

HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Petition (Cr.) No.26 of 2018**

Gahbar son of Shri Jhunulal, aged about 34 years,
Caste, Rajwar, R/o. Baraul, P.S. Jairamnagar,
District Surajpur (Chhattisgarh)

----- **Petitioner**
(In Jail)

Versus

1. State of Chhattisgarh, through its Principal Secretary, Department of Home Mantralaya, Mahanadi Bhavan, Naya Raipur, Raipur (Chhattisgarh)
2. The Jail and Correction Services, Chhattisgarh, Director General Prisoner Jail Road, Raipur, District Raipur (CG)
3. Jail Superintendent, Central Jail Ambikapur, District Surguja (CG)

----- **Respondents**

For Petitioner	: Mr.Chandrabhushan Kesharwani, Advocate
For Respondents	: Mr.Ravi Bhagat, Dy.Govt.Advocate
<i>Amicus Curiae</i>	: Mr.Manoj Paranjape, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal

Order on Board

04.02.2020

1. Petitioner-Gahbar was charge-sheeted for offences punishable under Sections 302/34 and 323/34 of the IPC and finally convicted by the Court of Sixth Additional Sessions Judge (F.T.C.), Surajpur, District Surguja presided over by Mr.T.N.H. Pancholi on 30.1.2003 and in appeal, his conviction for offence punishable under Section 323/34 of the IPC was set aside by this Court, however, conviction under Section 302 of the IPC was maintained and he is in jail since 28.9.2001 suffering

the sentence. He made an application to the State Government through the Jail Superintendent, Central Jail, Ambikapur for remission of sentence under Section 432 of the CrPC where he is suffering the sentence stating inter-alia that he has already suffered sentence of 20 years, 02 months and 12 days, therefore, he be granted remission under Section 432 (2) of the Code of Criminal Procedure, 1973 (hereinafter called as 'CrPC'). The competent authority by its memo dated 24.3.2017 (Annexure P-2) required the Presiding Officer of the Sixth Additional Sessions Judge (F.T.C.) by which the petitioner was convicted to state his opinion as to whether the application made by the petitioner should be granted or refused and sought his opinion. Learned Third Additional Sessions Judge, Surajpur before whom the matter was placed seeking his/her opinion in terms of Section 432(2) of the CrPC on 29.6.2017 declined to extend her opinion stating that she was not Presiding Officer of that Court at the time when the judgment of conviction was delivered on 30.1.2003 convicting the petitioner herein for offence under Section 302 of the IPC and communicated the same to the Jail Superintendent, Central Jail, Ambikapur and accordingly, in absence of opinion of the Third

Additional Sessions Judge, Surajpur, the petitioner's application could not be considered by the State Government.

2. Now the petitioner has preferred this writ petition under Article 226 of the Constitution of India stating inter-alia that he has completed more than 21 years, yet in absence of opinion of the Presiding Officer of the Court in terms of Section 432(2) of the CrPC, his application has not been considered by the State Government. Therefore, the State Government be directed to seek opinion from the Sixth Additional Sessions Judge (F.T.C.), Surajpur and thereafter his application for remission of sentence be considered in the light of Section 432 (2) of the CrPC.

3. Return has been filed by the respondents/State stating inter-alia that since procedure to be followed under section 432(2) of the CrPC is mandatory in view of decision of the Supreme Court in the matter of Union of India v. V. Sriharan alias Murugan and others¹, therefore, in absence of opinion of the Presiding Officer of the Court, the matter could not be considered.

4. Mr. Chandrabhushan Kesharwani, learned counsel for the petitioner, would submit that learned Presiding

¹ (2016) 7 SCC 1

Officer has declined to give her opinion under Section 432(2) of the CrPC on the ground which is wholly impermissible in law and the Presiding Officer of the Court would include the successor-in-office and since she was successor-in-office of the Court which convicted the petitioner, she was entitled to extend her opinion opining whether the application of the petitioner under Section 432(2) of the CrPC should be granted or refused, but that was not done and that has delayed the consideration of the petitioner's application under Section 432(2) of the CrPC, as such, appropriate direction be issued to the concerned Court to extend his/her opinion and thereafter the State Government would consider his application within time line.

