

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL WRIT PETITION NO. 4845 OF 2015**

Ramprasad Gupta
Son of Vishwanath Gupta,
Age: 40 years, Occ: Practicing Advocate,
Having residential address as
87/B/601, Madhukunj Co-op. Housing Society Ltd.,
Opp: SKP High School, Mother Dairy Road,
Nehru Nagar, Kurla (East),
Mumbai – 400 024

...Petitioner

Versus

1. The State of Maharashtra
(Summons to be served upon the
Ld. Public Prosecutor appointed
u/s. 24 of the Code of Criminal Procedure, 1973)
2. Secretary,
Home Department,
Government of Maharashtra,
Mantralaya, Mumbai – 400 032
3. Superintendent of Prison,
Thane Central Prison,
Thane, Maharashtra
4. Dilip Sitaram Palande,
Age: 52 years, R/o:19/604,
Sanskriti CHS, Thakur Complex,
Kandivali (E), Mumbai
5. Nitin Gorakhnath Sartape,
Age: 48 years, R/o: U/14, Hanjur Nagar,
Pump House, Andheri (E), Mumbai

6. Ganesh Ankush Harpude,
Age: 51 years, R/o: 6/114,
Police Quarters,
D. N. Nagar, Andheri (W), Mumbai
7. Anand Balaji Patade,
Age: 41 years, R/o: Miskita House,
First Floor, Bajaj Road,
Vile Parle (W), Mumbai
8. Prakash Ganpat Kadam,
Age: 55 years, R/o: A-26,
Police Quarters, S. V. Road,
Kandivali, Mumbai
9. Devidas Gangaram Hari Sakpal,
Age: 47 years, R/o: 48/06,
Worli Police Camp, Mumbai 400 025
10. Pandurang Ganpat Kokam,
Age: 51 years R/o: E-2/5,
Mira Gaothan Mandir Road,
Gaodevi Compound, Mira Road,
Thane
11. Ratnakar Gautam Kamble,
Age: 40 years, R/o:E/103,
Bandra Police Line, R. K. Patkar Marg,
Bandra (W), Mumbai 400 050
12. Sandip Hemraj Sardar,
Age: 39 years, R/o: 131,
Building No. 4, Aram Nagar,
Police Quarters, Seven Bungalow,
Andheri (W), Mumbai

13. Tanaji Bhausahab Desai,
Age: 44 years, R/o:A/77,
Worli Police Camp,
Mumbai – 400 025

14. Vinayak Babasaheb Shinde,
Age: 41 years, R/o : Plot No. 2,
Gold Sunit Co-op. Housing Society,
Kalwa Naka, Opp. Akash Bar,
Kalwa Road, District-Thane

...Respondents

Mr. Yug M. Choudhary a/w Ms. Ragini Ahuja and Ms. Payoshi Roy i/b
Ms. Anjali Awasthi for the Petitioner

Mr. M. P. Rao, Sr. Counsel a/w Mr. A. D. Kamkhedkar, A.P.P for the
Respondent Nos.1 to 3-State

Mr. Amit Desai, Sr. Counsel a/w Mr. Bimal Bhabhda, Ms. Laxmi J. I/b M/s.
Apte & Co. for the Respondent Nos. 4 to 14

CORAM : B. P. DHARMADHIKARI &
REVATI MOHITE DERE, JJ.
RESERVED ON : 5th FEBRUARY 2019
PRONOUNCED ON : 6th MARCH 2019

JUDGMENT (Per Revati Mohite Dere, J.) :

1 By this petition, the petitioner has sought the following
reliefs :

“A] That, this Hon'ble Court be pleased to issue the Writ of Certiorari and or any other appropriate writ or order exercising powers under Article 226 of the Constitution of India, 1950 and inherent powers u/s 482 of Code of Criminal Procedure, 1973 for holding the impugned Government order bearing No. MIS-1315/PR-KR/454/15/TURUNG-3 dated 02.12.2015 issued by Deputy

Secretary of Home Department as illegal, null, void, perverse, bad-in-law and this Hon'ble Court be pleased to quash and set aside the same.

B] Pending the hearing and final disposal of this petition, this Hon'ble Court be pleased to stay the effect, implementation and operation of impugned Government Resolution No. MIS-1315/PR-KR/454/15/TURUNG-3 dated 02.12.2015 in all manners with further directions to the police authorities to ensure the imprisonment of all released 11 prisoners under above Government Order.”

2 On 21st December 2015, this Court, after hearing the parties, granted Rule and interim relief in terms of prayer clause (B), pending the final disposal of the petition. This Court vide the said order also directed the respondent Nos. 4 to 14 to surrender before the concerned jail authorities.

3 Before we set out and deal with the submissions advanced by the parties, it is necessary to set out in brief a few facts as are germane to decide this petition;

A] The petitioner's brother-Ramnarayan Vishwanath Gupta was abducted along with Anil Jethalal Bheda by the police belonging to the D.N. Nagar Police Station and Versova Police Station on 11th

November 2006. It is the prosecution case that while the petitioner's brother was murdered by shooting him at close range, Anil Bheda was released after a month. The police are alleged to have shown Ramnarayan's death as having taken place in an encounter, near Nana Nani Park, 7 Bungalow, Versova, Andheri, Mumbai, and accordingly, an FIR bearing C.R. No. 302 of 2006 was registered with the Versova Police Station as against deceased-Ramnarayan under Section 307 of the Indian Penal Code ('IPC').

