IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

WRIT PETITION (CRL.) NO. 48 OF 2014

(With Connected Matters)

UNION OF INDIA ... Appellant(s)
VERSUS
V. SRIHARAN @ MURUGAN & ORS. ... Respondent(s)

Citations: 2015 INSC 895 | (2016) 7 SCC 1 | [2015] 14 S.C.R. 613

Bench: H.L. Dattu, C.J.I., F.M. Ibrahim Kalifulla, Pinaki Chandra Ghose, Abhay Manohar Sapre, U.U. Lalit, JJ.

Decided on: December 2, 2015

Page 1 JUDGMENT Reportable IN THE SUPREME COURT OF INDIA CRIMINAL ORIGINAL JURISDICTION WRIT PETITION (CRL.) NO. 48 OF 2014 Union of India …Petitioner VERSUS V. Sriharan @ Murugan & Ors. …Respondents With Writ Petition (Crl.) No.185/2014 Writ Petition (Crl.) No.150/2014 Writ Petition (Crl.) No.66/2014 Criminal Appeal No.1215/2011 J U D G M E N T FAKKIR MOHAMED IBRAHIM KALIFULLA, J. 1. The Petitioner has challenged the letter dated 19.02.2014 issued by the Chief Secretary, Government of Tamil Nadu to the Secretary, Government of India wherein the State of Tamil Nadu proposed to remit the sentence of life imprisonment and to release the respondent Nos. 1 to 7 in the Writ Petition who were convicted in the Rajiv Gandhi assassination case. As far as respondent Nos. 1 to 3 are concerned, originally they were imposed with the sentence of death. In the judgment reported as V. Sriharan alias Murugan v. Union of India & Ors. - (2014) 4 SCC 242, the sentence of death was commuted by this Court. Immediately thereafter, the impugned letter came to be issued by the State of Tamil Nadu which gave rise for the filing of the present Writ Petition. While dealing with the said Writ

Page 2 JUDGMENT Petition, the learned Judges thought it fit to refer seven questions for consideration by the Constitution Bench in the judgment reported as Union of India v. V. Sriharan @ Murugan & Ors. - 2014 (11) SCC 1 and that is how this Writ Petition has now been placed before us. In paragraph 52, the questions have been framed for consideration by this Bench. The said paragraph reads as under: “52.1 Whether imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission and whether as per the principles enunciated in paras 91 to 93 of Swamy Shraddananda(2), a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission? 52.2 Whether the “Appropriate Government” is permitted to exercise the power of remission under Section 432/433 of the Code after the parallel power has been exercised by the President under Article 72 or the Governor under Article 161 or by this Court in its Constitutional power under Article 32 as in this case? 52.3 Whether Section 432(7) of the Code clearly gives primacy to the Executive Power of the Union and excludes the Executive Power of the State where the power of the Union is co-extensive? 52.4 Whether the Union or the State has primacy over the subject matter enlisted in List III of the Seventh

Page 3 JUDGMENT Schedule to the Constitution of India for exercise of power of remission? 52.5 Whether there can be two Appropriate Governments in a given case under Section 432(7) of the Code? 52.6 Whether suo motu exercise of power of remission under Section 432(1) is permissible in the scheme of the section, if yes, whether the procedure prescribed in sub- clause (2) of the same Section is mandatory or not? 52.7 Whether the term “‘Consultation’” stipulated in Section 435(1) of the Code implies “‘Concurrence’”?” 2. It was felt that the questions raised were of utmost critical concern for the whole of the country, as the decision on the questions would determine the procedure for awarding sentence in criminal justice system. When we refer to the questions as mentioned in paragraph 52 and when we heard the learned Solicitor General for the petitioner and the counsel who appeared for the State of Tamil Nadu as well as respondent Nos. 1 to 7, we find that the following issues arise for our consideration: (a) Maintainability of this Writ Petition under Article 32 of the

Constitution by the Union of India. (b) (i) Whether imprisonment for life means for the rest of one's life with any right to claim remission? (ii) Whether as held in Shraddananda case a special

