogative in a manner which is consistent with the basic principle of fairness and certainty.

15. In ***Kehar Singh and another v. Union of India and another*** [(1989) 1 SCC 204], it was concluded that the power of the President under Article 72 of the Constitution cannot be subjected to judicial review on its merits, except within the parameters defined in ***Maru Ram*** (*supra*). In paragraph 14 of ***Kehar Singh*** (*supra*), it was held that-

“Upon the considerations to which we have adverted, it appears to us clear that the question as to the area of the President's power under Article 72 falls squarely within the judicial domain and can be examined by the court by way of judicial review.”

16. Another Constitution Bench in ***Bikas Chatterjee v.***

Union of India and others [(2004) 7 SCC 634] reiterated the principles in **Maru Ram** (*supra*) as well as **Satpal v. State of Haryana** [(2000) 5 SCC 170] and held in paragraph 9 that-

*“In a Division Bench decision of this Court in **Satpal v. State of Haryana** these very grounds have been restated as: (i) the Governor exercising the power under Article 161 himself without being advised by the Government; or (ii) the Governor transgressing his jurisdiction; or (iii) the Governor passing the order without application of mind; or (iv) the Governor's decision is based on some extraneous consideration; or (v) malafides. It is on these grounds that the Court may exercise its power of judicial review in relation to an order of the Governor under Article 161, or an order of the President under Article 72 of the Constitution, as the case may be.”*

17. In **Bikas Chatterjee** (*supra*), it was held that while

exercising the power of judicial review, the court shall keep in mind that where a power is vested in a very high authority, it must be presumed that the said authority would act properly and carefully after an objective consideration of all the aspects of the matter and further, the higher the power the more cautious would be its exercise.

18. What has to be examined at present is whether the power exercised by the Government in issuing Ext.P6 order in the name of the Governor can be considered as the exercise of power conferred on the Governor under Article 161 of the Constitution of India or it is merely as a result of the exercise of power by the appropriate Government under Section 433 Cr.P.C. In ***Ramachandran Nair C.S. and others v G.Balachandran and others*** [2011 (1) KLT 791], a Division Bench of this Court had occasion to consider whether the power exercised by the Government under Section 432 Cr.P.C. and the passing of an order therein in the name of the Governor could be considered as the

exercise of power by the Governor under Article 161 of the Constitution of India. Overruling the decision rendered by the learned Single Judge, the Division Bench held in ***Ramachandran Nair (supra)***, that such an exercise of power by the appropriate Government under Section 432 Cr.P.C., even when such an order is issued in the name of the Governor, is not the exercise of power of the Governor under Article 161 of the Constitution of India. It was held that such an exercise of power was only the result of Article 166 of the Constitution.

19. As per Article 166(1) of the Constitution, all executive action of the Government of a State shall be expressed to be taken in the name of the Governor. Even when there is an executive action, all such executive action of the Government of a State shall only be expressed to be taken in the name of the Governor. Therefore, when an order under Section 432 Cr.P.C. or Section 433 Cr.P.C. is issued in the name of the Governor, it cannot be said that

the Governor was called upon to exercise the powers conferred under Article 161 of the Constitution of India, whereas such a power was exercised in the name of the Governor as an expression by the Governor under Article 166(1) of the Constitution of India.

20. When the power has been exercised by the Government under Section 433 Cr.P.C. and the consequent order has been passed in the name of the Governor, it is independent of the powers conferred on the Governor under Article 161 of the Constitution of India. In such case, the scope of judicial review is wider than in the case of Article 72 as well as Article 161 of the Constitution of India. At the same time, when a power is conferred, the conferment of such power or its validity cannot be subjected to judicial review. When such exercise of power is vulnerable and it reflects arbitrariness, consideration of irrelevant materials, non consideration of relevant materials, etc., the scope of judicial review is wide.