B] Within a week of the alleged encounter, the petitioner herein, filed writ petition No. 2473 of 2006 in this Court and prayed that the police be directed to register an FIR as against the officers, who participated in the murder of his deceased brother and also sought transfer of the investigation to CBI, as it was a fake encounter. Since the National Human Rights Commission ('NHRC') had taken cognizance of the petitioner's complaint alleging fake encounter of his brother, this Court vide order dated 8th February 2007, adjourned the hearing of the petition, with a request to the NHRC to complete its inquiry/investigation at the earliest. Several orders were thereafter

passed by this Court for expediting the hearing i.e. the inquiry before the Executive Magistrate. This Court vide order dated 13th February 2008, after perusing the report dated 27th October 2007 submitted by the Executive Magistrate observed in para 1 as under :

“1. We are not at all satisfied with the report submitted by the Executive Magistrate as the report discloses failure on the part of the Executive Magistrate to inquire into the various relevant aspects of the matter including the proper examination of the guns allegedly used at the relevant time by the deceased as well as by the police personnels as also in relation to the complaint by the petitioner that the alleged encounter took place while the deceased was already in custody of the police, as well as regarding the allegation that the deceased was arrested by the police authorities prior to 4.00 p.m. on the relevant day.”

Accordingly, this Court being dissatisfied with the report, did not accept the same and instead directed the Chief Metropolitan Magistrate, Andheri, or any other Metropolitan Magistrate of the said Court, as may be specified by the Chief Metropolitan Magistrate, Andheri, to conduct necessary inquiry in exercise of its power under Section 176(1A) of the Code of Criminal Procedure (`Cr.P.C').

C] Accordingly, the Metropolitan Magistrate, conducted an

inquiry under Section 176 (1A) of Cr.P.C, as directed by this Court and submitted her report to this Court on 11th August 2008. In the said report, the Metropolitan Magistrate concluded that the petitioner's brother was abducted and then murdered and that the encounter had taken place whilst the deceased was in the custody of the police. It was further observed that there was strong circumstantial evidence on record to show that the police officers themselves had abducted the deceased, taken him to an unknown place, where he was done to death by firing and that all this had taken place whilst the deceased was in the custody of the police.

D] Pursuant to the said report, this Court vide order dated 13th August 2009, constituted a Special Investigation Team (SIT). On 20th August 2009, the petitioner's complaint/FIR was registered with the Versova Police Station vide C.R. No. 246 of 2009. After investigation, charge-sheet was filed as against 22 accused persons (including respondent Nos. 4 to 14) for the alleged offences punishable under Sections 120-B, 302, 364, 365, 201 of the IPC, besides other offences for abducting and committing the murder of

Ramnarayan Gupta alias Lakhanbhaiya. The respondent Nos. 4 to 14 along with other co-accused persons were tried for the said offences.

E] During the pendency of the Sessions Case, the learned Sessions Judge enlarged the respondent Nos. 6 to 10 on bail. The said order granting bail to the respondent Nos. 6 to 10 was challenged by the petitioner, before this Court vide Criminal Application Nos. 5283, 5284, 5285, 5303 and 5304 of 2010. This Court, vide order dated 21st January 2011, allowed the said applications and cancelled the bail granted by the Sessions Court to respondent Nos. 6 to 10, considering the overall facts of the case, as the case was an outcome of contract killing with the help of the police officials and other staff. The said order of this Court, cancelling the bail was challenged by the respondent Nos. 6 to 10 before the Apex Court. The Apex Court, vide order dated 13th May 2011, upheld the order of this Court and observed that the High Court was perfectly justified in cancelling the bail of the said accused.

F] Thereafter, the trial of the accused commenced, evidence was recorded and on conclusion of the trial, the learned Sessions

Judge (Mr. V. B. Jadhavar), vide judgment and order dated 12th July 2013, convicted 21 accused for the offences punishable under Sections 364, 365, 368, 302, 344, 201, 119 r/w 34, 120-B and 149 of the IPC and sentenced them to undergo imprisonment for life for the offences punishable under Sections 120-B r/w 364, 120-B r/w 302, 364 r/w 149, 302 r/w 34, 302 r/w 109 r/w 120-B of the IPC. Respondent Nos. 4 to 14 are amongst those 21 persons convicted by the learned Sessions Judge. The learned Sessions Judge was, however, pleased to acquit original accused No. 1-Pradip Sharma of all the offences. Pursuant to their conviction, all the accused, including respondent Nos. 4 to 14, preferred criminal appeals before this Court. The said appeals were admitted in 2013 and are pending final disposal.

G] Both, the petitioner and the State also challenged the acquittal of original accused Nos. 1-Pradip Sharma vide Criminal Appeal Nos. 854 of 2013 and 334 of 2015 respectively, in this Court. The said appeals preferred by the petitioner and the State were admitted by this Court and the same are also pending. The petitioner also sought enhancement of sentences of the convicted accused

(including respondent Nos. 4 to 14) by filing Criminal Revision Application No. 492 of 2013 and it is informed that the same is also pending before this Court.

It is a matter of record, that one of the respondents i.e. respondent No. 14-Vinayak Balasaheb Shinde had preferred an application seeking suspension of his sentence, being Criminal Application No. 14 of 2014 in Criminal Appeal No. 944 of 2013, in this Court, and that the said application was rejected vide order dated 8th August 2014. Respondent No. 14-Vinayak Shinde challenged the order rejecting his bail application in the Apex Court, however, the Apex Court refused to interfere in the said order and as such dismissed the SLP.

Admittedly, this Court vide order dated 8th August 2014, had rejected the applications of original accused Nos. 5, 6 and respondent No. 14 (original accused No. 7) seeking suspension of their sentences pending their appeals. It also appears that this Court, vide the same order, suspended the sentences of some of the accused, pending their appeals.

H] It is in this factual scenario, that the Respondent Nos. 4 to 14, pending their appeals in this Court, sent an application dated 12th August 2015 to the respondent No. 1-State of Maharashtra and sought suspension of their sentences, under Section 432 Cr.P.C. The ground stated in the application by the said respondents is, that they need to be outside the prison, to ensure early hearing of their appeals and to give instructions to their lawyers.