5. Mr. Ravi Bhagat, learned Deputy Government Advocate for the respondents/State, would submit that since the provision contained in Section 432(2) of the CrPC is mandatory in nature, upon receipt of opinion of the Presiding Officer of the concerned Court, the petitioner's application will be considered in accordance with law.

6. Mr. Manoj Paranjape, learned counsel appearing as *Amicus Curiae*, would submit that the Presiding Officer of the Court by which conviction was had or affirmed

would also include successor-in-office, otherwise, the object of enacting the provision under Section 432 of the CrPC would fail and that procedure to be followed as per Section 432 of the CrPC is mandatory and the Presiding Officer would include successor-in-office and the Presiding officer who delivered the judgment was not persona designata. Therefore, learned Third Additional Sessions Judge, Surajpur is absolutely unjustified in not rendering her opinion under Section 432 of the CrPC on the ground that she has not convicted the petitioner herein for offence under Section 302 of the IPC, as such, appropriate direction be issued to the Presiding Officer now holding that Court to extend opinion in terms of Section 432(2) of the CrPC to facilitate the consideration of his application for remission.

7. I have heard learned counsel for the parties and considered their rival submissions made hereinabove and also went through the records with utmost circumspection.

8. In order to consider the plea raised at the Bar, it would be appropriate to notice Section 432 (1) and (2) of the CrPC which states 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) to (7) xxx xxx xxx."

9. Section 432(2) of the CrPC mandates the State Government to state his/her opinion as to whether the application should be granted or refused.

10. In the matter of V. Sriharan (supra) the Supreme Court has clearly held that the procedure to be followed under Section 432(2) is mandatory and held as under:-

"150. We also hold that such a procedure to be followed under Section 432(2) is mandatory. The manner in which the opinion is to be rendered by the Presiding Officer can always be regulated and settled by the concerned High Court and the Supreme Court by stipulating the required procedure to be followed as and when any such application is forwarded by the appropriate Government. We, therefore, answer the said question to the effect that the *suo motu* power of remission cannot be exercised under Section 432(1), that it

can only be initiated based on an application of the persons convicted as provided under Section 432(2) and that ultimate order of suspension or remission should be guided by the opinion to be rendered by the Presiding Officer of the court concerned."

11. Thus, in order to grant application for remission filed by convict, the appropriate Government is bound to obtain opinion of the Presiding Officer of the Court before or by which he/she was convicted as to whether the application for remission should be granted or refused and then along with opinion of the concerned Court, the matter has to be considered by the State Government.

12. Now the question for consideration would be, whether the Presiding Officer of the Court before or by which the conviction was had or confirmed would include successor-in-office of the Court which convicted the accused for particular offence as in the instant case, the petitioner's application has been rejected only on the ground that he was convicted by Mr.T.N.H. Pancholi, the then Presiding Officer of that Court and she did not preside over the Court at that time.

13. Section 35 of the CrPC provides powers of Judges and Magistrates exercisable by their successors-in-office, which states as under: -

"35. Powers of Judges and Magistrates exercisable by their successors-in-office.—

(1) Subject to the other provisions of this Code, the powers and duties of a Judge or Magistrate may be exercised or performed by his successor-in-office.

(2) When there is any doubt as to who is the successor-in-office of any Additional or Assistant Sessions Judge, the Sessions Judge shall determine by order in writing the Judge who shall, for the purposes of this Code or of any proceedings or order thereunder, be deemed to be the successor-in-office of such Additional or Assistant Sessions Judge.