Page 4 JUDGMENT category of sentence; instead of death; for a term exceeding 14 years and put that category beyond application of remission can be imposed? (c) Whether the Appropriate Government is permitted to grant remission under Sections 432/433 Code of Criminal Procedure after the parallel power was exercised under Article 72 by the President and under Article 161 by the Governor of the State or by the Supreme Court under its Constitutional power(s) under Article 32? (d) Whether Union or the State has primacy for the exercise of power under Section 432(7) over the subject matter enlisted in List III of the Seventh Schedule for grant of remission? (e) Whether there can be two Appropriate Governments under Section 432(7) of the Code? (f) Whether the power under Section 432(1) can be exercised suo motu, if yes, whether the procedure prescribed under Section 432(2) is mandatory or not? (g) Whether the expression "'Consultation'" stipulated in Section 435(1) of the Code implies ''Concurrence''? 3. On the question of maintainability of the Writ Petition by the Union of India, according to learned Solicitor General, the same cannot be permitted to be raised in this Reference since the said question was not raised and considered in the order of Reference reported as Union of India v. V. Sriharan alias Murugan & Ors. (supra), and that when notice was issued in the Writ Petition to all the States on 09.07.2014 then also this question was not considered, that the scheme of Code of Criminal Procedure was to protect the interest of victims at the hands of accused which onerous responsibility is cast on the agency of the Central Government, namely, the CBI which took over the investigation on the very next

Page 5 JUDGMENT day of the crime and, therefore, the Union of India has every locus to file the writ petition, that since the issue raised in the Writ Petition cannot be worked out by way of suit under Article 131 of the Constitution since the accused are private parties, Writ Petition is the only remedy available, that after the questions of general importance are answered, the individual cases will go before the Regular Benches and, therefore, the Union of India is only concerned about the questions of general importance and lastly if Union of India is held to be the Appropriate Government in a case of this nature, then the State will be denuded of all powers under Sections 432/433 Code of Criminal Procedure and consequently any attempted exercise will fall to the ground. 4. Mr. Rakesh Dwivedi, learned Senior Counsel who appeared for the State of Tamil Nadu would, however, contend that the Writ Petition does not reflect any violation of fundamental right for invoking Article 32, that the maintainability question was raised as could be seen from the additional grounds raised by the Union of India in the Writ Petition itself though the question was not considered in the order of Reference. Mr. Ram Jethmalani, learned Senior Counsel who appeared for the private respondent(s) by referring to Articles 143 and 145(3) read along with the proviso to the

Page 6 JUDGMENT said sub-Article submitted that when no question of law was likely to arise, the referral itself need not have been made and, therefore, there is nothing to be answered. By referring to each of the sub-paragraphs in paragraph 52 of the Reference order, the learned Senior Counsel submitted that none of them would fall under the category of Constitutional question and, therefore, the Writ Petition was not maintainable. The learned Senior Counsel by referring to the correspondence exchanged between the State and the Union of India and the judgment reported as V. Sriharan alias Murugan v. Union of India & Ors. (supra) by which the sentence was commuted by this Court as stated in particular paragraph 32 of the said judgment, contended that in that judgment itself while it was held that commutation was made subject to the procedural checks mentioned in Section 432 and further substantive check in Section 433-A of the Code there is nothing more to be considered in this Writ Petition. 5. Having considered the objections raised on the ground of maintainability, having heard the respective counsel on the said question and having regard to the nature of issues which have been referred for consideration by this Constitution Bench, as rightly contended by the learned Solicitor General, we are also convinced that answer to those questions would involve substantial questions of law as to the interpretation of Articles 72, 73, 161 and 162, various