I] Accordingly, the respondent No.1-State sought the opinion of the Commissioner of Police on the said application preferred by the respondent Nos. 4 to 14. The Police Commissioner, Mumbai, vide letter dated 5th September 2015 gave his no objection to the suspension of sentences of respondent Nos. 4 to 14. The learned Special Judge, CBI also submitted his report/opinion on the request of the Jail Superintendent, Thane Central Prison. The report of the Special Judge dated 5th October 2015 and 21st October 2015 recommended suspension of sentences of some of the respondents. The Additional Director General of Police and Inspector General of

Prisons, Maharashtra, also gave his no objection to the suspension of sentences of respondent Nos. 4 to 14 vide letter dated 27th October 2015. The report of the NHRC dated 1st April 2010 stating that the encounter of the petitioner's brother was a genuine one, was also placed before the respondent No. 1-The State Government.

J] The State Government i.e. respondent No. 1 vide order dated 2nd December 2015, after taking into consideration the aforesaid reports submitted by various authorities, in exercise of its powers under Section 432(1) Cr.P.C, suspended the sentences of respondent Nos. 4 to 14 for a period of six months, on the terms and conditions mentioned therein. The said order is impugned in the present petition.

4 Mr. Yug Chaudhary, learned counsel for the petitioner assailed the impugned order passed by the respondent No.1-State on several counts; (i) that the State Government had no power to release/suspend the prisoners i.e. respondent Nos. 4 to 14's sentences under Section 432 Cr.P.C., till expiry of 14 years; (ii) that even if such a power exists, it could not be exercised since the respondents' appeals were pending in this Court and the Court is seized of the said appeals.

In this context, learned counsel relied on the judgment of the Apex Court in the case of *K. M. Nanavati v. The State of Bombay (now Maharashtra)*¹; (iii) that the object of introducing Section 433A would be defeated if the State Government is permitted to release prisoners, as is sought to be done in the present case under Section 432 Cr.P.C; and (iv) that the word 'release' used in Section 433A includes all forms of release including release of a prisoner, i.e. the suspension of a prisoner's sentences; and that the title of Section 433A cannot override its contents. Learned counsel for petitioner submitted that judicial review of the impugned order was permissible in the facts, since the action of the respondent No.1-State was malafide and reflected non-application of mind, as it had taken into consideration irrelevant material and had not considered the relevant material on record. Learned counsel vehemently assailed the reports of the learned Special Judge for CBI, Additional Director General of Police and Inspector General of Prisons, Maharashtra State, Pune; report of the NHRC, and the opinion of the Commissioner of Police, all relied upon by the respondent No.1-State, whilst passing the impugned order

1 AIR 1961 SC 112

dated 2nd December 2015. Mr. Choudhary urged that the Presiding Judge contemplated under Section 432(2) is the same Judge i.e. the presiding Judge of the Court before or by which the conviction was had or confirmed, or in his absence his successor in office, and not the Special Judge, CBI as has been done in the present case.

5 According to Mr. Choudhary, the impugned order suffers from serious infirmities, inasmuch as, absolutely no reasons have been recorded showing satisfaction of the State Government to invoke its extraordinary powers under Section 432 Cr.P.C. He submits that, infact, the application filed by the convicts dated 12th August 2015 is not forwarded through the Jailor as contemplated by the proviso to Section 432(5); and that the report of the Sessions Judge is sought by the Jailor and not the State Government as contemplated under Section 432(2). He submits that apart from the Special Judge, CBI, all other agencies of the Government had submitted reports to facilitate the release of respondent Nos. 4 to 14 under Section 432(1) Cr.P.C. Mr. Choudhary submits that the report of the NHRC dated 1st April 2010 relied upon by the State Government, was based on the

Executive Magistrate's Report, which was rejected by this High Court and infact, this Court had directed the Metropolitan Magistrate to conduct an inquiry under Section 176(1A) of Cr.P.C. He submitted that in the said inquiry, the Metropolitan Magistrate concluded that the encounter was a fake one. According to Mr. Choudhary, having regard to the facts, the impugned order being perverse and bad in law, cannot be sustained and as such, ought to be quashed and set-aside.

6 Mr. Rao, learned senior counsel appearing for the respondent-State opposed the petition and justified the impugned order. He submitted that there was no infirmity in the impugned order dated 2nd December 2015 passed by the respondent No.1-State, inasmuch as, the respondent No. 1 had complied with the provisions as mandated by Section 432 of Cr.P.C. Although, Mr. Rao submits that there is compliance of Section 432, he does not dispute the fact, that the jail authorities had sent a letter dated 1st September 2015 to the Principal Judge, Sessions Court and had sought an opinion, as required under Section 432(2) of Cr.P.C. He also does not dispute the fact, that the learned Special Judge, CBI had communicated his

opinion through the Principal Judge, to the jail authorities, as sought by them. According to Mr. Rao, the jail authorities had made a representation to the Principal Judge, City Civil and Sessions Court, Mumbai and the learned Special Judge, CBI was assigned to give his opinion under Section 432 Cr.P.C. As far as Section 433A Cr.P.C is concerned, Mr. Rao submits that the said Section does not curb/restrict the power of the State Government to suspend the sentences under Section 432 Cr.P.C and only specifically curbs the power of the State Government to remit/commute the sentences, before the expiry of 14 years imprisonment. Thus, according to Mr. Rao, there was no impediment for the State Government to pass the order dated 2nd December 2015, inasmuch as, the same is in accordance with Section 432 Cr.P.C. Mr. Rao, in support of his submission with regard to interpretation of the non-obstante clause in Section 433A Cr.P.C, relied on several judgments i.e. ***State of Haryana vs. Nauratta Singh & Ors.***²; ***State of Rajasthan vs. Jamil Khan***³; ***Shailesh Dhairyawan vs. Mohan Balkrishna Lulla***⁴; ***Central Bank of India vs. State of***

2 (2000) 3 SCC 514

3 (2013) 10 SCC 721

4 (2016) 3 SCC 619

Kerala & Ors.⁵; Surjit Singh Kalra vs. Union of India & Anr.⁶;