(3) *When there is any doubt as to who is the successor-in-office of any Magistrate, the Chief Judicial Magistrate, or the District Magistrate, as the case may be, shall determine by order in writing the Magistrate who shall, for the purposes of this Code or of any proceedings or order thereunder, be deemed to be the successor-in-office of such Magistrate."*

14. By virtue of Section 35 of the CrPC it is clearly evident that the powers and duties of a Judge or Magistrate may be exercised or performed by his successor-in-office, as the powers under the Code having been conferred on courts, they could be exercised by the successor-in-office.

15. The Supreme Court in the matter of Ajaib Singh and another v. Joginder Singh and another² while dealing with Section 559 of the old Code i.e. the Code of Criminal Procedure, 1898, which is *pari materia* to Section 35 of the present Code, has vividly held that

2AIR 1968 SC 1422

a successor-in-office of a Magistrate can file a complaint under Section 476 of the CrPC, 1898 (old Code) in respect of an offence under Section 195 of the IPC committed before his predecessor-in-office.

- 16.** The Delhi High Court in the matter of **M.L. Gulati and others v. J.L. Birmani**³ while considering the powers of succeeding Magistrate to issue process in a complaint of which cognizance had earlier been taken by his predecessor-in-office, has held that power and jurisdiction of the Code has been conferred to the Court and made out a distinction between "Court" and "*persona designata*" as under: -

"7. As was pointed out in the referring order, there is a clear and definite distinction between a "Court", properly so-called, and a "*persona designata*". When seizin is taken of a matter by a *persona designata*, it is a decision or cognizance of a matter by a designated person, authorised to do so in that behalf. Where, however, a matter, whether of a civil nature, or of criminal nature, is filed in a Court, properly so-called, cognizance or seizin is taken by the court and there is a distinction between the "Court" and Judicial Officer, who, for the time being, presides over it. When a *persona designata*, who has taken seizin of a matter ceases to exercise jurisdiction, for any reason, his successor is perhaps incapable of exercising jurisdiction unless specifically designated as such. Where, however, a Court is properly seized of a matter, the change in its Presiding Officer does not make any difference, and since the

Court had taken seizin of the matter, no further cognizance or seizin, by the succeeding Presiding Officer, is necessary until there is a specific provision or a known principle of law in that behalf, which may necessitate such a course. Court is the institution and the seat of judicial power, the presiding officers are the human instrumentality through whom the Court functions and exercises the power. Presiding Officers come and go, the Court, until abolished, survives the movement of the presiding officers."

17. Their Lordships highlighting the importance of trial to be decided by the Judge who had dealt with the matter, had held as under: -

"8. Ordinarily, it is the policy of law, in civil, criminal and other proceedings, that a matter before a Court is decided, as far as possible, by the Presiding Officer, who had dealt with the matter, at the earlier stages because the Presiding Officer, who has for example, examined evidence, has had first hand impression of the witnesses, the conduct of the parties, as indeed, the demeanour of the witnesses, and would, therefore, be in the best position to decide the questions in controversy between the parties. This is, particularly, so on the criminal side as an essential emanation of the requirement of a "just and fair trial". It is, however, not always possible to follow this practice, either on the civil or the criminal side, and the matters have invariably to be decided by Presiding Officers, who have not recorded evidence, or where the evidence was recorded, and other stages of the proceedings were conducted, partly by such Presiding Officers, and partly by one or more of his predecessors-in-office. The enabling provisions of Section 35 and Section 326 of the Cr.P.C. with certain additional safeguards built into the proviso to sub-

section (1) of Section 326 of the Cr.P.C. are based on the legislative recognition of such eventualities. Section 326, however, on one reckoning, if due weight is given to the head-note, would appear to be inapplicable to any inquiry, other than an inquiry in committal proceedings, although the body of the section does not appear to admit of such a limitation, particularly, having regard to the fact that the expression "inquiry" has been defined by Section 2(g) of the Code to mean, "every inquiry, other than a trial, conducted under this Code by a Magistrate or Court" and would, therefore, be wide enough to include an inquiry by a Court, seized of a complaint under Chapter XV thereof. On general principle, therefore, there could be no bar to a succeeding Magistrate continuing the proceedings in an inquiry or a trial from the stage where the succeeded Magistrate left them off."

