REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL ORIGINAL JURISDICTION

WRIT PETITION (CRL.) NO.491 OF 2022

BILKIS YAKUB RASOOL **...PETITIONER**

VERSUS

UNION OF INDIA & OTHERS **...RESPONDENTS**

WITH

WRIT PETITION (CRL.) NO.319 OF 2022

WRIT PETITION (CRL.) NO.326 OF 2022

WRIT PETITION (CRL.) NO.352 OF 2022

WRIT PETITION (CRL.) NO.403 OF 2022

WRIT PETITION (CRL.) NO.422 OF 2022

J U D G M E N T

NAGARATHNA, J.

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Preface:

Plato, the Greek Philosopher in his treatise, *The Laws*, underscores that punishment is to be inflicted, not for the sake of vengeance, for what is done cannot be undone, but for the sake of prevention and reformation (Thomas L. Pangle, The Laws of Plato, Basic Book Publishers, 1980). In his treatise, Plato reasons that the lawgiver, as far as he can, ought to imitate the doctor who does not apply his drug with a view to pain only, but to do the patient good. This curative theory of punishment likens penalty to medicine, administered for the good of the one who is being chastised (Trevor J. Saunders, Plato's Penal Code: Tradition, Controversy, and Reform in Greek Penology, Oxford University Press, 1991).

Thus, if a criminal is curable, he ought to be improved by education and other suitable arts, and then set free again as a better citizen and less of a burden to the state. This postulate lies at the heart of the policy of remission. In addition, there are also competing interests involved– the rights of the victim and the victim's family to justice *vis-a-vis* a convict's claim to a second chance by way of remission or reduction of his sentence for reformation.

Over the years, this Court initially attached greater weight to the former and has expressed scepticism over the latter, particularly if the offence in question is a heinous one. This sentiment can be gathered from the following observations of Fazal Ali J. in ***Maru Ram vs. Union of India, AIR 1980 SC 2147 ("Maru Ram")***:

> *"77. … It is true that there appears to be a modern trend of giving punishment a colour of reformation so that stress may be laid on the reformation of the criminal rather than his confinement in jail which is an ideal objective. At the same time, it cannot be gainsaid that such an objective cannot be achieved without mustering the necessary facilities, the requisite education and the appropriate climate which must be created to foster a sense of repentance and penitence in a criminal so that he may undergo such a mental or psychological revolution that he realises the consequences of playing with human lives. In the world of today and particularly in our country, this ideal is yet to be achieved and, in fact, with all our efforts it will take us a long time to reach this sacred goal.*
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> *79. The question, therefore, is — should the country take the risk of innocent lives being lost at the hands of criminals committing heinous crimes in the holy hope or wishful thinking that one day or the other, a criminal, however dangerous or callous he may be, will reform himself. Valmikis are not born everyday and to expect that our present generation, with the prevailing social and economic environment, would produce Valmikis day after day is to hope for the impossible."*

A woman deserves respect howsoever high or low she may be otherwise considered in society or to whatever faith she may follow or any creed she may belong to. Can heinous crimes, *inter alia*, against women permit remission of the convicts by a reduction in their sentence and by granting them liberty? These are the issues which arise in these writ petitions.

With the aforesaid philosophical preface, we proceed to consider these writ petitions, both on maintainability as well as on merits purely from a legal perspective.

Details of the writ petitioners:

2. These writ petitions have been filed assailing the Orders dated 10.08.2022, granting remission and early release of respondent Nos.3 to 13 in Writ Petition (Crl.) No.491 of 2022 (which petition shall be considered to be the lead petition), who were all convicted, having been found guilty of committing heinous crimes during the large-scale riots in Gujarat on 28.02.2002 and a few days thereafter which occurred in the aftermath of the burning of the train incident in Godhra in the State of Gujarat on 27.02.2002.

2.1. The grotesque and diabolical crime in question was driven by communal hatred and resulted in twelve convicts, amongst many

others, brutally gang-raping the petitioner in Writ Petition (Crl.) No.491 of 2022, namely, Bilkis Yakub Rasool, who was pregnant at that time. Further, the petitioner's mother was gang raped and murdered, her cousin who had just delivered a baby was also gang raped and murdered. Eight minors including the petitioner's cousin's two-day-old infant were also murdered. The petitioner's three-year-old daughter was murdered by smashing her head on a rock, her two minor brothers, two minor sisters, her *phupha, phupi, mama* (uncle, aunt and uncle respectively) and three-cousins were all murdered.

2.2. While eventually, the perpetrators of the crime, including the police personnel were convicted and sentenced, the petitioner, who was aged twenty-one years and pregnant at that time, having lost all members of her family in the diabolical and brutal attacks, has once again approached this Court seeking justice by challenging the *en-masse* remission granted to respondent Nos.3 to 13. Bilkis Yakub Rasool, being an unfortunate victim of the heinous crimes hereinabove narrated, has filed the present writ petition under Article 32 of the Constitution of India, seeking issuance of a writ, order or direction quashing the Orders dated 10.08.2022 passed by the State of Gujarat by which the convicts in Sessions Case No.634

of 2004, Mumbai (respondent Nos.3 to 13 herein), whose convictions were upheld by a Division Bench of the Bombay High Court and thereafter by this Court, have been released prematurely.

2.3. Writ Petition (Crl.) No.352 of 2022 titled ***Dr. Meeran Chadha Borwankar vs. State of Gujarat*** has been preferred by a former woman police officer, a woman bureaucrat who had served in the Indian Foreign Service and an academic, seeking, *inter alia,* the setting aside of the remission Orders dated 10.08.2022. The petitioners by way of the writ petition have also sought a writ or order in the nature of mandamus directing that the States must endeavour to have a pluralistic composition in Jail Advisory Committees, adequately representing the diverse nature of our society.

2.4. Writ Petition (Crl.) No.319 of 2022 titled ***Subhashini Ali vs. State of Gujarat*** being the first of the petitions filed in this batch has been preferred under Article 32 by Subhashini Ali, a former parliamentarian and presently the Vice-President of All India Democratic Women's Association; Revati Laul, an independent journalist and Roop Rekha Verma, former Vice-Chancellor of Lucknow University, challenging the Orders dated 10.08.2022.

2.5. Writ Petition (Crl.) No.326 of 2022 titled ***Mahua Moitra vs. State of Gujarat*** has been preferred by Mahua Moitra, a Member of Parliament from the Krishnanagar constituency in West Bengal, seeking issuance of a writ, order, or direction, quashing the Orders dated 10.08.2022. The petitioner in the said writ petition has also sought the framing of guidelines and the equitable application of existing guidelines by the State Government for the grant of remission so as to channelise the exercise of discretion in granting remission and to prevent the misuse of such discretion, if found necessary upon an examination of the existing statutory framework.

2.6. Writ Petition (Crl.) No.403 of 2022 titled ***National Federation of Indian Women (NFIW) vs. State of Gujarat*** has been filed by the National Federation of Indian Women (NFIW), which is a women centric organization that was established on 04.06.1954 for the purpose of securing women's rights, seeking appropriate directions in the form of a writ of mandamus to the respondent to revoke the remission granted to respondent Nos.3 to 13 by the competent authority of the Government of Gujarat under the remission policy dated 09.07.1992 and to re-arrest respondent Nos.3 to 13 herein.

2.7. Writ Petition (Crl.) No.422 of 2022 titled ***Asma Shafique Shaikh vs. State of Gujarat*** has been filed by Asma Shafique Shaikh, a lawyer by profession and a social activist, seeking issuance of a writ, order or direction, quashing the Orders dated 10.08.2022.

2.8. As Writ Petition (Crl.) No.491 of 2022 has been filed by one of the victims, Bilkis Yakub Rasool, seeking quashing of the orders dated 10.08.2022, for the sake of convenience, the factual background, details as well as the status of the parties shall be with reference to Writ Petition (Crl.) No.491 of 2022.

Factual Background:

3. The factual background in which these writ petitions have been filed is that following the aforesaid unfortunate and grave incident, a First Information Report ("FIR" for short) was registered against unknown accused, on 04.03.2002. The Investigation Agency filed a closure report stating that the accused could not be traced and the said closure report was accepted by the Judicial Magistrate vide Order dated 25.03.2003. The closure report was challenged by the petitioner-victim- Bilkis Yakub Rasool, before this Court in Writ Petition (Crl.) No.118 of 2003. This Court directed the reopening of

the case and transferred the investigation of the same to the Central Bureau of Investigation ("CBI" for short).

3.1. The CBI commenced a fresh investigation and submitted a chargesheet on 19.04.2004 against twenty persons accused of the crime. Charges of gang rape, murder and rioting armed with deadly weapons with a common intention were framed against twelve persons, six police personnel and two doctors

3.2. The petitioner-victim approached this Court by filing Transfer Petition (Crl.) No.192 of 2004, seeking transfer of the trial from the State of Gujarat to a neutral place. This Court in Transfer Petition (Crl.) No.192 of 2004, by an Order dated 06.08.2004, in the peculiar facts and circumstances of the case, considered it appropriate to transfer Sessions Case No.161 of 2004 pending before the learned Additional Sessions Judge, Dahod, Ahmedabad to the competent Court in Mumbai for trial and disposal. Charges were framed on 13.01.2005 amongst others against the eleven convicts for the commission of offences under Sections 143, 147, 302, 376(2)(e) and (g) of the Indian Penal Code, 1860 (hereinafter referred to as the "IPC" for the sake of brevity).

3.3. The Special Judge, Greater Mumbai, *vide* Judgment dated 21.01.2008 in Sessions Case No.634 of 2004 convicted the eleven accused and sentenced them to life imprisonment for the commission of the offences of, *inter alia*, gang rape and murder of the petitioner's mother; gang rape and murder of her cousin Shamim; murder of twelve more victims including the three and a half year old daughter of the petitioner, rioting, etc. and one police personnel for deliberately recording the FIR incorrectly. However, the Trial Court acquitted the remaining five police personnel and the two doctors, against whom there were serious charges. Respondent Nos.3 to 13 herein were convicted for the offences punishable under Sections 143, 147, 148, 302 r/w 149 of the IPC for the murder of fourteen people; Section 376 (2)(e) & (g) for having committed gang-rape on the petitioner-victim; Section 376(2)(g) for having committed gang rape on other women. The police officer, Somabhai Gori was convicted of the offence punishable under Sections 217 and 218 of the IPC.

3.4. On 05.08.2013, a Division Bench of the High Court of Bombay passed an Order in Criminal Writ Petition No.305 of 2013 titled ***Ramesh Rupabhai Chandana vs. State of Maharashtra*****,** preferred by respondent No.13 herein, holding that where a trial has

been transferred from one State to another and such trial has been concluded and the prisoner has been convicted, the prisoner should be transferred to the prison of his State.

3.5. Against the judgment of the Trial Court dated 21.01.2008, the persons convicted, as well as the State filed Criminal Appeals before the Bombay High Court. While the convicts filed criminal appeals assailing their conviction, the State filed criminal appeal against acquittal of the police officials and the doctors A bench comprising Mrs. Mridula Bhatkar and Mrs. V. K. Tahilramani, JJ. of the Bombay High Court upheld the conviction of the eleven persons accused of the offence of rioting armed with deadly weapons, gang-rape and murder by judgment dated 04.05.2017 in Criminal Appeal Nos.1020-1023 of 2009, 487 of 2010, 194 and 271 of 2011 titled ***Jaswantbhai Chaturbhai Nai vs. State of Gujarat.*** The five police officials and the two doctors who were acquitted by the Trial Court were also convicted by the High Court. The High Court also observed that the investigation by the Gujarat police was not proper and that the Gujarat police had taken the investigation in the wrong direction from the beginning i.e., the day of registering the FIR. That the investigation was not only unsatisfactory but it also smacked of dishonest steps to shield the culprits. It was further

observed that the earlier investigation had played the role of a villain in the case. The High Court while going through the evidence also noted that *"the truth and the falsehood are mixed up in such a manner that at every stage of investigation the truth is hidden under layers of intentional laxity, omissions, contradictions and falsehood and the truth is required to be unearthed"*.

3.6. All the persons convicted filed Special Leave Petitions against the judgment of the High Court. This Court *vide* Order dated 10.07.2017 passed in SLP (Crl.) Nos.4290/2017, 4705/2017 and 4716/2017 and by Order dated 20.11.2017 passed in SLP (Crl.) No.7831/2017 dismissed the Special Leave Petitions preferred by the convicts and upheld the findings rendered by the High Court, as well as the sentence awarded.

3.7. It is noteworthy that the petitioner-victim approached this Court by way of Criminal Appeal Nos.727-733 of 2019 seeking just and adequate compensation for her ordeals. This Court *vide* order dated 23.04.2019 observed that the petitioner is a victim of riots which occurred in the aftermath of the Godhra train burning. This Court noted that the petitioner's case had to be dealt with differently as the loss she has suffered surpassed normal cases. That the gruesome and horrific acts of violence had left an indelible imprint

on the mind of the petitioner, which will continue to torment and cripple her. This Court therefore directed the State Government to pay Rs. 50,00,000/- (Rupees Fifty Lakhs) to the petitioner within two weeks noting that the petitioner had been coerced into living the life of a nomad and an orphan and was barely sustaining herself on the charity of NGOs, having lost her family members.

3.8. After undergoing 14 years 5 months and 6 days of his sentence, respondent No.3 herein, namely, Radheshyam Bhagwandas Shah, filed Criminal Application No.4573 of 2019 before the Gujarat High Court challenging the non-consideration of his application for premature release under Sections 433 and 433A of the Code of Criminal Procedure, 1973 (hereinafter, the "CrPC" for the sake of brevity). The High Court after considering the submissions observed that respondent No.3 herein had been tried in the State of Maharashtra, hence, as per Section 432 (7), the 'appropriate government' for the purpose of Sections 432 and 433 of the CrPC would be the State of Maharashtra. The High Court placed reliance on the dictum of this Court in ***Union of India vs. V. Sriharan, (2016) 7 SCC 1 ("V. Sriharan")*** and by Order dated 17.07.2019 directed the petitioner therein (respondent No.3 herein) to pursue his remedy within the State of Maharashtra.

3.9. Respondent No.3 then moved an application dated 01.08.2019 before the Secretary, Department of Home Affairs, State of Maharashtra, seeking premature release under Sections 432 and 433A of the CrPC. Respondent No.3 specifically relied on the order dated 17.07.2019 of the Gujarat High Court granting liberty to the convict to approach the State of Maharashtra seeking premature release.

3.10. As the case was investigated and prosecuted by the CBI, the opinion of the said Agency was sought on the application for premature release. The CBI submitted its report dated 14.08.2019 wherein it was recommended that respondent No.3 should serve his sentence fully and no leniency should be given to him. The CBI submitted that respondent No.3 had actively participated in the heinous crime and that the offences committed by him and others were serious in nature and thus, he should not be pardoned or the sentence, suspended or remitted.

3.11. Further, on 03.01.2020, the Special CBI Court, Mumbai, also gave a negative report and objected to the prayer for premature release of respondent No.3 on the ground of seriousness of the offence. It was observed that the offences committed by the accused

fell into category 5 (b) of the relevant State policy and were extremely serious, thus, it would be improper to grant remission to respondent No.3.

3.12. Similarly, on 03.02.2020, the Superintendent of Police, Dahod, in his report submitted to the Collector and District Magistrate, Dahod, gave a negative opinion against the pre-mature release of respondent No.3 on the ground that the victim and her family members apprehended serious crimes against them if respondent No.3 was released prematurely. The Office of the Collector and District Magistrate, Dahod, on 19.02.2020 also opined against the pre-mature release of respondent No.3 by relying on the opinion dated 03.02.2020 of the Superintendent of Police, Dahod.

3.13. Respondent No.3 again approached the High Court of Gujarat by way of Criminal Miscellaneous Application No. 1 of 2019 in Criminal Application No.4573 of 2019 seeking remission under Section 432 read with Section 433 of the CrPC. The High Court *vide* Order dated 13.03.2020 rejected the application preferred by respondent No.3 with a specific observation that the appropriate government under Section 432(7)(b) to exercise the powers of remission would be the State of Maharashtra and not the State of Gujarat. It was further recorded in the said order that the counsel

for respondent No.3 had sought the permission of the Court to move the High Court of Bombay for the same relief and therefore the application was disposed of with liberty to the writ petitioner therein in the aforesaid terms. It is pertinent to note that this order still holds the field as it has neither been challenged nor recalled or set aside in accordance with law.

3.14. On 20.07.2021, a meeting of the Jail Advisory Committee of the State of Gujarat took place which comprised of four social workers; two members of the State Legislative Assembly; the Superintendent of Police, Godhra; the District and Sessions Judge, Godhra; the Secretary, Jail Advisory Committee and Superintendent, Godhra Sub-Jail and the District Magistrate, Godhra (Chairman of the Jail Advisory Committee, Godhra Sub-Jail).

3.15 The Sessions Judge, Godhra, being one of the ten members of the Jail Advisory Committee, after going through the case papers observed that the convict, respondent No.3 herein, had been sentenced to undergo life imprisonment in a sensitive case and that if he was released prematurely, it may create an adverse effect on the society and there is a possibility of peace being disturbed. The other Committee members recommended the grant of remission to

respondent No.3, on the ground that he had completed fifteen years of imprisonment and that his conduct in prison had been good.

3.16. On 18.08.2021, the Additional Director General of Police, Prisons and Correctional Administration, State of Gujarat, *vide* his letter to the Additional Chief Secretary, Home Department, Gujarat, after considering the opinion given by the Jail Advisory Committee, concurred with the opinion given by the Superintendent of Police, Dahod; CBI; the Special CBI Court, Mumbai and the District Magistrate, Dahod and did not recommend the premature release of the convict- respondent No.3.

3.17. In the interregnum, the rest of the convicts, respondent Nos.4 to 13 had applied for remission on varying dates in the month of February 2021 to the Superintendent, Godhra Sub-Jail. The opinion of the CBI was sought in this regard, and a negative opinion was given, so also by the Special Judge (CBI), Greater Mumbai. By a common opinion dated 22.03.2021, Special Judge (CBI), Greater Mumbai stated that since all the accused were tried and convicted in Mumbai, i.e., the State of Maharashtra, the Government Resolution issued by the Home Department, Government of Maharashtra would be applicable to them. The Special Judge after perusing the guidelines issued by the Government of Maharashtra

on 16.11.1978 and 11.05.1992 and the Government Resolution dated 11.04.2008 (Policy dated 11.04.2008), observed that the said resolution dated 11.04.2008 would apply as it had superseded all earlier orders and guidelines and would have been applicable in the normal course to the convicts undergoing life imprisonment. The Special Judge further noted that the case of the convicts mentioned above would fall under categories 2(c), 2 (d) and 4(d) of the Policy dated 11.04.2008, according to which the minimum period of imprisonment to be undergone is 28 years (Category 2(d)). However, the Superintendent of Police, Dahod, gave a positive opinion with respect to the premature release of respondent Nos.3 to 13. His opinion was seconded by the Collector and District Magistrate, Dahod.

3.18. In the aforesaid backdrop, when various steps were in progress at various stages, stealthily a writ petition, being Writ Petition (Crl.) No.135 of 2022 titled ***Radheshyam Bhagwandas Shah vs. State of Gujarat, (2022) 8 SCC 552 ("Radheshyam Bhagwandas Shah")***, was filed before this Court by respondent No.3 herein, seeking a direction in the nature of mandamus to the State of Gujarat to consider his application for pre-mature release

under its policy dated 09.07.1992, which was existing at the time of commission of his crime and his conviction.

3.19 This Court noted that the policy on the date of conviction was as per the resolution dated 09.07.1992 passed by the State of Gujarat. Hence, respondent No.3 (petitioner therein) would be governed by the same. This Court placed reliance on the dictum in ***State of Haryana vs. Jagdish, (2010) 4 SCC 216 ("Jagdish")*** to observe that the application for grant of pre-mature release will have to be considered on the basis of the policy which stood as on the date of conviction. The other pertinent findings of this Court in its judgment and Order dated 13.05.2022, in Writ Petition (Crl.) No.135 of 2022 are culled out hereunder:

i. The argument advanced by the respondents – State of Gujarat therein that since the trial had been concluded in the State of Maharashtra, the 'appropriate Government' as referred to under Section 433 of the CrPC would be the State of Maharashtra, was rejected by this Court holding that the crime in the instant case was admittedly committed in the State of Gujarat and ordinarily, the trial would have been concluded in the same

State and in terms of Section 432(7) of the CrPC, the appropriate Government in the ordinary course would have been the State of Gujarat but in the instant case, the case was transferred under exceptional circumstances by this Court for the limited purpose of trial and disposal to the State of Maharashtra. However, after the conclusion of trial and on conviction, the case stood transferred to the State where the crime was committed and the State of Gujarat remains the appropriate Government for the purpose of Section 432(7) of the CrPC.

ii. This Court observed that once the crime was committed in the State of Gujarat, after the trial came to be concluded and judgment of conviction came to be passed, all further proceedings would have to be considered, including remission or pre-mature release, as the case may be, in terms of the policy which is applicable in the State of Gujarat where the crime was committed and not the State where the trial stood transferred and concluded for exceptional reasons under the orders of this Court.

iii. This Court directed the State of Gujarat to consider the application of the petitioner therein for pre-mature release in terms of its policy dated 09.07.1992 which was applicable on the date of conviction.

3.20. Pursuant to the judgment of this Court dated 13.05.2022, a meeting of the Jail Advisory Committee of the State of Gujarat took place on 26.05.2022 and all the members recommended grant of remission to respondent Nos.3 to 13.

3.21. The Sessions Judge, Godhra, also considered the applications of respondent Nos.3 to 13 and upon going through the particulars provided by the Jail Superintendent, Sub-Jail, Godhra noted that the said report recorded that the convicts had demonstrated good behavior and conduct during the period of incarceration and that no adverse incident had been recorded against the convicts even when they were on furlough or on parole, except against one convict, namely, Mitesh Chimanlal Bhatt. That all convicts, by and large, surrendered themselves within the time after enjoying parole/furlough and participated in rehabilitation and corrective programmes. That the convicts still had substantial years of life remaining. Accordingly, the Sessions Judge applied the

policy dated 09.07.1992 and gave an 'affirmative' opinion as regards the premature release of respondent Nos.3 to 13.

3.22. The Additional Director General of Police, Prisons and Correctional Administration, State of Gujarat, addressed a letter dated 09.06.2022 to the Additional Chief Secretary, Home Department, Government of Gujarat, regarding the premature release of accused Kesarbhai Khimabhai Vahoniya. In the said letter, the details of the opinion given by the concerned authorities regarding the premature release of the said convict were also discussed. It was stated in the letter that the Superintendent of Police, Dahod, had given a positive opinion regarding premature release from jail; the Superintendent of Police, Special Crime Branch, Mumbai, however, had given a negative opinion about premature release from jail; the District Magistrate, Dahod, had given a positive opinion about the premature release from jail; the Sessions Court, Mumbai, which pronounced the sentence had given a negative opinion about premature release; however, the Jail Advisory Committee of Gujarat had given a positive opinion about the convict's premature release and the Superintendent, Godhra Sub-Jail had also given a positive opinion about the premature release. Thus, the Additional Director General of Police, Prisons and

Correctional Administration, State of Gujarat gave a positive opinion regarding the premature release of Kesarbhai Khimabhai Vahoniya to the Additional Chief Secretary, Home Department, Government of Gujarat. So also, as regards the other convicts, namely, Salesh Chimanlal Bhatt, Pradip Ramanlal Modhhiya, Mitesh Chimanlal Bhatt, Bipinchand Kanhaiyalal Joshi, Rajubhai Babulal Soni, Bakabhai Khimabhai Vahoniya, Jaswantbhai Chaturbhai Nai (Rawal) and Ramesh Rupabhai Chandana.

3.23. On 28.06.2022, the Department of Home Affairs, Government of Gujarat, addressed a letter to the Secretary, Ministry of Home Affairs, Government of India, seeking sanction from the Government of India on the proposal for the premature release of the prisoners, respondent Nos.3 to 13.

3.24. By letter dated 11.07.2022, the Ministry of Home Affairs, Government of India conveyed its approval under Section 435 of the CrPC for the premature release of all 11 convicts, respondent Nos.3 to 13.

3.25. Pursuant to the concurrence of the Central Government, the State of Gujarat issued the impugned orders dated 10.08.2022.

3.26. In the above background, these writ petitions have been filed, praying, *inter-alia,* for issuance of a writ, order, or direction, quashing the Orders dated 10.08.2022.

Counter affidavit of State of Gujarat:

4. Under Secretary, Home Department, State of Gujarat (first respondent) has filed his affidavit stating that he is acquainted with the facts of the case as appearing from the official records of the case. While denying every assertion, contention and statement made by the petitioner in Writ Petition (Crl.) No.319 of 2022, which was the first of the writ petitions filed before this Court, certain preliminary submissions have been advanced at the outset.

4.1 It is contended that the public interest litigation (PIL) filed by the petitioners (Subhashini Ali and others) is neither maintainable in law nor tenable on facts. That a third party has no locus to challenge the orders of remission passed by a competent authority under the garb of a PIL. A PIL is not maintainable in a criminal matter as the petitioners are in no way connected with the proceedings with which the convicted persons have been granted remission. Therefore, the writ petition may be dismissed on that ground alone. In support of this submission, reliance has been placed on ***Rajiv Ranjan Singh 'Lalan' (VIII) vs. Union of India,***

(2006) 6 SCC 613 ("Rajiv Ranjan"); Gulzar Ahmed Azmi vs. Union of India, (2012) 10 SCC 731 ("Gulzar Ahmed"); Simranjit Singh Mann vs. Union of India, (1992) 4 SCC 653 ("Simranjit Singh"); and, ***Ashok Kumar Pandey vs. State of West Bengal, (2004) 3 SCC 349 ("Ashok Kumar")***. It is submitted that a third party/stranger either under the provisions of the CrPC or under any other statute is precluded from questioning the correctness of grant or refusal of 'sanction for prosecution' or the conviction and sentence imposed by the Court after a regular trial. Similarly, a third party stranger is precluded from questioning a remission order passed by the State Government which is in accordance with law. Therefore, dismissal of the petition at the threshold is sought.

4.2. It is next averred that the petitioners have not pleaded as to how they have the locus to seek a writ of certiorari for quashing the orders of remission passed by respondent no.1 with respect to the eleven convicts sentenced by the Special Judge, Greater Mumbai in Sessions Case No.634 of 2004. That the petitioners have not pleaded as to how their fundamental rights have been abridged or how they are aggrieved by the action of the State Government. Therefore, filing of the writ petition as Public Interest Litigation (in short, 'PIL') is an abuse of PIL jurisdiction and is motivated by

political intrigues and machinations. In this regard, reliance has been placed on ***Tehseen Poonawalla vs. Union of India, (2018) 6 SCC 72*** **(*"Tehseen"*);** and ***Ashok Kumar.***

4.3. It is further submitted that the petitioners not being aggrieved persons have invoked the jurisdiction of this Court under Article 32 of the Constitution for extraneous purposes. As the petitioners are not the "persons aggrieved", the writ petition is not maintainable. On the scope and ambit of the expression "person aggrieved", reliance has been placed on ***State of Maharashtra vs. M.V. Dabholkar, (1975) 2 SCC 702*** **(*"M.V. Dabholkar"*);** ***Jasbhai Motibhai Desai vs. Roshan Kumar, Haji Bashir Ahmed, (1976) 1 SCC 671*** **(*"Jasbhai Motibhai"*);** and ***Thammanna vs. K. Veera Reddy, (1980) 4 SCC 62*** **(*"Thammanna"*).**

4.4. On merits, it is stated that one of the respondents/prisoners, namely, Radheshyam Bhagwandas Shah had filed Writ Petition (Crl.) No.135 of 2022, *inter alia,* praying to consider his remission application. This Court by its order dated 13.05.2022 held that the policy which will be applicable for deciding the remission application is the one which was in vogue at the time of conviction i.e. Premature Release of Convicts Policy of 1992. Further, this Court held that for the purposes of Section 432 of the CrPC, the

"appropriate Government" for considering the remission application is the State in which the offence was committed and not the State in which the trial was conducted and therefore, directed the State of Gujarat to consider the application of the prisoner within a period of two months. Accordingly, the State of Gujarat considered the application of the prisoners as per Section 432 read with Section 435 of the CrPC along with the Premature Release of Convicts Policy of 1992. That, the State Government *vide* its Circular dated 09.07.1992 had issued a policy for early release of prisoners who have completed fourteen years of imprisonment and who were imposed punishment of life imprisonment. As per the aforesaid Policy of 1992, the Inspector General of Jail is mandated to obtain the opinion of the District Police Officer, District Magistrate, Jail Superintendent and Advisory Board Committee for early release of a convict. Thereafter, the Inspector General of Jail is mandated to give his opinion with the copy of the nominal roll and copy of the judgment and the recommendation of the Government. Further, the Jail Advisory Board at the time of consideration of the premature release application shall be guided by the Policy of 1992. A copy of the policy has been annexed as Annexure R-2. It is further submitted that the State Government considered the case of all the eleven convicts as per the Policy of 1992. Further, the remission in

these cases was not granted under the Circular governing grant of remission to prisoners as part of celebration as 'Azadi Ka Amrit Mahotsav".

4.5. The State Government in fact directed the Additional Director General of Prisons, Ahmedabad to send the necessary proposal of remission as per the direction of this Court before 31.05.2022 vide letter dated 25.05.2022. A reminder was also sent on 08.06.2022. Ten proposals were received on 09.06.2022 and one proposal was received on 17.06.2022. The applications of the accused were considered according to the remission policy dated 09.07.1992 in accordance with the directions issued by this Court. As laid down in the abovementioned policy, the Department received the opinions of the concerned District Police Officer, District Magistrate and Chairman of Jail Advisory Board Committee. It is further stated that the State Government has considered the opinions of the Inspector General of Prisons, Gujarat State, Jail Superintendent, Jail Advisory Committee, District Magistrate, Police Superintendent, CBI, Special Crime Branch, Mumbai and Sessions Court, Mumbai (CBI). Therefore, the opinions of seven authorities were considered. Further, having regard to the provisions of Section 435 of the CrPC, sanction of the Government of India was also necessary. As the CBI

was a central investigating agency, the State Government obtained the approval/suitable orders of the Government of India. The prisoners/convicts had completed fourteen years of imprisonment and the opinions of the concerned authorities were obtained as per Policy dated 09.07.1992. The same was submitted to the Ministry of Home Affairs, Government of India *vide* letter dated 28.06.2022 and sought the approval/suitable orders of the Government of India. The Government of India vide its letter dated 11.07.1992 conveyed its concurrence/approval. On considering all the opinions, the State Government decided to release the eleven convicts since they had completed fourteen years and above in jail and their behaviour was found to be good.

4.6. Reliance has been placed on ***Jagdish*** and ***V. Sriharan*** to contend that if a policy which is beneficial to the convict exists at the time of consideration of the application of premature release then the convict cannot be deprived of such beneficial policy and that judicial review of the order of remission is not permissible in law. The Under Secretary has further proceeded to place the following facts to contend that the impugned orders are in accordance with law:

"29. I say that the relevant records pertaining to the application for remission *qua* the prisoner, Kesharbhai Khimabhai Vahoniya, is as under:

Sl. No.	Document	Opinion of the concerned Authority
1.	Premature release application dated 19.02.2021.	-
2.	Letter dated 11.03.2021 from the Superintendent of Police, CBI, SCB, Mumbai.	Prisoner should not be released prematurely.
3.	Letter dated 22.03.2021 from the Special Judge (CBI), City Civil & Sessions Court, Gr. Bombay	Considering the Govt. Resolution dated 11.04.2008, issued by the State of Maharashtra, prisoner should not be released prematurely.
4.	Letter dated 07.03.2022 from the Superintendent of Police, Dahod, Gujarat.	No objection to the premature release of the prisoner.
5.	Letter dated 07.03.2022 from the Collector & DM, Dahod, Gujarat	No objection to the premature release of the prisoner.
6.	Opinion of the Jail Superintendent, Godhra Sub-Jail, Gujarat.	No objection to the premature release of the prisoner.
7.	Opinion of the Jail Advisory Committee, dated 26.05.2022.	The committee has unanimously given the opinion in favour of the premature release of the prisoner.
8.	Letter dated 09.06.2022 to the Home Department, Govt. of Gujarat, from the Addl. Director General of Police, Prisons & Correctional	No objection to the premature release of the prisoner.