Directorate of Enforcement vs. Deepak Mahajan & Anr.⁷;

7 Mr. Rao, on the point of external and internal aids, relied on the judgments in the case of ***Tata Power Company Ltd. vs. Reliance Energy Ltd. & Ors.⁸*** and ***Raichurmatham Prabhakar & Anr. vs. Rawatmal Dugar⁹***. He further submitted that the judgment in the case of ***Nanavati (supra)*** will not apply to the facts in the present case, inasmuch as, the judgment in ***Nanavati's case (supra)*** was rendered in 1961 whereas Section 433A came into force in 1978 and therefore, the ratio of ***Nanavati's case (supra)*** will not apply to the facts of the present case. As far as Section 433A is concerned, he submits that the non-obstante clause does not refer to the term 'suspension of sentences' and that the word 'release' used in Section 433A does not cover suspension of sentences and would apply only to permanent release after 14 years. He, therefore, submitted that Section 433A does not touch the power of the State Government to suspend the sentence in an appropriate case, under Section

5 (2009) 4 SCC 94

6 (1991) 2 SCC 87

7 AIR 1994 SC 1775

8 (2009) 16 SCC 659

9 (2004) 4 SCC 766

432. He submitted that the sentences of the respondents has been suspended only for a temporary period and is not kept in abeyance and has been suspended on certain terms and conditions in accordance with the provisions of Section 432.

8 Mr. Amit Desai, learned senior counsel for the respondent Nos. 4 to 14 also opposed the petition. He submitted that Section 433A contemplates unconditional release and that what is sought to be done in the present case is, that the respondents' sentences have been suspended for a period of six months on certain terms and conditions and as such, it is a conditional release permissible under Section 432. He submitted that the respondent No.1-State had suspended the sentences for only six months i.e. has kept the sentences in abeyance for six months and had not curtailed the sentences. He further submitted that the Court's power to suspend the sentence is under Section 389 Cr.P.C, whereas, the State's power to suspend sentence is under Section 432 Cr.P.C. Learned senior counsel relied on certain judgments in support of his submission - whether the heading of Section 433A was a heading or a marginal note, as urged by the learned counsel for the petitioner. According to Mr. Desai, the State Government is

competent to exercise its powers under Section 432 and is not required to wait till the appeal is disposed of. He submitted that appeals are pending in Courts for years and the Apex Court has also expressed its anguish in ***Kashmira Singh vs. The State of Punjab***¹⁰. He submitted that the powers of the Court under Section 389 Cr.P.C and powers of the State under Section 432 operate in their respective fields. He further submitted that the State Government had exercised its power while passing the impugned order under Section 432 by following due procedure as contemplated therein. He submitted that there are enough checks and balances/safeguards in Section 432 to prevent arbitrary exercise of power and that the State, whilst exercising its power of suspension under Section 432 had followed the said process. He submitted that the impugned order shows application of mind. He submitted that admittedly on the date when the respondents' application for suspension of sentences was considered, no application seeking suspension of sentences was pending in this Court. He further submitted that the respondents had undergone five years of sentences at the time when the impugned order was passed. According to Mr. Desai, no ground/averment is raised in the present petition, which is

10 (1977) 4 SCC 291

now sought to be argued i.e. making allegations against the learned Special Judge, CBI, who had given his opinion, without affording any opportunity to him. He further submitted that if allegations are made against the Judicial Officer who gave his opinion, he ought to have been made a party.

9 Mr. Desai, learned senior counsel distinguished ***Maru Ram vs. Union of India & Ors.***¹¹. He submitted that the said case was concerned with the unconditional release of the prisoner and not conditional release, as in the present case. He further submitted that in ***Nanavati's case (supra)***, in particular, para 18 of the said judgment, it is observed that the ambit of Article 161 is very much wider and it is only in a very narrow field that the power contained in Article 161 is also contained in Article 142, namely, the power of suspension of sentences during the period when the matter is sub-judice in the Supreme Court. Therefore, on the principle of harmonious construction and to avoid a conflict between the two powers, it must be held that Article 161 does not deal with the suspension of sentences during the time that Article 142 is in operation and the matter is sub-judice in this Court. He submitted that there were no pending applications when the impugned order was passed and as such the

11 (1981) 1 SCC 107

Executive was well within its powers to invoke Section 432 Cr.P.C, since no application for suspension of sentences, was pending in any Court. He further submitted that suspension is abeyance of sentence and is not equivalent to remission/commutation and that Section 432 contemplates conditional as well as unconditional release of a prisoner. Mr. Desai submitted that there are no averments/grounds made out in the petition to review the impugned order. He submitted that senior officers had given their opinion and as such no malafides can be attributed to them. He submitted that there was no ground made out in the petition for seeking judicial review of the impugned order, inasmuch as, no malafides have been pleaded and even if pleaded, have not been supported by any material on record. He further submitted that the principle of natural justice i.e. of hearing the complainant, is not contemplated while exercising the powers under Section 432 and as such the complainant has no locus to file the petition.

10 Having heard the learned counsel at length, on all points, we are of the considered view, that it is not necessary to delve into the issue whether the State Government has the power to suspend the sentences of

respondent Nos. 4 to 14 under Section 433A Cr.P.C, in this petition, as the impugned order, on the face of it, being perverse and bad in law, is liable to be quashed and set-aside, for the reasons set out hereinunder.

11 A few undisputed facts are as under :

- It is not in dispute that 11 convicts i.e. respondent Nos. 4 to 14 had submitted an application/representation dated **12th August 2015** to the respondent No.1-State, seeking suspension of their sentences. The three grounds on which suspension of sentences was sought were, (i) that the High Court, while rejecting their bail application, had observed that 'whether the evidence is sufficient or not, would be decided at the time when the appeal is finally heard'; (ii) that the NHRC, New Delhi and District Collector, Mumbai and Special Land Acquisition Officer had decided in their favour and based on the said reports, there is a strong possibility that they would be acquitted; and (iii) that in order to enable them to instruct their advocates and for a early hearing of their appeals, their

sentences should be suspended. The said application/representation has been signed by 11 accused i.e. respondent Nos. 4 to 14.