- 18.** The Full Bench of the Andhra Pradesh High Court in the matter of The Public Prosecutor (A.P.) v. Legisetty Ramayya and another⁴ laid down the test to determine "Court" and "*persona designata*" and held as under:-

"36. From what was discussed above the following conclusions would follow:

(1) Where, by statute, matters are referred to the determination of a Court with no further provision, the necessary implication is that the Court will determine the matters as a court. Its jurisdiction is enlarged with all the incidents of such jurisdiction.

(2) Where a person is indicated not by name but by official designation the question always arises whether the intention was to single him out as a *persona designata*, i.e.

⁴ 1975 Cri.L.J. 144

as an individual, the designation being merely his further description. The question whether such a person in a persona designate or not depends upon the intention to be gathered from the words used, nature of the functions to be performed and object and purpose to be achieved.

(3) When a reference is made to an officer presiding over a Court and not the Court itself it does not necessarily follow that such a person is intended to act as a "persona designata" and not as a Court because it is quite an ordinary practice for a reference to be made to the officer presiding over the Court even when the intention is to refer to the Court. The mention of the officer presiding over the court instead of the Court does not by itself imply that he is intended to act as a persona designata end not as a Court.

(4) When a statute confers authority a judicial officer one should be slow in saying that the Legislature confers such authority on the said officer as a persona designata.

(5) Where a judicial officer who presides over a Court is appointed to perform a function under any statute and he is intended by the statute to act not otherwise than in a judicial capacity, in the absence of any other indication to the contrary he cannot come within the expression "persona designata" and he acts as a Court only.

(6) When a Judicial Authority, like an officer who presides over a Court, is appointed to perform a function, that is to judge and decide in accordance with law and nothing has been mentioned about the finality or otherwise of the decisions made by that authority, it is an indication that the authority is to act as a Court in which case only it is not necessary to mention whether they are final or not as all the incidents of exercising jurisdiction as a

Court would necessarily follow.

(7) Whether the authority functions as a persona designata or as a Court does not necessarily depend on the question whether it is acting against the decisions of designated persons or Tribunals or not. Statutes are full of instances where appeals or revisions to courts are provided even as against the decisions of designated persons and Tribunals."

- 19.** The Bombay High Court in the matter of Ramprasad Gupta v. State of Maharashtra⁵ has clearly held that if the Presiding Officer was not available to give his opinion under Section 432(2) of the CrPC, in that event, it would be his successor in office, who would be required to give an opinion. It was observed as under:-

"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.B.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) CrPC."

- 20.** Reverting to the facts of the present case in the light of principle of law laid down in the above-stated judgments (supra), it is quite vivid that since

power and authority to extend opinion in terms of Section 432(2) of the CrPC has been confirmed to the Presiding Officer of the Court who had delivered the judgment of conviction and that would include successor-in-office if the Presiding Officer is not available as power and authority has been confirmed to the Presiding Officer of the Court and not to the particular person as persona designata, if such interpretation as held by the trial Court is accepted, the provisions contained in Section 432 (1) & (2) of the CrPC would render otiose and in case of any other exigency like transfer, removal, retirement or in other like situation, application of convict for remission cannot be considered.

21. In view of that, learned Third Additional Sessions Judge, Surajpur is absolutely unjustified in holding that she cannot render an opinion in terms of Section 432(2) of the CrPC.

22. Accordingly, the Sixth Additional Sessions Judge (F.T.C.), Surajpur/his successor-in-office is directed to consider the application of the petitioner for remission of sentence and render his/her opinion under Section 432(2) of the CrPC within 45 days from the date of receipt of copy of this order and thereafter the appropriate Government will consider the

application for remission within further 45 days.

23. With the aforesaid observation/direction, the writ petition stands finally disposed of.

24. This Court appreciates the assistance rendered by Mr.Manoj Paranjape, learned *amicus curiae*.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-