Page 7 JUDGMENT Entries in the Seventh Schedule consisting of Lists I to III as well as the corresponding provisions of Indian Penal Code and Code of Criminal Procedure and thereby serious public interest would arise for consideration and, therefore, we do not find it appropriate to reject the Reference on the narrow technical ground of maintainability. We, therefore, proceed to find an answer to the questions referred for consideration by this Constitution Bench. 6. Having thus steered clear of the preliminary objections raised by the respondents on the ground of maintainability even before entering into the discussion on the various questions referred, it will have to be stated that though in the Writ Petition the challenge

is to the letter of State of Tamil Nadu dated 19.02.2014, by which, before granting remission of the sentences imposed on the private respondent Nos.1 to 7, the State Government approached the Union of India by way of 'Consultation' as has been stipulated in Section 435(1) of Cr.P.C, the questions which have been referred for the consideration of the Constitution Bench have nothing to do with the challenge raised in the Writ Petition as against the letter dated 19.02.2014. Therefore, at this juncture we do not propose to examine the correctness or validity or the power of the State of Tamil Nadu in having issued the letter dated 19.02.2014. It may be, that depending upon the ultimate

Page 8 JUDGMENT answers rendered to the various questions referred for our consideration, we ourselves may deal with the challenge raised as against the letter of the State Government dated 19.02.2014 or may leave it open for consideration by the appropriate Bench which may deal with the Writ Petition on merits. 7. In fact in this context, the submission of Learned Solicitor General that the answers to the various questions referred for consideration by the Constitution Bench may throw light on individual cases which are pending or which may arise in future for being disposed of in tune with the answers that may be rendered needs to be appreciated. 8. Keeping the above factors in mind, precisely the nature of questions culminates as follows: (i) As to whether the imprisonment for life means till the end of convict's life with or without any scope for remission? (ii) Whether a special category of sentence instead of death for a term exceeding 14 years can be made by putting that category beyond grant of remission? (iii) Whether the power under Sections 432 and 433 Code of Criminal Procedure by Appropriate Government would be available even after the Constitutional power

Page 9 JUDGMENT 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? (iv) Whether State or the Central Government have the primacy under Section 432(7) of Code of Criminal Procedure? (v) Whether there can be two Appropriate Governments under Section 432(7)? (vi) Whether power under Section 432(1) can be exercised suo motu without following the procedure prescribed under section 432(2)? (vii) Whether the expression ''Consultation'' stipulated in 435(1) really means ''Concurrence''? 9. In order to appreciate the various contentions raised on the above questions by the respective parties and also to arrive at a just conclusion and render an appropriate answer, it is necessary to note the relevant provisions in the Constitution, the Indian Penal Code and the Code of Criminal Procedure The relevant provisions of the Constitution which require to be noted are Articles 72, 73, 161, 162, 246(4), 245(2), 249, 250 as well as some of the Entries in List I, II and III of the Seventh Schedule. In the Indian Penal Code the relevant provisions required to be stated are Sections 6, 7, 17, 45, 46, 53, 54, 55, 55A, 57, 65, 222, 392, 457, 458, 370, 376A 376B and 376E. In

Page 10 JUDGMENT the Code of Criminal Procedure, the provisions relevant for our purpose are Sections 2(y), 4, 432, 433, 434, 433A and 435. The said provisions can be noted as and when we examine those provisions and make an analysis of its application in the context in which we have to deal with those provisions in the case on hand. 10. Keeping in mind the above perception, we proceed to examine the provisions contained in the Constitution. Articles 72, 73, 161 and 162 of the Constitution read as under: "Article 72.- Power of President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases .- (1) the President 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- (a) In all cases where the punishment or sentence is by a Court Martial ; (b) In 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; (c) In all cases where the sentence is a sentence of death. (2) Nothing in sub-clause (a) of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court martial. (3) Nothing in sub-clause (c) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force."