- On **17th August 2015**, the Government asked the Additional Director General of Police and Inspector General of Prisons, Maharashtra State, Pune, to submit nominal rolls, conduct reports and other related documents with opinion regarding the suspension of the sentences of respondent Nos. 4 to 14.
- On **17th August 2015**, the Government also asked the Commissioner of Police, Mumbai, to submit his opinion regarding seriousness of the crime, status of the pending court matters against the convicted prisoners with his opinion regarding the suspension of the sentences of respondent Nos. 4 to 14.
- Vide letter dated **5th September 2015**, the Commissioner of Police, Mumbai, submitted his opinion stating therein, the facts and the material as against the accused, the filing of

charge-sheet as against them, their conviction and acquittal of one of the accused. It also mentions that the complainant had filed a revision application for enhancement of sentences of some of the accused and an appeal against acquittal for one of the accused. It is stated that all these appeals have been admitted and the hearing of the appeals was yet to commence. It is mentioned in para 12 of the said opinion that out of the prisoners, who had filed the appeal, some of the prisoners i.e. Sunil Solanki, Suresh Shetty, Manoj @ Mannu Mohan Raj, Mohammed @ Takka Mainuddin Shaikh, Janardan @ Janyasheth Tukaram Bhangre were enlarged on bail by the High Court and thereafter in para 13, it was mentioned that Shailendra Pande @ Pinki had jumped parole after his release on parole and one prisoner Arvind Arjun Sarvankar died in jail due to his illness. Thereafter, in para 14, it is mentioned as under :

“14. After considering pros and cons of all the facts, the Bombay High Court has granted bail to the prisoners mentioned in paragraph No. 12. On this ground, the opinion is expressed that there is no objection to stay the sentence of the 11 prisoners, who had requested for suspension of their sentence, by the Govt. of

Maharashtra, pending the decision of the appeals filed by them against the sentences.”

- On **1st September 2015**, the Superintendent, Thane Central Prison, requested the Hon'ble City Civil and Sessions Judge, Mumbai, for an opinion in the said case. Pursuant thereto, the Special Judge, CBI gave his recommendation/opinion dated 5th October 2015. The said recommendation/opinion given by the learned Special Judge, CBI was communicated to the Superintendent, Thane Central Prison with a forwarding letter of the Principal Judge, City Civil and Sessions Judge, Mumbai dated 7th October 2015.
- On **15th October 2015**, the Superintendent, of Thane Central Prison forwarded the recommendation of the learned Special Judge, CBI, Greater Mumbai dated 5th October 2015 to the Office of the Additional Director General of Police and Inspector General of Prisons, Maharashtra State, Pune.
- The office of the Additional Director General of Police and Inspector General of Prisons, Maharashtra State, Pune,

submitted the recommendation of the learned Special Judge, CBI with nominal rolls, health reports along with its opinion to the State Government. The Additional Director General of Police and Inspector General of Prisons, Maharashtra State, Pune, opined that in view of the recommendations of the Special Judge, police report, conduct reports submitted by the Superintendent, Thane Central Prison, the Government may take an appropriate decision.

- As the recommendation/opinion given by the learned Special Judge, CBI, did not include the names of all the 11 convicted persons, the office of the Additional Director General of Police and Inspector General of Prisons, Maharashtra State, Pune, vide telephonic conversation with the Superintendent, Thane Central Prison asked him to bring the same to the notice of the learned Special Judge, CBI and to request the learned Judge to give recommendation for the prisoner-Ratnakar Kamble i.e. respondent No. 11.

- The learned Special Judge, CBI, thereafter, included the name of the prisoner-Ratnakar Kamble i.e. respondent No. 11 on **21st October 2015** and forwarded the same to the Superintendent, Thane Central Prison.
- The Superintendent, Thane Central Prison forwarded the new recommendation of the learned Judge, CBI to the Additional Director General of Police and Inspector General of Prisons, on **26th October 2015**, who, in turn, submitted it to the State Government on **27th October 2015**.
- Accordingly, on receipt of the opinion of the learned Special Judge, CBI, recommendations of the Additional Director General of Police and Inspector General of Prisons, Maharashtra State, Pune and the Commissioner of Police and report of the NHRC, the respondent No. 1-State, vide order dated **2nd December 2015**, suspended the sentences of respondent Nos. 4 to 14.

12 As noted above, the State Government relied on the opinions/recommendations of (i) the learned Special Judge, C.B.I,

(ii) the Commissioner of Police; (iii) the Additional Director General of Police and Inspector General of Prisons, Maharashtra State and (iv) the report of the NHRC, whilst passing the impugned order.

13 In order to consider, whether the mandate of Section 432 Cr.P.C has been complied with, it would be apposite to reproduce Section 432 Cr.P.C, with which, we are concerned. The said Section reads as under:

“432. Power to suspend or remit sentences.- (1) *When any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.*

(2) *Whenever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government may require the presiding Judge of the Court before or by which the conviction was had or confirmed, to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists.*

(3) *If any condition on which a sentence has been suspended or remitted is, in the opinion of the appropriate Government, not fulfilled, the appropriate Government may cancel the suspension or remission, and thereupon the person in whose*

favour the sentence has been suspended or remitted may, if at large, be arrested by any police officer, without warrant and remanded to undergo the unexpired portion of the sentence.

(4) The condition on which a sentence is suspended or remitted under this section may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.

(5) The appropriate Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with:

Provided that in the case of any sentence (other than a sentence of fine) passed on a male person above the age of eighteen years, no such petition by the person sentenced or by any other person on his behalf shall be entertained, unless the person sentenced is in jail, and,-

(a) where such petition is made by the person sentenced, it is presented through the officer in charge of the jail; or

(b) where such petition is made by any other person, it contains a declaration that the person sentenced is in jail.