	Administration, Ahmedabad.	
9.	Letter dated 28.06.2022 to the Ministry of Home Affairs, Govt. of India from Home Department, Govt. of Gujarat.	Recommended premature release of the prisoner. Sought approval/suitable orders from the Govt. of India.
10.	Letter dated 11.07.2022 to the Home Department, Govt. of Gujarat from the Ministry of Home Affairs, Govt. of India	Approved the premature release of the prisoner.

Copy of the relevant records *qua* the prisoner, Kesharbhai Khimabhai Vahoniya is annexed herewith as ANNEXURE R-3.

30. I say that the relevant records pertaining to the application for remission *qua* the prisoner, Shaileshbhai Chimanlal Bhatt, is as under:

Sl. No.	Document	Opinion of the concerned Authority
1.	Premature release application dated 23.02.2021.	-
2.	Letter dated 11.03.2021 from the Superintendent of Police, CBI, SCB, Mumbai.	Prisoner should not be released prematurely.
3.	Letter dated 22.03.2021 from the Special Judge (CBI), City Civil & Sessions Court, Gr. Bombay	Considering the Govt. Resolution dated 11.04.2008, issued by the State of Maharashtra, prisoner should not be released prematurely.
4.	Letter dated 07.03.2022 from the Superintendent of Police, Dahod, Gujarat.	No objection to the premature release of the prisoner.

5.	Letter dated 07.03.2022 from the Collector & DM, Dahod, Gujarat	No objection to the premature release of the prisoner.
6.	Opinion of the Jail Superintendent, Godhra Sub-Jail, Gujarat.	No objection to the premature release of the prisoner.
7.	Opinion of the Jail Advisory Committee, dated 26.05.2022.	The committee has unanimously given the opinion in favour of the premature release of the prisoner.
8.	Letter dated 09.06.2022 to the Home Department, Govt. of Gujarat, from the Addl. Director General of Police, Prisons & Correctional Administration, Ahmedabad.	No objection to the premature release of the prisoner.
9.	Letter dated 28.06.2022 to the Ministry of Home Affairs, Govt. of India from Home Department, Govt. of Gujarat.	Recommended premature release of the prisoner. Sought approval/suitable orders from the Govt. of India.
10.	Letter dated 11.07.2022 to the Home Department, Govt. of Gujarat from the Ministry of Home Affairs, Govt. of India	Approved the premature release of the prisoner.

Copy of the relevant records *qua* the prisoner, Shaileshbhai Chimanlal Bhatt is annexed herewith as Annexure-RG-4.

31. I say that the relevant records pertaining to the application for remission *qua* the prisoner, Pradip Ramanlal Modhiya, is as under:

Sl. No.	Document	Opinion of the concerned Authority
1.	Premature release application dated 23.02.2021.	-
2.	Letter dated 11.03.2021 from the Superintendent of Police, CBI, SCB, Mumbai.	Prisoner should not be released prematurely.
3.	Letter dated 22.03.2021 from the Special Judge (CBI), City Civil & Sessions Court, Gr. Bombay	Considering the Govt. Resolution dated 11.04.2008, issued by the State of Maharashtra, prisoner should not be released prematurely.
4.	Letter dated 07.03.2022 from the Superintendent of Police, Dahod, Gujarat.	No objection to the premature release of the prisoner.
5.	Letter dated 07.03.2022 from the Collector & DM, Dahod, Gujarat	No objection to the premature release of the prisoner.
6.	Opinion of the Jail Superintendent, Godhra Sub-Jail, Gujarat.	No objection to the premature release of the prisoner.
7.	Opinion of the Jail Advisory Committee, dated 26.05.2022.	The committee has unanimously given the opinion in favour of the premature release of the prisoner.
8.	Letter dated 09.06.2022 to the Home Department, Govt. of Gujarat, from the Addl. Director General of Police, Prisons & Correctional Administration, Ahmedabad.	No objection to the premature release of the prisoner.
9.	Letter dated 28.06.2022 to the Ministry of Home Affairs, Govt. of India	Recommended premature release of the prisoner.

	from Home Department, Govt. of Gujarat.	Sought approval/suitable orders from the Govt. of India.
10.	Letter dated 11.07.2022 to the Home Department, Govt. of Gujarat from the Ministry of Home Affairs, Govt. of India	Approved the premature release of the prisoner.

Copy of the relevant records *qua* the prisoner, Pradip Ramanlal Modhiya is annexed herewith as ANNEXURE RG-5.

32. I say that the relevant records pertaining to the application for remission *qua* the prisoner, Mitesh Chimanlal Bhatt, is as under:

Sl. No.	Document	Opinion of the concerned Authority
1.	Premature release application dated 18.02.2021.	-
2.	Letter dated 10.03.2021 from the Superintendent of Police, CBI, SCB, Mumbai.	Prisoner should not be released prematurely.
3.	Letter dated 22.03.2021 from the Special Judge (CBI), City Civil & Sessions Court, Gr. Bombay.	Considering the Govt. Resolution dated 11.04.2008, issued by the State of Maharashtra, prisoner should not be released prematurely.
4.	Letter dated 25.05.2022 from the Superintendent of Police, Dahod, Gujarat.	No objection to the premature release of the prisoner.
5.	Letter dated 25.05.2022 from the Collector & DM, Dahod, Gujarat	No objection to the premature release of the prisoner.
6.	Opinion of the Jail Superintendent, Godhra Sub-Jail, Gujarat.	No objection to the premature release of the prisoner.

7.	Opinion of the Jail Advisory Committee, dated 26.05.2022.	The committee has unanimously given the opinion in favour of the premature release of the prisoner.
8.	Letter dated 09.06.2022 to the Home Department, Govt. of Gujarat, from the Addl. Director General of Police, Prisons & Correctional Administration, Ahmedabad.	No objection to the premature release of the prisoner.
9.	Letter dated 28.06.2022 to the Ministry of Home Affairs, Govt. of India from Home Department, Govt. of Gujarat.	Recommended premature release of the prisoner. Sought approval/suitable orders from the Govt. of India.
10.	Letter dated 11.07.2022 to the Home Department, Govt. of Gujarat from the Ministry of Home Affairs, Govt. of India	Approved the premature release of the prisoner.

Copy of the relevant records *qua* the prisoner, Mitesh Chimanlal Bhatt is annexed herewith as ANNEXURE RG-6.

33. I say that the relevant records pertaining to the application for remission *qua* the prisoner, Bipinchandra Kanaiyalal Joshi, is as under:

Sl. No.	Document	Opinion of the concerned Authority
1.	Premature release application dated 16.02.2021.	-
2.	Letter dated 10.03.2021 from the Superintendent of Police, CBI, SCB, Mumbai.	Prisoner should not be released prematurely.

3.	Letter dated 22.03.2021 from the Special Judge (CBI), City Civil & Sessions Court, Gr. Bombay.	Considering the Govt. Resolution dated 11.04.2008, issued by the State of Maharashtra, prisoner should not be released prematurely.
4.	Letter dated 07.03.2022 from the Superintendent of Police, Dahod, Gujarat.	No objection to the premature release of the prisoner.
5.	Letter dated 07.03.2022 from the Collector & DM, Dahod, Gujarat.	No objection to the premature release of the prisoner.
6.	Opinion of the Jail Superintendent, Godhra Sub-Jail, Gujarat.	No objection to the premature release of the prisoner.
7.	Opinion of the Jail Advisory Committee, dated 26.05.2022.	The committee has unanimously given the opinion in favour of the premature release of the prisoner.
8.	Letter dated 09.06.2022 to the Home Department, Govt. of Gujarat, from the Addl. Director General of Police, Prisons & Correctional Administration, Ahmedabad.	No objection to the premature release of the prisoner.
9.	Letter dated 28.06.2022 to the Ministry of Home Affairs, Govt. of India from Home Department, Govt. of Gujarat.	Recommended premature release of the prisoner. Sought approval/ suitable orders from the Govt. of India.
10.	Letter dated 11.07.2022 to the Home Department, Govt. of Gujarat from the Ministry of Home Affairs, Govt. of India	Approved the premature release of the prisoner.

Copy of the relevant records *qua* the prisoner, Bipinchandra Kanaiyalal Joshi is annexed herewith as ANNEXURE RG-7.

34. I say that the relevant records pertaining to the application for remission *qua* the prisoner, Rajubhai Babulal Soni, is as under:

Sl. No.	Document	Opinion of the concerned Authority
1.	Premature release application dated 15.02.2021.	-
2.	Letter dated 11.03.2021 from the Superintendent of Police, CBI, SCB, Mumbai.	Prisoner should not be released prematurely.
3.	Letter dated 22.03.2021 from the Special Judge (CBI), City Civil & Sessions Court, Gr. Bombay.	Considering the Govt. Resolution dated 11.04.2008, issued by the State of Maharashtra, prisoner should not be released prematurely.
4.	Letter dated 07.03.2022 from the Superintendent of Police, Dahod, Gujarat.	No objection to the premature release of the prisoner.
5.	Letter dated 07.03.2022 from the Collector & DM, Dahod, Gujarat.	No objection to the premature release of the prisoner.
6.	Opinion of the Jail Superintendent, Godhra Sub-Jail, Gujarat.	No objection to the premature release of the prisoner.
7.	Opinion of the Jail Advisory Committee, dated 26.05.2022.	The committee has unanimously given the opinion in favour of the premature release of the prisoner.
8.	Letter dated 09.06.2022 to the Home Department, Govt. of Gujarat, from the Addl. Director	No objection to the premature release of the prisoner.

	General of Police, Prisons & Correctional Administration, Ahmedabad.	
9.	Letter dated 28.06.2022 to the Ministry of Home Affairs, Govt. of India from Home Department, Govt. of Gujarat.	Recommended premature release of the prisoner. Sought approval/suitable orders from the Govt. of India.
10.	Letter dated 11.07.2022 to the Home Department, Govt. of Gujarat from the Ministry of Home Affairs, Govt. of India	Approved the premature release of the prisoner.

Copy of the relevant records *qua* the prisoner, Rajubhai Babulal Soni is annexed herewith as ANNEXURE RG-8.

35. I say that the relevant records pertaining to the application for remission *qua* the prisoner, Bakabhai Khimabhai Vahoniya, is as under:

Sl. No.	Document	Opinion of the concerned Authority
1.	Premature release application dated 18.02.2021.	-
2.	Letter dated 10.03.2021 from the Superintendent of Police, CBI, SCB, Mumbai.	Prisoner should not be released prematurely.
3.	Letter dated 22.03.2021 from the Special Judge (CBI), City Civil & Sessions Court, Gr. Bombay.	Considering the Govt. Resolution dated 11.04.2008, issued by the State of Maharashtra, prisoner should not be released prematurely.
4.	Letter dated 07.03.2022 from the Superintendent of Police, Dahod, Gujarat.	No objection to the premature release of the prisoner.

5.	Letter dated 07.03.2022 from the Collector & DM, Dahod, Gujarat.	No objection to the premature release of the prisoner.
6.	Opinion of the Jail Superintendent, Godhra Sub-Jail, Gujarat.	No objection to the premature release of the prisoner.
7.	Opinion of the Jail Advisory Committee, dated 26.05.2022.	The committee has unanimously given the opinion in favour of the premature release of the prisoner.
8.	Letter dated 09.06.2022 to the Home Department, Govt. of Gujarat, from the Addl. Director General of Police, Prisons & Correctional Administration, Ahmedabad.	No objection to the premature release of the prisoner.
9.	Letter dated 28.06.2022 to the Ministry of Home Affairs, Govt. of India from Home Department, Govt. of Gujarat.	Recommended premature release of the prisoner. Sought approval/ suitable orders from the Govt. of India.
10.	Letter dated 11.07.2022 to the Home Department, Govt. of Gujarat from the Ministry of Home Affairs, Govt. of India	Approved the premature release of the prisoner.

Copy of the relevant records *qua* the prisoner, Bakabhai Khimabhai Vahoniya is annexed herewith as ANNEXURE R-9.

36. I say that the relevant records pertaining to the application for remission *qua* the prisoner, Govindbhai Akhambhai Nai (Raval), is as under:

Sl. No.	Document	Opinion of the concerned Authority
1.	Premature release application dated 15.02.2021	-
2.	Letter dated 10.03.2021 from the Superintendent of Police, CBI, SCB, Mumbai.	Prisoner should not be released prematurely.
3.	Letter dated 22.03.2021 from the Special Judge (CBI), City Civil & Sessions Court, Gr. Bombay	Considering the Govt. Resolution dated 11.04.2008, issued by the State of Maharashtra, prisoner should not be released prematurely.
4.	Letter dated 07.03.2022 from the Superintendent of Police, Dahod, Gujarat.	No objection to the premature release of the prisoner.
5.	Letter dated 07.03.2022 from the Collector & DM, Dahod, Gujarat	No objection to the premature release of the prisoner.
6.	Opinion of the Jail Superintendent, Godhra Sub-Jail, Gujarat	No objection to the premature release of the prisoner.
7.	Opinion of the Jail Advisory Committee, dated 26.05.2022	The committee has unanimously given the opinion in favour of the premature release of the prisoner.
8.	Letter dated 09.06.2022 to the Home Department, Govt. of Gujarat, from the Addl. Director General of Police, Prisons & Correctional Administration, Ahmedabad.	No objection to the premature release of the prisoner.
9.	Letter dated 28.06.2022 to the Ministry of Home Affairs, Govt. of India	Recommended premature release of the prisoner.

	from Home Department, Govt. of Gujarat.	Sought approval/ suitable orders from the Govt. of India
10.	Letter dated 11.07.2022 to the Home Department, Govt. of Gujarat from the Ministry of Home Affairs, Govt. of India.	Approved the premature release of the prisoner.

37. Copy of the relevant records *qua* the prisoner, Govindbhai Akhambhai Nai (Raval) is annexed herewith as Annexure R-10.

38. I say that the relevant records pertaining to the application for remission *qua* the prisoner, Jashvantbhai Chaturbhai Nai (Raval), is as under:

Sl. No.	Document	Opinion of the concerned Authority
1.	Premature release application dated 15.02.2021	-
2.	Letter dated 10.03.2021 from the Superintendent of Police, CBI, SCB, Mumbai.	Prisoner should not be released prematurely.
3.	Letter dated 22.03.2021 from the Special Judge (CBI), City Civil & Sessions Court, Gr. Bombay	Considering the Govt. Resolution dated 11.04.2008, issued by the State of Maharashtra, prisoner should not be released prematurely.
4.	Letter dated 07.03.2022 from the Superintendent of Police, Dahod, Gujarat.	No objection to the premature release of the prisoner.
5.	Letter dated 07.03.2022 from the Collector & DM, Dahod, Gujarat	No objection to the premature release of the prisoner.

6.	Opinion of the Jail Superintendent, Godhra Sub-Jail, Gujarat	No objection to the premature release of the prisoner.
7.	Opinion of the Jail Advisory Committee, dated 26.05.2022	The committee has unanimously given the opinion in favour of the premature release of the prisoner.
8.	Letter dated 09.06.2022 to the Home Department, Govt. of Gujarat, from the Addl. Director General of Police, Prisons & Correctional Administration, Ahmedabad.	No objection to the premature release of the prisoner.
9.	Letter dated 28.06.2022 to the Ministry of Home Affairs, Govt. of India from Home Department, Govt. of Gujarat.	Recommended premature release of the prisoner. Sought approval/ suitable orders from the Govt. of India
10.	Letter dated 11.07.2022 to the Home Department, Govt. of Gujarat from the Ministry of Home Affairs, Govt. of India.	Approved the premature release of the prisoner.

Copy of the relevant records *qua* the prisoner, Jashvantbhai Chturbhai Nai (Raval) is annexed herewith as Annexure R-11.

39. I say that the relevant records pertaining to the application for remission *qua* the prisoner, Rameshbhai Rupabhai Chandana, is as under:

Sl. No.	Document	Opinion of the concerned Authority
1.	Premature release application dated 25.02.2021	-
2.	Letter dated 10.03.2021 from the Superintendent of Police, CBI, SCB, Mumbai.	Prisoner should not be released prematurely.
3.	Letter dated 22.03.2021 from the Special Judge (CBI), City Civil & Sessions Court, Gr. Bombay	Considering the Govt. Resolution dated 11.04.2008, issued by the State of Maharashtra, prisoner should not be released prematurely.
4.	Letter dated 07.03.2022 from the Superintendent of Police, Dahod, Gujarat.	No objection to the premature release of the prisoner.
5.	Letter dated 07.03.2022 from the Collector & DM, Dahod, Gujarat	No objection to the premature release of the prisoner.
6.	Opinion of the Jail Superintendent, Godhra Sub-Jail, Gujarat	No objection to the premature release of the prisoner.
7.	Opinion of the Jail Advisory Committee, dated 26.05.2022	The committee has unanimously given the opinion in favour of the premature release of the prisoner.
8.	Letter dated 09.06.2022 to the Home Department, Govt. of Gujarat, from the Addl. Director General of Police, Prisons & Correctional Administration, Ahmedabad.	No objection to the premature release of the prisoner.
9.	Letter dated 28.06.2022 to the Ministry of Home Affairs, Govt. of India	Recommended premature release of the prisoner.

	from Home Department, Govt. of Gujarat.	Sought approval/ suitable orders from the Govt. of India
10.	Letter dated 11.07.2022 to the Home Department, Govt. of Gujarat from the Ministry of Home Affairs, Govt. of India.	Approved the premature release of the prisoner.

Copy of the relevant records *qua* the prisoner, Rameshbhai Rupabhai Chandana is annexed herewith as Annexure R-12.

40. I say that the relevant records pertaining to the application for remission *qua* the prisoner, Radheshyam Bhagwandas Shah @ Lala Vakil, is as under:

Sl. No.	Document	Opinion of the concerned Authority
1.	Premature release application dated 01.08.2019	-
2.	Letter dated 14.08.2019 from the Superintendent of Police, CBI, SCB, Mumbai.	Prisoner should not be released prematurely.
3.	Letter dated 03.01.2020 from the Special Judge (CBI), City Civil & Sessions Court, Gr. Bombay	Objected to the premature release of the prisoner.
4.	Letter dated 13.02.2020 from the Superintendent of Police, Dahod, Gujarat.	Objected to the premature release of the prisoner.
5.	Letter dated 19.02.2020 from the Collector & DM, Dahod, Gujarat	Objected to the premature release of the prisoner.
6.	Opinion of the Jail Superintendent, Godhra Sub-Jail, Gujarat	No objection to the premature release of the prisoner.

7.	Opinion of the Jail Advisory Committee, dated 20.07.2021	9 out of 10 members of the Committee has recommended the premature release of the prisoner.
8.	Letter dated 18.08.2021 to the Home Department, Govt. of Gujarat, from the Addl. Director General of Police, Prisons & Correctional Administration, Ahmedabad.	Did not recommend to the premature release of the prisoner.
9.	Letter dated 28.06.2022 to the Ministry of Home Affairs, Govt. of India from Home Department, Govt. of Gujarat.	Recommended premature release of the prisoner. Sought approval/ suitable orders from the Govt. of India
10.	Letter dated 11.07.2022 to the Home Department, Govt. of Gujarat from the Ministry of Home Affairs, Govt. of India.	Approved the premature release of the prisoner.

Copy of the relevant records *qua* the prisoner, Radheshyam Bhgwandas Shah @ Lala Vakil is annexed herewith as Annexure R-13."

4.7 Therefore, it has been contended that PIL is not maintainable as it is misconceived and devoid of any merit and as such is liable to be dismissed.

5. Respondent No.2 has not filed any pleading in this matter. Even though respondent Nos.3 to 13 have filed their counter affidavits, we do not find it necessary to advert to the same as they would be replicating the stand of the State of Gujarat.

Submissions:

6. We have heard learned counsel Ms. Shobha Gupta for the petitioner in Writ Petition (Crl.) No.491 of 2022; learned ASG, Sri S.V. Raju appearing on behalf of the State of Gujarat and Union of India; and learned senior counsel Mr. Sidharth Luthra and other counsel for respondent Nos.3 to 13 and perused the material on record.

6.1 We have also heard learned senior counsel and learned counsel Ms. Indira Jaising, Ms. Vrinda Grover and Ms. Aparna Bhat, for the petitioners in the public interest litigations.

6.2 We have perused the material on record as well as the judicial dicta cited at the Bar.

7. Learned counsel for the petitioner in Writ Petition (Crl.) No.491 of 2022, Ms. Shobha Gupta at the outset submitted that the *en-masse* remission granted to respondent Nos.3 to 13 by Orders dated 10.08.2022 has not only shattered the victim-petitioner and

her family but has also shocked the collective conscience of the Indian society. That in the present case, the right of the victim and the cry of the society at large have been ignored by the State and Central Governments while recommending the grant of remission to all convicts in the case.

7.1. It was asserted that though the crime was committed in the State of Gujarat, the investigation and trial were carried out in the State of Maharashtra pursuant to the orders of this Court. Hence, in view of the unambiguous language of Section 432(7)(b), only the State of Maharashtra would be the appropriate government which could have considered the applications filed by respondent Nos.3 to 13 seeking remission of their sentences. Learned counsel has placed reliance on the following judgments to buttress her argument, namely, ***State of M.P. vs. Ratan Singh, (1976) 3 SCC 470 ("Ratan Singh"); Government of A.P. vs. M.T. Khan, (2004) 1 SCC 616 ("M.T. Khan"); Hanumant Dass vs. Vinay Kumar, (1982) 2 SCC 177*** **("*Hanumant Dass*")** and ***V. Sriharan***.

7.2. According to learned counsel, once a competent Court in the State of Maharashtra had tried and convicted the accused then that State is the 'appropriate Government'. Therefore, the Orders of remission passed by the State of Gujarat in respect of respondent

Nos.3 to 13 is without jurisdiction and a nullity and thus, are liable to be quashed.

7.3. As regards the applicability of the relevant remission policy, learned counsel for the petitioner submitted that since the 'appropriate government' in the instant case is the State of Maharashtra, the remission policy of the State of Maharashtra would be applicable. Thus, the remission policy of the State of Gujarat dated 09.07.1992 would be wholly inapplicable. It was contended that the remission policy dated 09.07.1992 of the State of Gujarat was not even in existence as on the date for consideration of the remission applications as it was scrapped by way of a Circular dated 08.05.2014 pursuant to the letter of the Central Government circulated to all the States/UTs requiring the implementation of the judgment of this Court in ***Sangeet vs. State of Haryana, (2013) 2 SCC 452 ("Sangeet"),*** wherein this Court held that before actually exercising the power of remission under Section 432 of the CrPC, the appropriate government must obtain the opinion of the Presiding Judge of the convicting or confirming court and that the remission shall not be granted in a wholesale manner, such as, on the occasion of Independence Day etc. That pursuant to the cancellation of the policy dated 09.07.1992, the State of Gujarat

came up with a new remission policy dated 23.01.2014, and even this policy would not entitle remission of the accused herein, for two reasons: firstly, because the remission policy of the State of Maharashtra would be applicable as it is the 'appropriate government', and secondly, the 2014 policy of the State of Gujarat bars the grant of remission to convicts of heinous crimes.

7.4. Relying on the opinion of the Special Judge, Sessions Court, Greater Mumbai, it was submitted that the Special Judge had rightly stated that the remission policy applicable in the present case would be the Policy dated 11.04.2008 of the State of Maharashtra in respect of which the Circular dated 13.06.2008 of the State of Maharashtra was issued, wherein a convict of communal crime, gang rape and murder would fall under the categories 2(c), 2(d) and 4 (e) of the Policy which prescribes that the minimum period of imprisonment to be undergone by the convict before remission can be considered would be twenty eight years. Thus, respondents-convicts were not entitled to be granted remission as they had not completed the minimum period of imprisonment as per the applicable remission policy.

7.5. It was further contended that the remission orders under challenge failed to meet the criteria laid down by this Court in

Sangeet; and ***Ram Chander vs. State of Chhattisgarh, (2022) 12 SCC 52 ("Ram Chander")***, wherein it has been stated that the appropriate government must obtain the opinion of the Presiding Judge of the convicting court before deciding the remission application. That the State of Gujarat granted remission to all the convicts by completely ignoring the negative opinions expressed by two major stakeholders i.e., the Presiding Judge of the convicting Court in Mumbai and the prosecuting agency (CBI).

7.6. Reliance was placed on the decisions of this Court in ***State of Haryana vs. Mohinder Singh, (2000) 3 SCC 394 ("Mohinder Singh")***; ***Sangeet***; ***Ratan Singh***, and ***Laxman Naskar vs. State of West Bengal, (2000) 2 SCC 595 ("Laxman Naskar")*** to emphasize that a convict cannot claim remission as a matter of right. The remission policies only give a right to the convict to be considered and do not provide an indefeasible right to remission.

7.7. Further, reference was made to the dicta of this Court in ***Mohinder Singh***; ***Epuru Sudhakar vs. State of A.P., (2006) 8 SCC 161 ("Epuru Sudhakar")***; ***Maru Ram; Sangeet; Ratan Singh*** and ***Laxman Naskar*** to contend that the decision to grant remission should be well informed, reasonable and fair and that the power cannot be exercised arbitrarily.

7.8. Emphasizing the gravity of the offences in this case and the grotesque nature of the crimes committed by the accused, learned counsel Ms. Shobha Gupta submitted that while considering the application for remission, the appropriate government was required to bear in mind the effect of its decision on the victim and the family of the victims, the society as a whole and the precedent it would set for the future. To buttress the said submission, she relied on ***Epuru Sudhakar***, ***Swamy Shraddhananda (2) vs. State of Karnataka, (2008) 13 SCC 767***, ***("Shraddhananda")***, and ***Jagdish***. Reliance was also placed on the decision in ***Laxman Naskar*** wherein this Court had discussed the factors to be considered before granting remission.

7.9. It was urged that the prerogative power of remission is not immune from judicial review, *vide* ***Epuru Sudhakar*** wherein it was observed that judicial review of the order of remission is available on the following grounds: (i) non-application of mind; (ii) order is *mala fide;* (iii) order has been passed on extraneous or wholly irrelevant considerations; (iv) relevant materials kept out of consideration; (v) order suffers from arbitrariness.

7.10. It was contended that in the present case, remission was granted to all the convicts mechanically and without application of mind to each of the cases and that the relevant factors were not considered. That the State Government failed to consider the relevant material and make an objective assessment while considering the applications of the convicts for remission. The nature and gravity of the crime, the impact of the remission orders on the victim and her family, witnesses and society at large, were not considered. That mere good behaviour in jail and completion of fourteen years in jail are not the only pre-requisites while considering the application for premature release of the convicts.

7.11. Attention was drawn to the fact that respondent No.3 herein had approached the High Court of Gujarat by way of Crl. Application No.4573 of 2019 seeking a direction to the State Government to consider his application for remission. The High Court *vide* Order dated 17.07.2019 dismissed the same in view of Section 432 of the CrPC. Respondent No.3's second application was also dismissed *vide* Order dated 13.03.2020 passed by the Gujarat High Court. That in fact, within fourteen days of the First Order dated 17.07.2019, respondent No.3 had approached the Government of Maharashtra by way of an application dated 01.08.2019. Upon his

application, opinion was sought from the (i) Investigating Agency (CBI) and the (ii) Presiding Officer of the convicting court (Special Judge, Sessions Court, Greater Mumbai), both of whom opined in the negative and against remission being granted to the said respondent. Further, the Superintendent of Police, Dahod, *vide* letter dated 03.02.2020 gave a negative opinion by noting that the victim and her relatives stated that respondent No.3 should not be released. The District Magistrate, Dahod, also gave a negative opinion *vide* letter dated 19.02.2020, so also the Jail Advisory Committee at its meeting held on 20.07.2021. That it was thereafter that respondent No.3 approached this Court by filing Writ Petition (Crl.) No.135 of 2022 and by Order dated 13.05.2022 this Court directed the State of Gujarat to consider respondent No.3's application within a period of two months from the date of the order.

7.12. Further adverting to the sequence of events, it was stated that in the meanwhile, the rest of the convicts had also applied separately for remission in February 2021. The Presiding Officer (Special Judge, Greater Mumbai) *vide* a common letter dated 22.03.2021 gave a negative opinion against the premature release of the remaining ten convicts, respondent Nos.4 to 13 herein. That thereafter, for one good year, their case was kept pending and only

after 07.03.2022 the new Superintendent of Police, Dahod, gave a 'no objection' for the premature release of all the convicts by separate letters of the same date. The District Magistrate, Dahod, also gave a positive opinion in favour of the premature release of all the convicts. On 26.05.2022, a meeting of the Jail Advisory Committee of Gujarat was held and this time, all the members of the Committee gave a positive opinion. The Additional Director General of Police, Prisons and Correctional Administration vide letter dated 09.06.2022 this time gave a positive opinion and did not raise any objection for the release of the ten convicts.

7.13. That although the reference by the Jail Advisory Committee to the State Government, was only *qua* respondent Nos.4 to 13, the State Government erroneously recommended the name of respondent No.3 also, to the Central Government for remission even in the absence of any application pending before the State Government.

7.14. Learned counsel for the petitioner next submitted that the Presiding Judge's reasoned negative opinion opposing the premature release was disregarded and this was contrary to the mandate of Section 432(2) of the CrPC. The remission Orders dated 10.08.2022 of respondent No.1 are in the teeth of the negative

opinion of the Presiding Judge, Special Judge (CBI), Sessions Court, Greater Mumbai, dated 03.01.2020 and 22.03.2021, thereby, defeating the purpose of Section 432(2) of the CrPC. Further, the remission Orders dated 10.08.2022 are conspicuously silent about the opinion of the Presiding Judge to be mandatorily obtained under Section 432(2) of the CrPC. Not even a reference is made to the said opinion. This amounts to an erasure of record by removing from consideration a document that is statutorily mandated to be considered and judicially held to be determinative. Reliance was placed on ***Ram Chander*** to contend that the opinion of the Presiding Judge of the court that convicted the offender will 'have a determinative effect' on the exercise of executive discretion under Section 432 of the CrPC. Further, reference was made to the decision of this Court in ***V. Sriharan***, wherein a Constitution Bench of this Court held that the procedure stipulated in Section 432(2) of the CrPC is mandatory and that the opinion of the Presiding Judge of the Court which had tried the convict is critical and an essential safeguard to check that the power of remission is not exercised arbitrarily.

7.15. It was next contended that the premature release was granted illegally as the imprisonment in default for the non-payment

of fine was not served. The Trial Court while sentencing the respondents-convicts had also imposed a fine of Rs. 2,000/- on each of them, for each of the fourteen counts of murder and three counts of rape and in the event of default in payment of said fine, sentenced them to suffer rigorous imprisonment for a further period of two years each for each count. The total fine payable by the respondents-convicts amounted to Rs.34,000/- each and, in default, they were liable to serve rigorous imprisonment for a period of thirty-four years (two years each for each count). The Trial Court had further directed that the 'substantive sentences' shall run concurrently and that the period of detention, if any, undergone by the respondents-convicts during the investigation, enquiry, trial, shall be set off against the terms of imprisonment, not being imprisonment in default of payment of fine imposed on the accused. That as per the nominal roll of respondent Nos.3 to 13, none of them had paid the fine sentenced by the Trial Court, making them liable to serve the penalty of rigorous imprisonment for default in payment of fine. But the respondents have neither paid the fine of Rs. 34,000/- to which each of them was sentenced, nor have they served any sentence in default of the non-payment of fine. It was submitted that the penalty of imprisonment ordered for default in payment of fine stands on a completely different footing from the substantive

sentence of imprisonment to be undergone for an offence. While under Section 432 of the CrPC, the Government has the power to remit 'punishment for offence', the executive discretion does not extend to waiving off the penalty of imprisonment for default in payment of fine under Section 64 of the IPC. In this regard, reliance was placed on ***Sharad Hiru Kolambe vs. State of Maharashtra, (2018) 18 SCC 718 ("Sharad Kolambe")*** and ***Shantilal vs. State of M.P., (2007) 11 SCC 243 ("Shantilal")***.