21. The learned counsel for the petitioners have pointed out that the only ground relied on by the Government in Ext.P6 to commute the sentence as one of fine of ₹1 lakh, is that the incident had occurred 26 years back and *'if he is asked to surrender for an incident that happened 26 years back, due to the health conditions, he cannot withstand the detention at this stage, and if he is detained, his life will be at danger taking into account of the diseases that he suffer'*. On going through Ext.P6, it seems that the main ground on which the Government has chosen to commute the sentence is that the incident had occurred 26 years back. Here, it is pertinent to note the question posed by the learned counsel for the petitioner Sri.M.Revikrishnan that, is it the law that the sentence on an accused, who is a fugitive to law, who could manage to move scot free for a long period of 26 years, be commuted? The said lapse of 26 years had occurred not due to any of the acts of the prosecution, the court or the defacto

complainant. At the same time, the reason for the said delay can clearly be attributable to the 2nd respondent alone and none else.

22. To the above point, the contention resorted to by the 2nd respondent is that for 17 years, he was not made known about the order passed by this Court in the Criminal Revision. Is it the duty of the Court to approach the 2nd respondent and to inform him that his Revision was dismissed? No person of commonsense or ordinary prudence can digest such a contention. The 2nd respondent is not expected to explain the delay of 17 years in the matter by pointing out such an aspect, which is not palatable to judicial sense. Therefore, when the delay of 26 years is attributable to the 2nd respondent alone, he cannot be permitted to encash it for getting the power of commutation exercised in his favour.

23. The next aspect is whether the 2nd respondent is suffering from ill health and other diseases like Diabetes,

Sick Sinus Syndrome and Coronary Artery disease, rendering him incapable of undergoing the sentence? True that the 2nd respondent could procure a certificate in his favour as Ext.P14 from the Prison Medical Board. Under what authority he was referred to the Prison Medical Board is not discernible from the records. Whatever it is, it is a fact that he was advised by the Medical Board to avoid all strenuous activities by finding that he is suffering from Type 2 DM, Coronary Artery Disease, FCII effort angina, and sick sinus syndrome.

24. The learned counsel for the petitioner has invited the attention of this Court to Ext.P7 judgment passed by a Division Bench of this Court in W.P.(Crl.) No.520/2014. It was a matter wherein the son of the 2nd respondent herein had chosen to approach this Court for a writ of Habeas Corpus alleging that the 2nd respondent was remaining as a detainee under the illegal custody of another woman. On 23.12.2014, the so-called detainee appeared in person

before the Division Bench of this Court and submitted that he was a free agent and that he was not in illegal confinement or custody. He also submitted that he was busy with the conduct of 'Grand Kerala Shopping Festival' and on account of his commitments, he was forced to travel frequently all over Kerala. I am reminded of that the Prison Medical Board, which issued Ext.P14, was convened on 24.02.2014.

25. Can a person, who cannot do any strenuous work on account of the alleged Sick Sinus Syndrome and Coronary Artery disease etc., travel frequently all over Kerala to canvas for the 'Grand Kerala Shopping Festival', is a question that has to be considered. Such a question has not been considered by the Government while passing Ext.P6 order. Can it be said that the Government was not aware of such a circumstance? When the Government has machinery like police, intelligence etc., the Government cannot be heard to say that they could not get any such

information.

26. Over and above the aforesaid aspects, the learned counsel for the petitioners have pointed out that the 2nd respondent has a series of criminal antecedents. The details of such evidence are furnished as Exts.P9 to P13 in W.P.(C) No.25001/2015. This Court is not expressing any opinion on those matters. At the same time, this Court has taken note of the repeated reports filed by various police personnel before the Government that the 2nd respondent had no criminal antecedents or he was not involved in any other criminal case. Those matters were also not considered by the Government.

27. The learned Senior Counsel for the 2nd respondent has pointed out that all those cases were settled. The learned counsel for the petitioners have pointed out that the said submission is not correct and in a case wherein the 2nd respondent was convicted and sentenced for the offence under Section 138 of the NI Act, even this Court had

occasion to pass Ext.P13 judgment whereby his conviction was confirmed and the sentence was modified.

28. The learned Director General of Prosecutions Sri.Asaf Ali has invited the attention of this Court to the decision in ***Epuru Sudhakar*** (supra), wherein it was held in paragraph 56 that-

“It appears that in the petition filed by respondent No.3 there is no mention about pendency of a Criminal Case No.411 of 2000. Learned Counsel for the respondent No.1 State submitted that though this fact not mentioned by the respondent No.3 in the petition yet the State Government considered the effect of the pendency of that petition. This certainly is a serious matter because a person who seeks exercise of highly discretionary power of a high constitutional authority, has to show bona fides and must place materials with clean hands.”