(6) The provisions of the above sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law which restricts the liberty of any person or imposes any liability upon him or his property.

(7) In this section and in section 433, the expression "appropriate Government" means,-

(a) in cases where the sentence is for an offence against, or the order referred to in sub-section (6) is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government;

(b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed.”

14 Section 432(2) contemplates, that whenever an application is made to the appropriate Government for suspension of the sentence, the appropriate Government may require the Presiding Judge of the Court before/by which conviction was had/confirmed to give his opinion, whether the application should be granted/refused, along with his reasons. In the present case, it is evident from the report of the Special Judge, CBI and an undisputed fact that it is the jail authorities who had sought an opinion from the Court and not the State Government i.e. the appropriate Government and as such, the same was completely in breach of the provision of 432(2) Cr.P.C. It is also pertinent to note that there is no explanation as to why the jail authorities and not the State Government, which is the appropriate Government, as contemplated under Section 432(2), had approached the Principal Judge, City Civil and Sessions Court. The Constitution Bench of the Apex Court in ***Union of India vs. V. Sriharan alias Murugan & Ors.***¹² has observed as under :

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“141. Therefore, when in the course of exercise of larger constitutional powers of similar kind under Articles 72 and 161 of the Constitution, it has been opined by this Court to be exercised with great care and caution, the one exercisable under a statute, namely, under Section 432(1) CrPC which is lesser in degree should necessarily be held to be exercisable in tune with the adjunct provision contained in the same Section. **Viewed in that respect, we find that the procedure to be followed whenever any application for remission is moved, the safeguard provision under Section 432(2) CrPC should be in sine quo non for the ultimate power to be exercised under Section 432(1) CrPC.**

142 By following the said procedure prescribed under Section 432(2), the action of the appropriate Government is bound to survive and stand the scrutiny of all concerned, including the judicial forum. It must be remembered, barring minor offences, in cases involving heinous crimes like, murder, kidnapping, rape, robbery, dacoity, etc., and such other offences of such magnitude, the verdict of the trial court is invariably dealt with and considered by the High Court and in many cases by the Supreme Court. **Thus, having regard to the nature of opinion to be rendered by the Presiding Officer of the Court concerned will throw much light on the nature of crime committed, the record of the convict himself, his background and other relevant factors, which will enable the appropriate Government to take the right decision as to whether or not suspension or remission of a sentence should be granted.** It must also be borne in mind that while for the exercise of the constitutional powers under Articles 72 and 161, the Executive Head will have the benefit of act and advise of the Council of Ministers, for the exercise of power under Section 432(1) CrPC, the appropriate Government will get the valuable opinion of the judicial forum, which will definitely throw much light on the issue relating to grant of suspension or remission.”

15 As noted earlier, it is the State Government which ought to have approached the Presiding Judge, as contemplated under Section

432(2) and sought his opinion on suspension of the respondent Nos. 4 to 14's sentences. Instead, it is the jail authorities who approached the Sessions Court and sought an opinion, contrary to the mandate of Section 432(2) Cr.P.C.

16 Neither of the counsel were in a position to inform whether the learned Sessions Judge Mr. V. B. Jadhavar i.e. the Presiding Judge, who convicted the respondents-accused was available, as under Section 432(2), he would be the authority to give the opinion. Assuming the Presiding Judge was not available, in that event, and needless to state, that it would be his successor in office, who would be required to give an opinion. The opinion was not given by the successor of Mr. V. B. Jadhavar, but by the learned Special Judge, C.B.I Mr. M. B. Gosavi, and as such, the same was clearly in contravention of Section 432(2) Cr.P.C.

17 Now coming to the opinion given by the learned Special Judge, C.B.I, during the course of hearing, we noted that there were two opinions submitted by the learned Special Judge, C.B.I, one dated 5th October 2015 and the other dated 21st October 2015. We carefully perused both the said reports and found that there were certain grammatical mistakes in the

opinion dated 21st October 2015, which were not there in the opinion/report dated 5th October 2015. It is also pertinent to note that the name of respondent No. 11-Ratnakar Gautam Kamble finds place in the report dated 21st October 2015, however, the same is missing in the report dated 5th October 2015. Mr. Rao, learned senior counsel for the respondent-State submits that the learned Special Judge, C.B.I submitted his report twice, on 5th October 2015 and again on 21st October 2015, both on the request of the jail authorities. As far as the name of Ratnakar Gautam Kamble (respondent No. 11) is concerned, the same was not included in the report dated 5th October 2015 and was included in the report dated 21st October 2015.

The petitioner has placed before us a chart pointing out the variance between two reports dated 5th October 2015 and 21st October 2015 submitted by very same learned Special Judge. The fact that said variance exists, is not in dispute. It is material to note that the grammatical or other errors are more in the latter report dated 21st October 2015. It follows that if errors or grammatical mistakes of construction existed in earlier report, it could have been rectified in latter report. Here, the position is otherwise.

This assumes importance because in both reports, signature of learned Special Judge appears on last page on its back side. That last page does not carry any substantive part of opinion/report and hence, it can be made part of any document. Since Mr. Rao does not dispute the authenticity of the report dated 21st October 2015, we do not want to delve into the same.

18 It appears from the opinions dated 5th October and 21st October, that the judgment of conviction of the respondents was not available initially with the learned Special Judge, C.B.I., for giving an opinion and hence, the same was called for, from the Jailor. However, apart from that, no other material/evidence or rejection of the bail order of the accused was placed before the learned Special Judge, C.B.I. The opinion/report clearly reflects that the Jailor had not produced any material to show whether the bail applications of the accused were pending or were rejected. It is, thus, apparent that the learned Special Judge, C.B.I, did not have the relevant material before him, when he gave his opinion.