7.16. It was asserted that respondent No.1 while granting premature release failed to apply its mind and address the determinative factors outlined by this Court in ***Laxman Naskar***. Thus, the orders of remission are vitiated by the vice of arbitrariness for non-consideration of relevant facts and factors. According to learned counsel for the petitioners, a bare perusal of the Orders dated 10.08.2022 would make it clear that premature release was granted mechanically and arbitrarily, without giving due consideration to the factors enumerated in ***Laxman Naskar,*** qua each of the respondents-convicts. That the Order(s) dated 10.08.2022 are conspicuous in their silence on the behavior and the following acts of misconduct of each of the respondents-convicts,

including the offences committed while on parole/furlough, namely,:

i. Case Crime No.11210012000158/2020 was registered against the respondent-convict, Mitesh Chimanlal Bhatt, under Sections 354, 304 and 306 of the IPC, committed on 19.06.2020 during parole/furlough; and

ii. Case Crime No.02/2015 was registered against the respondent-convict, Rameshbhai Rupabhai Chadana under the Prisons Act.

7.17. It was further submitted that it is trite that in cases where a convict has been sentenced to more than one count of life imprisonment, he can only be released if remission is duly granted as per law for each count of life imprisonment. That it is a matter of record that the respondents-convicts were sentenced on fifteen counts of life imprisonment. However, the Orders dated 10.08.2022 have not granted remission for each of the fifteen counts and is only a generic and blanket order, making the release of the convicts illegal and arbitrary.

7.18. That respondent No.3 approached this Court in Writ Petition (Crl.) No.135 of 2022, without disclosing that he had already acted

on the judgment of the Gujarat High Court dated 17.07.2019 and had submitted his application to the Home Department, State of Maharashtra, and that his application had already been considered by the authorities concerned, whereby, the major stakeholders had written against the grant of remission to him. Further, when the matter was listed before this Court, no notice was issued to the petitioner – victim and neither was she heard by this Court in the matter.

7.19. That the Orders dated 10.08.2022 have blatantly ignored the grave and real apprehension regarding the safety and security of the victims-survivors raised by public functionaries whose opinions are required to be taken into account by respondent No.1 State before granting premature release as per the 1992 policy. That this Court in a catena of judgments, such as, ***Epuru Sudhakar*** and ***Rajan vs. Home Secretary, Home Department of Tamil Nadu (2019) 14 SCC 114 ("Rajan")*** has highlighted the importance of considering the impact of premature release on the victims in particular and the society in general. That even the Superintendent of Police, Dahod, on 03.02.2020 had recommended against the release of Radheyshyam Bhagwandas Shah as he had cited the possibility of peace being disturbed. The Sessions Judge, Panchmahal at Godhra

also raised questions regarding the security of the victim – petitioner herein.

7.20. Learned counsel next asserted that the *en-masse* and non-speaking "sanction" of the Central Government dated 11.07.2022 under Section 435(1)(a) of the CrPC does not meet the statutory requirement of "consultation". The said sanction conveys its approval for the premature release of eleven convicts *sans* any reason as to why the case of each respondent-convict is deemed fit for grant of remission. Thus, the approval was granted without considering the relevant factors outlined in ***Laxman Naskar***.

7.21. That non-application of mind is evident in the non-speaking and stereotyped orders dated 10.08.2022 which are bereft of any reason. The Orders are devoid of reasons or grounds as to why the respondents-convicts were found fit for the grant of remission. All of the eleven orders are a verbatim replication of each other, having only substituted the name and personal details of the respondents-convicts. Further, the recommendations of the Jail Advisory Committee dated 26.05.2022 as regards remission of respondent Nos.3 to 13 are untenable, being arbitrary and mechanical and vitiated by non-application of mind. The said opinions are verbatim

and mechanical reproductions of each other that show no independent consideration of facts of each case of the convicts.

7.22 With the aforesaid submissions, it was prayed that Writ Petition (Crl.) No.491 of 2022 be allowed and a writ, order or direction be issued quashing the Orders dated 10.08.2022 passed by the State of Gujarat by which the convicts in Sessions Case No. 634 of 2004, Mumbai (respondent Nos.3 to 13 herein), were released prematurely.

8. Learned senior counsel Ms. Indira Jaising appearing for the petitioner in Writ Petition (Crl.) No.326 of 2022, at the outset submitted that the petitioner is a Member of Parliament and is a public personality and consequently possesses the locus to file this petition as a bona fide person and citizen of India. That the petitioner seeks to discharge her fundamental duty under Article 51A(e) of the Constitution of India, seeking to promote harmony and the spirit of brotherhood amongst the people of India, as well as to denounce the derogation of the dignity of women. That the petitioner seeks to uphold the rule of law and thus is not a mere busybody.

8.1. The following submissions were made to contest the orders of remission:

(i) that when the actions of the State cause some harm to the general public, an action by a concerned citizen would be maintainable and reliance was placed on ***B.P Singhal vs. Union of India, (2010) 6 SCC 331 ("B.P Singhal")*** in this regard.

(ii) that the impugned decisions of remission is characterized by arbitrariness and *mala fides* and bear no consideration of relevant factors That the power of the executive must be exercised in line with constitutional ideals and must be for the benefit of the public. In this regard, reliance is placed on ***Maru Ram*** and ***S.P. Gupta vs. Union of India, (1981) Supp SCC 87 ("S.P. Gupta")***.

(iii) that there exists no statutory right of appeal against an order of remission. The only avenue available to assail an order of remission is either under Article 32 or Article 226. Reliance was placed on ***Epuru Sudhakar*** and ***Ram Chander.*** Further, the jurisdiction of this Court is not ousted by the existence of alternative legal remedies. Reliance was

placed on a Constitution Bench decision of this Court in ***Kavalappara Kottarathil Kochuni vs. States of Madras and Kerala, (1960) 3 SCR 887 ("Kochuni")***.

(iv) that the present proceedings pertain to administrative law and not criminal law and as a result, the principle of being a stranger to the criminal proceeding does not apply to the case at hand. Nevertheless, this Court has entertained petitions filed by 'strangers' in criminal matters in the past, as in the case of ***K. Anbazhagan vs. Superintendent of Police, (2004) 3 SCC 767 ("K. Anbazhagan")***.

(v) that such exercises of executive power may be challenged on the basis of the grounds laid down in ***Epuru Sudhakar*** and ***Maru Ram***.

(vi) that an important question of law arises in the present proceedings, namely, whether it is appropriate to grant remission after a period of fourteen years to convicts of heinous crimes. That a further question arises, as to whether, the victims of such crimes must be heard and due

consideration given to their vulnerability prior to the grant of remission. That there needs to be a consideration of how compliant such executive actions and the associated policies are with constitutional morality. Therefore, this Court may quash the remission orders passed under Section 432 of the CrPC if they appear to be poorly reasoned.

(vii) that there is a need to situate the crimes committed in the larger context of sectarian and communal violence that was ensuing in the 2002 riots in Gujarat State. That the crimes were specifically targeted at the victim on the basis of her religion and gender. That these heinous crimes constitute crimes against humanity. It was submitted that the nature of the crime is important to consider while deciding whether to grant remission. The heinousness of the crimes committed by respondent Nos.3 to 13, the communal motivation of the crimes and the context in which those took place are contended to have not been considered by the State while granting remission. Reliance was placed on

Sanaboina Satyanarayana vs. Government of Andhra Pradesh, (2003) 10 SCC 78 ("Sanaboina Satyanarayana"), wherein a certain Government Order issued by the State of Andhra Pradesh that excluded from the scope of remission those prisoners who had committed crimes against women and were sentenced to life imprisonment was upheld by this Court considering the nature of the offences.

(viii) that the Executive is bound not merely by provisions of the CrPC but also by the overarching spirit of the Constitution that seeks to promote the upliftment of women, children, and minorities and to protect these groups from further vulnerability and marginalization. That the policies and actions of the State must be guided by this vision.

(ix) that, in accordance with the aforementioned constitutional principles, grant of remission to those persons sentenced to life imprisonment and accused of crimes under the Scheduled Castes and Schedules Tribes (Prevention of Atrocities) Act, the Explosive Substances Act and the Indian Arms Act,

as well as crimes against women under Sections 376 and 354 of the IPC must not be permissible. Factors such as the opinion of the Presiding Judge, public interest, potential for recidivism, impact on the victims and on society and the nature of the offence must be borne in mind by the State, as held in ***Epuru Sudhakar, Sanaboina Satyanarayana*** and ***Zahid Hussain vs. State of West Bengal, 2001 (3) SCC 750 ("Zahid Hussain")***. That the non-consideration of these factors proves the *mala fide*, arbitrary and unreasonable manner in which the impugned orders were passed.

(x) that the 1992 Policy of remission of the State of Gujarat does not contain any substantive guidelines pertaining to remission and merely deals with procedural formalities. That the 2014 Policy is thus the first instance at which categories of crimes for which remission may not be granted was outlined. As such, it is the 2014 Policy that would apply to the question of remission for respondent Nos.3 to 13.

(xi) that the grant of remission to the respondent Nos.3 to 13 is in violation of India's obligations under international law, specifically instruments such as the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Discrimination Against Women. That rape was used as a tool of oppression by the perpetrators and the victim in the instant case experienced significant trauma as a consequence.

(xii) that the grant of remission in the instant case is in violation of the obligation to prevent crimes against humanity, which itself forms a part of the norm of jus cogens. That there is a link between the peremptory norm of jus cogens and fundamental values, making the former non-derogable and a part of domestic law even if not explicitly codified. Reliance was placed on ***State of Punjab vs. Dalbir Singh, (2012) 3 SCC 346 ("Dalbir Singh")*** on this aspect.

(xiii) that the acts of violence that were committed in Gujarat in 2002 are crimes against humanity, owing to their widespread nature and communal

motivations. That remission must not be granted to perpetrators of crimes of such gravity.

8.2 With the above submissions learned senior counsel for the petitioners sought quashing of the impugned orders.

9. Learned counsel Ms. Vrinda Grover for the petitioner in Writ Petition (Crl.) No.352 of 2022, submitted that it was absolutely necessary to consider the opinion of the Presiding Judge. Reliance was placed on ***Ram Chander*** and ***V. Sriharan***. Her further submissions are recorded as under:

(i) that the Presiding Judge, namely the Special Judge (CBI), Sessions Court, Mumbai gave negative opinions dated 03.01.2020 and 22.03.2021 as to grant of remission to respondent Nos.3 to 13. The said opinion was well-reasoned and took into account all of the relevant factors, but this was completely disregarded by the respondent -State.

(ii) that a fine was imposed on each of the respondent-convicts as a part of their sentence, amounting to Rs. 34,000/- per person. That they had defaulted in paying these fines and thus would be required to undergo rigorous imprisonment for a further period

of 34 years. The Trial Court had clarified that these sentences were substantive in nature and would run concurrently. In this context, reliance was placed on ***Sharad Kolambe*** and ***Shantilal***.

(iii) reiterating the submissions regarding the remission orders being arbitrary by virtue of non-consideration of relevant factors, it was urged that the criteria outlined in the decision of this Court in ***Laxman Naskar*** were not considered at all. Reliance was further placed on the decision of this Court in ***Mohinder Singh***, wherein it was held that the decision to grant remission must be reasonable, well-informed and fair. That non-application of mind and the mechanical nature of the remission orders utterly belie these principles.

(iv) that reference has only been made to four documents, namely (1) the order of this Court dated 13.05.2022, (2) the letter of the Additional Director General of Police and Inspector General of Prisons, State of Gujarat at Ahmedabad, (3) the Department Circular dated 09.07.1992 and (4) the letter of the Ministry of Home Affairs, Government of India in the

impugned orders of remission. It was contended that the non-consideration of determinative factors has rendered the remission orders mechanical and arbitrary, with reliance placed on what is described as the untenable and unlawful *en-masse* approval of the Central Government.

(v) that one of the criteria that is required to be considered which was highlighted in ***Laxman Naskar*** is the possibility of reformation and recidivism. That these factors have been given no consideration as there is no mention of the respondent-convicts' behavior while in prison, as well as offences committed while out on parole/furlough. That a case has been registered against one of the respondent-convicts under Sections 304, 306 and 354 IPC while on parole. That a range of punishments were imposed on the respondent-convicts in prison hence, the possibility of recidivism cannot be entirely ruled out.

(vi) that there is a real and grave apprehension of danger to the victim if the respondent-convicts are released into society. This has been reflected in the

recommendation of Superintendent of Police, Dahod as well as the questions raised by the Principal and Sessions Judge, Panchmahal at Godhra in the Jail Advisory Committee meeting dated 26.05.2022.

(vii) that remission must be granted for each particular count of life imprisonment, as all of these are superimposed over each other. Remission granted qua one sentence does not automatically extend to the others as well. That a generic, mechanical and unreasoned blanket order of remission has been passed by the respondent-State, as remission is not stated to have been granted for all of the life sentences of each respondent-convict.

(viii) that Section 435(1)(a) of the CrPC makes it mandatory for the State Government to consult the Central Government regarding the exercise of power to grant remission. But the *en-masse* and non-speaking nature of the sanction granted by the Central Government, merely conveys approval of the premature release of the respondent-convicts,

which do not meet the requirement of 'consultation'. Reliance was again placed on ***Laxman Naskar***.

(ix) further, the opinion of the Sessions Judge, Panchmahal, Godhra is of a casual and perfunctory character, that doesn't pay heed to the heinous nature of the crimes committed.

(x) it was further submitted that the remission orders having thus been established as unreasoned, untenable and vitiated by arbitrariness and *mala fides*, there is a need for judicial intervention in the same.

10. Learned counsel for the petitioner in Writ Petition (Crl.) No.319 of 2022, Ms. Aparna Bhat submitted that the aforesaid writ petition has been filed purely in the interest of the general public and out of concern for the impact on society if the respondents-convicts were released. That there is no political agenda behind the filing of this writ petition by the petitioner, who is a member of a national political party and an advocate for women's rights.

11. Sri Mohammad Nizamuddin Pasha, learned counsel appearing on behalf of the petitioner in Writ Petition (Crl.) No.403 of 2022 submitted that the cases which are at stages prior to

conviction. i.e., investigation and trial must be treated as being on a different footing as guilt would not have been established and the fair trial rights of the accused still subsisted. However, there is no right to remission post-conviction as held in ***V. Sriharan***. That it is only upon conviction that the need for the accused to remain in prison becomes a concern of the society. That all theories of punishment, including those of retributivism and utilitarianism, emphasize the impact on society as being of primary importance. Reliance was placed on ***T.K. Gopal vs. State of Karnataka, (2000) 6 SCC 168 ("T.K. Gopal"), Narinder Singh vs. State of Punjab, (2014) 6 SCC 466 ("Narinder Singh"), Shailesh Jasvantbhai vs. State of Gujarat, (2006) 2 SCC 359 ("Shailesh Jasvantbhai")*** and ***Ahmed Hussain Vali Mohammed Saiyed vs. State of Gujarat, (2009) 7 SCC 254 ("Mohammed Saiyed")***.

12. Sri. S.V. Raju, learned Additional Solicitor General of India, appearing on behalf of the State of Gujarat and Union of India, at the outset submitted that the writ petitions filed by persons other than the victim are not maintainable. That the said persons are strangers and have no locus-standi to challenge the remission orders passed by the State of Gujarat. The said petitioners are in no way connected with the proceedings which convicted the

respondents herein nor the proceedings which culminated in the grant of remission to the convicts. Reliance was placed on the decisions of this Court in ***Rajiv Ranjan***; ***Gulzar Ahmed Azmi***; ***Simranjit Singh*** and ***Ashok Kumar*** to contend that no third party/stranger's interference in criminal matters is permissible in law in the garb of filing a PIL.

12.1. Referring to Writ Petition (Crl.) No.319 of 2022, it was contended that nowhere has the petitioner therein, namely, Subhasini Ali pleaded as to how her fundamental rights had been abridged and as to how she was aggrieved by the action of the State Government. That the petitioner therein was nothing but an interloper and a busybody and not a 'person aggrieved' as per the dicta of this Court in ***M. V. Dabholkar*** and ***Jasbhai Motibhai.*** Thus, the PIL filed by such a person is nothing but an abuse of the PIL jurisdiction of this Court and against the principles laid down in ***Tehseen*** and ***Ashok Kumar***. Therefore, learned ASG sought for dismissal of all the PILs challenging the impugned orders of remission on the ground of maintainability.

12.2. It was next contended that there was no illegality in the Orders granting remission to respondent Nos.3 to 13, dated 10.08.2022. That this Court in Writ Petition (Crl.) No.135 of 2022

vide judgment dated 13.05.2022 had held that the policy which would be applicable for deciding the remission application was the one which was in vogue at the time of conviction i.e., the premature release policy of 1992 and that for the purposes of Section 432 of the CrPC, the 'appropriate government' for considering the remission application is that State in which the offence was committed and not the State in which the trial was conducted and therefore, had directed the State of Gujarat to consider the application of respondent No.3, Radheshyam Bhagwandas Shah. Accordingly, the respondent-State of Gujarat had considered the application of the convict as per the procedure prescribed under Section 432 of the CrPC read with Section 435 of the CrPC, along with the Premature Release of Convicts Policy of 1992. The State Government considered the cases of all eleven prisoners as per the policy of 1992 and remission was granted on 10.08.2022.

12.3. That further, the Order(s) dated 10.08.2022 were passed after duly considering the opinions expressed by Inspector General of Prisons, Gujarat State; Jail Superintendent; Jail Advisory Committee, District Magistrate; Superintendent of Police, CBI, Special Crime Branch, Mumbai; and the Special Court, Mumbai (CBI). That as per Section 435 of the CrPC, it is indispensable to

obtain the sanction of the Government of India in cases in which the investigation of the offence was carried out by a central investigation agency. In the present case, the investigation was carried out by CBI, hence, the State Government obtained the approval of Government of India.

12.4. It was next submitted that respondent Nos.3 to 13 had completed more than fourteen years in custody, that their behaviour had been good and the opinions of the concerned authorities had been obtained as per the policy of 09.07.1992. The State Government submitted the opinions of the concerned authorities to the Ministry of Home Affairs, Government of India *vide* letter dated 28.06.2022 and sought the approval of the Government of India which conveyed its concurrence/approval under Section 435 of the CrPC for the premature release of eleven convicts vide letter dated 11.07.2022. Hence, after following the due procedure, Orders were issued on 10.08.2022 to release the convicts which would not call for any interference by this Court.

12.5. Reliance was placed on the judgment of this Court in ***Jagdish*** wherein it was held that if a policy which is beneficial to the convict exists at the time of consideration of his application for premature release, then the convict cannot be deprived of such a

beneficial policy. It was held in the said case that, *"In case a liberal policy prevails on the date of consideration of the case of a "lifer" for premature release, he should be given the benefit thereof."* That bearing in mind such considerations, the applications of respondent Nos.3 to 13 for remission were considered and decided.

12.6. That the crime in the instant case was admittedly committed in the State of Gujarat and ordinarily, the trial was to be concluded in the same State and in terms of Section 432 (7) of the CrPC, the appropriate government in the ordinary course would be the State of Gujarat. However, the trial in the instant case was transferred under exceptional circumstances by this Court to the neighboring State of Maharashtra for the limited purpose of trial and disposal by an order dated 06.08.2004 but after the conclusion of trial and the prisoners being convicted, the matter stood transferred to the State where the crime was committed and thus, the State of Gujarat was the appropriate government for the purpose of Section 432(7) of the CrPC.

12.7 It was submitted that the Orders dated 10.08.2022 were passed by the Government of Gujarat after following the due procedure laid down in this regard and on an application of mind.

Therefore, the same do not call for any interference by this Court in these petitions.

13. Learned Counsel for respondent No.3, Sri Rishi Malhotra at the outset attacked the maintainability of the writ petitions on the ground that in substance, the petitions seek to challenge the judgment of this Court dated 13.05.2022 in Writ Petition (Crl.) No.135 of 2022; that the same is impermissible and is in the teeth of the judgment of a Constitution Bench of this Court in ***Rupa Ashok Hurra vs. Ashok Hurra, (2002) 4 SCC 388***, ***("Rupa Ashok Hurra")*** wherein it has been held that a writ petition assailing the judgment or order of this Court after the dismissal of the Review Petition is not maintainable. Thus, the only remedy, if any, available to the petitioner-victim herein against the dismissal of the Review Petition, is to file a Curative Petition as propounded by this Court in the case of ***Rupa Ashok Hurra***.

13.1. Sri Rishi Malhotra further submitted that in this proceeding this Court cannot sit over the judgment passed by another co-ordinate bench. It was further submitted that this Court by its judgment dated 13.05.2022 was right in categorically directing the State of Gujarat to consider the application for premature release of respondent No.3 in terms of the policy dated 09.07.1992 which was

applicable on the date of conviction. That after duly taking into account the fact that respondent No.3 had undergone over fifteen years of imprisonment and that no objections were received from the Jail Superintendent, Godhra and that nine out of ten members of the Jail Advisory Committee had recommended his premature release. That coupled with the aforesaid facts the Home Department of the State of Gujarat as well as the Union Government had recommended and approved the premature release of respondent No.3. This clearly demonstrates that the remission order was correct. Further, it is nowhere mentioned in the 1992 policy that all stakeholders must give a unanimous opinion for the release of the convict. All it says is that the State Government should collate various opinions from different quarters in order to arrive at a decision.

13.2. As regards the contention of learned counsel for the petitioner-victim to the effect that the Orders are illegal inasmuch as those were passed without consulting the Presiding Judge of the convicting court as required under Section 432(2) of the CrPC, it was submitted that the said provision categorically stipulates that the appropriate government 'may require' the Presiding Judge of the Trial Court to give his opinion, hence obtaining such an opinion is

not mandatory; whereas, Section 435 of the CrPC uses the word 'shall' in respect to the State Government to act only after consultation with the Central Government. The legislature is conscious to use the words 'may' and 'shall' whenever it deems appropriate and necessary and that the said procedure has been followed in the instant case.

14. At the outset, learned senior counsel appearing for respondent No.13, Sri Sidharth Luthra contended that a writ petition does not lie against the final order of this Court, thus the petitioners could have only filed a Curative Petition. He further submitted as follow:

i) In this regard reliance was placed on the decision of this Court in ***Rupa Ashok Hurra***, wherein it was held that a writ petition under Article 32 assailing a final judgment of this Court is not maintainable. That since the Review Petition against the Order dated 13.05.2022 has been dismissed by this Court, similar contentions cannot be re-agitated in the guise of the present writ petition. Reliance was also placed on the decision of this Court in ***Naresh Shridhar Mirajkar vs. State of Maharashtra, AIR 1967 SC 1 ("Naresh Shridhar Mirajkar")***, wherein it has been held that a writ shall not lie

against an order of a Constitutional Court. It was thus submitted that the order dated 13.05.2022 has attained finality and cannot be questioned by way of a writ petition under Article 32. Furthermore, in view of the Rules framed by this Court, Order XLVIII thereof lays down how an order of this Court can be questioned by means of a Curative Petition and thus, a natural corollary is that the same cannot be done through a writ petition.

ii) As regards the issue of appropriate government and appropriate policy, learned senior counsel Sri Luthra submitted that the said issues stood settled in view of this Court's Order dated 13.05.2022. The judgments of this Court in ***Rashidul Jafar vs. State of U.P., 2022 SCC OnLine SC 1201 ("Rashidul Jafar"); State of Haryana vs. Raj Kumar, (2021) 9 SCC 292 ("Raj Kumar")*** and ***Hitesh vs. State of Gujarat (Writ Petition (Crl.) No.467/2022)*** ("***Hitesh***") were pressed into service wherein it had been held that the policy as on the date of conviction would apply, and therefore, the 1992 Policy of the State of Gujarat will apply for the grant of remission in the present case.

iii) Learned senior counsel thereafter raised the plea that in India, a reformative/rehabilitative and penal sentencing policy is

followed and not one which is punitive in nature. The same was reiterated when the Model Prison Act, 2023 was finalized which aims at *"reforming prison management and ensuring the transformation of inmates into law-abiding citizens and their rehabilitation in society."* Furthermore, in the case of ***Vinter vs. The United Kingdom (Applications Nos.66069/09, 130/10 and 3896/10), (2016) III ECHR 317*** ("***Vinter***") in the context of rehabilitation and reformation it was held by the European Court of Human Rights that, *"Moreover, if such a person is incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there is the risk that he can never atone for his offence: whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable."* Learned senior counsel submitted that respondent No.13 had exhibited unblemished behaviour in prison and there was no criminality attached to his conduct in prison.

iv) Sri Luthra refuted the argument of the petitioners that in the light of the grievous nature of the offence, the convicts herein do not deserve remission. At the stage of remission, the length of sentence or the gravity of the original crime cannot be the sole basis for refusing premature release as held in ***Satish vs.***

State of UP, (2021) 14 SCC 580 ("Satish"). Therefore, any argument regarding the factual nature of the crime or the impact it had on society are not relevant for consideration of remission was the submission of Sri Luthra.

v) That it is open for the High Court as well as this Court to modify the punishment by providing for a specific period of incarceration without remission, considering the purported heinous nature of the offence but neither the High Court nor this Court chose to exercise the said power to incarcerate the private respondents herein for a duration which was non-remittable. This shows that the aforesaid argument advanced by the petitioner is only a red herring.

vi) It was emphasized that an order of remission passed by an authority merely affects the execution of the sentence, without interfering with the sentence passed by the Court. Therefore, since the matter has already attained finality, it is not possible to question the validity of such an order on factual grounds alone, such as, the nature of crime, impact on society and society's cry for justice.

vii) Learned senior counsel submitted that the mere fact that fine had not been paid or that there was a default in payment of the fine imposed does not impact the exercise of the power of

remission. The sentence is something which an offender must undergo unless it is set aside or remitted in part or in whole either in appeal, or in revision, or in other appropriate judicial proceedings or 'otherwise', whereas, a term of imprisonment ordered in default of payment of fine stands on a different footing *vide* ***Shantilal***; ***Abdul Gani vs. State of Madhya Pradesh, (1950) SCC OnLine MP 119 ("Abdul Gani")*** and ***Shahejadkham Mahebubkham Pathan vs. State of Gujarat, (2013) 1 SCC 570 ("Shahejadkham Mahebubkham Pathan")***. Further, reliance was placed on ***Sharad Kolambe***, wherein it was observed by this Court that, "*If the term of imprisonment in default of payment of fine is a penalty which a person incurs on account of non-payment of fine and is not a sentence in strict sense, imposition of such default sentence is completely different and qualitatively distinct from a substantive sentence."*

15. Learned senior counsel appearing for respondent No.7 Mrs. Sonia Mathur, while adopting the submissions of other senior counsel further contended as under:

15.1. That as per Section 432 (7)(b) of the CrPC and the judicial precedent set in ***Radheshyam Bhagwandas Shah***, the appropriate government would be the State of Gujarat. The said judgment has attained finality as the Review Petition filed against the said judgment was dismissed by this Court on 13.12.2022. Thus, the said judgment must be followed for the sake of judicial propriety.

15.2. As to the nature of the requirement under Section 432 (2) of the CrPC, i.e., whether mandatory or directory, it was submitted that as observed by this Court in ***Ram Chander*** the opinion so obtained is not to be mechanically followed and the government has the discretion to seek an opinion afresh. That the said view would demonstrate that the discretion vests with the concerned government as to whether or not to seek and rely upon the opinion of the Presiding Judge of the Trial Court.

15.3. As regards the contentions of the learned counsel for the petitioner-victim as to non-payment of fine, it was submitted that a fine of Rs.6,000/- was paid by respondent No.7 without any objection on 27.09.2019 before the Sessions Court, Greater Mumbai. However, without prejudice to the said payment, there is no provision in the Prison Manual of Gujarat, which bars remission

from being granted if the fine is not paid. The grant of remission cannot be restricted just because a convict is not financially capable to bear the fine. The same would cause discrimination based on the economic and financial capacity of a convict to pay fine, resulting in the violation of Articles 14 and 21 of the Constitution.

15.4. We have heard learned counsel for the other respondents. With the aforesaid submissions, it was prayed that these writ petitions be dismissed.

Reply Arguments:

16. Ms. Shobha Gupta, learned counsel for the petitioner-victim submitted in her rejoinder on the point that the writ petition was maintainable under Article 32 of the Constitution as follows:

(i) that the order of grant of remission being an administrative order, there was neither a statutory nor substantive right of appeal available to the aggrieved parties. The only remedy available was to file a writ petition under Article 226 of the Constitution before the High Court of Gujarat, or to file a writ petition before this Court under Article 32 of the Constitution.

(ii) that this Court has on multiple occasions entertained writ petitions under Article 32 of the Constitution in those cases where there existed a "gross violation of fundamental rights", or when an executive or administrative decision "shocked the conscience of the public, the nation or of this Court". In this context, reliance was placed on the judgments of this Court in ***Epuru Sudhakar; Satpal vs. State of Haryana, (2000) 5 SCC 170 ("Satpal")*** and ***Mohammed Ishaq vs. S. Kazam Pasha, (2009) 12 SCC 748 ("Mohammed Ishaq").*** It was submitted that a similar issue of maintainability arose in ***Mohammed Ishaq***, wherein this Court observed that the mere existence of an alternative remedy in the form of Article 226 does not preclude an aggrieved person from approaching this Court directly under Article 32. The rule requiring the exhaustion of alternative remedies was described as being one of "convenience and discretion" as opposed to being absolute or inflexible in nature.

(iii) that this Court had in the past entertained writ petitions under Article 32 filed by convicts seeking intervention in matters of premature release or the

issuance of appropriate directions. Reliance was placed on the judgments in ***Ram Chander, Laxman Naskar*** and ***Rajan.***

(iv) that this Court had earlier entertained a writ petition filed by none other than respondent No.3 himself and no question was raised as to the maintainability of that writ petition. All of the other private respondents are beneficiaries of the order dated 13.05.2022 passed by this Court in the aforesaid writ petition. It is thus incongruous to raise the objection of maintainability only against the writ petition filed by the petitioner-victim. That the petitioner-victim was totally unaware of Writ Petition (Crl.) No.135 of 2022 filed by respondent No.3 seeking premature release before this Court. The petitioner learnt about the release, like the general public did, from the news and social media. That the petitioner had barely begun to recover from the shock of respondent Nos.3 to 13 being released when several PILs were filed, and this Court was already seized of the matter. This left the petitioner with no choice but to approach this Court.

(v) that the petitioner had also filed a Review Petition seeking review of the order dated 13.05.2022, wherein this Court held the State of Gujarat to be the appropriate government to consider the grant of remission, being the State in which the crime took place. The said order was *per incuriam* and contrary to the judgements of this Court. On this aspect, reliance was again placed on ***V. Sriharan, Rattan Singh, M. T. Khan*** and ***Hanumant Dass***. Hence, the petitioner was under the impression that the said Review Petition and this writ petition would be considered together by this Court. But the Review Petition has been dismissed. Hence, this writ petition has to be considered on its own merits.

(vi) that the challenge to the maintainability of this writ petition is fallacious in the context of the specific argument raised by respondent Nos.1 and 2, namely, that the direction given by this Court as on 13.05.2022 was a mandate that was merely being adhered to in the remission order and therefore the same would not be open to challenge. That this further exemplifies non-application of mind and a hasty and

mechanical manner of granting remission by misrepresenting about the order dated 13.05.2022.

(vii) It was submitted that the 'right to justice' was recognized as an indispensable human and fundamental right in ***Anita Kushwaha vs. Pushap Sudan, (2016) 8 SCC 509 ("Anita Kushwaha")***, and that this writ petition was maintainable on that basis also.

In light of the aforementioned submissions, learned counsel contended that the filing of a writ petition under Article 32 before this Court is the most efficacious remedy available to the petitioner.

16.1. Reiterating her submissions regarding the non-consideration of the negative opinions of the investigating agency, namely the CBI as well as the Judge of the Special CBI Court, Mumbai, learned counsel went on to refute the claim of the learned Additional Solicitor-General that the relevant opinion would be that of the Presiding Judge of the Godhra Court who was convinced of the merits of grant of remission. That this contention of learned ASG would contradict the plain language of Section 432(2) which specifies that the Presiding Judge should have been the one who awarded or confirmed the sentence. Reliance was again placed on

the judgments of this Court in ***Sangeet, Ram Chander*** and ***V. Sriharan.*** Learned counsel further contended that the submission of the learned ASG that the use of the word 'may' in Section 432(2) would imply that there is no necessary requirement to seek the opinion of the Presiding Judge is erroneous in light of the dictum of this Court in ***V. Sriharan***.

16.2. It was next contended that a letter dated 17.11.2021 was filed along with the application dated 10.08.2022. The said letter by the State of Gujarat addressed to the State of Maharashtra detailed that the State of Gujarat possessed no powers of remission with respect to respondent No.3 and that the appropriate government in this respect would be the State of Maharashtra. Despite taking this view, which is in accordance with the position of law laid down by this Court in various cases, including ***V. Sriharan***, no review petition was filed by the State challenging the 13.05.2022 order.