It was further held in paragraph 58 that-

“The order granting remission which is impugned in the petitions is clearly unsustainable and is set aside. However, it is open to the respondent No.1 to treat the petition as a pending one for the purpose of reconsideration. It shall be open to the Governor to take note of material placed before him by the functionaries of the State, and also to make such enquiries as considered necessary and relevant for the purpose of ascertaining the relevant factors otherwise. The writ petitions are allowed to the extent indicated above. No costs.”

29. The function of determining whether the act of a constitutional or statutory functioning falls within the constitutional or legislative conferment of power, or is vitiated by self-denial on an erroneous appreciation of the full amplitude of the power, is a matter for the court to determine. In such case, the intervention of the court by way of judicial review is called for.

30. In ***Mohammed Ishaq*** (*supra*), it was held that-

“There is no denial of the fact that while making request for commutation of sentence, A-1 has not made any reference to the effect that he was in fact absconding for about 4 months before his surrender. He was fugitive to law for four months. The records clearly show that the High Court gave its decision on 29-1-2007, but A-1 surrendered before the Court of the First Additional Metropolitan Sessions Judge only on 16-4-2007.

None of the reports mentioned hereinabove took into consideration this vital aspect of the case that, even after imposition of sentence by the High Court, A-1 showed utter disregard to the rule of law by evading the arrest. Interestingly, A-1 is stated to have been drawing his salary during the aforesaid period when he was absconding which unmistakably shows his callous attitude towards rule of law.

The executive clemency may not be extended to a law disobeying citizen who did not surrender before the trial court as mandated by the law. This vital aspect has

been completely ignored by the Andhra Pradesh Government who without any application of mind accepted the reports submitted by different functionaries in undue haste and finished the entire exercise within a week from the date of request of commutation by A-1. In fact, the order of commutation is just reiteration of the identical reports submitted by different government authorities without any independent scrutiny.”

31. In ***Delhi Administration v. Manohar Lal*** [(2002) 7 SCC 222], it was held that-

“We are also of the view that even the appropriate Government may not, as a matter of routine course, indulge in exercise of such powers as its sweet will, pleasure and whim or fancy. As observed earlier, the powers conferred upon the appropriate Government under Section 433 Cr.P.C., have to be exercised in accordance with rules and established principles - reasonably and rationally, keeping in view the reasons

germane and relevant for the purpose of law under which the conviction and sentence has been imposed, commiserative facts necessitating the commutation, and the interests of the society and public interest. The exercise of any power vested by the statute in a public authority is to be always viewed as in trust, coupled with a duty to exercise the same in the larger public and societal interest, too. When the legislature concerned has chosen to mandate for the imposition of a minimum sentence in a given situation, the responsibility of the appropriate Government becomes all the more greater and power under Section 433 CrPC, may have to be exercised with great circumspection. Otherwise, the legislative will might become a mere dead letter at the whim of the executive.”

32. It is evident that in passing Ext.P6 order, the Government has not considered relevant materials. At the

same time, the Government has considered an irrelevant material that the incident had occurred 26 years back. Ext.P6 reflects absolute arbitrariness in exercising such a power. It is true that the Government has passed the said order mainly on the basis of the recommendation made by the then Law Secretary (not the present Law Secretary). It is a pity that a District Judge, who happened to be the Law Secretary, has given a blanket recommendation to the Government to commute the sentence, without going through the records properly.

33. As held in ***Epuru Sudhakar*** (*supra*), it is open to the Government to treat the matter even now as alive to take a proper decision in accordance with law on it. Ext.P6 is liable to be quashed as it reflects arbitrariness. The Government shall treat Ext.P5 as alive and shall take a decision on it in accordance with law and by taking into consideration the observations made above, and dispose of the same, as expeditiously as possible, at any rate, within a

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-: 32 :-

period of two months from the date of receipt of a copy of this judgment.

In the result, these writ petitions are allowed with the above observations. Ext.P6 in W.P.(C) No.9626/2015 is quashed.

Sd/- (B.KEMAL PASHA, JUDGE)

ul/aks/11/12

[True copy]

P.S. to Judge