19 The learned Special Judge, C.B.I's opinion shows that initially he had expressed his inability to give his opinion as, no evidence or papers of investigation were placed before him, however, subsequently, he agreed to give an opinion as he was persuaded to change his mind. The same is evident from the opinion given by the learned Special Judge. The relevant part of the said order dated 5th October 2019, is being reproduced herein under :

*“After their conviction the accused have filed appeal against their conviction in Hon'ble High Court and the same is pending vide No. 1038/2013. All record and proceeding is already sent to the Honourable High Court as ordered by. **In short, I did not have opportunity to go through the papers of investigation, notes of evidence as appear against each accused and reasoned judgment of my Ld. Predecessor. In fact, I had intimated this fact to jail superintendent of Talaja vide letter dated 19/8/2015 expressing my inability to give opinion about stay of conviction of another convict in this case by name C 198 Pradeep Pandurang Suryavanshi. However, one of jail officer from Thane personally met me and requested to give opinion as proposal is to be put to the appropriate Government on priority basis. I appraised him that Record and proceeding and copy of judgment in S.C. No. 317/2010 and on basis of that I give my opinion by going through well reasoned judgment of my Ld predecessor running in 1668 pages.***

Before, I proceed to my opinion, I may point out that the accused may have requested Hon'ble High Court to suspend the sentence pending appeal as per section 389(1) of Code of Criminal Procedure. I have no opportunity to go through the Honourable High Court's order suspending the sentence as its copy is not available with Sessions Department of

this court. (It was not placed before me by Sessions Department), the convicted accused (For whom the opinion is sought) were police men/police officers took part in fake encounter. As far as convicted No. 1 C-6089 Dilip Sitaram Palande is concerned, I stated that his case is not fit for consideration of suspension of sentence because there is clear evidence against him that he actually fired at deceased. There is evidence on record to show that —18A, one of bullet retrieved from body of Ramnarayan @ Lakhanbhaiya Vishwanath Gupta was being fired from his service revolver. Other two bullets retrieved from the body of deceased appears to have been fired from service revolver of accused Pradeep Sharma (Acquitted) and accused Pradeep Pandurang Suryavanshi (Convicted and kept in Taloja Central Prison).”
(emphasis supplied)

20 It is thus evident that the learned Special Judge, C.B.I had failed to verify whether any application for suspension of sentences was pending before any Court or whether any application seeking suspension of sentences was rejected by any Court and as such ought not to have acceded to the request of the jail authorities, although urgency was pressed to give the opinion. The learned Special Judge, C.B.I, was under no obligation to oblige the jail authorities, in the absence of sufficient material being placed before him to give an opinion, as contemplated under Section 432(2) of Cr.P.C, and more particularly, as it was not even sought by the State Government. Infact, the learned Special Judge, C.B.I, has offered no reasons for subsequently adding the name of respondent No. 11-Ratnakar

Kamble, in his opinion dated 21st October 2015, more particularly, when he had not recommended his suspension, in the earlier order dated 5th October 2015. It is also evident that the said inclusion of respondent No. 11's name was made pursuant to a request made by the learned Additional Director General through the jail authorities. It is not in dispute, that on the request made by the jail authorities that the learned Special Judge, C.B.I, had given his opinion dated 5th and 21st October 2015. Having perused the opinions, we find that there is complete non-application of mind by the learned Special Judge, C.B.I, whilst giving his opinions. One cannot loose sight of the fact, that when the appropriate Government seeks opinion of the Presiding Judge of the concerned Court under Section 432(2), the object is to ensure that the nature of opinion to be rendered by the Presiding Officer will throw much light on the nature of crime committed, the record of the convict himself, his background and other relevant factors, which will enable the appropriate Government to take the right decision, as to whether or not suspension of sentences should be granted. It must be borne in mind that while for the exercise of the Constitutional power under Articles 72 and 161, the Executive Head has the benefit of the advice of the Council of Ministers, in the exercise of power under Section 432(1), the appropriate

Government will have the benefit and valuable opinion of the judicial forum, which will facilitate, guide and throw light on the issue relating to grant of suspension. Thus, the opinion of the Presiding Judge is of great relevance and importance in the Scheme of Section 432, inasmuch as, the ultimate order of suspension is to be guided by the opinion rendered by the Presiding Officer of the concerned Court and as such the Judge cannot abdicate his duty in a casual and cavalier manner, as has been done in the present case.

21 As far as the application/representation, seeking suspension of sentences dated 12th August 2015 is concerned, the same was sent by the respondent Nos. 4 to 14 to the respondent No. 1-State, on certain grounds mentioned therein. Mr. Choudhary contended that the application ought to have been sent through the Jailor in terms of proviso to Section 432(5), and not directly to the respondent No.1-State. Mr. Rao, although states that there is no breach of any provision, has not brought to our notice anything contrary, to show that the said application was not sent directly. A perusal of the proviso to Section 432(5) contemplates, that no petition by the person (above 18 years) sentenced (other than a sentence of fine) or by any

other person on his behalf, shall be entertained, unless the person sentenced is in jail and (a) where such petition is made by the person sentenced, it is presented through the officer in-charge of the jail. In the present case, we are concerned only with proviso to Section 432(5). As noted above, the petition/application preferred by respondent Nos. 4 to 14 was sent directly and not as contemplated under the proviso to Section 432(5)(a) i.e. through the Jailor. Admittedly, the Government has not framed any rules or special order or given direction as to the suspension of sentences and the conditions on which petitions should be presented/dealt with. Thus, the presentation of the representation/application by the respondent Nos. 4 to 14 is not in conformity with Section 432(5).