16.3. It was next submitted that the learned Additional Solicitor-General had placed on record the opinion of the CBI dated 09.07.2022 wherein, after an apparent change of mind, grant of remission to respondent Nos.3 to 13 was recommended. That neither of the documents, namely, the letter of the State of Gujarat and the changed opinion of the CBI find any mention in the counter-

affidavit filed by the State on 17.10.2022. It was further submitted that these additional documents establish the rapid timeline of the process adopted by the Central Government in affirming the orders of remission, as the State Government's communication was received on 06.07.2022, the opinion of the CBI was sought and received on 09.07.2022 and the Central Government expressed its concurrence on 11.07.2022.

16.4. It was further contended that respondent No.3 produced a document dated 18.06.2022 during the course of his arguments, stating that the same was the opinion of the Presiding Judge of the Mumbai Special Court (CBI). However, the veracity of the said document cannot be established as the State claimed to be not in possession of and is entirely unaware of the same.

16.5. Learned counsel reiterated that the above facts reveal non-application of mind and the mechanical manner in which the orders of remission were passed in the instant case.

16.6. Learned counsel for the petitioners next submitted that on 30.08.2023, the fine amounts owed were deposited by respondent Nos.3 to 13. That this is as an admission on their part of the non-payment of fine. It was contended that they would ordinarily have

had to undergo a further period of six years of imprisonment. That non-consideration of this fact further proves the non-application of mind and a mechanical exercise of power by the State of Gujarat and Union of India in granting remission.

16.7. Learned counsel went on to submit that in Writ Petition (Crl.) No.135 of 2022 filed by respondent No.3, there was no mention of material particulars, such as, the name of the petitioner-victim and the nature of the crimes in question, i.e., gang rape and mass murder in the petition. Also the fact that his application for grant of remission before the State of Maharashtra had been negatively opined by all the concerned authorities. That respondent No.3 did not place on record the judgements and orders of the Trial Court, High Court, and this Court that had upheld his conviction. That he made "incorrect and misleading" statements with reference to the orders of the Bombay High Court dated 05.08.2013 and Gujarat High Court dated 17.07.2019, namely, that the two courts had given differing opinions, and this fact played a role in this Court's decision-making while passing the order dated 13.05.2022. Respondent No.3 made it seem like both High Courts were sending him to the other State and that there was a contradiction. However, the aforesaid order of the Bombay High Court was dealing with the

transfer of convicts to another jail in their parent State and did not discuss the issue of remission, which could not have arisen in the year 2013.

16.8. It was reiterated that the investigating agency of the State of Gujarat had filed a closure report stating that the accused persons were not traceable. That the FIR contained erroneous recording of facts merely to hinder the investigative process. That the case was transferred by this Court to the State of Maharashtra as a consequence of the tainted nature of investigation. That the only reason the petitioner could get justice was because the investigation was conducted by the CBI. That this demonstrates the highly biased and partisan treatment of the petitioner by the State of Gujarat. That the State has been granting parole and furlough to the respondents in a liberal manner once they were transferred to the Godhra Jail. That in light of the highly diabolical and gruesome nature of the crimes, the treatment awarded to the respondents by the State indicates favouritism and leniency.

16.9. Learned counsel reiterated that the nature of the crimes committed by the respondent Nos.3 to 13 were unusual and egregious. That these crimes were very shocking to the society as a whole and the treatment of the respondents upon being granted

remission invoked a common sense of pain in the nation. That in fact the Bombay High Court had described the brutal treatment of the victims by the respondent Nos.3 to 13, which was reflected in the condition of the dead bodies. These factors require that respondents Nos.3 to 13 be treated differently from other ordinary criminals.

17. Learned senior counsel, Ms. Indira Jaising, appearing for the petitioner in Writ Petition (Crl.) No.326 of 2022 in her rejoinder at the outset submitted that the State of Gujarat does not have a policy of any kind for the release of prisoners under Section 432 of the CrPC. That the 1992 Policy merely outlines the procedure to be followed when releasing convicts on remission. That the State must abide by the law laid down by this Court as well as the constitutional mandate to protect the fundamental rights of women, particularly when they are victims of sexual violence in relation to ethnic conflict.

17.1 Further, it was contended that the State of Gujarat is not the appropriate government and therefore the order of this Court dated 13.05.2022 is *per incuriam* by virtue of failing to follow the binding precedent in ***V. Sriharan***. That the impugning of the order of the Gujarat High Court that held the State of Maharashtra to be the

appropriate Government in Writ Petition (Crl.) No.135 of 2022, filed by respondent No.3, is completely contrary to the position of law laid down in ***Naresh Shridhar Mirajkar***, wherein it was held that no writ petition alleging the violation of fundamental rights would lie against the judgement or order of a court. That the respondent No.3 committed fraud on this Court by misrepresenting the order of the Bombay High Court dated 05.08.2013 in Writ Petition (Crl.) No.135 of 2022. That the question of two High Courts taking "dramatically different views" did not arise as the issue of appropriate Government was not in question before the Bombay High Court at all. That this amounts to *suppressio veri, expression falsi*. That this Court in ***Union of India vs. Ramesh Gandhi, (2012) 1 SCC 476 ("Ramesh Gandhi")***, has held that any judgement that is a consequence of misrepresentation of necessary facts would constitute fraud and would be treated as a nullity. That this error of the Court cannot lead to the deprivation of justice to the victims. While the criminal justice system must strive to adopt a reformative approach, proportionality of sentence must be treated as an equally important ideal. Reliance was placed on the judgements of this Court in ***Alister Anthony Pareira vs. State of Maharashtra, (2012) 2 SCC 648 ("Alister Anthony Pareira"),***

Ravji vs. State of Rajasthan, (1996) 2 SCC 175 ("Ravji") and ***Soman vs. State of Kerala, (2013) 11 SCC 382 ("Soman")***.

18. Ms. Vrinda Grover, learned counsel for the petitioner in Writ Petition (Crl.) No.352 of 2022 reiterated the contentions as to the centrality and non-optional nature of seeking the opinion of the Presiding Judge under Section 432(2) of the CrPC, the non-serving of the concurrent sentences for the non-payment of fine by the respondent Nos.3 to 13 as well as the need to consider the nature of the crimes and the impact on public welfare while considering the grant of remission. Reliance was placed on the judgment of this Court in ***Ram Chander, Sharad Kolambe, Devendra Kumar vs. State of Uttaranchal, (2013) 9 SCC 363 ("Devendra Kumar")*** and ***Abdul Gani.***

18.1. It was further submitted that the State of Gujarat has not considered the possibility of recidivism and whether there was any evidence of reformation of respondent Nos.3 to 13. That as per the record, respondent Nos.3 to 13 have not demonstrated any sign of reform and have not expressed any remorse for the crimes they have committed. That their applications for remission do not contain reference to feelings of remorse felt by them for their actions. The non-payment of fine is further indication of the absence of remorse.

Also fresh cases have been registered against two of the respondents, and this serves as proof of their non-reformation.

18.2. It was also contended that reliance cannot be placed on documents, such as, letter dated 09.07.2022 of the C.B.I, wherein an affirmative opinion on remission was expressed as well as a letter produced by respondent No.3 containing the affirmative opinion of the Special Judge (C.B.I), Civil and Sessions Court, Mumbai as these documents have not been listed among the documents relied upon by the State of Gujarat while granting remission to the respondent Nos.3 to 13.

19. Ms. Aparna Bhat, learned counsel for the petitioner in Writ Petition (Crl.) No.319 of 2022 in her rejoinder submitted that the remission granted by the State of Gujarat to respondent Nos.3 to 13 was violative of Article 14 of the Constitution of India. That prison statistics from the year 2021 reveal that 66.7% of the convicts in Gujarat are undergoing life imprisonment, at least a fraction of whom have completed fourteen years of incarceration. That no special case has been made out either by the State of Gujarat or the Union of India as to why respondent Nos.3 to 13 are singularly entitled to remission over all of the other convicts. Reliance was placed on judgements in ***S. G. Jaisinghani vs. Union***

of India, AIR 1967 SC 1427 ("S. G. Jaisinghani") and ***E.P. Royappa vs. State of T.N., (1974) 4 SCC 3 ("E.P. Royappa")***, wherein this Court held that arbitrary and *mala fide* exercise of power by the State would constitute a violation of Article 14 of the Constitution. That discretionary and *en-masse* remission on festive occasions was held to be impermissible in the case of ***Sangeet***.

19.1. It was further submitted that there is no right to remission that a convict can necessarily avail. That remission must be an exercise of discretion judiciously by the concerned authorities. Reliance was placed on the judgments of this Court in ***Sangeet, V. Sriharan, State of Haryana vs. Mahender Singh, (2007) 13 SCC 606 ("Mahender Singh"); Mohinder Singh, Maru Ram*** and ***Shri Bhagwan vs. State of Rajasthan, (2001) 6 SCC 296 ("Shri Bhagwan")***.

20. Mr. Mohammad Nizamuddin Pasha, learned counsel for the petitioner in Writ Petition (Crl.) No.403 of 2022 reiterated the contention that materials not relied upon by the State of Gujarat while deciding on the question of remission for respondent Nos.3 to 13 cannot be used to justify the decision retrospectively. Reliance was placed on the decision of this Court in ***OPTO Circuit India Ltd. vs. Axis Bank, (2021) 6 SCC 707 ("OPTO Circuit")***. That

contrary to the submission of the learned ASG, the State has to consider the gravity of the offence while deciding whether to grant remission or not. That in cases, where the crimes are of a much less serious nature, remission has not been granted owing to the perceived seriousness of the offences by the State but in these cases of gruesome crime, remission has been simply granted. Further, there is a need to consider the fact that the victim and the convicts live in close proximity while granting remission, which fact has been considered in other cases but not in the impugned remission orders.

Points for consideration:

21. Having heard learned senior counsel and learned counsel for the respective petitioners as well as learned ASG, learned senior counsel and learned counsel for the respondents, the following points would arise for our consideration:-

1) Whether the petition filed by one of the victims in Writ Petition (Crl.) No.491 of 2022 under Article 32 of the Constitution is maintainable?
2) Whether the writ petitions filed as Public Interest Litigation (PIL) assailing the impugned orders of remission dated 10.08.2022 are maintainable?

3) Whether the Government of the State of Gujarat was competent to pass the impugned orders of remission?

4) Whether the impugned orders of remission passed by the respondent-State of Gujarat in favour of respondent Nos.3 to 13 are in accordance with law?

5) What Order?

The aforesaid points shall be considered *in seriatim*.

A detailed narration of facts and contentions would not call for reiteration at this stage.

***Re: Point No.1:* "Whether the petition filed by one of the victims in Writ Petition (Crl.) No.491 of 2022 under Article 32 of the Constitution is maintainable?"**

22. Sri Rishi Malhotra, learned counsel for respondent No.3, while placing reliance on the decisions of this Court, made a specific plea regarding maintainability of Writ Petition (Crl.) No.491 of 2022 filed by the victim by contending that the said petitioner had filed a review petition challenging the order dated 13.05.2022 passed in Writ Petition (Crl.) No.135 of 2022 and the same was dismissed. Therefore, the only remedy open to the petitioner was to file a curative petition in terms of the judgment of this Court in ***Rupa Ashok Hurrah*** and not challenging the remission orders by filing a

fresh writ petition. We shall answer this contention in detail while considering point No.3.

22.1. One of the contentions raised by learned Senior Counsel, Sri S. Guru Krishna Kumar appearing for one of the private respondents was that the petitioner in Writ Petition (Crl.) No.491 of 2022, Bilkis Bano, ought to have challenged the orders of remission before the Gujarat High Court by filing a petition under Article 226 of the Constitution rather than invoking Article 32 of the Constitution before this Court. In this regard, it was submitted that by straightaway filing a petition under Article 32 of the Constitution a right of approaching this Court by way of an appeal by an aggrieved party has been lost. It was submitted that if victims file petitions under Article 32 of the Constitution before this Court challenging orders of remission, floodgates would be opened and persons such as the petitioner would straightaway file writ petitions before this Court. That when an alternative remedy of filing a writ petition under Article 226 of the Constitution is available which is also a wider remedy than Article 32 of the Constitution, the petition filed by the writ petitioner in Writ Petition (Crl.) No.491 of 2022 must be dismissed reserving liberty to her to approach the High Court, if so advised.

Similar arguments were made by learned senior counsel Sri Chidambaresh.

22.2. At the outset, we state that Article 32 of the Constitution is a part of Part-III of the Constitution of India which deals with Fundamental Rights. The right to file a petition under Article 32 of the Constitution is also a Fundamental Right. In the instant case, the petitioner - Bilkis Bano has filed her writ petition under Article 32 of the Constitution in order to enforce her Fundamental Rights under Article 21 of the Constitution which speaks of right to life and liberty and Article 14 which deals with right to equality and equal protection of the laws. The object and purpose of Article 32 of the Constitution which is also recognised to be the "soul of the Constitution" and which is a Fundamental Right in itself is for the enforcement of other Fundamental Rights in Part-III of the Constitution. We think that the aforesaid constitutional remedy is also to enforce the goals enshrined in the Preamble of the Constitution, which speak of justice, liberty, equality and fraternity. Bearing in mind the expanded notion of access to justice which also includes speedy remedy, we think that the petition filed by the petitioner in Writ Petition (Crl.) No.491 of 2022 cannot be dismissed on the ground of availability of an alternative remedy under Article

226 of the Constitution or on the ground of its maintainability under Article 32 of the Constitution before this Court.

22.3. There is another stronger reason as to why the said petitioner has approached this Court by filing a petition under Article 32 of the Constitution rather than invoking Article 226 of the Constitution before the High Court. That is because earlier, one of the respondents, namely, respondent No.3 Radheshyam Bhagwandas Shah had preferred Writ Petition (Crl.) No.135 of 2022 invoking Article 32 of the Constitution before this Court by seeking a direction to the State of Gujarat to consider his case for remission under the Policy of 1992. This Court issued a categorical direction to that effect. In fact, the respondent-State has understood the said direction as if it was a command or a direction to grant remission within a period of two months. But, before this Court in the said proceedings, one of the serious contentions raised by the State of Gujarat was that it was not the appropriate Government to grant remission which contention was negatived by the order dated 13.05.2022. In fact, that is one of the grounds raised by the petitioner victim to assail the orders of remission granted to respondent Nos.3 to 13. That being so, the High Court of Gujarat would not have been in a position to entertain the aforesaid

contention in view of the categorical direction issued by this Court in Writ Petition (Crl.) No.491 of 2022 disposed on 13.05.2022. In the teeth of the aforesaid order of this Court, the contention regarding the State of Gujarat not being the competent State to consider the validity of the orders of remission in a petition filed under Article 226 of the Constitution, particularly, when the question of competency was raised, could not have been dealt with by the Gujarat High Court on the principle of judicial propriety. Therefore, for this reason also the petitioner in Writ Petition (Crl.) No.135 of 2022 has, in our view, rightly approached this Court challenging the orders of remission. The contentions of learned Senior Counsel, Sri S. Guru Krishna Kumar and Sri Chidambaresh are hence, rejected. Thus, we hold that Writ Petition (Crl.) No.491 of 2022 filed under Article 32 of the Constitution is clearly maintainable.

<u>Re: Point No.2</u>: "Whether the writ petitions filed as Public Interest Litigation (PIL) assailing the impugned orders of remission dated 10.08.2022 are maintainable?"

23. We now record the submissions made with regard to maintainability of the Public Interest Litigation (PIL) assailing the orders of remission in favour of respondent Nos.3 to 13 herein.

23.1. Learned ASG appearing for the State of Gujarat as well as Union of India submitted that the writ petitions filed as public interest litigations are not maintainable as the petitioners are strangers to the impugned orders of remission and they are in no way connected with the matter. In this context, reliance was placed on certain decisions referred to above including ***Rajiv Ranjan, Simranjit Singh***, and, ***Ashok Kumar***, to contend that there can be no third party interference in criminal matters in the garb of filing public interest litigations. It was also contended that the petitioners who have filed the public interest litigation are interlopers and busybodies and are not persons who are aggrieved. In the aforesaid context, reliance was placed on ***M.V. Dabholkar*** and ***Jasbhai Motibhai***.

23.2. Shri Sidharth Luthra, learned senior counsel has also voiced the arguments of the respondents by referring to certain decisions of this Court while contending that the grant of remission is in the exclusive domain of the State and although no convict can seek remission as a matter of fundamental right has nevertheless the right to be considered for remission. That remission is a matter between the convict and the State and, therefore, there can be no third party inference in such a matter. The detailed submissions of

the learned counsel have already been adverted to above and, therefore, it is unnecessary to reproduce the same once again.

23.3. Respondent No.3 has challenged the locus of the petitioners in Writ Petition (Crl.) No.319 of 2022 and connected writ petitions and contended that the petitioners therein are not related to the said case and are third-party/strangers to the case. If petitions filed by third- party strangers are entertained by this Court, then it would unsettle the settled position of law and would open floodgates for litigation. Learned counsel for respondent No.3 Sri Rishi Malhotra placed reliance on the decision of this Court in ***Janata Dal vs. H.S. Chowdhary, (1992) 4 SCC 305 ("Janata Dal")*** which was reiterated and followed in ***Simranjit Singh*** and in ***Subramanian Swamy vs. Raju, (2013) 10 SCC 465 ("Subramanian Swamy")*** where it has consistently been held that a third party, who is a total stranger to the prosecution has no *'locus standi'* in criminal matters and has no right whatsoever to file a petition under Article 32.

23.4. In ***Simranjit Singh***, this Court was faced with the situation where a conviction of some of the accused persons by this Court under the Terrorist and Disruptive Activities (Prevention) Act, (TADA Act) was sought to be challenged under Article 32 of the

Constitution by the President of the Akali Dal (M), namely, Simranjit Singh Mann which was dismissed. In paragraph 5 of the judgment in ***Simranjit Singh***, this Court categorically dealt with the said issue and held that the petition under Article 32 of the Constitution was not maintainable for the simple reason that the petitioner therein did not seek to enforce any of his fundamental rights nor did he complain that any of his fundamental rights were being violated. This Court was of the view that a total stranger in a criminal case cannot be permitted to question the correctness of a decision.

24. *Per contra*, learned senior counsel, Ms. Indira Jaising, has made her submissions on the issue of locus standi of the petitioner in Writ Petition (Crl.) No.326 of 2022. According to her, even when no specific legal injury is caused to a person or to a determinate class or group of persons by an act or omission of the State or any public authority but when an injury is caused to public interest, a concerned citizen can maintain an action for vindicating the rule of law and setting aside the unlawful action or enforcing the performance of public duty. (*Vide* ***B.P Singhal).***

24.1. She asserted that the writ petition raises questions of great public importance in that, in a democracy based on the rule of law,

no authority has any unfeterred and unreviewable discretion. All powers vested in an authority, are intended to be used only for public good. The exercise of executive power must be informed by the finer canons of constitutionalism, *vide* ***Maru Ram.*** That the impugned decision of granting remission to the convicts violates rule of law, is arbitrary and not based on any relevant consideration. Therefore, the writ petition filed by the petitioner in public interest is maintainable. In this regard reliance was placed on ***S.P. Gupta***.

24.2. As regards respondents' contention that by entertaining the petition under Article 32 of the Constitution the convicts have been denied the right of appeal, it was submitted that there exists no statutory right of appeal against an order denying or permitting remission. Such an order can only be challenged under Article 226 or Article 32 of the Constitution. Further, a Constitution Bench of this Court in ***Kochuni*** observed that, "…the mere existence of an adequate alternative remedy cannot per se be a good and sufficient ground for throwing out a petition under Article 32, if the existence of a fundamental right and a breach, actual or threatened, of such right is alleged and is *prima facie* established on the petition."

24.3. As regards the respondents' submission that a stranger to the criminal proceedings under any circumstance cannot file a petition under Article 32, it was contended that the instant proceedings are not criminal in nature, they fall within the realm of administrative law as they seek to challenge orders of remission which are administrative decisions. Learned senior counsel brought to our notice the fact that this Court had entertained a petition filed by a DMK leader under Section 406 of the CrPC seeking the transfer of a pending criminal trial against his political opponent, J. Jayalalithaa, from the State of Tamil Nadu to the State of Karnataka *vide* ***K. Anbazhagan***.

25. Ms. Vrinda Grover, learned counsel for the petitioner in Writ Petition (Crl.) No.352 of 2022, at the outset, submitted that the said petition has been filed in the larger public interest by the petitioners who have vast knowledge and practical expertise on issues of public policy, governance and upholding the rule of law. Their petition challenges not only the arbitrary and *mala fide* exercise of executive prerogative under Section 432 of the CrPC, but also prays for a shift in practices related to the grant of remission by bringing in more accountability and transparency to the process of grant of

remission. Thus, the writ petition is maintainable as a Public Interest Litigation.

25.1. Learned counsel contended that the petition does not constitute an intervention into criminal proceedings but is rather a challenge to arbitrary executive action, which is amenable to judicial review. That it is settled law that the exercise of power under Section 432 of the CrPC is an administrative act which neither retracts from a judicial order nor does it wipe out the conviction of the accused and is merely an executive prerogative exercised after the judicial function in a criminal proceeding has come to an end v*ide* ***Epuru Sudhakar*** and ***Ashok Kumar.***

25.2. It was further submitted that all the judgments cited by the respondents-convicts as also the respondent-State to argue that the petitioners have no locus standi in the matter refer to different stages of criminal proceedings, viz. petitions related to investigation, trial, sentencing or quashing of the FIR. However, the present petition is a challenge to the arbitrary and *mala fide* administrative action which has arisen after the criminal proceedings have attained finality in the eye of law.

25.3. Learned counsel submitted that it is trite that the exercise of executive discretion is subject to rule of law and fairness in State action as embodied in Article 14 of the Constitution. The exercise of such discretion under Section 432 of the CrPC which is arbitrary or *mala fide* amounts to State action in violation of constitutional and statutory obligations and is detrimental to public interest. Learned counsel placed reliance on the decision of this Court in ***S. P. Gupta*** to submit that this Court has in many cases held that in case of public injury caused by an act or omission of the State which is contrary to the rule of law, any member of the public acting *bona fide* can maintain an action for redressal of a public wrong. In the case at hand, the *mala fide* and arbitrary grant of premature release to the respondents-convicts by State action is *de hors* constitutional mandate and abets immunity for violence against women. (*Vide* ***Sheonandan Paswan vs. State of Bihar, (1987) 1 SCC 288 ("Sheonandan Paswan")*** and ***Abdul Wahab K. vs. State of Kerala, (2018) 18 SCC 448 ("Abdul Wahab")***.

25.4. Learned counsel next submitted that this Court in ***Subramanian Swamy,*** while adjudicating on the locus of a public-spirited intervenor in a case requiring interpretation of the Juvenile Justice (Care and Protection of Children) Act, 2015, held that the

intervenor had sought an interpretation of criminal law which would have a wide implication beyond the scope of the parties in that case and hence, allowed the same. Thus, when larger questions of law are involved, which include interpretation of statutory provisions for the purpose of grant of premature release/remission, public-spirited persons who approach the Court in a *bona fide* manner, ought not to be prevented from assisting the Court to arrive at a just and fair outcome.

25.5. Learned counsel Ms. Grover further submitted that in cases where offences have shocked the conscience of the society, spread fear and alarm amongst citizens and have impugned on the secular fabric of society, like in the instant case, this Court has allowed interventions by members of the public seeking to bring to the attention of the Court the inaction and apathy on the part of the State in discharging its duty within the criminal justice system. It has been held in some cases that the technical rule of locus cannot shield the arbitrary and illegal exercise of executive discretion in violation of constitutional and statutory principles, once the same have been brought to the attention of this Court.

26. Learned counsel for the petitioner in Writ Petition (Crl.) No.319 of 2022, Smt. Aparna Bhat submitted that the petitioner

has locus standi to approach this Court against the remission orders dated 10.08.2022. It was submitted that upholding the constitutional values and protection of all citizens is the responsibility of the State and there is a legitimate expectation that the State conducts all its actions in accordance with constitutional values. That the aforesaid petition has been filed in public interest as the premature release of respondent Nos.3 to 13 cannot be permitted since the convicts pose a danger to society. That the petitioners in the connected matters fulfil the wide ambit of the expression "person aggrieved" as envisaged under PIL jurisdiction since they are challenging the release of convicts who have committed heinous and grave offences against society.

26.1. On the issue of locus standi of the petitioners to approach this Court, the learned counsel relied on para 6 of ***A.R Antulay vs. Ramdas Sriniwas Nayak, (1984) 2 SCC 500 ("A.R Antulay").*** Further, it was submitted that in ***Sheonandan Paswan,*** this Court relied on ***A. R. Antulay*** and held that if a citizen can set the machinery of criminal law in motion, she is also entitled to oppose the unwarranted withdrawal of prosecution in an offence against society.

26.2. Learned counsel further placed reliance on the dictum of this Court in ***Manohar Lal vs. Vinesh Anand, (2001) 5 SCC 407,*** wherein it was held that the doctrine of locus standi is totally foreign to criminal jurisprudence and that society cannot afford to have a criminal escape his liability. Also, in ***Ratanlal vs. Prahlad Jat, (2017) 9 SCC 340,*** this Court held that a crime is not merely an offence committed in relation to an individual but is also an offence against society at large and it is the duty of the State to punish the offender.

27. Although, we have recorded the detailed submissions made on behalf of the respective parties, we do not think it is necessary to answer the point regarding maintainability of the PILs in this case inasmuch as one of the victims, namely, Bilkis Bano has also filed a writ petition invoking Article 32 of the Constitution assailing the orders of remission which we have held to be maintainable. The consideration of that petition on its merits would suffice in the instant case. Hence, we are of the view that the question of maintainability of the PILs challenging the orders of remission in the instant case would not call for an answer from us owing to the aforesaid reason. As a result, we hold that consideration of the point on the maintainability of the PILs has been rendered wholly academic and not requiring an answer in this case. Therefore, the

question regarding maintainability of a PIL challenging orders of remission is kept open to be considered in any other appropriate case.

28. Before we consider point No.3, we shall deal with the concept of remission.

Remission : Scope & Ambit

29. Krishna Iyer, J. in ***Mohammad Giasuddin vs. State of A.P., (1997) 3 SCC 287***, quoted George Bernard Shaw the famous satirist who said, "*If you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him and, men are not improved by injuries.*" According to him, humanity today views sentencing as a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as a means of social defence.

29.1. Further, quoting a British Buddhist-Christian Judge, it was observed that in the context of *karuna (compassion)* and punishment for *karma (bad deeds),* '*The two things are not incompatible. While an accused is punished for what he has done, a quality of what is sometimes called mercy, rather than an emotional*

hate against the man for doing something harmful must be deserved. This is what compassion is about.'

30. Learned senior counsel Sri Sidharth Luthra, drew our attention to the principles covering grant of remission and distinguished it from concepts, such as commutation, pardon, and reprieve, with reference to a judgment of this Court in ***State (Govt. of NCT of Delhi) vs. Prem Raj, (2003) 7 SCC 121 ("Prem Raj").*** Articles 72 and 161 deal with clemency powers of the President of India and the Governor of a State, and also include the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentences in certain cases. The power under Article 72 *inter alia* extends to all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends and in all cases where the sentence is a sentence of death. Article 161 states that the Government of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends. It was observed in the said judgment that the powers under Articles 72 and 161 of the

Constitution of India are absolute and cannot be fettered by any statutory provision, such as, Sections 432, 433 or 433-A of the CrPC or by any prison rule.

30.1. It was further observed that a pardon is an act of grace, proceeding from the power entrusted with the execution of the law, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed. It affects both the punishment prescribed for the offence and the guilt of the offender. But pardon has to be distinguished from "amnesty" which is defined as a "general pardon of political prisoners; an act of oblivion". An amnesty would result in the release of the convict but does not affect disqualification incurred, if any. 'Reprieve' means a stay of execution of a sentence, a postponement of a capital sentence. Respite means awarding a lesser sentence instead of the penalty prescribed in view of the fact that the accused has had no previous conviction. It is something like a release on probation for good conduct under Section 360 of the CrPC. On the other hand, remission is reduction of a sentence without changing its character. In the case of a remission, the guilt of the offender is not affected, nor is the sentence of the court, except in the sense that the person concerned does not suffer incarceration for the entire period of the

sentence, but is relieved from serving out a part of it. Commutation is change of a sentence to a lighter sentence of a different kind. Section 432 empowers the appropriate Government to suspend or remit sentences.

30.2. Further, a remission of sentence does not mean acquittal and an aggrieved party has every right to vindicate himself or herself. In this context, reliance was placed on ***Sarat Chandra Rabha vs. Khagendranath Nath, AIR 1961 SC 334 ("Sarat Chandra Rabha"),*** wherein a Constitution Bench of this Court while distinguishing between a pardon and a remission observed that an order of remission does not wipe out the offence; it also does not wipe out the conviction. All that it does is to have an effect on the execution of the sentence; though ordinarily a convicted person would have to serve out the full sentence imposed by a court, he need not do so with respect to that part of the sentence which has been ordered to be remitted. An order of remission thus, does not in any way interfere with the order of the court; it affects only the execution of the sentence passed by the court and frees the convicted person from his liability to undergo the full term of imprisonment inflicted by the court even though the order of conviction and sentence passed by the court still stands as it is.

The power to grant remission is an executive power and cannot have the effect which the order of an appellate or revisional court would have of reducing the sentence passed by the trial court and substituting in its place the reduced sentence adjudged by the appellate or revisional court. According to *Weater's Constitutional Law,* to cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment but does not alter it qua the judgment.

30.3. Reliance was placed on ***Mahender Singh***, to urge that a right to be considered for remission, keeping in view the constitutional safeguards of a convict under Articles 20 and 21 of the Constitution of India, must be held to be a legal one. Such a legal right emanates from not only the Prisons Act but also from the Rules framed thereunder. Although no convict can be said to have any constitutional right for obtaining remission in his sentence, the policy decision itself must be held to have conferred a right to be considered therefor. Whether by reason of a statutory rule or otherwise if a policy decision has been laid down, the persons who come within the purview thereof are entitled to be treated equally, *vide* ***State of Mysore vs. H. Srinivasmurthy, (1976) 1 SCC 817 ("H. Srinivasmurthy").***

30.4. In ***Mahender Singh,*** this Court was considering the correctness of a judgment of the Punjab and Haryana High Court in which a circular/letter issued by the State of Haryana laying down criteria for premature release of the prisoners had been declared to be unconstitutional. In the above context, this Court considered the right of the convict to be considered for remission and not on what should be the criteria when the matter was taken up for grant thereof.

30.5. ***Satish*** was pressed into service to contend that the length of the sentence or the gravity of the original crime cannot be the sole basis for refusing premature release. Any assessment regarding a predilection to commit crime upon release must be based on antecedents as well as conduct of the prisoner while in jail, and not merely on his age or apprehensions of the victims and witnesses. It was observed that although, a convict cannot claim remission as a matter of right, once a law has been made by the appropriate legislature, it is not open for the executive authorities to surreptitiously subvert its mandate. It was further observed that where the authorities are found to have failed to discharge their statutory obligations despite judicial directions, it would then not be inappropriate for a constitutional court while exercising its

powers of judicial review to assume such task onto itself and direct compliance through a writ of mandamus. Considering that the petitioners therein had served nearly two decades of incarceration and had thus suffered the consequences of their actions, a balance between individual and societal welfare was struck by granting the petitioners therein conditional premature release, subject to their continuing good conduct. In the said case, a direction was issued to the State Government to release the prisoners therein on probation in terms of Section 2 of the U.P. Prisoners Release on Probation Act, 1938 within a period of two weeks. The respondent State was reserved liberty with the overriding condition that the said direction could be reversed or recalled in favour of any party or as per the petitioner therein.

31. The following judgments of this Court are apposite to the concept of remission:

(a) In ***Maru Ram***, a Constitution Bench considered the validity of Section 433-A of the CrPC. Krishna Iyer, J. speaking for the Bench observed, "Ordinarily, where a sentence is for a definite term, the calculus of remissions may benefit the prisoner to instant release at the point where the subtraction results in zero". However, "when it comes to life imprisonment, where the

sentence is indeterminate and of an uncertain duration, the result of subtraction from an uncertain quantity is still an uncertain quantity and release of the prisoner cannot follow except on some fiction of quantification of a sentence of uncertain duration.