Page 11 JUDGMENT Article 73. Extent of executive power of the Union (1) Subject to the provisions of this Constitution, the executive power of the Union shall extend— (a) to the matters with respect to which Parliament has power to make laws; and (b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement: Provided that the executive power referred to in sub- clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws. (2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer or

authority thereof could exercise immediately before the commencement of this Constitution. Article 161.- Power of Governor to grant pardons, etc., and to suspend, remit or commute sentences in certain cases The Governor 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. Article 162.- Extent of executive power of State

Page 12 JUDGMENT Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws: Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof. 11. Under Article 72, there is all pervasive power with the President as the Executive Head of the Union as stated under Article 53, to grant pardons, reprieves, respite and remission of punishments apart from the power to suspend, remit or commute the sentence of any person convicted of any offence. Therefore, the substantive part of sub-Article (1), when read, shows the enormous Constitutional power vested with the President to do away with the conviction imposed on any person of any offence apart from granting the lesser relief of reprieve, respite or remission of punishment. The power also includes power to suspend, remit or commute the sentence of any person convicted of any offence. Sub-Article (1), therefore, discloses that the power of the President can go to the extent of wiping of the conviction of the person of any offence by granting a pardon apart from the power to remit the punishment or to suspend or commute the sentence.

Page 13 JUDGMENT 12. For the present purpose, we do not find any need to deal with Article 72(1)(a). However, we are very much concerned with Article 72(1)(b) which has to be read along with Article 73 of the Constitution. Reading Article 72(1)(b) in isolation, it prescribes the power of the President for the grant of pardon, reprieve, remission, commutation etc. in 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. In this context when we refer to sub-Article (1) (a) of Article 73 which has set out the extent of Executive Power of the Union, it discloses that the said power is controlled only by the proviso contained therein. Therefore, reading Article 72(1)(b) along with Article 73(1)(a) in respect of a matter in which the absolute power of the President for grant of pardon etc. will remain in the event of express provisions in the Constitution or in any law made by the Parliament specifying the Executive Power of the Centre so prescribed. When we refer to Article 72(1)(c) the power of the President extends to all cases where the sentence is a sentence of death. 13. When we examine the above all pervasive power vested with the President, a small area is carved out under Article 72(3), wherein, in respect of cases where the sentence is a sentence of death, it is provided that irrespective of such enormous power vested with the

Page 14 JUDGMENT President relating to cases where sentence of death is the punishment, the power to suspend, remit or commute a sentence of death by the Governor would still be available under any law for the time being in force which fall within the Executive Power exercisable by the Governor of the State. Article 72(1)(c) read along with Article 72(3) is also referable to the proviso to Article 73(1) as well as Articles 161 and 162. 14. When we read the proviso, while making reference to the availability of the Executive Power of the Union under Article 73(1)(a), we find a restriction imposed in the exercise of such power in any State with reference to a matter with respect to which the Legislature of the State has also power to make laws, save as expressly provided in the Constitution or any law made by the Parliament conferment of Executive Power with the Centre. Therefore, the exercise of the Executive Power of the union under Article 73(1)(a) would be subject to the provisions of the said saving clause vis-a-vis any State. Therefore, reading Article 72(1)(a) and (3) along with the proviso to Article 73(1)(a) it emerges that wherever the Constitution expressly provides as such or a law is made by the Parliament that empowers all pervasive Executive Power of the Union as provided under Article 73(1)(a), the same could be extended in any State even if the dual power to make laws are available to the States as well.

Page 15 JUDGMENT 15. When we come to Article 161 which empowers the Governor to grant pardon etc. which is more or less identical to the power vested with the President under Article 72, though not to the full extent, the said Article empowers the Governor of a State to grant pardon, respite, reprieve or remission 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 will be necessary to keep in mind while reading Article 161, the nature and the extent to which the extended Executive Power of the Union is available under Article 73(1)(a), as controlled under the proviso to the said

Article. 16. Before deliberating upon the extent of Executive power which can also be exercised by the State, reference should also be made to Article 162 which prescribes the extent of Executive Power of the State. The Executive Power of the State under the said Article extends to the matters with respect to which the Legislature of the State has power to make laws. The proviso to Article 162 which is more or less identical to the words expressed in the proviso to Article 73(1)(a) when applied would result in a situation where the result of the consequences that would follow by applying the proviso to Article 73(1)(a) would be the resultant position.