22 Even the report of the NHRC dated 1st April 2010 relied upon by the State Government could not have been acted upon, as the order of the NHRC was based on the Executive Magistrate's report (Special Land Acquisition Officer), which report was not accepted by the High Court vide order dated 13th February 2008 in Criminal Writ Petition No. 2473 of 2006 and instead, the Chief Metropolitan Magistrate was directed to conduct an inquiry under Section 176 (1A) Cr.P.C. It is pertinent to note,

that the respondent Nos. 4 to 14, were well aware that the Executive Magistrate's report relied upon by the NHRC was rejected by this Court, and that this Court had directed the Chief Metropolitan Magistrate to conduct an inquiry under Section 176(1A) Cr.P.C; and that the inquiry report submitted by the Metropolitan Magistrate had concluded that the encounter was not a genuine one. However, despite the same, the respondent Nos. 4 to 14 relied upon the reports of the NHRC and the Special Land Acquisition Officer, for seeking suspension of their sentences. It is evident that the order of the NHRC was based on the 1st report, and was prior to the report of the Metropolitan Magistrate, which had opined that the encounter was a fake one. The respondent Nos. 4 to 14 had thus, suppressed true and correct facts in their application to the State Government, seeking suspension of their sentences.

23 Even the opinion given by the Commissioner of Police is flawed, inasmuch as, it does not mention the fact, that the bail application of respondent No. 14 was rejected by the High Court and confirmed by the Apex Court. It is also pertinent to note that although the Government had sought opinion regarding seriousness of crime, status of pending court

matters against convict prisoners with opinion regarding suspension, there is no reference with regard to the seriousness of the crime in question. A perusal of the opinion of the Commissioner of Police giving no objection to the suspension of respondent Nos. 4 to 14's sentences shows that the same is essentially on the premise, that bail was granted to original accused Nos. 8, 10, 12, 14 and 21. It is pertinent to note that the said accused were not policemen and that bail was granted to them by the High Court, after *prima facie*, considering the evidence against them. The learned Commissioner of Police, in his opinion, has failed to take into consideration a material fact that this Court had rejected the bail applications of original accused Nos. 5, 6 and 7 (respondent No. 14 herein), who were policemen. There is no mention of the said fact i.e. of rejection of bail applications of the said accused persons. There is also no mention of the fact that original accused No. 7 (respondent No.14) had preferred an SLP in the Apex Court challenging the rejection of his bail by this Court and the fact that the SLP was dismissed. It is thus evident that the Commissioner of Police had not considered the relevant material as stated aforesaid, thus showing non-application of mind.

24 Even the report/opinion dated 27th October 2015 submitted by the Additional Director General of Police to the respondent No.1-State, expressing his no objection to the suspension of sentences of respondent Nos. 4 to 14, shows non-application of mind. There is no reference in the said opinion, to the judgment of conviction awarded to the accused by the Sessions Judge. Apart from the same, the Additional Director General's report dated 27th October 2015 is contrary to the Special Judge's report/opinion dated 21st October 2015, inasmuch as, the Special Judge had not recommended the suspension of sentences of respondent Nos. 4, 5 and 13, yet the Additional Director General had recommended the suspension of sentences of all the respondents i.e. respondent Nos. 4 to 14. No reason/explanation is given for recommending suspension of sentences of respondent Nos. 4, 5 and 13.

25 It appears that all agencies of the Government had submitted reports to facilitate the release of respondent Nos. 4 to 14, by submitting biased reports. Infact, even the impugned order does not reflect the subjective satisfaction of the Government to invoke its extraordinary powers under Section 432 Cr.P.C, to suspend the sentences of respondent

Nos. 4 to 14. The order only refers to the application made by respondent Nos. 4 to 14 and the reports obtained by different authorities. The impugned order shows not only non-application of mind, but also consideration of irrelevant factors and non-consideration of relevant factors. It is pertinent to note, that though the Special Judge, C.B.I had not recommended/given a favourable opinion in favour of some of the respondents i.e. respondent Nos. 4, 5 and 13, yet the respondent No. 1 suspended their sentences and no reasons have been recorded for doing so. As noted earlier, the report of the NHRC dated 1st April 2010 could not have been relied upon by the respondent No. 1, as the same was based on the Special Land Acquisition Officer/Executive Magistrate's report dated 27th October 2007, which report was rejected by this Court vide order dated 13th February 2008. This Court had infact, after rejecting the said report, directed the Chief Metropolitan Magistrate to conduct an inquiry under Section 176(1A) Cr.P.C. Accordingly, the Metropolitan Magistrate conducted an inquiry and in the said inquiry, concluded that the encounter of Ramnarayan (deceased) was a fake encounter and that the deceased was in the custody of the police when he was killed. On receipt of the said

report, this Court had directed registration of the FIR as against the accused and had constituted a SIT to investigate the same. The said fact was completely overlooked/ignored by the respondent No. 1 whilst passing the impugned order, showing not only non-application of mind, but consideration of irrelevant material and non-consideration of relevant material. In fact, except for referring to reports, the impugned order does not show application of mind and is also bereft of cogent reasons. It is amply evident that the respondent No.1-State has considered irrelevant material and ignored relevant material, whilst passing the impugned order, warranting interference in writ jurisdiction. The powers under Section 432 are of wide amplitude and as such recording of subjective satisfaction is a *sine qua non* for invoking these powers, more particularly, when the respondents were convicted for a serious offence under Section 302 and the matter was subjudice before this Court and more particularly, when this Court had rejected the bail application of one of the respondents, which was confirmed by the Apex Court.

26 In the aforesaid circumstances, judicial review of administrative action is warranted to uphold the rule of law, lest, it results

in failure of justice. Courts cannot be expected to be silent spectators to such decisions, which are blatantly perverse and unsustainable in law.

27 Having regard to what is stated aforesaid, the petition ought to succeed. Accordingly, the petition is allowed and the impugned order dated 2nd December 2015 passed by the respondent No.1-State is quashed and set-aside.

28 We once again clarify, that we have not gone into the issue, whether the State Government has the power to suspend the sentence of a prisoner under Section 433A, and as such keep all contentions of all parties open, on the said point.

REVATI MOHITE DERE, J.

B. P. DHARMADHIKARI, J.