(i) Referring to ***Gopal Vinayak Godse vs. State of Maharashtra, (1961) 3 SCR 440***, it was observed that the said judgment is an authority for the proposition that a sentence of imprisonment for life is one of "imprisonment for the whole of the remaining period of the convicted person's natural life", unless the said sentence is committed or remitted by an appropriate authority under the relevant provisions of law.

(ii) In ***Gopal Vinayak Godse***, a distinction was drawn between remission, sentence and life sentence. Remission limited a time, helps computation but does not *ipso jure* operate as release of the prisoner. But, when the sentence awarded by the Judge is for a fixed term, the effect of remissions may be to scale down the term to be endured and reduce it to nil, while leaving the factum and quantum of sentence intact. However, when the sentence is a lifesentence, remissions, quantified in

time, cannot reach a point of zero. Since Section 433-A deals only with life sentences, remissions cannot entitle a prisoner to release. It was further observed that remission, in the case of life imprisonment, ripens into a reduction of sentence of the entire balance only when a final release order is made. If this is not done, the prisoner will continue in custody. The reason is, that life sentence is nothing less than life long imprisonment and remission vests no right to release when the sentence is life imprisonment. Nor is any vested right to remission cancelled by compulsory fourteen years jail life as a life sentence is a sentence for whole life.

(iii) Interpreting Section 433-A it was observed that there are three components in it which is in the nature of saving clause. Firstly, the CrPC generally governs matters covered by it. Secondly, if a special or local law exists covering the same area, the latter law will be saved and will prevail, such as short sentencing measures and remission schemes promulgated by various States. The third component is, if there is a specific provision to the contrary then, whether it would override the special or local law. It was held that Section 433-A picks out of a mass of imprisonment cases a specific class of life imprisonment cases and subjects it explicitly to a

particularized treatment. Therefore, Section 433-A applies in preference to any special or local law. This is because Section 5 of the CrPC expressly declares that specific provision, if any, to the contrary will prevail over any special or local law. Therefore, Section 433-A would prevail and escape exclusion of Section 5. The Constitution Bench concluded that Section 433-A is supreme over the remission rules and short-sentencing statutes made by various States. Section 433-A does not permit parole or other related release within a span of fourteen years.

(iv) It was further observed that criminology must include victimology as a major component of its concerns. When a murder or other grievous offence is committed the victims or other aggrieved persons must receive reparation and social responsibility of the criminal to restore the loss or heal the injury which is part of the punitive exercise which means the length of the prison term is no reparation to the crippled or bereaved.

(v) Fazal Ali, J. in his concurring judgment in ***Maru Ram*** observed that crime is rightly described as an act of warfare against the community touching new depths of lawlessness. According to him, the object of imposing deterrent sentence is three-fold.

While holding that the deterrent form of punishment may not be a most suitable or ideal form of punishment yet, the fact remains that the deterrent punishment prevents occurrence of offence. He further observed that Section 433-A is actually a social piece of legislation which by one stroke seeks to prevent dangerous criminals from repeating offences and on the other hand protects the society from harm and distress caused to innocent persons. While opining that where section 433-A applies, no question of reduction of sentence arises at all unless the President of India or the Governor of a State choose to exercise their wide powers under Article 72 or Article 161 of the Constitution respectively which also have to be exercised according to sound legal principles as, any reduction or modification in the deterrent punishment would, far from reforming the criminal, be counter-productive.

(b) ***Mohinder Singh*** is a case which arose under Section 432 on remission of sentence in which the difference between the terms `bail', `furlough' and `parole' having different connotations were discussed. It was observed that furloughs are variously known as temporary leaves, home visits or temporary community release and are usually granted when a convict is suddenly faced with a severe

family crisis such as death or grave illness in the immediate family and often the convict/inmate is accompanied by an officer as part of the terms of temporary release of special leave which is granted to a prisoner facing a family crisis. Parole is a release of a prisoner temporarily for a special purpose or completely before the expiry of the sentence or on promise of good behaviour. Conditional release from imprisonment is to entitle a convict to serve remainder of his term outside the confines of an institution on his satisfactorily complying all terms and conditions provided in the parole order.

(c) In ***Poonam Latha vs. M.L. Wadhwan, (1987) 3 SCC 347 ("Poonam Latha"),*** it was observed that parole is a professional release from confinement but it is deemed to be part of imprisonment. Release on parole is a wing of reformative process and is expected to provide opportunity to the prisoner to transform himself into a useful citizen. Parole is thus, a grant of partial liberty or lessening of restrictions to a convict prisoner but release on parole does not change the status of the prisoner. When a prisoner is undergoing sentence and confined in jail or is on parole or furlough his position is not similar to a convict who is on bail. This is because a convict on bail is not entitled to the benefit of the remission system. In other words, a prisoner is not eligible for

remission of sentence during the period he is on bail or his sentence is temporarily suspended. Therefore, such a prisoner who is on bail is not entitled to get remission earned during the period he is on bail.

32. Apart from the constitutional provisions, there are also provisions of the CrPC which deal with remission of convicts. Sections 432, 433, 433A and 435 of the CrPC are relevant and read 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.

433. Power to commute sentence.— The appropriate Government may, without the consent of the person sentenced, commute—

(a) a sentence of death, for any other punishment provided by the Indian Penal Code (45 of 1860);

(b) a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;

(c) a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced, or for fine;

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

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

435. State Government to act after consultation with Central Government in certain cases.— (1) The powers conferred by Sections 432 and 433 upon the State Government to remit or commute a sentence, in any case where the sentence is for an offence—

(a) which was investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, or

(b) which involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or

(c) which was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty,

shall not be exercised by the State Government except after consultation with the Central Government.

(2) No order of suspension, remission or commutation of sentences passed by the State Government in relation to a person, who has been convicted of offences, some of which relate to matters to which the executive power of the Union extends, and who has been sentenced to separate terms of imprisonment which are to run concurrently, shall have effect unless an order for the suspension, remission or commutation, as the case may be, of such sentences has also been made by the Central Government in relation to the offences committed by such person with regard to matters to which the executive power of the Union extends."

32.1. Sub-section (1) of Section 432 is an enabling provision which states that when any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without conditions or upon any condition 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. The pertinent provision involved in this case is sub-section (2) which deals with an application made to the appropriate Government for the suspension or remission of a sentence and 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. Sub-section (3) deals with

cancellation of the suspension or remission in the event of there being any non-fulfilment of any condition imposed by the appropriate Government whereupon the person in whose favour the sentence has been suspended or remitted, may be arrested by the police officer, without warrant and remanded to undergo the unexpired portion of the sentence, if such a person is at large. Sub-section (4) states that 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. 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 *vide* sub-section (5) of Section 432 of the CrPC. The proviso to sub-section (5) states 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 it is presented through the officer in-charge of the jail; or where such petition is made by any other person, it contains a declaration that the person sentenced is in jail. Sub-section (6) of Section 432 states that the provisions of this Section would apply to any order passed

by a Criminal Court under any section of the CrPC or of any other law which restricts the liberty of any person or imposes any liability upon him or his property.

32.2. The expression "appropriate Government" used in Section 432 as well as in Section 433, is defined in sub-section (7) of Section 432. It expresses that 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; and in other cases, the Government of the State within which the offender is sentenced or the said order is passed.

32.3. Section 433-A is a restriction on the powers of remission or commutation in certain cases. It begins with a *non-obstante clause* and states that notwithstanding anything contained in Section 432, where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commuted under Section 433 into one of imprisonment for life, such person shall not be released from prison unless he had served at least fourteen years of imprisonment.

32.4. Section 434 states that the powers conferred by Sections 432 and 433 upon the State Government may in case of sentences of death also be exercised by the Central Government concurrently.

32.5. The necessity for the State Government to act in consultation with the Central Government in certain cases is mandated in Section 435. The powers conferred by Sections 432 and 433 upon the State Government to remit or commute a sentence, in any case where the sentence is for an offence (a) which was investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946, or by any other agency empowered to make investigation into an offence under any Central Act other than the CrPC, or (b) which involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or (c) which was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty, shall not be exercised by the State Government except after consultation with the Central Government. Sub-section (2) of Section 435 states that no order of suspension, remission or commutation of sentences passed by the State Government in relation to a person, who has been convicted of offences, some of which relate to matters to which the executive

power of the Union extends, and who has been sentenced to separate terms of imprisonment which are to run concurrently, shall have effect unless an order for the suspension, remission or commutation, as the case may be, of such sentences has also been made by the Central Government in relation to the offences committed by such person with regard to matters to which the executive power of the Union extends.

With the above backdrop of provisions, we move to consider Point No.3.

Point No.3 : Whether the Government of State of Gujarat was competent to pass the impugned orders of remission?

33. The point for consideration revolves around the definition of the expression "appropriate Government". In other words, whether the first respondent – State of Gujarat was competent to pass the orders of remission in the case of respondent Nos.3 to 13 herein is the question. The meaning and import of the expression "appropriate Government" has to be discerned from the judgments of this Court in the light of sub-section (7) of Section 432 of the CrPC.

33.1. The contentions raised by the learned counsel for the petitioner in Writ Petition (Crl.) No.491 of 2022 as well as the

arguments of learned ASG appearing for Union of India as well as State of Gujarat on this aspect need not be reiterated.

33.2. The expression "appropriate Government" no doubt has been defined in sub-section (7) of Section 432 to mean that 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; in other cases, the Government of the State within which the offender is sentenced or the said order is passed. The expression "appropriate Government" also finds place in sub-section (1) of Section 432 which, as already discussed above, states that when any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without conditions or upon any condition 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.

33.3. Sub-section (1) of Section 432 of the CrPC deals with a power vested with the appropriate Government which is an enabling power. The discretion vested with the appropriate Government has to be exercised judiciously in an appropriate case and not to abuse the same. However, when an application is made to the appropriate

Government for the suspension or remission of a sentence such as in the instant case by a convict, the appropriate Government may seek the opinion of the Presiding Judge of the Court before or by which the conviction was had or confirmed and on considering the reasons for such opinion, may consider the application for remission *vide* sub-section (2) of Section 432 of the CrPC.

33.4. On a combined reading of sub-sections (1) and (2) of Section 432, it is apparent that the conviction and sentence of the Court which had tried the case assumes significance and the appropriate Government may have to seek the opinion of the Presiding Judge of the Court before which the conviction took place, before passing an order of remission. This is particularly so when an application is filed by or on behalf of a convict seeking remission. Therefore, logically the expression appropriate Government in clause (b) of sub-section (7) of Section 432 also states that the Government of the State within which the offender is sentenced or the said order is passed which is the appropriate Government. The aforesaid consistency is significant inasmuch as the intent of the Parliament is, it is only the Government of the State within which the offender was sentenced which is competent to consider an application for remission and pass an order remitting the sentence of a convict.

This clearly means that the place of occurrence of the incident or place of imprisonment of the convict are not relevant considerations and the same have been excluded from the definition of the expression appropriate Government in clause (b) of sub-section (7) of Section 432. If the intention of the Parliament was that irrespective of the Court before which the trial and conviction had taken place, the order of remission can be considered by the Government within whose territorial jurisdiction the offence has been committed or the offender is imprisoned, the same would have been indicated by the definition. On the contrary, the definition of appropriate Government is otherwise. The intention of the Parliament is that the Government of the State within which the offender was tried and sentenced, is the appropriate Government to consider either under sub-section (1) of Section 432 of the CrPC or on an application made by the convict for remission of the sentence under sub-section (2) of Section 432 of the CrPC. This places emphasis on the place of trial and sentence of the offender rather than the place or location where the crime was committed. Such an interpretation would also include a situation, such as in the present case, where not only the investigation but also the trial of respondents No.3 to 13 herein was transferred from the State of Gujarat to the State of Maharashtra and particularly to the Special

Court at Mumbai. Thus, the aforesaid definition also takes within its scope and ambit a circumstance wherein the trial is transferred by this Court for reasons to be recorded and which is in the interest of justice from one State to another State.

33.5. There may be various reasons for transferring of a trial from a competent Court within the territorial jurisdiction of one State to a Court of equivalent jurisdiction in another State, as has been done in the instant case. But what is certain is that the transfer of the trial to a court in another State would be a relevant consideration while considering as to which State has the competency to pass an order of remission. Thus, the definition of appropriate Government in sub-section (7) of Section 432 clearly indicates that the Government of the State within which the offender is sentenced, is the appropriate Government to pass an order of remission.

33.6. In almost all cases, the court before which the offender was sentenced is located within the territory of a State Government wherein the offence occurred and, therefore, in such a case, there can be no further doubt about the meaning of the expression appropriate Government. But according to us, even in a case where the trial has been transferred by this Court from a court of competent jurisdiction of a State to a court in another State, it is

still the Government of the State within which the offender was sentenced which is the appropriate Government which has the jurisdiction as well as competency to pass an order of remission under Section 432 of the CrPC. Therefore, it is not the Government of the State within whose territory the offence occurred or the convict is imprisoned which can assume the power of remission.

33.7. In this regard, the following judgments of this Court may be relied upon:

(a) In ***Ratan Singh,*** on discussing Section 401 of the erstwhile CrPC (corresponding to Section 432 of the present CrPC) it was observed that the test to determine the appropriate Government is to locate the State where the accused was convicted and sentenced and the Government of that State would be the appropriate Government within the meaning of Section 401 of the CrPC. In the said case, it was observed that the accused was convicted and sentenced in the State of Madhya Pradesh and though he was discharging his sentence in a jail in Amritsar in the State of Punjab, the appropriate Government under section 401 (1) of the erstwhile CrPC to exercise the discretion for remission of the sentence was the State of Madhya Pradesh. It was further observed that even under the new Code i.e. CrPC, 1973 as per sub-section (7) of Section 432

thereof, the phrase appropriate Government had the same meaning as the latter provision had been bodily lifted from Section 402(3) of the erstwhile CrPC. On a review of the case law and the statutory provisions of the CrPC the following propositions were culled out:

> "9. …(1) that a sentence of imprisonment for life does not automatically expire at the end of 20 years including the remissions, because the administrative rules framed under the various Jail Manuals or under the Prisons Act cannot supersede the statutory provisions of the Indian Penal Code. A sentence of imprisonment for life means a sentence for the entire life of the prisoner unless the appropriate Government chooses to exercise its discretion to remit either the whole or a part of the sentence under Section 401 of the Code of Criminal Procedure;
>
> (2) that the appropriate Government has the undoubted discretion to remit or refuse to remit the sentence and where it refuses to remit the sentence no writ can be issued directing the State Government to release the prisoner.
>
> (3) that the appropriate Government which is empowered to grant remission under Section 401 of the Code of Criminal Procedure is the Government of the State where the prisoner has been convicted and sentenced, that is to say, the transferor State and not the transferee State where the prisoner may have been transferred at his instance under the Transfer of Prisoners Act; and
>
> (4) that where the transferee State feels that the accused has completed a period of 20 years it has merely to forwardthe request of the prisoner to the concerned State Government, that is to say, the Government of the State where theprisoner was convicted and sentenced and even if this request is rejected by the State Government the order of the government cannot be interfered with by a High Court in its writ jurisdiction."

(b) The aforesaid decision was reiterated in ***Hanumant Dass.*** In the said case, the incident had occurred in Dharmshala and when the matter was pending before the Sessions Court, Dharmshala in Himachal Pradesh at the instance of the complainant, on an application moved before this Court, the case was transferred from Himachal Pradesh to the Sessions Court at Gurdaspur in Punjab.

(c) Insofar as clemency power of a Governor of a State under Article 161 of the Constitution to grant remission to prisoners convicted by courts outside the State but undergoing sentences in jails in the State is concerned, this Court in ***M.T. Khan*** observed that the appropriate government on whose advice the Governor has to act while granting remission to such a prisoner was to be decided on the basis of the aid and advice of the Council of Ministers of the State which had convicted the accused and not the State where the accused/convict is transferred to be lodged in the jail. In this case it was held that since the judgment of conviction had been passed in the States of Madhya Pradesh and Maharashtra and the convict was lodged in the State of Andhra Pradesh, the appropriate Governments were the States of Madhya Pradesh and Maharashtra even under Article 161 of the

Constitution. Hence, the appeals filed by the Government of Andhra Pradesh were allowed.

(d) ***V. Sriharan*** is a judgment of a Constitution Bench of this Court wherein the Government of Tamil Nadu had proposed to remit the sentence of life imprisonment to release seven convicts who were convicted in the Rajiv Gandhi assassination case – ***State, through Superintendent of Police, CBI vs. Nalini, (1999) 5 SCC 253 ("Nalini")***. While discussing the phrase "appropriate Government", it was observed that barring cases falling under Section 432(7)(a), in all other cases where the offender is sentenced or the sentence or order is passed within the territorial jurisdiction of the State concerned, that State Government would be the appropriate Government. Following the earlier decisions it was observed that even if an offence is committed in State-A, but, the trial takes place and the sentence is passed in State-B, it is the latter State which shall be the appropriate Government.

33.8. In our view, on a plain reading of sub-section (7) of Section 432 of the CrPC and considering the judgments of this Court, it is the State of Maharashtra, which had the jurisdiction to consider the application for remission *vis-à-vis* respondent Nos.3 to 13 herein as they were sentenced by the Special Court, Mumbai.

Hence the applications filed by respondent Nos.4 to 13 seeking remission had to be simply rejected by the State of Gujarat owing to lack of jurisdiction to consider them. This is because Government of Gujarat is not the appropriate Government within the meaning of the aforesaid provision. The High Court of Gujarat was therefore right in its order dated 17.07.2019.

33.9. When an authority does not have the jurisdiction to deal with a matter or it is not within the powers of the authority i.e. the State of Gujarat in the instant case, to be the appropriate Government to pass orders of remission under Section 432 of the CrPC, the orders of remission would have no legs to stand. On the aspect of jurisdiction and nullity of orders passed by an authority, the decision of the House of Lords in ***Anisminic vs. Foreign Compensation Commission, (1969) 2 WLR 163 : (1969) 1 All ER 208 ("Anisminic"),*** is of significance and the same can be cited by way of analogy. The House of Lords in the said case held that the Foreign Compensation Commission had committed an error which was a jurisdictional error as its decision was based on a matter which it had no right to take into account and so its decision was a nullity and subject to judicial review. Although in ***Anisminic***, the scope and ambit of the concept of *"jurisdictional*

error" or "*error of jurisdiction*" was very much extended, and of a very broad connotation, in the instant case we are primarily dealing with a narrower concept i.e. when an authority, which is the Government of State of Gujarat in the instant case, was lacking jurisdiction to consider the applications for remission. Just as an order passed by a Court without jurisdiction is a nullity, in the same vein, an order passed or action taken by an authority lacking in jurisdiction is a nullity and is *non est* in the eye of law.

33.10. On that short ground alone the orders of remission have to be quashed. This aspect of competency of the Government of State of Gujarat to pass the impugned orders of remission goes to the root of the matter and the impugned orders of remission are lacking in competency and hence a nullity. The writ petition filed by the victim would have to succeed on this reasoning. But the matter does not rest at that.

34. Learned ASG appearing for respondent Nos.1 and 2, has placed strong reliance on the order of this Court dated 13.05.2022 to contend that in view of the directions issued by this Court in Writ Petition No.135 of 2022, respondent No.1 – State of Gujarat had to consider the applications for remission filed by respondents No.3 to 13 herein. Further, the consideration had to be made as per the

1992 Policy of Remission of the State of Gujarat. Hence, the appropriate Government in the case of respondent Nos.3 to 13 was the Government of Gujarat in terms of the order of this Court dated 13.05.2022. It was further contended that the offences had also occurred within the State of Gujarat. Therefore, the first respondent – State of Gujarat had no option but to consider the applications filed by respondent Nos.3 to 13 herein and pass the orders dated 10.08.2022 granting remission to them.

35. Learned counsel for the petitioner in Writ Petition (Crl.) No.491 of 2022 has countered the above submission contending that one of the convicts-Radheshyam Bhagwandas Shah, respondent No.3 herein, had initially approached the High Court of Gujarat by filing Criminal Application No.4573 of 2019 for a direction to consider his application for remission by the State of Gujarat. By order dated 17.07.2019 the High Court disposed of Criminal Application No.4573 of 2019 by observing that he should approach the appropriate Government being the State of Maharashtra. His second such application before the Gujarat High Court was also dismissed *vide* order dated 13.03.2020. That when the said prisoner filed Writ Petition (Crl.) No.135 of 2022 before this Court, he did not disclose the following facts:

(i) that within fourteen days of the order dated 17.07.2019, he had approached the Government of Maharashtra vide application dated 01.08.2019;

(ii) that the CBI had given a negative recommendation vide its letter dated 14.08.2019;

(iii) that the Special Judge (CBI), Mumbai had given a negative recommendation vide his letter dated 03.01.2020;

(iv) that the Superintendent of Police, Dahod, Gujarat had given a negative recommendation vide his letter dated 03.02.2020; and,

(v) that the District Magistrate, Dahod, Gujarat had given a negative recommendation vide his letter dated 19.02.2020.

35.1. Further, the writ petitioner also made a misleading statement by referring to the order dated 05.08.2013 of the Bombay High Court in juxtaposition to the order of the Gujarat High Court dated 17.07.2019 to contend that there was a divergent opinion between the two High Courts, which aspect constrained him to file Writ Petition (Crl.) No.135 of 2022 before this Court. That the order dated 05.08.2013 passed by the Bombay High Court was dealing with transfer of the convicts in Maharashtra jail to their parent

State (State of Gujarat) that too, in the year 2013, when the issue of remission did not arise at all. But the said writ petitioner projected as if the two High Courts had contradicted themselves in their orders and, therefore, he was constrained to file the writ petition invoking the jurisdiction of this Court under Article 32 of the Constitution.

35.2. It was contended that on account of the suppression of facts as well as misleading this Court with erroneous facts, the order dated 13.05.2022 is vitiated by fraud and is hence a nullity and the same cannot be binding on the parties to the said order or to the petitioner Bilkis Bano who, in any case, was not arrayed as a party in the said writ petition.

36. It is necessary to highlight the salient aspects of the order passed by this Court in the case of ***Radheshyam Bhagwandas Shah*** dated 13.05.2022 in Writ Petition (Crl.) No.135 of 2022. That was a petition filed by one of the convicts, respondent No.3 herein, seeking a direction to consider his application for premature release under the policy dated 09.07.1992 of the State of Gujarat which was existing at the time of his conviction. The relevant pleadings in the said writ petition are extracted as under:

"Question of Law:

A. Whether the policy dated 9.7.92, which was existing at the time of the conviction will prevail for considering the case of the petitioner for premature release?

B. Whether in view of *'State of Haryana Vs. Jagdish, (2010) 4 SCC 216'*, a policy which is more liberal and prevailing would be given preference as compared to the policy which is sought to be made applicable at the time of consideration of the cases of premature release?

x x x

FACTS OF THE CASE:

x x x

That at this juncture it would be pertinent to mention herein that one of the co-accused Ramesh Rupabhai had approached the Bombay High Court by way of Crl. W.P. No.305/2013. In the said order, the Bombay High Court clarified that the undertrials in this case were lodged in Maharashtra Jail only because of the fact that at that time the Trial was pending in the State of Maharashtra (transferred from Gujarat to Maharashtra by the Supreme Court). The High Court further clarified that once the Trial has concluded and the prisoner has been convicted, the appropriate prison would be the State of Gujarat and accordingly, the said prisoners were transferred to the State of Gujarat from the State of Maharashtra…

At this juncture, the petitioner had approached the Gujarat High Court on the ground that despite he having undergone more than actual sentence of 14 years, his case was not being considered by the respondent/authorities for premature release. The Gujarat High Court vide its order dated 17.7.19 with great respect took a completely a diametrically opposite view as that of Bombay High Court and erroneously

held that since the petitioner's case was tried in the State of Maharashtra, therefore, his case for premature release has to be considered by the State of Maharashtra and not by the State of Gujarat.

Hence the instant Writ Petition under Article 32 of the Constitution issuing a writ of Mandamus or any other similar direction to the State of Gujarat praying *inter alia* that the case of the petitioner may be considered as per the policy dated 9.7.92 (i.e. policy existing at the time of conviction of the petitioner) in the light of settled decision in *"State of Haryana Vs. Jagdish, (2010) 4 SC 216".*

x x x

PRAYER:

In the light of the above-mentioned facts and circumstances, the petitioner through this instant writ petition prays before this Hon'ble Court as under:

A. Issue a writ, order or direction in the nature of *Mandamus* to the Respondent/State of Gujarat to consider the case of the petitioner for premature release under the policy dated 9.7.92 i.e. the policy which was existing at the time of conviction.

B. Or in the alternative, issue a writ, order or direction in the nature of *Mandamus* to the respondent/Union of India to consider the case of the petitioner in light of *"UOI Vs. V. Sriharan, (2016) 7 SCC 1."* and

C. *Pass any such further Order(s)/direction(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."*

36.1. The aforesaid pleadings do not indicate that State of Gujarat had no jurisdiction to consider his application for remission. Also,

there was no pleading that he had filed any application before the Government of Gujarat. Thirdly, there is no mention that the policy of 09.07.1992 had been cancelled. Moreover, the said policy was not at all applicable as the writ petitioner was convicted in Maharashtra State and therefore, Government of Gujarat was not the appropriate Government.

36.2. On the above basis, this Court passed the order dated 13.05.2022, the relevant portion of which reads as under:

> "6. The present petitioner filed his petition for pre-mature release under Sections 433 and 433A of the Code of Criminal Procedure, 1973 (hereinafter being referred to as the "CrPC") stating that he had undergone more than 15 years 4 months of custody but his petition filed in the High Court of Gujarat came to be dismissed taking note of Section 432(7) CrPC and placing reliance on the judgment of this Court in ***Union of India vs. V. Sriharan alias Murugan and Others, (2016) 7 SCC 1,*** on the premise that since the trial has been concluded in the State of Maharashtra, the application for pre-mature release has to be filed in the State of Maharashtra and not in the State of Gujarat, as prayed by the petitioner by judgment impugned dated 17th July 2019.
>
> xxx xxx xxx
>
> 10. Learned counsel for the respondents has placed reliance on the judgment of this Court in ***Union of India vs. V. Sridharan alias Murugan and Others*** (supra) and submits that since the trial has been concluded in the State of Maharashtra, taking assistance of Section 432(7) CrPC, the expression 'appropriate government as referred to under Section 433 CrPC in the instant case, would be the State of Maharashtra and accordingly no error has been committed by the High Court in the order impugned.

11. In our considered view, the submission made by learned counsel for the respondents is not sustainable for the reason that the crime in the instant case was admittedly committed in the State of Gujarat and ordinarily, the trial was to be concluded in the same State and in terms of Section 432(7) CrPC, the appropriate Government in the ordinary course would be the State of Gujarat but the instant case was transferred in exceptional circumstances by this Court for limited purpose for trial and disposal to the neighbouring State (State of Maharashtra) by an order dated 06th August, 2004 but after the conclusion of trial and the prisoner being convicted, stood transferred to the State where the crime was committed remain the appropriate Government for the purpose of Section 432(7) CrPC.

12. Indisputedly, in the instant case, the crime was committed in the State of Gujarat which is the appropriate Government competent to examine the application filed for pre-mature release and that is the reason for which the High Court of Bombay in Criminal Writ Petition No.305 of 2013 filed at the instance of co-accused Ramesh Rupabhai under its Order dated 5th August, 2013 declined his request to consider the application for pre-mature release and left the application to be examined according to the policy applicable in the State of Gujarat by the concerned authorities.

13. The judgment on which the learned counsel for the respondents has placed reliance may not be of any assistance for the reason that under Section 432(7) CrPC, the appropriate Government can be either the Central or the State Government but there cannot be a concurrent jurisdiction of two State Governments under Section 432(7) CrPC.

14. In the instant case, once the crime was committed in the State of Gujarat, after the trial been concluded and judgment of conviction came to be passed, all further proceedings have to be considered including remission or pre-mature release, as the case may be, in terms of the policy which is applicable in the State of Gujarat where the

crime was committed and not the State where the trial stands transferred and concluded for exceptional reasons under the orders of this Court.

15. Consequently, the petition is allowed. The judgment impugned dated 17th July, 2019 is set aside.

16. The respondents are directed to consider the application of the petitioner for pre-mature release in terms of its policy dated 9th July, 1992 which is applicable on the date of conviction and may be decided within a period of two months. If any adverse order is passed, the petitioner is at liberty to seek remedy available to him under the law."

36.3. The following aspects are noted by this Court in the order dated 13.05.2022:

(i) that the crime was committed in the State of Gujarat but this Court in Transfer Petition (Crl.) No.192 of 2004 had considered it appropriate to transfer Sessions Case No.161 of 2004 pending before the learned Additional Sessions Judge, Dahod, Ahmedabad to the competent court in Mumbai for trial and disposal by order dated 06.08.2004.

(ii) that the trial court, Mumbai in Sessions Case No.634 of 2004, on completion of the trial held the said respondent as well as the other accused guilty and sentenced them to undergo rigorous imprisonment for life by judgment and order dated 21.01.2008.

(iii) that one of the co-accused Ramesh Rupabhai had approached the Bombay High Court by filing Writ Petition (Crl.) No.305 of 2013 seeking premature release but his application was dismissed by order 05.08.2013 on the premise that the crime was committed in the state of Gujarat and his trial was transferred to the competent court in Maharashtra and once the trial had concluded and sentence has been passed, the appropriate Government would be the State of Gujarat and accordingly, the application filed by the said co-accused for premature release was to be examined as per the policy applicable in the State of Gujarat.

(iv) that the judgment on which learned counsel for the State of Gujarat had placed reliance (***V. Sriharan***) was not of any assistance for the reason that under Section 432 (7) of the CrPC, the appropriate Government can be either Central or State Government but there cannot be a concurrent jurisdiction of two State Governments under the said provision.

(v) that once the crime was committed in the State of Gujarat, after the trial has been concluded and the judgment of conviction came to be passed, all further proceedings had to be considered including remission or pre-mature release, as the case may be, in terms of the policy which is applicable in the State of Gujarat where the crime was committed and not the State where the trial stood transferred and concluded for exceptional reasons under the order of this Court.

(vi) Consequently, the writ petition was allowed. Further even in the absence of there being any challenge, the order dated 17.07.2019 passed by the Gujarat High Court in a petition filed by the same petitioner (respondent No.3) under Article 226 of the Constitution was set aside by this Court in the writ petition filed by him under Article 32 of the Constitution.

(vii) Further, it was not brought to the notice of this Court that the policy dated 09.07.1992 had been cancelled and was no more effective. In the absence of the same, direction was issued to the State of Gujarat to consider the case of the petitioner therein for pre-

mature release in terms of the said policy within a period of two months.

36.4. Our inferences on the Order of this Court dated 13.05.2022 passed on the aforesaid writ petition are as under:

(i) that the convict who approached this Court, namely, Radheshyam Bhagwandas Shah respondent No.3 herein had stated that he had undergone about 15 years 4 months of custody;

(ii) that respondent No.3 herein had not stated that his writ petition filed in the High Court of Gujarat had been dismissed by taking note of Section 432 (7) of the CrPC and on the basis of the decision in ***V. Sriharan*** as the trial had been concluded in the State of Maharashtra;

(iii) that respondent No.3 had not stated that the application for premature release had been filed by him in the State of Maharashtra and not in the State of Gujarat as directed by the judgment of the Gujarat High Court dated 17.07.2019;

(iv) Respondent No.3 herein who had filed the writ petition had not disclosed that he had acted upon the order dated 17.07.2019 passed by the Gujarat High Court inasmuch as–

(a) he had approached the Government of Maharashtra *vide* application dated 01.08.2019;

(b) the CBI had given a negative recommendation *vide* its letter dated 14.08.2019;

(c) the Special Judge (CBI), Mumbai had given a negative recommendation *vide* his letter dated 03.01.2020;

(d) the Superintendent of Police, Dahod, Gujarat had given a negative recommendation *vide* his letter dated 03.02.2020; and,

(e) the District Magistrate, Dahod, Gujarat had given a negative recommendation *vide* his letter dated 19.02.2020.

(v) that the respondent No.3 had not assailed the order dated 17.07.2019 passed by the Gujarat High Court as there is a bar in law to assail an order passed by High Court under Article 226, under Article 32 of the Constitution.

(vi) Interestingly, in the writ petition, the respondent State of Gujarat placed reliance on the judgment in ***V. Sriharan*** and contended that the trial had been concluded in the State of Maharashtra and therefore the expression appropriate government under section 432 of the CrPC would be the State of Maharashtra and that no error had been committed by the High Court in its order dated 17.07.2019.

(vii) Strangely, this Court held that the aforesaid submission on behalf of the State of Gujarat was not sustainable as the crime had been committed in the State of Gujarat and *"ordinarily, the trial was to be concluded in the same State and in terms of Section 432 (7) of the Code of Criminal Procedure, the appropriate Government in the ordinary course would be the State of Gujarat but the instant case, was transferred in exceptional circumstances by this Court for limited purpose for trial and disposal to the neighbouring State (State of Maharashtra) by an order dated 06.08.2004 but after the conclusion of trial and the prisoner being convicted, stood transferred to the State where the crime was committed remain the*

appropriate Government for the purpose of Section 432(7) Code of Criminal Procedure." This portion of the order of this Court is contrary to the judgments of this Court discussed above. This implies that the said order is *per se per incuriam*.

(viii) This Court went on to hold that the High Court of Bombay had declined to interfere in Criminal Writ Petition No.305 of 2013 filed by the co-accused Ramesh Rupabhai by its order dated 05.08.2013 without realising what the prayer in the said writ petition was, which was filed in the year 2013, as at that point of time, the issue of remission had not arisen at all. The Bombay High Court had declined to entertain the Writ Petition filed by one of the convicts by holding to consider his plea for transfer to a jail in State of Gujarat.

(ix) Interestingly, no review petition was filed against the order of this Court dated 13.05.2022 by the State of Gujarat for seeking a review of the said order but the victim – petitioner in Writ Petition (Crl.) No.491 of 2022 – had filed a review petition which has been rejected by this Court.

(x) that although the respondent No.3 who approached this Court as well as the State of Gujarat had termed the order of the Gujarat High Court dated 17.07.2019 as "impugned Order", the said order was not at all impugned or assailed in the proceedings before this Court. What was filed by the convict i.e., respondent No.3 before this Court was a writ petition under Article 32 of the Constitution seeking a direction to the State of Gujarat to consider his remission application;

(xi) More significantly, while a reference has been made to Criminal Writ Petition No.305 of 2013 filed by one of the co-accused Ramesh Rupabhai in the year 2013 before the Bombay High Court seeking a direction for transfer of the convicts from Maharashtra Jail to Gujarat Jail, the reference to the Order of the Gujarat High Court dated 17.07.2019 dismissing the writ petition filed by respondent No.3 herein directing him to approach the Maharashtra State for remission was only in the context of the said order being "diametrically opposite" to the view of the Bombay High Court without explaining and by suppression of

the backgrounds under which the two writ petitions were filed before the respective High Court.

(xii) In fact, there was no pleading or prayer for seeking setting aside of the Gujarat High Court Order dated 17.07.2019 nor was there any challenge to the said Order. That said Order had attained finality as no Special Leave Petition as against the said Order was filed by the writ petitioner, Radheshyam Bhagwandas Shah respondent No.3 herein before this Court; rather he had acted upon it. Curiously, in the writ petition filed under Article 32 of the Constitution, the Order dated 17.07.2019 has been set aside even in the absence of there being any prayer thereto nor any discussion of the same.

(xiii) Further, contrary to Section 432 (7) and the judgements of the Constitution Bench and other benches of this Court, a writ of mandamus was issued to the State of Gujarat to consider the prayer of the writ petitioner for premature release in terms of its policy dated 09.07.1992. It was not brought to the notice of this Court by any party that the said policy had been cancelled and had been substituted by

another policy in the year 2014. What was the effect of cancellation of the policy dated 09.07.1992 was not brought to the notice of this Court either by the writ petitioner or by the State of Gujarat.

(xiv) In ***Sangeet & Another vs. State of Haryana, (2013) 2 SCC 452***, this Court speaking through Lokur, J., observed that a convict undergoing a sentence does not have right to get a remission of sentence but he certainly does have a right to have his case considered for the grant of remission. The term of sentence spanning the life of the convict can be curtailed by the appropriate Government for good and valid reasons in exercise of its powers under Section 432 of the CrPC. The said Section provides for some procedural and substantive checks on the arbitrary exercise of this power. While observing that there is no decision of this Court detailing the procedure to be followed for the exercise of power under Section 432 of the CrPC, it was stated that sub-section (2) to sub-section (5) of Section 432 of the CrPC lay down the basic procedure, which is making of an application to the appropriate Government for the suspension or remission of a

sentence, either by the convict or someone on his behalf. Thus, the representation has to be made to the appropriate Government in terms of the provisions under Section 432 of the CrPC. It was further observed that the exercise of power by the appropriate Government under sub-section (1) of Section 432 of the CrPC cannot be *suo motu* for the simple reason that this sub-section is only an enabling provision. In other words, the appropriate Government is enabled to "override" a judicially pronounced sentence, subject to fulfillment of certain conditions. Those conditions are found either in the jail manual or in statutory rules. Therefore, sub-section (1) of Section 432 of the CrPC cannot be read to enable the appropriate Government to "further override" the judicial pronouncement over and above what is permitted by the jail manual or the statutory rules. On such an application being made, the appropriate Government is required to approach the Presiding Judge of the Court before or by which the conviction was made or confirmed to opine (with reasons) whether the application should be granted or refused. Thereafter,

the appropriate Government may take a decision on the remission application and pass orders granting remission subject to some conditions, or refusing remission. There has to be an application of mind to the issue of grant of remission and the power of remission cannot be exercised arbitrarily. It was further observed that a convict undergoing life imprisonment is expected to remain in custody till the end of his life, subject to any remission granted by the appropriate Government under Section 432 of the CrPC which in turn is subject to the procedural checks in that Section and the substantive check in Section 433-A of the CrPC.

Pursuant to the judgment in ***Sangeet***, the Government of India *vide* its communication dated 01.02.2013 made to all the Home Secretaries of the States and Union Territories, stated that there is a need to relook at the manner in which remissions of sentence are made with reference to Section 432 read with Section 433-A of the CrPC and hence requested that there should be scrupulous compliance of the aforesaid provisions and not to grant remission in a

wholesale manner. Thereafter, on 08.05.2013, the Home Department, Government of Gujarat issued a Circular referring to the decision of this Court dated 20.11.2012 in ***Sangeet*** and in order to implement the same and also taking note of the communication of the Government of India dated 01.02.2013, the Circular dated 09.07.1992 was cancelled in following manner:

> "... Therefore, the provisions of circular No.JLK/3390/CM/16/part/2/J dated 09.07.1992 of the Home Department hereinabove referred to in Srl. No.1, hereby stand cancelled."

Thereafter, on 23.01.2014, the State Government constituted a Committee headed by the Additional Chief Secretary (Home) for considering the policy and guidelines to be followed for the purpose of remission and pre-mature release of the prisoners. After careful consideration, the State Government issued guidelines/policy for consideration of cases of remission and premature release of the prisoners. In the said policy, it was categorically mentioned that "the prisoners who are convicted for the crimes" as

mentioned in Annexure-I, shall not be considered for remission. Annexure-I contained the classes of prisoners who shall not be granted state remission as well as for premature release. Clause IV (a) and (d) read as follows:

(a) A prisoner or prisoners sentenced for group murder of two or more persons.

x x x

(d) Prisoners convicted for murder with rape or gang rape.

(xv) Realising that respondent Nos.3 to 13 would not be released under the Remission Policy dated 23.01.2014, which had substituted the earlier Policy dated 09.07.1992, which had been cancelled, the writ petition was filed by respondent No.3 herein before this Court seeking a specific direction to the State of Gujarat to consider his case as per the Policy dated 09.07.1992 which had by then been cancelled and substituted by another Policy dated 23.01.2014.

(xvi) What is the effect of cancellation of the said policy by the State of Gujarat in light of the judgement of this Court in ***Sangeet*** and the communication of

> Union of India issued to each of the states including the State of Gujarat? Does it mean that the said policy of 09.07.1992 had stood cancelled and therefore got effaced and erased from the statute book and substituted by a new policy of 2014 which had to be considered. There was no pleading or discussion to that effect.

36.5 Thus, by suppressing material aspects and by misleading this Court, a direction was sought and issued to the respondent State of Gujarat to consider the premature release or remission of the writ petitioner, i.e., respondent No.3 on the basis of the policy dated 09.07.1992.

37. More pertinently, respondent No.3 had suppressed the fact that on the basis of the judgment of the Gujarat High Court in the writ petition that he had filed, the convict had acted upon it and had made an application to the State of Maharashtra for remission on 01.08.2019 and the said application was being processed inasmuch as the stakeholders had given their opinion on the application, such as, the Presiding Judge of the court which had convicted the accused; the Director - CBI as well as the Director General and Inspector General of Police, State of Maharashtra who

were all unanimous in their opinion inasmuch as they had all negatived grant of remission to the convict – Radheshyam Bhagwan Das. Suppressing all this, the writ petition was filed by respondent No.3 invoking Article 32 of the Constitution and the same was allowed by also setting aside the Order of the Gujarat High Court dated 17.07.2019 and thereby setting at naught the steps taken pursuant to the said Order of the Gujarat High Court.

38. At this stage, we may point out that if respondent No.3 had felt aggrieved by the order of the Gujarat High Court dated 17.07.2019, it was open to him to have challenged the said order before this Court by filing a special leave petition, but he did not do so. Rather, he complied with the order of the Gujarat High Court by filing remission application dated 01.08.2019 before the Government of Maharashtra where, not only the process for consideration of the remission prayer was initiated, but opinions of various authorities were also obtained. When the opinions were found to be negative, respondent No.3 filed Writ Petition (Crl.) No.135 of 2022 before this Court seeking a direction to the State of Gujarat to consider his remission application suppressing the above material facts. This he could not have done, thereby

misrepresenting and suppressing relevant facts, thus playing fraud on this Court.

39. We have no hesitation in holding that neither the order of the Gujarat High Court dated 17.07.2019 could have been challenged by respondent No.3 or for that matter by anybody else before this Court in a writ proceeding under Article 32 of the Constitution of India nor the said order of the High Court could have been set aside in a proceeding under Article 32 thereof. This proposition of law has been settled long ago by a nine-Judge bench decision of this Court in ***Naresh Shridhar Mirajkar vs. State of Maharashtra, AIR 1967 SC 1***, which is binding on us.

39.1. When an oral order of the learned Judge passed in the original suit of the Bombay High Court was challenged by the petitioner therein by way of a writ petition under Article 226 of the Constitution of India before the Bombay High Court, the writ petition was dismissed by a division bench of the Bombay High Court on the ground that the impugned order was a judicial order of the High Court and was not amenable to writ jurisdiction under Article 226. Thereafter, the petitioner therein moved this Court under Article 32 of the Constitution of India for enforcement of his fundamental rights under Article 19(1)(a) and (g) of the Constitution

of India. This Court observed that the impugned order was passed by the learned Judge in the course of trial of a suit before him after hearing the parties. This Court took the view that the restraint order was passed to prohibit publication of evidence in the media during the progress of the trial and could not be construed as imposing a permanent ban on the publication of the said evidence.

39.2. The question which fell for consideration before this Court was whether a judicial order passed by the High Court prohibiting the publication in newspapers of evidence given by a witness pending the hearing of the suit, was amenable to be corrected by a Writ of Certiorari of this Court under Article 32 of the Constitution of India. In the above context, this Court first held that a judicial verdict pronounced by a court in a matter brought before it for its decision cannot be said to affect the fundamental rights of citizens under Article 19(1) of the Constitution of India. Thereafter, this Court proceeded to hold that if any judicial order was sought to be attacked on the ground that it was inconsistent with Article 14 or any other fundamental rights, the proper remedy to challenge such an order would be by way of an appeal or revision as may be provided by law. It would not be open to the aggrieved person to invoke the jurisdiction of this Court under Article 32 of the

Constitution and to contend that a Writ of Certiorari should be issued to quash such an order. This Court observed that it would be inappropriate to allow the petitioners to raise the question about the jurisdiction of the High Court to pass the impugned order in a proceeding under Article 32. Rejecting the argument of the petitioners, this Court held that judicial orders passed by High Courts in or in relation to proceedings pending before the High Courts are not amenable to be corrected by this Court exercising jurisdiction under Article 32 of the Constitution of India. This being the law of the land, it is binding on all the courts including benches of lesser coram of this Court.

40. Before proceeding further, it may also be mentioned that it was only respondent No.3 who had approached this Court by filing a writ petition under Article 32 of the Constitution of India being Writ Petition (Crl.) No.135 of 2022, seeking a direction to the State of Gujarat to consider his pre-mature release. None of the other convicts, i.e. respondent Nos.4 to 13 had approached this Court or any High Court seeking such a relief. Therefore, in so far these respondents are concerned, there was no direction of this Court or any court to the State of Gujarat to consider their pre-mature release.

41. We are of the considered view that the writ proceedings before this Court is pursuant to suppression and misleading of this Court and a result of *suppressio veri suggestio falsi*. Hence, in our view, the said order was obtained by fraud played on this Court and hence, is a nullity and *non est* in law. In view of the aforesaid discussion, we hold that consequently the order dated 13.05.2022 passed by this Court in Writ Petition (Crl.) No.135 of 2022 in the case of ***Radheshyam Bhagwandas Shah*** is hit by fraud and is a nullity and *non est* in the eye of law and therefore cannot be given effect to and hence, all proceedings pursuant to the said order are vitiated.

42. It is trite that fraud vitiates everything. It is a settled proposition of law that fraud avoids all judicial acts. In ***S.P. Chengalvaraya Naidu vs. Jagannath (Dead) through LRs, (1994) 1 SCC 1 ("S.P. Chengalvaraya Naidu")***, it has been observed that "fraud avoids all judicial acts, ecclesiastical or temporal." Further, "no judgment of a court, no order of a minister would be allowed to stand if it has been obtained by fraud. Fraud unravels everything" *vide* ***Lazarus Estates Ltd. vs. Beasley, (1956) 1 ALL ER 341 ("Lazarus Estates Ltd.")***.

43. It is well-settled that writ jurisdiction is discretionary in nature and that the discretion must be exercised equitably for promotion of good faith *vide* ***State of Maharashtra vs. Prabhu, (1994) 2 SCC 481 ("Prabhu")***. This Court has further emphasized that fraud and collusion vitiate the most solemn precedent in any civilized jurisprudence; and that fraud and justice never dwell together *(fraus et jus nunquam cohabitant*). This maxim has never lost its lustre over the centuries. Thus, any litigant who is guilty of inhibition before the Court should not bear the fruit and benefit of the court's orders. This Court has also held that fraud is an act of deliberation with a desire to secure something which is otherwise not due. Fraud is practiced with an intention to secure undue advantage. Thus, an act of fraud on courts must be viewed seriously.

43.1. Further, fraud can be established when a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii), recklessly, being careless about whether it be true or false. While suppression of a material document would amount to a fraud on the Court, suppression of material facts vital to the decision to be rendered by a court of law is equally serious. Thus, once it is held that there was a fraud in judicial proceedings all advantages gained

as a result of it have to be withdrawn. In such an eventuality, doctrine of *res judicata* or doctrine of binding precedent would not be attracted since an order obtained by fraud is *non est* in the eye of law.

43.2. In ***K.D. Sharma vs. Steel Authority of India Limited, (2008) 12 SCC 481 ("K.D. Sharma")***, this Court held that the jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution is extraordinary, equitable and discretionary and it is imperative that the petitioner approaching the Writ Court must come with clean hands and put forward all the facts before the Court without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the Court, his petition may be dismissed at the threshold without considering the merits of the claim. It was held thus:

> "38. The above principles have been accepted in our legal system also. As per settled law, the party who invokes the extraordinary jurisdiction of this Court Under Article 32 or of a High Court Under Article 226 of the Constitution is supposed to be truthful, frank and open. He must disclose all material facts without any reservation even if they are against him. He cannot be allowed to play "hide and seek" or to "pick and choose" the facts he likes to disclose and to suppress (keep back) or not to disclose (conceal) other facts. The very basis of

> the writ jurisdiction rests in disclosure of true and complete (correct) facts. If material facts are suppressed or distorted, the very functioning of writ courts and exercise would become impossible. The Petitioner must disclose all the facts having a bearing on the relief sought without any qualification. This is because "the court knows law but not facts".
>
> 39. … Suppression or concealment of material facts is not an advocacy. It is a jugglery, manipulation, maneuvering or misrepresentation, which has no place in equitable and prerogative jurisdiction. If the applicant does not disclose all the material facts fairly and truly but states them in a distorted manner and misleads the court, the court has inherent power in order to protect itself and to prevent an abuse of its process to discharge the Rule nisi and refuse to proceed further with the examination of the case on merits. If the court does not reject the petition on that ground, the court would be failing in its duty. In fact, such an applicant requires to be dealt with for contempt of court for abusing the process of the court."

43.3. In ***K. Jayaram vs. Bangalore Development Authority, 2021 SCC OnLine SC 1194 ("K. Jayaram"),*** a bench of this Court headed by Sri Nazeer, J. noticed that the appellants therein had not come to the Court with clean hands. The appellants in the said case had not disclosed the filing of a suit and its dismissal and also the dismissal of the appeal against the judgment of the Civil Court. This Court stressed that the parties have to disclose the details of all legal proceedings and litigations either past or present concerning any part of the subject matter of dispute which is within their knowledge in order to check multiplicity of proceedings pertaining

to the same subject-matter and more importantly to stop the menace of soliciting inconsistent orders through different judicial forums by suppressing material facts either by remaining silent or by making misleading statements in the pleadings in order to escape the liability of making a false statement. This Court observed that since the appellants therein had not disclosed the filing of the suit and its dismissal and also the dismissal of the appeal against the judgment of the civil court, the appellants had to be non-suited on the ground of suppression of material facts. They had not come to the court with clean hands and they had also abused the process of law, therefore, they were not entitled to the extraordinary, equitable and discretionary relief.

43.4. A Division Bench of this Court comprising Justice B. R. Gavai and Justice C.T. Ravikumar placing reliance on the dictum in ***S.P. Chengalvaraya Naidu*****,** held in ***Ram Kumar vs. State of Uttar Pradesh, AIR 2022 SC 4705***, that a judgment or decree obtained by fraud is to be treated as a nullity.

44. We wish to consider the case from another angle. The order of this Court dated 13.05.2022 is also *per incuriam* for the reason that it fails to follow the earlier binding judgments of this Court including that of the Constitution Bench in ***V. Sriharan*** *vis-à-vis*

the appropriate Government which is vested with the power to consider an application for remission as per sub-section (7) of Section 432 of the CrPC and that of the nine Judge Bench decision in ***Naresh Shridhar Mirajkar*** that an order of a High Court cannot be set aside in a proceeding under Article 32 of the Constitution.

44.1. In ***State of U.P. vs. Synthetics and Chemicals Ltd., (1991) 4 SCC 139 ("Synthetics and Chemicals Ltd.")***, a two Judge Bench of this Court (speaking through Sahai J. who also wrote the concurring judgment along with Thommen, J.) observed that the expression *per incuriam* means *per ignoratium.* This principle is an exception to the rule of *stare decisis*. The 'quotable in law' is avoided and ignored if it is rendered, '*in ignoratium* of a statute or other binding authority'. It would result in a judgment or order which is *per incuriam*. In the case of ***Synthetics and Chemicals Ltd.,*** the High Court relied upon the observations in paragraph 86 of the judgment of the Constitution Bench in ***Synthetics and Chemicals Ltd.,*** namely, "sales tax cannot be charged on industrial alcohol in the present case, because under the Ethyl Alcohol (Price Control) Orders, sales tax cannot be charged by the State on industrial alcohol" and struck down the levy.

In ***Synthetics and Chemicals Ltd.,*** before the two-judge bench, it was categorically argued by the learned Advocate General appearing for the appellant State of Uttar Pradesh that the reference to "sales tax" in the judgment of this Court in the earlier round of the litigation was accidental and did not arise from the judgment. This was because the levy of sales tax was not in question at any stage of the arguments nor was the question considered as it was not in issue. The Court gave no reason whatever for abruptly stating that "sales tax was not leviable by the State by reason of the Ethyl Alcohol (Price Control) Orders." In fact, the question which arose for consideration in the earlier litigation was in regard to the validity of "vend fee and other fees" charged by the States. The argument was that such impost, to the extent that it fell on industrial alcohol, encroached upon the legislative field reserved for Parliament in respect of a controlled industry coming under Entry 52 of List I (read with Entry 33 of List III). Vend fee or transport fee and similar fees, unless supported by *quid pro quo*, this Court held, interfered with the control exercised by the Central Government under the Industries (Development and Regulation) Act, 1951 (for short "IDR Act, 1951") and the various orders made thereunder with respect to prices, licences, permits, distribution, transport, disposal, acquisition, possession, use, consumption, etc., of articles related

to a controlled industry, industrial alcohol being one of them. But none of the observations in the judgment warranted the abrupt conclusion, to which the court came, that the power to levy taxes on sale or purchase of goods referable to Entry 54 of List II was curtailed by the control exercised by the Central Government under the IDR Act. The casual reference to sales tax in the concluding portion of the judgment was accidental and *per incuriam* was the submission.

While considering the said plea, this Court observed that "the only question which had to be determined between the same parties reported in ***(1990) 1 SCC 109 (Synthetics and Chemicals Ltd. vs. State of U.P.***) was "whether intoxicating liquor in Entry 8 in List II was confined to potable liquor or includes all liquors." Answering this question, this Court categorically held that intoxicating liquor within the meaning of Entry 8 of List II was confined to potable liquor and did not include industrial liquor. This Court did not deal with the taxing power of the State under Entry 54 of List II which deals with 'taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92-A of List I'. The power of the State to levy taxes on sale or purchase of goods under that entry was not the subject matter of discussion by this Court

although in paragraph 86 of the leading judgment of this Court, there was a reference to sales tax.

Therefore, the only question that was considered by the seven-judge bench of this Court was whether the State could levy "excise duty" or "vend fee" or "transport fee" and the like by recourse to Entry 51 or 8 in List II in respect of industrial alcohol. Entry 52 List II was not applicable to fee or charges in question. Entry 52 List II refers to "Taxes on the entry of goods into a local area for consumption, use or sale therein". Further, the observation that sales tax cannot be charged by the State on industrial alcohol was an abrupt observation without a preceding discussion, and inconsistent with the reasoning adopted by this Court in earlier decisions from which no dissent was expressed on the point. However, the aforesaid observation with reference to Entry 52 of List II in connection with excise duty and sales tax when neither falls under that entry, was held to be *per incuriam*.

This was because this Court by a detailed discussion in the seven-judge bench decision had observed that the impugned statutory provisions purportedly levying fees or enforcing restrictions in respect of industrial alcohol were impermissible in view of the control assumed by the Central Government in exercise of its power under Section 18-G of the IDR Act in respect of a

declared industry falling under Entry 52 of List I, read with Entry 33 of List III.

It was in the above background that this Court considered the question whether or not the power of the State to levy tax on the sale or purchase of goods falling under Entry 54 of List II would comprehend industrial alcohol. This was because the taxing power under Entry 54 of List II was subject to taxing power of the Parliament under Entry 92-A of List I. Therefore, it was observed that the provisions in question by which sales tax could be levied within the scope and ambit of Entry 54 List II was contrary to what had been stated (in paragraph 86) by the seven-judge bench decision between the same parties. It was observed that the aforesaid decision of this Court was not an authority for the proposition canvassed by the assessee in challenging the provision. This Court could not have intended to say that the Price Control Orders made by the Central Government under the IDR Act imposed a fetter on the legislative power of the State under Entry 54 of List II to levy taxes on the sale or purchase of goods. The reference to sales tax in paragraph 86 of that judgment was merely accidental or *per incuriam* and therefore, had no effect.

In the earlier litigation of ***Synthetics and Chemicals Ltd.,*** the question was whether the State Legislature could levy vend fee or excise duty on industrial alcohol. The seven-Judge Bench answered in the negative as industrial alcohol being unfit for human consumption, the State legislature was incompetent to levy any duty of excise either under Entry 51 or Entry 8 of List II of the Seventh Schedule. While doing so, the Bench recorded the above conclusion. It was not preceded by any discussion. No reason or rationale could be found in the judgment. Therefore, it was held by the two-Judge Bench that the same was *per incuriam* and was liable to be ignored in a subsequent matter between the same parties. The courts have taken recourse to this principle for relieving from injustice being perpetrated by unjust precedents. It was observed that uniformity and consistency are core of judicial discipline. But, if a decision proceeds contrary to the law declared, it cannot be a binding precedent. It was further observed that the seven-Judge Bench in ***Synthetics and Chemicals Ltd.*** did not discuss the matter and had observed that the State cannot levy sales tax on industrial alcohol. In the subsequent matter which arose from the High Court between the same parties, it was held by this Court that the conclusion of law by the Constitution Bench that no sales or purchase tax could be levied on industrial alcohol was *per incuriam*

and also covered by the rule of *sub-silentio* and therefore, was not a binding authority or precedent.

Thus, although it is the *ratio decidendi* which is a precedent and not the final order in the judgment, however, there are certain exceptions to the rule of precedents which are expressed by the doctrines of *per incurium* and *sub silentio*. *Incuria* legally means carelessness and *per incurium* may be equated with *per ignorantium*. If a judgment is rendered *in ignorantium* of a statute or a binding authority, it becomes a decision *per incurium.* Thus, a decision rendered by ignorance of a previous binding decision of its own or of a court of coordinate or higher jurisdiction or in ignorance of the terms of a statute or of a rule having the force of law is *per incurium*. Such a *per incurium* decision would not have a precedential value. If a decision has been rendered *per in curium*, it cannot be said that it lays down good law, even if it has not been expressly overruled *vide* ***Mukesh K. Tripathi vs. Senior Divisional Manager, LIC, (2004) 8 SCC 387*** **(para 23).** Thus, a decision *per incurium* is not binding.

44.2. Another exception to the rule of precedents is the rule of *sub-silentio*. A decision is passed *sub-silentio* when the particular point of law in a decision is not perceived by the court or not present to

its mind or is not consciously determined by the court and it does not form part of the *ratio decidendi* it is not binding *vide* ***Amrit Das vs. State of Bihar, (2000) 5 SCC 488***.

45. One of the contentions raised in the present case was that since this Court in the order dated 13.05.2022 had directed that the State of Gujarat was the appropriate Government, the same was binding on the parties even though it may be contrary to the earlier decisions of this Court. We cannot accept such a submission having regard to what has been observed above in the case of ***Synthetics and Chemicals Ltd.*** which was also with regard to the application of the same doctrine between the very same parties inasmuch as when a judgment has been delivered *per incuriam* or passed *sub-silentio*, the same cannot bind either the parties to the judgment or be a binding precedent for the future even between the same parties. Therefore, for this reason also, the order dated 13.05.2022 would not bind the parties thereto and particularly, to the petitioner in Writ Petition (Crl.) No.491 of 2022 who was in any case not a party to the said writ proceeding.

46. Having regard to the above discussion and in light of the provisions of the CrPC, the judgments of this Court and our own understanding of the order dated 13.05.2022 passed by a

coordinate Bench of this Court in Writ Petition No.135 of 2022, we hold as follows:

(i) that the Government of State of Gujarat (respondent No.1 herein) had no jurisdiction to entertain the applications for remission or pass the orders of remission on 10.08.2022 in favour of respondent No.3 to 13 herein as it was not the appropriate Government within the meaning of sub-section (7) of Section 432 of the CrPC;

(ii) that this Court's order dated 13.05.2022 being vitiated and obtained by fraud is therefore a nullity and *non est* in law. All proceedings taken pursuant to the said order also stand vitiated and are *non est* in the eye of law.

47. Point No.3 is accordingly answered.

Point No.4 : Whether the impugned order of remission passed by the respondent - State of Gujarat in favour of respondent Nos.3 to 13 are in accordance with law?

48. We have perused the original record which is the English translation from Gujrati language.

48.1. Even according to the respondent State of Gujarat Radheshyam Bhagwandas Shah has not made any application seeking remission before the Superintendent, Godhra Sub-Jail or the State of Gujarat on 01.08.2019.

48.2. All the other applications were made even prior to the order of this Court made in Writ Petition (Crl.) No.135 of 2022 on 13.05.2022. Within next few days i.e. on 26.05.2022, the Jail Advisory Committee gave its opinion recommending grant of remission. The recommendation of ADG and IG of Jails was received in almost cases on 09.06.2022. In two cases, (i) the recommendation of the ADG and IG was received on 18.08.2021 and 09.06.2021 [in the case of ***Govind Bhai Akham Bhai Nai (Raval)]*** and (ii) on 18.08.2021 [in the case of ***Radheyshyam Bhagwandas Shah***].

48.3. The communication of the State Government to the Central Government was made on 28.06.2022; the second respondent Union of India gave its concurrence on 11.07.2022; and, the order of remission was made on 10.08.2022.

48.4. We extract one of the orders of remission dated 10.08.2022 in the case of respondent No.3 as under:

"GOVERNMENT OF GUJARAT
Order Number JLK/83202/2978/J
Secretariat House, Gandhinagar,
Dated: 10/08/2022.

Reference:

(1) Order of the Hon'ble Supreme Court date:13/05/2022, Writ Petition (Criminal) No.135/2022.

(2) The Additional Director General of Police and Inspector General of Prisons, State of Gujarat, Ahmedabad/letter dated:17/06/2022 No:- JUD/14 Year/2/4754/2022.

(3) Department Circular Date: 09/7/1992, No.JLK/3390/CM/16/Part-2/J.

(4) Ministry of Home, The Government of India, Letter dated: 11/07/2022, No.15/05/2022/JC-II

::FORWARD::

Mr. Radheshyam Bhagwandas Shah, From Godhra Sub Jail filed Writ Petition in the Hon'ble Supreme Court as per reference No.1 and Hon'ble Supreme Court passed order to take decision as per policy mentioned in reference No.3 within two months regarding Pre-mature release application of Mr. Shah. The premature release proposal was prepared and sent by the Additional Director General of Police and Inspector General of Prisons as per the letter of reference No.2. The provision under Section 432 of CrPC the State Government has power for pre-mature release, however provision under Section 435(1)(A) of CrPC. Indicates that any case investigated by any agency which is established by Union Government Rules, in those cases it is need to be consulted with Central Government is required. This case was investigated by CBI, therefore the State Government of Gujarat in consultance with Central Government letter dated 28/06/2022. Pursuant to which the Ministry of Home Affairs of the Government of India has given a positive opinion regarding the release of the prisoner from the letter reference (4), considering all the details, the release of Mr. Radheshyam Bhagwandas Shah was under consideration.

::ORDER::

Provision under Criminal Procedure Code, 1973 Section 443(A), power given to State Government under Section 432 of Criminal Procedure Code, 1973, the convict prisoner Radheshyam Bhagwandas Shah's life sentence remitted under the following conditions and taken decision by Government to release him from immediate effect.

::CONDITIONS::

(1) He shall to furnish surety of two gentlemen about after releasing him, he will behave good up to two years and also given undertaking he will not breach public peace and harass parties and witnesses.

(2) After being released from prison if he commits cognizable offense causing grievous hurt to anyone or property then he may be re-arrested and shall serve the remaining of his sentence.

(3) After released from jail he must give his attendance in nearest police station, once in a month till one year.

The jail authority shall read and explain above conditions to him and before releasing him, prior to his release from prison, the jail authority must keep a written record indicating that he has understood the said conditions and that he agrees to these conditions of release from prison.

By order of the Governor of Gujarat and in his name.

---sd---
(Mayursinh Vaghela)
Under Secretary
Home Department."

48.5. Though we have extracted one of the remission orders, we observe that having given our categorical finding on Point No.3, it may not be necessary to dilate on certain aspects of Point No.4, though it is quite evident that the said order is a non-speaking one reflecting complete non-application of mind. All orders dated 10.08.2022 are a stereotyped and cyclostyled orders.

48.6. Be that as it may, it would be useful to refer to the following judgments in the context of passing an order of remission in terms of Section 432 read with Section 435 of the CrPC.

(a) ***V. Sriharan*** is a judgment of this Court wherein the Constitution Bench answered seven questions out of which the following questions are relevant for the purposes of this case:

> "xxx xxx xxx
>
> 8.3. (iii) Whether the power under Sections 432 and 433 of the Criminal Procedure Code by the appropriate Government would be available even after the constitutional power under Articles 72 and 161 by the President and the Governor is exercised as well as the power exercised by this Court under Article 32?
>
> 8.4. (iv) Whether the State or the Central Government have the primacy under Section 432(7) of the Criminal Procedure Code?
>
> 8.5. (v) Whether there can be two appropriate Governments under Section 432(7)?
>
> 8.6. (vi) Whether power under Section 432(1) can be exercised *suo motu* without following the procedure prescribed under Section 432(2)?

8.7. (vii) Whether the expression "consultation" stipulated in Section 435(1) really means "concurrence"?"

(i) This Court observed that the procedure to be followed under Section 432(2) is mandatory and that *suo moto* power of remission cannot be exercised under Section 432(1) and it can only be initiated by an application of the person convicted as provided under Section 432(2) and the ultimate order of suspension of sentence or remission should be guided by the opinion to be rendered by the Presiding Officer of the Court concerned. In this case the earlier judgement of this court in ***Sangeet*** was approved.

(b) In ***Sangeet***, it was observed that a convict undergoing a sentence does not have a right to get remission of sentence, however, he certainly does have a right to have his case considered for the grant of remission as held in ***Mahender Singh*** and ***Jagdish***. It was further observed in the said case that there does not seem to be any decision of this Court detailing the procedure to be followed for the exercise of power under Section 432 of the CrPC which only lays down the basic procedure i.e. by making an application to theappropriate Government for the suspension or remission of a sentence, either by the convict or someone on his

behalf. It was observed that sub-section (1) of Section 432 of the CrPC is only an enabling provision to override a judicially pronounced sentence, subject to the fulfilment of certain conditions. These conditions are found either in the Jail Manual or in statutory rules. It was pertinently observed that when an application for remission is made the appropriate Government may take a decision on the remission application and pass orders granting remission subject to certain conditions or, refuse remission. But there has to be an application of mind on the remission application so as to eliminate discretionary *en-masse* release of convicts on "festive" occasions, since each release requires a case by case scrutiny. It was observed that the power of remission cannot be exercised arbitrarily and the decision to grant remission has to be well informed, reasonable and fair to all concerned. The statutory procedure under Section 432 of the CrPC provides a check on the possible misuse of power of the appropriate Government.

(i) It was further observed that there is a misconception that a prisoner serving a life sentence has an indefeasible right to be released on completion of fourteen years or twenty years of imprisonment; however, in reality, the prisoner has no such

right. A convict undergoing life imprisonment is expected to remain in custody till the end of his life, subject to any remission granted by the appropriate Government under Section 432 of the CrPC which, in turn, is subject to the procedural checks in that section and the substantive check in Section 433-A of the CrPC. That the application of Section 432 of the CrPC to a convict is limited inasmuch as, a convict serving a definite term of imprisonment is entitled to earn a period of remission under a statutory rule framed by the appropriate Government or under the Jail Manual. The said period is then offset against the term of punishment given to him. Thus, upon completion of the requisite period of incarceration, a prisoner's release is automatic. However, Section 432 of the CrPC will apply only when a convict is to be given an "additional" period of remission for his release i.e., the period to what he has earned as per the Jail Manual or the statutory rules.That in the case of convict undergoing life imprisonment, the period of custody is indeterminate. Remissions earned or awarded to such a life convict are only notional and Section 432 of the CrPC reduces the period of incarceration by an order passed by an appropriate

Government which cannot be reduced to less than fourteen years as per Section 433-A of the CrPC. This Court after a detailed discussion came to the following conclusions on the aspect of grant of remissions:

> "77.5. The grant of remissions is statutory. However, to prevent its arbitrary exercise, the legislature has built in some procedural and substantive checks in the statute. These need to be faithfully enforced.
>
> 77.6. Remission can be granted under Section 432 Cr.P.C. in the case of a definite term of sentence. The power under this section is available only for granting "additional" remission, that is, for a period over and above the remission granted or awarded to a convict under the Jail Manual or other statutory rules. If the term of sentence is indefinite (as in life imprisonment), the power under Section 432 Cr.P.C. can certainly be exercised but not on the basis that life imprisonment is an arbitrary or notional figure of twenty years of imprisonment.
>
> 77.7. Before actually exercising the power of remission under Section 432 Cr.P.C. the appropriate Government must obtain the opinion (with reasons) of the Presiding Judge of the convicting or confirming Court. Remissions can, therefore, be given only on a case-by-case basis and not in a wholesale manner."

(c) ***Ram Chander*** was a case of a writ petition being filed before this Court under Article 32 of Constitution seeking a direction to the respondent-State therein to grant him premature release. This Court speaking through Dr. D.Y. Chandrachud., J., (presently the learned Chief Justice) considered the aspect of judicial review of

power of remission and referred to ***Mohinder Singh*** to observe that the power of remission cannot be exercised arbitrarily and the decision to grant remission should be informed, reasonable and fair. In this context, reliance was placed on ***Laxman Naskar*** wherein this Court, stipulated the factors that govern the grant of remission namely:

i. Whether the offence is an individual act of crime without affecting the society at large?

ii. Whether there is any chance of future recurrence of committing crime?

iii. Whether the convict has lost his potentiality in committing crime?

iv. Whether there is any fruitful purpose of confining this convict any more?

v. Socio-economic condition of the convict's family."

(i) That while grant of remission is the exclusive prerogative of the executive, the Court cannot supplant its view. The Court can direct the authorities to reconsider the representation of the convict *vide* ***Rajan.*** Therefore, while there can be no direction to release a prisoner forthwith or to remit the remaining sentence, at best there can only be a direction issued to the

State to consider the representation made for remission expeditiously on its own merits and in accordance with law. In this case, reliance was placed on Halsbury's Law of India (Administrative Law) to observe that sufficiency of reasons, in a particular case, depends on the facts of each case while considering an application for remission. It was further observed that mechanical or stereo typed reasons are not adequate as also, a mere repetition of the statutory language in the order will not make the order a reasoned one. In the aforesaid case, the application for remission was directed to be reconsidered with adequate reasoning and taking into consideration all the relevant factors that govern the grant of remission as laid down in ***Laxman Naskar***.

(d) ***Epuru Sudhakar*** is also a case where a writ petition was filed under Section 32 of the Constitution challenging an order of Government of Andhra Pradesh, whereby a convict (respondent No.2 therein) was granted remission of unexpired period of about seven years' imprisonment. The petition was filed by the son of the murdered persons while the convict was on bail in the murder case of petitioner No.1's father therein. In the writ petition it was alleged, *inter alia,* that the grant of remission was illegal as relevant

materials were not placed before the Governor and the impugned order was made without application of mind and based on irrelevant and extraneous materials and therefore, liable to be set aside. That was a case where remission or grant of pardon was under Article 161 of the Constitution by the Governor of the State of Andhra Pradesh. This Court, while considering the philosophy underlining the power of pardon or the power of clemency observed that the said power exercised by a department or functionary of the Government is in the context of its political morality. Reliance was placed on ***Biddle, Warden vs. Perovich, 274 US 480 (1927) ("Biddle")*** in which case, Holmes, J of the United States Supreme Court had observed on the rationale of pardon in the following words:

> "…a pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed…"

(i) It was observed that the prerogative of mercy exercised by a State as a prerogative power of a Crown as in England (U.K.) or of the President of India or Governor of a State in India is reviewable as an administrative action in case there is an abuse in the exercise of the prerogative power. That the prerogative power to pardon or grant clemency or for that matter remission

of sentence being a discretionary power, it must be exercised for the public good and the same can be examined by the Courts just as any other discretionary power which is vested with the executive. Therefore, judicial review of the exercise or non-exercise of the power of pardon by the President or Governor is available in law. That any exercise of public power, including constitutional power, shall not be exercised arbitrarily or *mala fide vide* ***Maru Ram***. It was observed in the said case that, considerations of religion, caste, colour or political loyalty are totally irrelevant and fraught with discrimination. The function of determining whether the act of a constitutional or statutory functionary falls within the constitutional or legislative conferment of power or is vitiated by self-denial or an erroneous appreciation of the full amplitude of the power, is a matter for the Court to decide *vide* ***Kehar Singh vs. Union of India, (1989) 1 SCC 204 ("Kehar Singh").***

(ii) In ***Epuru Sudhakar,*** two other aspects were also considered: one relating to the desirability of indicating reasons in the order granting pardon/remission and the other, relating to the power to withdraw the order of granting pardon/remission, if subsequently, materials are placed to show that certain

relevant materials were not considered or certain materials of extensive value were kept out of consideration. It was observed that the affected party need not be given the reasons but that does not mean that there should not be legitimate or relevant reasons for passing the order. It was also observed that in the absence of any specific reference under Articles 72 or 161 of Constitution with regard to withdrawal of an order of remission, there is no bar for such power being exercised.

(iii) On a consideration of the facts of the said case, it was observed that, irrelevant and extraneous materials had entered into the decision-making process, thereby vitiating it. The order granting remission impugned in the writ petitions was set aside being unsustainable and directed to be reconsidered and the writ petition was allowed to that extent. Kapadia, J., as the learned Chief Justice then was, in his concurring opinion observed that, exercise of executive clemency is a matter of discretion and yet subject to certain standards. The discretion has to be exercised or public considerations allowed. Therefore, the principle of exclusive cognizance would not apply when the decision impugned is in derogation of a constitutional provision. It was further stated that granting of pardon has the

effect of eliminating conviction without addressing the defendant's guilt or innocence.

(iv) The exercise of the prerogative power is subject to judicial review and rule of law which is the basis for evaluation of all decisions. Rule of law cannot be compromised on the grounds of political expediency as "*to go by such consideration would be subversive of the fundamental principles of rule of law and it would amount to setting a dangerous precedent.*"

(e) In ***Mansukhlal Vithaldas Chauhan vs. State of Gujarat, (1997) 7 SCC 622,*** the basis on which the legality of an administrative decision could be reviewed was stated. It could be on whether, a decision making authority exceeding its powers committed an error of law; committed a breach of rules of natural justice; reached a decision which no reasonable tribunal would have reached or abused its powers. In other words, the judicial review of the order of the President or the Governor under Article 72 or Article 161 of the Constitution, as the case may, is available and such orders can be impugned on the following grounds:

i. that the order has been passed without application of mind;

ii. that the order is *mala fide*;

iii. that the order has been passed on extraneous or wholly irrelevant considerations;

iv. that relevant materials have been kept out of consideration;

v. that the order suffers from arbitrariness.

(f) Further, in ***Swamy Shraddananda,*** it was observed that judicial notice has to be taken of the fact that remission, if allowed to life convicts in a mechanical manner without any sociological or psychiatric appraisal of the convict and without any proper assessment as to the effect of early release of a particular convict on the society. It was further observed that, the power of executive clemency is not only for the benefit of the convict but what has to be borne in mind is the effect of the decision on the family of the victims, society as a whole and the precedent which it sets for the future. Thus, the exercise of power depends upon the facts and circumstances of each case and has to be judged from case to case. Therefore, one cannot draw the guidelines for regulating exercise of power. Further, the exercise or non-exercise of power of pardon or remission is subject to judicial review and a pardon obtained by fraud or granted by mistake or granted for improper reasons would

invite judicial review and the vindication of the rule of law being the main object of judicial review, the mechanism for giving effect to that justification varies. Thus, rule of law should be the overarching conditional justification for judicial review.

(g) In ***Rajan***, it was observed that where a person has been convicted on several counts for different offences in relation to which life imprisonment has been granted, the convict may succeed in being released prematurely only if the competent authority passes an order of remission concerning all the life sentences awarded to the convict on each count which is a matter to be considered by the competent authority.

48.7. With regard to the remission policy applicable in a given case, the following judgments are of relevance:

(a) In ***Jagdish,*** a three Judge Bench of this Court considered the conflicting opinions expressed in ***State of Haryana vs. Balwan, (1999) 7 SCC 355 ("Balwan")*** on the one hand and ***Mahendar Singh,*** and ***State of Haryana vs. Bhup Singh, (2009) 2 SCC 268*** (***"Bhup Singh")*** on the other. The question considered by the three-Judge bench was, whether, the policy which provides for remission and sentence should be that which was existing on the date of the conviction of the accused or should it be the policy that existed on

date of consideration of his case for premature release by the appropriate authority. Noting that remission policy would be changed from time to time and after referring to the various decisions of this Court, including ***Gopal Vinayak Godse*** and ***Ashok Kumar***, this Court observed that, liberty is one of the most precious and cherished possessions of a human being and he would resist forcefully any attempt to diminish it. Similarly,rehabilitation and social reconstruction of a life convict, as an objective of punishment become a paramount importance in a welfare State. The State has to achieve the goal of protecting the society from the convict and also rehabilitate the offender. The remission policy manifests a process of reshaping a person who, under certain circumstances, has indulged in criminal activities and is required to be rehabilitated. Thus, punishment should not be regarded as the end but only a means to an end. Relevancy of circumstances to an offence such as the state of mind of the convict when the offence was committed, are factors to be taken note of. It was further observed as under:

> "46. At the time of considering the case of premature release of a life convict, the authorities may require to consider his case mainly taking into consideration whether the offence was an individual act of crime without affecting the society at large; whether there was any chance of future recurrence of committing a crime; whether the convict had lost his potentiality in committing the crime;

whether there was any fruitful purpose of confining the convict any more; the socio-economic condition of the convict's family and other similar circumstances."

(i) That the executive power of clemency gives an opportunity to the convict to reintegrate into the society. However, the power of clemency must be pressed into service only in appropriate cases. Ultimately, it was held that the case for remission has to be considered on the strength of the policy that was existing on the date of conviction of the accused. It was further observed that in case no liberal policy prevails on the date of consideration of the case of a convict under life imprisonment for premature release, he should be given the benefit thereof subject of course to Section 433-A of the CrPC.

48.8. At this juncture, it is relevant to refer to the following decisions of this Court, wherein orders of remission have been quashed and set aside by this Court on various grounds:

(a) In ***Swaran Singh vs. State of Uttar Pradesh, (1998) 4 SCC 75***, a three-Judge Bench of this Court considered the question as to scope of judicial review of an order of a Governor under Article 161 of the Constitution of India. In the said case, a Member of the Legislative Assembly of the State of Uttar Pradesh had been convicted of the offence of murder and within a period of less than

two years, he was granted remission from the remaining long period of his life sentence. The son of the deceased moved the Allahabad High Court challenging the aforesaid action of the Governor and the same having been dismissed, the matter had been brought to this Court. This Court noticed that the Governor exercised the power to grant remission, without being appraised of material facts concerning the prisoner, such as, his involvement in five other criminal cases of serious nature, the rejection of his earlier clemency petition and the report of the jail authority that his conduct inside the jail was far from satisfactory and that out of the two years and five months he was supposed to have been in jail, he was in fact out on parole during the substantial part thereof. The Court further held that when the Governor was not in the know of material facts, the Governor was deprived of the opportunity to exercise the power to grant remission in a fair and just manner and that the order granting remission fringed on arbitrariness. Therefore, the order of the Governor granting remission, was quashed, with a direction to re-consider the petition of the prisoner in light of the materials which the Governor had no occasion to know earlier. As regards the question as to the power of judicial review over an order passed by the Governor under Article 161 of the Constitution, the following observations were made:

"10. A Constitution Bench of this Court has considered the scope of judicial review of exercise of powers under Articles 72 and 161 of the Constitution of India in ***Kehar Singh v. Union of India (1989) 1 SSC 204***. The bench after observing that the Constitution of India is a constitutive document which is fundamental to the governance of the country under which people of India have provided a constitutional polity consisting of certain primary organs, institutions and functionaries to exercise the powers provided in the Constitution, proceeded to add thus:

> "All power belongs to the people and it is entrusted by them to specified institutions and functionaries with the intention of working out, maintaining and operating a constitutional order."

The Constitution Bench laid down that judicial review of the Presidential order cannot be exercised on the merits except within the strict limitations defined in ***Maru Ram v. Union of India (1981) 1 SCC 107***. The limitations of judicial review over exercise of powers under Articles 72 and 161 of the Constitution have been delineated in the said decision by the constitution Bench. It has been observed that "all public power, including constitutional power, shall never be exercisable arbitrarily or mala fide, and ordinarily guidelines for fair and equal execution are guarantors of valid play of power." The bench stressed the point that the power being of the greatest moment, cannot be a law unto itself but it must be informed by the finer canons of constitutionalism.

11. It was therefore, suggested by the bench to make rules for its own guidance in the exercise of the pardon power keeping a large residuary power to meet special situations or sudden developments.

12. In view of the aforesaid settled legal position, we cannot accept the rigid contention of the learned counsel for the third respondent that this Court has no power to touch the order passed by the Governor under Article 161 of the constitution. If such power was exercised arbitrarily, mala fide or in absolute disregard of the finer canons of the

constitutionalism, the by-product order cannot get the approval of law and in such cases, the judicial hand must be stretched to it."

(underlining by us)

(b) In ***Joginder Singh vs. State of Punjab, (2001) 8 SCC 306*** the facts were that the respondents-convicts therein were convicted for offences punishable under Sections 324, 325 and 326 read with Section 34 of the IPC and had been awarded a sentence of one year and six months which was challenged upto the High Court of Punjab and Haryana and was confirmed. On the dismissal of the Revision Petition by the High Court, the convicts surrendered before the Superintendent of the concerned jail and on the same day were released by the jail authorities on being granted the benefit of remission. It is of importance to note that during the period of trial ending with confirmation of conviction in the Revision Petition by the High Court, the convicts (earlier accused) were almost all at the time out on bail except for a period of about 2 months and 25 days when they were in jail, serving part of their sentence. The appellant before this Court, who was the complainant, unsuccessfully challenged the remission order before the High Court and thereafter approached this Court by way of a Special Leave Petition. The primary ground of challenge before this Court was that the periods of remission permissible under successive notifications issued

between 13.07.1988 and 29.07.1998 (period between date of conviction by the Chief Judicial Magistrate and the date on which the conviction and sentence was upheld by the High Court) were cumulatively allowed to the convicts. That is to say that the maximum period of remission permissible under each of the seven notifications issued between the said dates was to be cumulatively taken into account to grant a total remission of 17 and a half months. It was contended before this Court that the said approach was erroneous in construing successive policies of remission. It was further contended that while applying the period of remission granted by the Government under any remission notification, the period during which an accused person was out on bail cannot be taken into account.

(i) This Court while allowing the appeal of the appellant therein-complainant held that the High Court fell in error in holding that the convicts were entitled to the benefit of the period of remission given by the various notifications cumulatively to be counted against the period during which they were out on bail.

(c) In ***Satpal***, the order of the Governor granting remission to convicts therein, in the exercise of power conferred by Article 161 of the Constitution of India read with Section 132 of the Code of Criminal Procedure was assailed by the brother and widow of the

deceased. The primary ground raised before this Court was that the power to grant remission was exercised without application of mind, and that the said power was exercised by the Governor having regard to extraneous considerations and even without the aid and advice of the Government, namely, the concerned Minister. This Court examined the said case having regard to the parameters of judicial review in relation to an order granting remission by the Governor. It was noted that the Governor had proceeded to grant remission of sentence without any knowledge as to the period of sentence already served by the convicts and if at all they had undergone any period of imprisonment. It was noted that an order granting remission would be arbitrary and irrational if passed without knowledge or consideration of material facts.

49. On a reading of the aforesaid judgments what emerges is that the power to grant remission on an application filed by the convict or on his behalf, is ultimately an exercise of discretion by the appropriate Government. It is trite that where there is exercise of legal power coupled with discretion by administrative authorities, the test is, whether, the authority concerned was acting within the scope of its powers. This would not only mean that the concerned authority and in the instant case, the appropriate Government had

not only the jurisdiction and authority vested to exercise its powers but it exercised its powers in accordance with law i.e., not in an arbitrary or perverse manner without regard to the actual facts or unreasonably or which would lead to a conclusion in the mind of the Court that there has been an improper exercise of discretion. If there is improper exercise of discretion, it is an instance of an abuse of discretion. There can be abuse of discretion when the administrative order or exercise of discretion smacks of *mala fides* or when it is for any purpose based on irrelevant consideration by ignoring relevant consideration or it is due to a colourable exercise of power; it is unreasonable and there is absence of proportionality. There could also be an abuse of discretion where there is failure to apply discretion owing to mechanical exercise of power, non-application of mind, acting under dictation or by seeking assistance or advice or there is any usurpation of power.

49.1. It is not necessary to dilate upon each of the aforesaid aspects of abuse of discretion in the instant case, as we have observed that the consideration of the impugned orders or manner of exercise of powers is unnecessary, having regard to the answer given by us to Point No.3.

50. However, it would be relevant to refer to one aspect of abuse of discretion, namely, usurpation of power. Usurpation of power arises when a particular discretion vested in a particular authority is exercised by some other authority in whom such power does not lie. In such a case, the question whether the authority which exercised discretion was competent to do so arises.

50.1. Applying the said principle to the instant case, we note that having regard to the definition of "appropriate Government" and the answer given by us to Point No.3, the exercise of discretion and the passing of the impugned orders of remission in the case of respondent Nos.3 to 13 herein was an instance of usurpation of power. It may be that this Court by its order dated 13.05.2022 passed in Writ Petition No.135 of 2022 had directed the first respondent State of Gujarat to consider the case of respondent No.3 under the 1992 Policy of the State of Gujarat, by setting aside the order of the High Court of Gujarat dated 17.07.2019. What is interesting is that in the said writ petition, the State of Gujarat had correctly submitted before this Court that the appropriate Government in the instant case was State of Maharashtra and not the State of Gujarat. The said contention was in accordance with the definition of appropriate Government under clause (b) of sub-

section (7) of Section 432 of the CrPC. However, the said contention was rejected by this Court contrary to several judgments of this Court including that of the Constitution Bench in ***V. Sriharan.*** But the State of Gujarat failed to file a review petition seeking correction of the order of this Court dated 13.05.2022, (particularly when we have now held that the said order is a nullity). Complying with the said order can also be said to be an instance of usurpation of power when the provision, namely, clause (b) of sub-section (7) of Section 432 states otherwise.

50.2. We fail to understand as to, why, the State of Gujarat, first respondent herein, did not file a review petition seeking correction of the order dated 13.05.2022 passed by this Court in Writ Petition No.135 of 2022 in the case of respondent No.3 herein. Had the State of Gujarat filed an application seeking review of the said order and impressed upon this Court that it was not the "appropriate Government" but the State of Maharashtra was the "appropriate Government", ensuing litigation would not have arisen at all. On the other hand, in the absence of filing any review petition seeking a correction of the order passed by this Court dated 13.05.2022, the first respondent-State of Gujarat herein has usurped the power of the State of Maharashtra and has passed the impugned orders of

remission on the basis of an order of this Court dated 13.05.2022 which, in our view, is a nullity in law.

50.3. In this regard it is necessary to dilate on the background to this case and refer to the previous orders passed by this Court as under:-

The first order is dated 16.12.2003, referring the matter to the CBI for investigation; the second is an order of transfer of the trial from the competent Court in Gujarat to the Special Court at Mumbai and the third is an order passed by this Court granting compensation to the petitioner in Writ Petition (Crl.) No.491 of 2022. The relevant portions of the aforesaid orders read as under:-

W.P.(Crl.) No.118 of 2003, dated 16.12.2003 – referring matter to the CBI for investigation;

"**ORDER**

"Considering the nature of the allegations made, Shri Mukul Rohtagi learned Additional Solicitor General appearing for the respondents accepts that further investigation in this case may be done by the CBI, though he does not concede that the Gujarat Police is incompetent to investigate the matter. Hence, we direct the CBI to take over further investigation of this case and report to this Court from time to time.

Let a report be filed by the CBI within eight weeks.

List after report is filed."

Transfer Petition (Crl.) No.192 of 2004, dated 06.08.2004 – transfer of the trial from the competent Court in Gujarat to the Special Court at Mumbai;

ORDER

"We are of the view that on account of the nature and the allegations of the case, session case No.161 of 2004 before the Additional Sessions Judge, Dahod now transferred to Additional Sessions Judge of IVth Court of the City Civil Sessions Court Ahmedabad (CBI Case No.RCZ/S/2004, SCB Mumbai) title CBI vs. Jaswantbhai Chaturbhai & Others be transferred to any competent Court in Mumbai for trial and disposal. This order be placed before the Chief Justice of Bombay High Court who shall designate the competent Court as he may deem fit. The transfer petition is accordingly allowed.

This order is based on the perceptions of the CBI as recorded in its report and should not be taken as a reflection on the competence or impartiality of the judiciary in the State of Gujarat.

Having regard to the peculiar facts of this case the State of Gujarat shall bear the expenditure of the defence of the accused in accordance with the provisions of the Section 304 of the Code of Criminal Procedure.

It is made clear that for the purpose of this case the Central Government will appoint the public prosecutor."

Criminal Appeal Nos.727-733 of 2019, order dated 23.04.2019 - compensation

ORDER

"The appellant, Bilkis Yakub Rasool, is a victim of riots which occurred in the aftermath of the Godhra train burning incident in the State of Gujarat on February 27, 2002. While eventually, the perpetrators of the crime including the police personnel stand

punished, the appellant, who was aged twenty-one years and pregnant at that time, having lost all members of her family in the diabolical and brutal attacks needs to be adequately compensated. Additional facts which we must note are that the appellant was repeatedly gangraped and was a mute and helpless witness to her three-and-a-half-year-old daughter being butchered to death. This factual position is undisputed and unchallenged in light of the findings of the trial court upheld by the High Court and this Court.

The appellant, we are informed, is presently about forty years of age and is without any home and lives with her daughter who was born after the incident. She has been coerced to live life of a nomad and as an orphan, and is barely sustaining herself on the charity of NGOs, having lost company of her family members. The gruesome and horrific acts of violence have left an indelible imprint on her mind which will continue to torment and cripple her.

We do not have to search and elaborate upon principles of law to come to the conclusion that the appellant deserves to be adequately compensated. It is only the quantum of compensation that needs to be worked out by the Court. Time and again this Court has held that the compensation so awarded must be just and fair, and the criteria objective. However, this case has to be dealt with differently as the loss and suffering evident from the facts stated above surpass normal cases. Taking into account the totality of the facts of the case, we are of the view that compensation of Rs.50,00,000/- (Rupees fifty lakh only) to be paid by the State Government within two weeks from today, on proper identification, would meet the ends of justice. Coupled with the aforesaid relief, we deem it proper to further direct the State Government to provide the appellant with an employment under the State, if she wishes so and is inclined, and also to offer her government accommodation at a place of her choice, if she is willing to live in such accommodation.

With the aforesaid direction, the appeals relating to compensation are disposed of."

The aforesaid orders clearly indicate why this Court had transferred the investigation and trial to the CBI and to the State of Maharashtra respectively.

50.4. Such being the case, it was the State of Maharashtra which was the appropriate Government which had to consider the appellant for remission *vis-à-vis* respondent Nos.3 to 13 herein. Instead, being unsuccessful before the High Court of Gujarat, respondent No.3 surreptitiously filed the writ petition before this Court seeking a direction to consider his case for remission without disclosing the full and material facts before this Court. Relief was granted by this Court by conferring jurisdiction on State of Gujarat which it did not possess as per Section 432 (7) of the CrPC, in the guise of consideration for remission on the basis of the 09.07.1992 policy, which had also stood cancelled in the year 2013. Taking advantage of this Court's order dated 13.05.2022, all other convicts also sought consideration of their case by the Government of Gujarat for remission even in the absence of any such direction in their cases by this Court. Thus, the State of Gujarat has acted on the basis of the direction issued by this Court but contrary to the

letter and spirit of law. We have already said that the State of Gujarat never sought for the review of the order of this Court dated 13.05.2022 by bringing to the notice of this Court that it was contrary to Section 432 (7) and judgments of this Court.

50.5. Instead, the State of Gujarat has acted in tandem and was complicit with what the petitioner-respondent No.3 herein had sought before this Court. This is exactly what this Court had apprehended at the previous stages of this case and had intervened on three earlier occasions in the interest of truth and justice by transferring the investigation of the case to the CBI and the trial to the Special Court at Mumbai. But, in our view, when no intervention was called for in the writ petition filed by one of the convicts /respondent No.3 herein, this Court was misled to issue directions contrary to law and on the basis of suppression and misstatements made by respondent No.3 herein. We have held that order of this Court dated 13.05.2022 to be a nullity and *non est* in the eye of law. Consequently, exercise of discretion by the State of Gujarat is nothing but an instance of usurpation of jurisdiction and an instance of abuse of discretion. If really State of Gujarat had in mind the provisions of law and the judgments of this Court, and had adhered to the rule of law, it would have filed a review petition

before this Court by contending that it was not the appropriate Government. By failing to do so, not only are the earlier orders of this Court in the matter have been vindicated but more importantly, rule of law has been breached in usurping power not vested in it and thereby aiding respondent Nos.3 to 13. This is a classic case where the order of this Court dated 13.05.2022 has been used for violating the rule of law while passing orders of remission in favour of respondent Nos.3 to13 in the absence of any jurisdiction by respondents – State of Gujarat. Therefore, without going into the manner in which the power of remission has been exercised, we strike down the orders of remission on the ground of usurpation of powers by the State of Gujarat not vested in it. The orders of remission are hence quashed on this ground also.

Section 432(2) of the CrPC : Opinion of the Presiding Judge of the convicting court:

51. Sub-section (2) of Section 432 of the CrPC states that when an application is made to the appropriate Government, *inter alia,* for 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.

52. Learned ASG Sri S.V. Raju submitted that the expression "*appropriate Government may require the opinion of the Presiding Judge of the Court*" indicates that this is not a mandatory requirement, therefore, in the instant case the opinion of the Presiding Judge of the Court by which respondent Nos.3 to 13 were convicted, namely, the Special Judge, Mumbai, was unnecessary. It was further submitted that since the State of Gujarat was considering the applications for remission filed by respondent Nos.3 to 13, the opinion of local Sessions Judge at Dahod was obtained as a member of the Jail Advisory Committee and there was a positive opinion for grant of remission to respondent Nos.3 to 13 herein.

52.1. This contention was however refuted by the learned counsel Ms. Shobha Gupta by reiterating her submission that the expression "may require" in sub-section (2) of Section 432 of the CrPC ought to be read as "shall require". This is evident from the dicta of this Court. In this regard, reliance was placed on certain judgments of this Court which we shall advert to in the first instance as under:

(i) In ***Sangeet,*** it was observed that before actually exercising the power of remission under Section 432 of the CrPC, the appropriate Government must obtain the opinion (with reasons) of the Presiding Judge of the convicting or confirming Court. Remissions can, therefore, be given only on a case-by-case basis and not in a wholesale manner.

(ii) Further, in ***V. Sriharan,*** it was observed that the declaration of law made by this Court in ***Sangeet*** referred to above, is correct and further the procedure to be followed under Section 432(2) of the CrPC is mandatory. The manner in which the opinion is to be rendered by the Presiding Judge 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. Therefore, it was observed that the *suo motu* power of remission cannot be exercised under Section 432(1) of the CrPC and it can only be initiated based on an application of the person convicted under Section 432(2) of the CrPC and the ultimate order of remission should be guided by the opinion to be rendered by the Presiding Officer of the Court concerned.

(iii) This Court, in ***Ram Chander,*** has specifically dealt with the value of the opinion of the Presiding Judge with reference to paragraph 61 of ***Sangeet*** and paragraphs 148 and 149 of ***V. Sriharan*** referred to above and observed in paragraphs 25 and 26 as under:

> *"25.* In ***Sriharan (supra)***, the Court observed that the opinion of the presiding judge shines a light on the nature of the crime that has been committed, the record of the convict, their background and other relevant factors. Crucially, the Court observed that the opinion of the presiding judge would enable the government to take the *'right'* decision as to whether or not the sentence should be remitted. Hence, it cannot be said that the opinion of the presiding judge is only a relevant factor, which does not have any determinative effect on the application for remission. The purpose of the procedural safeguard under Section 432 (2) of the CrPC would stand defeated if the opinion of the presiding judge becomes just another factor that may be taken into consideration by the government while deciding the application for remission. It is possible then that the procedure under Section 432 (2) would become a mere formality.
>
> 26. However, this is not to say that the appropriate government should mechanically follow the opinion of the presiding judge. If the opinion of the presiding judge does not comply with the requirements of Section 432 (2) or if the judge does not consider the relevant factors for grant of remission that have been laid down in ***Laxman Naskar v. Union of India (supra),*** the government may request the presiding judge to consider the matter afresh."

(iv) In paragraph 27, it was further observed that the Presiding Judge in the said case had not taken into account the factors which have been laid down in ***Laxman Naskar*** and that the opinion was

a mechanical one bereft of reasons and therefore, inadequate and not in accordance with law. Consequently, the petitioner's application for remission was directed to be considered afresh with a direction to the Special Judge, Durg to provide an opinion on the application afresh accompanied with adequate reasoning, taking into account all the relevant factors that govern the grant of remission as laid down in ***Laxman Naskar.*** A direction was issued to State of Chhattisgarh in the said case to take a final decision on the application for remission afresh within a month after receiving the opinion of the Special Judge, Durg. Consequently, the petition filed under Article 32 was allowed in the aforesaid terms.

52.2. Thus, the consistent view of this Court which emerges is that the expression "may" has to be interpreted as "shall" and as a mandatory requirement under sub-section (2) of Section 432 of the CrPC. The said provision has sufficient guidelines as to how the opinion must be provided by the Presiding Judge of the Court which has convicted the accused inasmuch as –

(i) the opinion must state as to whether the application for remission should be granted or refused and for either of the said opinions, the reasons must be stated;

(ii) naturally, the reasons must have a bearing on the facts and circumstances of the case;

(iii) the reasons must be in tandem with the record of the trial or of such record thereof as exists;

(iv) the Presiding Judge of the Court before or by which the conviction was had or confirmed, must also forward along with the statement of such opinion granting or refusing remission, a certified copy of the record of the trial or of such record thereof as exists.

52.3. Having regard to the requirements which the Presiding Judge must comply with while stating his opinion to the appropriate Government on an application for remission of sentence made by a convict, it cannot be held that the expression "may" in the said provision is not mandatory nor can it be left to the whims and fancies of the appropriate Government either to seek or not to seek the opinion of the Presiding Judge or the Court before which the conviction had taken place.

52.4. In the instant case, what is interesting is that when respondent No.3 - Radheshyam Bhagwandas Shah filed his application for remission before the State of Maharashtra pursuant to the order of the Gujarat High Court dated 17.07.2019, the State

of Maharashtra sought the opinion of the Special Judge at Mumbai who gave a negative opinion. This was one of the reasons for respondent No.3 to file the Writ Petition (Crl.) No.135 of 2022 before this Court. However, subsequently, when a direction was issued by this Court to the first respondent State of Gujarat to consider the application for remission, the opinion of the local Sessions Court at Dahod was obtained and the opinion of the Special Judge, Mumbai where the trial had taken place was ignored. The Sessions Court at Dahod obviously had not complied with the mandatory requirements noted above under sub-section (2) of Section 432 of the CrPC inasmuch as the opinion was not forwarded along with reasons having regard to the record of the trial as no trial had taken place before the Sessions Court, Dahod. Further, the Presiding Judge of the Sessions Court, Dahod also did not forward any certified copy of the record of the trial. Moreover, learned Sessions Judge at Dahod was also a member of the Jail Advisory Committee.

52.5. We further observe that the Presiding Judge of the Court before which the conviction happens can never be a Member of the Jail Advisory Committee, inasmuch he is an independent authority who should give his opinion on the application seeking remission which is a mandatory requirement as per the requirements of sub-

section (2) of Section 432. In the instant case, the opinion given by the District & Sessions Judge at Dahod is vitiated for two reasons: firstly, because he was not the Presiding Judge before which the conviction of respondent Nos.3 to 13 took place; and, secondly, if the Presiding Judge of the Court where the conviction occurred is an independent authority which must be consulted by the appropriate Government then he could not have been a Member of the Jail Advisory Committee as in the instant case.

52.6. On perusal of the counter affidavit of the respondent-State of Gujarat, it is noted that pursuant to the applications filed by respondent Nos.4 to 13 (respondent No.3 had filed his application before State of Maharashtra on 01.08.2019) seeking pre-mature release or remission, opinion of the Special Judge (CBI), City Civil & Sessions Court, Greater Mumbai was taken by the State of Gujarat and in respect of all the respondent Nos.3 to 13 the categorical opinion was that having regard to the Government's Resolution dated 11.04.2008, issued by the State of Maharashtra, said prisoners should not be released pre-maturely. Had the State of Maharashtra considered the applications of respondent Nos.3 to 13 for remission, this vital opinion of the Presiding Judge of the Court which had convicted them would have carried weight in the mind of

the Government of the State of Maharashtra as well as the terms of the Government's Resolution dated 11.04.2008 which was the applicable policy for remission. In fact, the first respondent, namely, the Government of the State of Gujarat, which usurped the power of the Government of the State of Maharashtra, simply brushed aside the opinion of the Special Judge (CBI), Greater Mumbai. Instead the opinion of the Sessions Judge, Godhra, District Panchmahal within whose jurisdiction the offences had occurred and who was a member of the Jail Advisory Committee was highlighted by Sri S.V. Raju, learned ASG appearing for the State of Gujarat. Although this opinion is also a negative opinion, the same is not in accordance with sub-section (2) of Section 432 of the CrPC and, therefore, is of no consequence except when viewed from the prism of being an opinion of one of the members of the Jail Advisory Committee, Dahod Jail.

53. As we have held, in the first place, the first respondent State of Gujarat was not at all the appropriate Government, therefore, the proceedings of the Jail Advisory Committee of Dahod Jail, which had recommended remission is itself vitiated and further, there is no compliance of sub-section (2) of Section 432 of the CrPC in the instant case in as much as the said opinion was not considered by

the appropriate Government. On that score also, the orders of remission dated 10.08.2022 are vitiated.

Sentence in default of fine:

54. Learned counsel Mrs. Shobha Gupta contended that respondent Nos.3 to 13 had not paid the fine and therefore, in the absence of payment of fine, the default sentence ought to have been undergone by the said respondents. This aspect of the matter has been lost sight of or ignored while granting the orders of remission and therefore, the orders of remission are vitiated on that score.

54.1. In response to the above arguments, learned senior counsel, Sri Sidharth Luthra, at the outset, submitted that although applications for payment of fine have been filed and are pending consideration before this Court, nevertheless respondent Nos.3 to 13 have now on their own tendered the fine and the same has been accepted by the Special Court at Mumbai.

54.2. In this regard, following judgments were referred to at the bar:

(a) In ***Shantilal vs. State of Madhya Pradesh, (2007) 11 SCC 243 ("Shantilal")***, the contention was that the term of imprisonment in default of payment of fine is not a sentence. It is a penalty which a person incurs on account of non-payment of fine.

This sentence must be undergone by the offender unless it is set-aside or remitted in part or in whole, either in appeal or in revision or in other appropriate judicial proceedings or otherwise. However, a term of imprisonment ordered in default of payment of fine stands on a different footing. A person is required to undergo imprisonment for default in payment of fine either because he is unable to pay the amount of fine or refuses to pay such amount. He, therefore, can always avoid to undergo imprisonment in default of payment of fine by paying such amount. It is, therefore, not only the power, but the duty of the Court to keep in view the nature of offence, and circumstances under which it was committed, the position of the offender and other relevant considerations before ordering the offender to suffer imprisonment in default of payment of fine.

(i) The further question considered was, whether, a Court of law can order a convict to remain in jail in default of payment of fine. It was observed that even in the absence of a specific provision in the law empowering a Court to order imprisonment in default of payment of fine, such power is implicit and is possessed by a Court administering criminal justice. In this regard, reference was made to Sections 40 to 42 and Sections 63 to 70 IPC as well as Section 30 of the CrPC which deals with a sentence of imprisonment in default of payment of fine and

Section 25 of the General Clauses Act, 1897 which deals with recovery of fine. It was observed that even in the absence of a provision to the contrary viz. that no order of imprisonment can be passed in default of payment of fine, such power is explicit and can always be exercised by a court having regard to Section 30 of the CrPC.

(b) In ***Sharad Hiru Kolambe vs. State of Maharashtra, (2018) 18 SCC 718 ("Sharad Hiru Kolambe"),*** the point for consideration was regarding quantum of fine that was imposed by way of a default sentence in case of non-payment of fine. It was contended that though the substantive sentence stood remitted and the appellant was directed to be released on completion of fourteen years of actual sentence, the appellant would still be inside till he completes twenty-four years. This was because the trial court in the said case directed "all sentences shall run concurrently", therefore, all default sentences must also run concurrently *inter se*. It was contended that the default sentences so directed was unconscionable and excessive.

(i) This Court speaking through Lalit, J. (as the learned Chief Justice then was) observed that if the term of imprisonment in default of payment of fine is a penalty which a person incurs on account of non-payment of fine and is not a sentence in a

strict sense, imposition of such default sentence is completely different and qualitatively distinct from a substantive sentence. Theoretically, if the default sentences awarded in respect of imposition of fine in connection with two or more offences are to be clubbed or directed to run concurrently, there would not be any occasion for the persons so sentenced to deposit the fine in respect of the second or further offences. It would effectively mean imposition of one single or combined sentence of fine. Such an exercise would render the very idea of imposition of fine with a deterrent stipulation while awarding sentence in default of payment of fine to be meaningless. If imposition of fine and prescription of mandatory minimum is designed to achieve a specific purpose, the very objective will get defeated if the default sentences were directed to run concurrently. Therefore, the contention regarding concurrent running of default sentences was rejected. It was observed that there is no power of the Court to order the default sentences to run concurrently but if a prisoner does not pay the fine or refuses to pay the fine then he must undergo the default sentences so imposed.

(c) In ***Shahejadkhan Mahebubkhan Pathan vs. State of Gujarat, (2013) 1 SCC 570 ("Shahejadkhan Mahebubkhan***

Pathan"), this Court speaking through Sathasivam, J. (as the learned Chief Justice then was) held that the term of imprisonment in connection with a fine is not a sentence but a penalty which a person incurs on account of non-payment of fine. But on the other hand, if a sentence is imposed, an offender must undergo the same unless it is modified or varied in part or whole in the judicial proceedings or by way of remission. But the imprisonment order in default of fine stands on different footing. When such a sentence on default of payment of fine is imposed, the person is required to undergo imprisonment either because he is unable to pay the fine or refuses to do so. The only way he can avoid to undergo imprisonment in default of payment of fine is by paying such amount.

54.3. The aforesaid dicta would therefore clearly indicate that the sentence of imprisonment awarded to a person for committing an offence is distinct than the imprisonment ordered to be undergone in default of payment of fine. The latter is not a substantive sentence for commission of the offence but is in the nature of penalty for default in payment of fine.

54.4. In the instant case, while considering the applications for remission, the Jail Advisory Committee did not take into

consideration whether respondent Nos.3 to 13 convicts had tendered the fine which was imposed by the Special Court and affirmed by the High Court as well as by this Court. Therefore, this is an instance of leaving out of a relevant consideration from the gamut of facts which ought to have been considered by the Jail Advisory Committee. Had the respondent State of Gujarat considered the opinion from the Presiding Judge of the Court which had convicted, respondent Nos.3 to 13 herein, the aspect regarding non-payment of fine would have surfaced. In the absence of non-compliance with the direction to pay fine, there would be default sentence which would be in the nature of penalty. The question whether the default sentence or penalty had to be undergone by these respondents, was a crucial consideration at the time of recommending remission to the State Government by the Jail Advisory Committee. This aspect of the matter has also not been taken into consideration by the State Government while passing the impugned orders of remission. Realising this, during the pendency of these writ petitions, applications were filed seeking permission to tender the fine amount. However, even before the said applications could be considered and orders passed thereon, the respondents convicts have paid the fine amount and have produced receipts in that regard. This fact would not alter the consideration of the case

of respondent Nos.3 to 13 herein inasmuch the fact of payment of fine ought to have been a point which had to be taken into consideration prior to the passing of the orders of remission as there could be no relaxation in the sentence with regard to payment of fine. There can only be reduction in the substantive sentence to be undergone by way of imprisonment for which the application seeking remission is filed. Remission of sentence, which is for reduction of the period of imprisonment, cannot however relate to the payment of fine at all. Since there was non-application of mind in this regard, the impugned orders of remission are contrary to law and are liable to be quashed on this count as well.

In view of the above, the other contentions based on Wednesbury principles do not require consideration in the present case and hence all contentions on the said aspect are left open.

55. We however would like to indicate the factors that must be taken into account while entertaining an application for remission under the provisions of the CrPC, which are however not exhaustive of the tests which we have discussed above. They can be adumbrated as under:

(a) The application for remission under Section 432 of the CrPC could be only before the Government of the State within whose territorial jurisdiction the applicant was convicted (appropriate Government) and not before any other Government within whose territorial jurisdiction the applicant may have been transferred on conviction or where the offence has occurred.

(b) A consideration for remission must be by way of an application under Section 432 of the CrPC which has to be made by the convict or on his behalf. In the first instance whether there is compliance of Section 433A of the CrPC must be noted inasmuch as a person serving a life sentence cannot seek remission unless fourteen years of imprisonment has been completed.

(c) The guidelines under Section 432(2) with regard to the opinion to be sought from the Presiding Judge of the Court which had convicted the applicant must be complied with mandatorily. While doing so it is necessary to follow the requirements of the said Section which are highlighted by us, namely,

(i) the opinion must state as to whether the application for remission should be granted or

refused and for either of the said opinions, the reasons must be stated;

(ii) the reasons must have a bearing on the facts and circumstances of the case;

(iii) the opinion must have a nexus to the record of the trial or of such record thereof as exists;

(iv) the Presiding Judge of the Court before or by which the conviction was had or confirmed, must also forward along with the statement of such opinion granting or refusing remission, a certified copy of the record of the trial or of such record thereof as exists.

(d) The policy of remission applicable would therefore be the Policy of the State which is the appropriate Government and which has the jurisdiction to consider that application. The policy of remission applicable at the time of the conviction could apply and only if for any reason, the said policy cannot be made applicable a more benevolent policy, if in vogue, could apply.

(e) While considering an application for remission, there cannot be any abuse of discretion. In this regard, it is

necessary to bear in mind the following aspects as mentioned in ***Laxman Naskar***, namely, -

(i) Whether the offence is an individual act of crime without affecting the society at large?

(ii) Whether there is any chance of future recurrence of committing crime?

(iii) Whether the convict has lost his potentiality in committing crime?

(iv) Whether there is any fruitful purpose of confining this convict any more?

(v) Socio-economic condition of the convict's family.

(f) There has also to be consultation in accordance with Section 435 of the CrPC wherever the same is necessitated.

(g) The Jail Advisory Committee which has to consider the application for remission may not have the District Judge as a Member inasmuch as the District Judge, being a Judicial Officer may coincidently be the very judge who may have to render an opinion independently in terms of sub-section (2) of Section 432 of the CrPC.

(h) Reasons for grant or refusal of remission should be clearly delineated in the order by passing a speaking order.

(i) When an application for remission is granted under the provisions of the Constitution, the following among other tests may apply to consider its legality by way of judicial review of the same.

(i) that the order has been passed without application of mind;

(ii) that the order is *mala fide*;

(iii) that the order has been passed on extraneous or wholly irrelevant considerations;

(iv) that relevant materials have been kept out of consideration;

(v) that the order suffers from arbitrariness.

Summary of Conclusions:

56. On the basis of the aforesaid discussion, we arrive at the following summary of conclusions:

a) We hold that the Writ Petition (Crl.) No.491 of 2022 filed under Article 32 of the Constitution before this Court is maintainable and that it was not mandatory for the petitioner therein to have

filed a writ petition under Article 226 of the Constitution before the Gujarat High Court.

b) Since Writ Petition (Crl.) No.491 of 2022 has been filed by one of the victims invoking Article 32 of the Constitution before this Court which has been entertained by us, the question, whether, the writ petitions filed as public interest litigation assailing the impugned orders of remission dated 10.08.2022 are maintainable, is kept open to be raised in any other appropriate case.

c) In view of Section 432 (7) read with Section 432 (1) and (2) of the CrPC, we hold that the Government of the State of Gujarat had no jurisdiction to entertain the prayers seeking remission of respondent Nos.3 to 13 herein as it was not the appropriate Government within the meaning of the aforesaid provisions. Hence, the orders of remission dated 10.08.2022 made in favour of respondent Nos.3 to 13 herein are illegal, vitiated and therefore, quashed.

d) While holding as above, we also hold that the judgment dated 13.05.2022 passed by this Court is a nullity and is *non est* in law since the said order was sought by suppression of material facts as well as by misrepresentation of facts (*suppressio veri,*

suggestio falsi) and therefore, fraudulently obtained at the hands of this Court.

i) Further, the petitioner in Writ Petition (Crl.) No.491 of 2022 not being a party to the said writ proceeding, the same is not binding on her and she is entitled in law to question the orders of remission dated 10.08.2022 from all angles including the correctness of the order dated 13.05.2022.

ii) In addition to the above, the said order, being contrary to the larger bench decisions of this Court, (holding that it is the Government of the State within which the offender is sentenced which is the appropriate Government which can consider an application seeking remission of a sentence) is *per incuriam* and is not a binding precedent. Hence, the impugned orders of remission dated 10.08.2022 are quashed on the above grounds.

e) Without prejudice to the aforesaid conclusions, we further hold that the impugned orders of remission dated 10.08.2022 passed by the respondent-State of Gujarat in favour of respondent Nos.3 to 13 are not in accordance with law for the following reasons:

i) That the Government of the State of Gujarat had usurped the powers of the State of Maharashtra which only could have considered the applications seeking remission. Hence, the doctrine of usurpation of powers applies in the instant case.

ii) Consequently, the Policy dated 09.07.1992 of the State of Gujarat was not applicable to the case of respondent Nos.3 to 13 herein.

iii) That opinion of the Presiding Judge of the Court before which the conviction of respondent Nos.3 to 13 was made in the instant case i.e. Special Court, Mumbai (Maharashtra) was rendered ineffective by the Government of the State of Gujarat which in any case had no jurisdiction to entertain the plea for remission of respondent Nos.3 to 13 herein. The opinion of the Sessions Judge at Dahod was wholly without jurisdiction as the same was in breach of sub-section (2) of the Section 432 of the CrPC.

iv) That while considering the applications seeking remission, the Jail Advisory Committee, Dahod and the other authorities had lost sight of the fact that respondent Nos.3 to 13 herein had not yet paid the fine ordered by the Special Court, Mumbai which had been confirmed by the Bombay High Court. Ignoring this relevant consideration also vitiated exercise of discretion in the instant case.

56.1. Having declared and held as such, we now move to point No.5.

Point No.5: What Order?

57. Respondent Nos.4 to 13, who had made applications to the first respondent-State of Gujarat seeking remission of their sentences, have been granted remission by the impugned orders dated 10.08.2022, while it is not known whether respondent No.3 had made any application to seek remission to the State of Gujarat as the same is not adverted to in the counter affidavit. The application seeking remission by respondent No.3 before the State of Gujarat has not been brought on record as he had filed his application before the State of Maharashtra. Respondent Nos.3 to13 have been released pursuant to the orders of remission dated

10.08.2022 and set at liberty. We have now quashed the orders of remission. Since 10.08.2022, respondent Nos.3 to 13 have been the beneficiaries of the orders passed by an incompetent authority inasmuch as the impugned orders are not passed by the appropriate Government within the meaning of Section 432 of the CrPC. So long as the said orders impugned were not set-aside, they had carried the stamp of validity and hence till date the impugned orders of remission were deemed to have been valid. Respondent Nos.3 to 13 are out of jail. Since we have quashed the orders of remission, what follows?

58. In our view, the most important constitutional value is personal liberty which is a fundamental right enshrined in Article 21 of our Constitution. It is in fact an inalienable right of man and which can be deprived of or taken away only in accordance with law. That is the quintessence of Article 21. But, this is a case where respondent Nos.3 to 13 have been granted liberty and have been released from imprisonment by virtue of the impugned orders of remission dated 10.08.2022 which we have declared and quashed as wholly without jurisdiction and *non est*. Having quashed the orders of remission made in favour of respondent Nos.3 to 13, should they be sent back to prison? Whether respondent No.3 to 13

must have the benefit of their liberty despite obtaining the same from an incompetent authority with the aid of an order of this Court obtained fraudulently and therefore, the same being illegal and carry a stamp of being a nullity and *non est* in the eye of law? This has been a delicate question for consideration before us.

59. Learned counsel for the petitioner in Writ Petition (Crl.) No.491 of 2022 has vehemently contended that there being failure of rule of law in the instant case, justice would be done by this Court only when respondent Nos.3 to 13 are returned to the prison. They can be granted remission only in accordance with law. On the other hand, respective learned senior counsel and counsel for the respondents Nos.3 to 13 who have appeared have pleaded that they have been enjoying liberty since 10.08.2022 and in spite of there being any error in the orders of remission, although the orders of remission may be quashed, by exercising jurisdiction under Article 142 of the Constitution, these respondents may not be subjected to imprisonment once again and they may remain out of jail as free persons. In other words, their liberty may be protected.

60. We have given our anxious thought to the aforesaid divergent contentions. The primary question that now arises for our consideration is this: when is liberty of a person protected? Article

21 of the Constitution states that no person shall be deprived of his liberty except in accordance with law. Conversely, we think that a person is entitled to protection of his liberty only in accordance with law. When a person's liberty cannot be violated in breach of a law, can a person's liberty be protected even in the face of a breach or violation of law? In other words, should rule of law prevail over personal liberty of a person or *vice-versa*? Further, should this Court weigh in favour of a person's freedom and liberty even when it has been established that the same was granted in violation of law? Should the scales of justice tilt against rule of law? In upholding rule of law are we depriving respondent Nos.3 to 13 their right to freedom and liberty? We wish to make it clear that only when rule of law prevails will liberty and all other fundamental rights would prevail under our Constitution including the right to equality and equal protection of law as enshrined in Article 14 thereof. In other words, whether liberty of a person would have any meaning at all under our Constitution in the absence of rule of law or the same being ignored or turned a blind eye? Can rule of law surrender to liberty earned as a consequence of its breach? Can breach of rule of law be ignored in order to protect a person's liberty that he is not entitled to?

61. Before we proceed further, we wish to reiterate what this Court has spoken on the concept of rule of law through its various judgments.

62. Rule of law means wherever and whenever the State fails to perform its duties, the Court would step in to ensure that the rule of law prevails over the abuse of the process of law. Such abuse may result from, *inter alia*, inaction or even arbitrary action of protecting the true offenders or failure by different authorities in discharging statutory or other obligations in consonance with the procedural and penal statutes. Breach of the rule of law, amounts to negation of equality under Article 14 of the Constitution.

63. More importantly, rule of law means, no one, howsoever high or low, is above the law; it is the basic rule of governance and democratic polity. It is only through the courts that rule of law unfolds its contours and establishes its concept. The concept of rule of law is closely intertwined with adjudication by courts of law and also with the consequences of decisions taken by courts. Therefore, the judiciary has to carry out its obligations effectively and true to the spirit with which it is sacredly entrusted the task and always in favour of rule of law. There can be no rule of law if there is no equality before the law; and rule of law and equality before the law

would be empty words if their violation is not a matter of judicial scrutiny or judicial review and relief and all these features would lose their significance if the courts don't step in to enforce the rule of law. Thus, the judiciary is the guardian of the rule of law and the central pillar of a democratic State. Therefore, the judiciary has to perform its duties and function effectively and remain true to the spirit with which they are sacredly entrusted to it.

In our view, this Court must be a beacon in upholding rule of law failing which it would give rise to an impression that this Court is not serious about rule of law and, therefore, all Courts in the country could apply it selectively and thereby lead to a situation where the judiciary is unmindful of rule of law. This would result in a dangerous state of affairs in our democracy and democratic polity.

64. Further, in a democracy where rule of law is its essence, it has to be preserved and enforced particularly by courts of law. Compassion and sympathy have no role to play where rule of law is required to be enforced. If the rule of law has to be preserved as the essence of democracy, it is the duty of the courts to enforce the same without fear or favour, affection or ill-will.

65. The manner of functioning of the court in accord with the rule of law has to be dispassionate, objective and analytical. Thus, everyone within the framework of the rule of law must accept the system, render due obedience to orders made and in the event of failure of compliance, the rod of justice must descend down to punish. It is mainly through the power of judicial review conferred on an independent institutional authority such as the High Court or the Supreme Court that the rule of law is maintained and every organ of the State is kept within the limits of the law. Thus, those concerned with the rule of law must remain unmindful and unruffled by the ripples caused by it. Rule of law does not mean protection to a fortunate few. The very existence of the rule of law and the fear of being brought to book operates as a deterrent to those who have no scruples in killing others if it suits their ends. In the words of Krishna Iyer, J., "the finest hour of the rule of law is when law disciplines life and matches promise with performance". In ***ADM, Jabalpur vs. Shivakant Shukla***, H.R. Khanna, J. in his dissenting judgment said, "rule of law is the antithesis of arbitrariness".

66. In this context, it would also be useful to refer to the notion of justice in the present case. It is said that justice should remain loyal to the rule of law. In our view, justice cannot be done without

adherence to rule of law. This Court has observed "the concept of "justice" encompasses not just the rights of the convict, but also of the victims of crime as well as of the law abiding section of society who look towards the courts as vital instruments for preservation of peace and the curtailment or containment of crime by punishing those who transgress the law. If the convicts can circumvent the consequences of their conviction, peace, tranquility and harmony in society will be reduced to chimera." (*vide* ***Surya Baksh Singh vs. State of UP, (2014) 14 SCC 222***)

67. This Court has further observed that the principle of justice is an inbuilt requirement of the justice delivery system and indulgence and laxity on the part of the law courts would be an unauthorized exercise of jurisdiction and thereby, put a premium on illegal acts. Courts have to be mindful of not only the spelling of the word "justice" but also the content of the concept. Courts have to dispense justice and not justice being dispensed with. In fact, the strength and authority of courts in India are because they are involved in dispensing justice. It should be their life aim.

68. The faith of the people in the efficacy of law is the saviour and succour for the sustenance of the rule of law. Justice is supreme and justice ought to be beneficial for the society. Law courts exist

for the society and ought to rise to the occasion to do the needful in the matter. Respect for law is one of the cardinal principles for an effective operation of the Constitution, law and the popular Government. The faith of the people is the source to invigorate justice intertwined with the efficacy of law. Therefore, it is the primary duty and the highest responsibility of this Court to correct arbitrary orders at the earliest and maintain the confidence of the litigant public in the purity of the fountain of justice and thereby respect rule of law.

69. In the same vein, we say that Article 142 of the Constitution cannot be invoked by us in favour of respondent Nos.3 to 13 to allow them to remain out of jail as that would be an instance of this Court's imprimatur to ignore rule of law and instead aid persons who are beneficiaries of orders which in our view, are null and void and therefore *non est* in the eye of law. Further, we cannot be unmindful of the conduct of respondent Nos.3 to 13, particularly respondent No.3 who has abused the process of law and the court in obtaining remission. In such a situation, arguments with an emotional appeal though may sound attractive become hollow and without substance when placed in juxtaposition with our reasoning on the facts and circumstances of this case. Therefore, in complying

with the principles of rule of law which encompasses the principle of equal protection of law as enshrined in Article 14 of the Constitution, we hold that 'deprivation of liberty' *vis-à-vis* respondent Nos.3 to 13 herein is justified in as much as the said respondents have erroneously and contrary to law been set at liberty. One cannot lose sight of the fact that the said respondents were all in prison for a little over fourteen years (with liberal paroles and furloughs granted to them from time to time). They had lost their right to liberty once they were convicted and were imprisoned. But, they were released pursuant to the impugned remission orders which have been quashed by us. Consequently, the status *quo ante* must be restored. We say so for another reason in the event respondent Nos.3 to 13 are inclined to seek remission in accordance with law, they have to be in prison as they cannot seek remission when on bail or outside the jail. Therefore, for these reasons we hold that the plea of 'protection of the liberty' of respondent Nos.3 to 13 cannot be accepted by us.

70. We wish to emphasize that in the instant case rule of law must prevail. If ultimately rule of law is to prevail and the impugned orders of remission are set-aside by us, then the natural consequences must follow. Therefore, respondent Nos.3 to 13 are

directed to report to the concerned jail authorities within two weeks from today.

Conclusion:

71. Consequently, we pass the following orders:

a. Writ Petition (Crl.) No.491 of 2022 is allowed in the aforesaid terms.

b. Other Writ Petitions stand disposed of.

c. Pending applications, if any, stand disposed of.

72. Before parting, we place on record our appreciation of all learned senior counsel, learned ASG and learned counsel appearing for the respective parties for their effective assistance in the matter.

.....J.
(B.V. NAGARATHNA)

.....J.
(UJJAL BHUYAN)

New Delhi;
January 08, 2024.

ITEM NO.1501 COURT NO.12 SECTION X
(For Judgment)

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Writ Petition (Criminal) No. 491/2022

BILKIS YAKUB RASOOL **Petitioner(s)**

VERSUS

UNION OF INDIA & ORS. **Respondent(s)**

([HEARD BY: HON. B.V. NAGARATHNA AND HON. UJJAL BHUYAN, JJ.]
IA No. 99431/2023 - APPROPRIATE ORDERS/DIRECTIONS
IA No. 189394/2022 - EX-PARTE AD-INTERIM RELIEF
IA No. 189393/2022 - EXEMPTION FROM FILING O.T.)

WITH
W.P.(Crl.) No. 326/2022 (PIL-W)
(FOR APPROPRIATE ORDERS/DIRECTIONS ON IA 121799/2022
FOR EXEMPTION FROM FILING AFFIDAVIT ON IA 121800/2022
IA No. 121799/2022 - APPROPRIATE ORDERS/DIRECTIONS
IA No. 121800/2022 - EXEMPTION FROM FILING AFFIDAVIT
IA No. 192621/2022 - EXEMPTION FROM FILING O.T.)

W.P.(Crl.) No. 352/2022 (PIL-W)
(List FOR APPROPRIATE ORDERS/DIRECTIONS ON IA 132343/2022
FOR APPROPRIATE ORDERS/DIRECTIONS ON IA 106376/2023
IA No. 106376/2023 - APPROPRIATE ORDERS/DIRECTIONS
IA No. 132343/2022 - APPROPRIATE ORDERS/DIRECTIONS)

W.P.(Crl.) No. 403/2022 (PIL-W)
(IA No. 149781/2022 - EXEMPTION FROM FILING O.T.)

W.P.(Crl.) No. 319/2022 (PIL-W)
(IA No. 160107/2023 - APPLICATION FOR PERMISSION
IA No. 177399/2023 - APPLICATION FOR PERMISSION
IA No. 175331/2023 - APPLICATION FOR PERMISSION
IA No. 175329/2023 - APPLICATION FOR PERMISSION
IA No. 175095/2023 - APPLICATION FOR PERMISSION
IA No. 175015/2023 - APPLICATION FOR PERMISSION
IA No. 120893/2022 - CLARIFICATION/DIRECTION
IA No. 125604/2022 - INTERVENTION APPLICATION
IA No. 131457/2022 - INTERVENTION/IMPLEADMENT
IA No. 135510/2023 - PERMISSION TO FILE ADDITIONAL DOCUMENTS/FACTS/ANNEXURES)

W.P.(Crl.) No. 422/2022 (PIL-W)

contd..

Date : 08-01-2024 These matters were called on for pronouncement of judgment today

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Mr. Amit Sharma, Adv.
Mr. K Ashwin, Adv.
Mr. Shreyas Balaji, Adv.
Mr. Vaibhav Dwivedi, Adv.

Hon'ble Mrs. Justice B.V. Nagarathna has pronounced the judgment of the Bench comprising Her Ladyship and Hon'ble Mr. Justice Ujjal Bhuyan.

The operative portion of the judgment reads as under -

"We wish to emphasize that in the instant case rule of law must prevail. If ultimately rule of law is to prevail and the impugned orders of remission are set-aside by us, then the natural consequences must follow. Therefore, respondent Nos.3 to 13 are directed to report to the concerned jail authorities within two weeks from today.

contd..

Conclusion:

Consequently, we pass the following orders:

a. **Writ Petition (Crl.) No.491 of 2022 is allowed in the aforesaid terms.**
b. **Other Writ Petitions stand disposed of.**
c. **Pending applications, if any, stand disposed of.**

Before parting, we place on record our appreciation of all learned senior counsel, learned ASG and learned counsel appearing for the respective parties for their effective assistance in the matter."

The Original Records received from the concerned Authorities be returned.

Pending applications, including the application(s) for intervention/impleadment stand disposed of.

(NEETU SACHDEVA)
Assistant Registrar-cum-PS

(MALEKAR NAGARAJ)
Court Master (NSH)

(signed reportable judgment is placed on the file)