Page 16 JUDGMENT 17. Pithily stated under the proviso to Article 73(1)(a) where there is an express provision in the Constitution or any law is made by the Parliament, providing for specific Executive Power with the Centre, then the Executive Power referred to in sub-clause (a) of sub-article (1) of Article 73 would be available to the Union and would also extend in any State to matters with respect to which the Legislature of the State has also powers to make laws. In other words, it can be stated that, in the absence of any such express provision in the Constitution or any law made by the Parliament in that regard, the enormous Executive Power of the Union stipulated in Article 73(1)(a), would not be available for the Union to be extended to any State to matters with respect to which the Legislature of the State has also powers to make laws. To put it differently, in order to enable the Executive Power of the Union to extend to any State with respect to which the Legislature of a State has also got power to make laws, there must be an express provision providing for Executive Power in the Constitution or any law made by the Parliament. Therefore, the said prescription, namely, the saving clause provided in the proviso to Article 73(1)(a) will be of paramount consideration for the Union to exercise its Executive Power while examining the provision providing for the extent of Executive Power of the State as contained in Article 162.

Page 17 JUDGMENT 18. Before examining the questions referred for consideration, it will be necessary to make a detailed analysis of the Constitutional and statutory provisions that would be required to be applied. When we refer to Article 161, that is the power of the Governor to grant pardon etc., as well as to suspend, remit etc., the last set of expressions contained in the said Article, namely, “to a matter to which the Executive Power of the State extends”, makes it clear that the exercise of such power by the Governor of State is restricted to the sentence of any person convicted of any offence against any law relating to a matter to which the Executive Power of the State is extended. In other words, such power of the Governor is regulated by the Executive Power of the State as has been stipulated in Article 162. In turn, we have to analyze the extent, to which the Executive Power of the Union as provided under Article 73(1)(a) regulated by the proviso to the said sub-article (1), which stipulates that the overall Executive Power of the Union is regulated to the extent to which the legislature of State has also got the power to make laws subject, however, to the express provisions in the Constitution or in any law made by Parliament. The proviso to Article 162 only re-emphasizes the said extent of coextensive legislative power of the State to make any laws at par with the Parliament which again will be subject to, as well as, limited by the express provision providing for Executive Power with the Centre in

Page 18 JUDGMENT the Constitution or in any law made by Parliament upon the Union or its authorities. In respect of the punishments or convictions of any offence against any law relating to a matter to which the Executive Power of the State extends, the power of pardon etc. or power to suspend or remit or commute etc., available to the Governor of a State under Article 161 would be available as has been stipulated therein. 19. In this respect, when we examine the opening set of expressions in Article 73(1), namely: “subject to the provisions of this Constitution, the Executive Power of the Union extend…….” It will be appropriate to refer to Articles 246(4), 245(2), 249 and 250. Each of the said Articles will show the specific power conferred on the Union in certain extraordinary situations as well as, in respect of areas which remain untouched by any of the States. Such powers referred to in these Articles are de hors the specific power provided under Article 73(1)(a), namely, with respect to matters for which Parliament has power to make laws. 20. In this context, it will also be relevant to analyze the scope of Article 162 which prescribes the extent of Executive Power of the State. Proviso to Article 162 in a way slightly expands the Executive

Page 19 JUDGMENT Power of the Union with respect to matters to which the State Legislature as well as the Parliament has power to make laws. In such matters the Executive Power of the State is limited and controlled to the extent to which the power of the Union as well as its authorities are expressly conferred by the Constitution or the laws made by Parliament. 21. If we apply the above Constitutional prescription of the Executive Power of the Union vis-à-vis the Executive Power of the State in the present context with which we are concerned, namely, the power of remission,

commutation etc., it is well known that the powers relating to those actions are contained, governed and regulated by the provisions under the Criminal Procedure Code, which is the law made by Parliament covered by Entry 1 in List III (viz.), Concurrent List of the Seventh Schedule of the Constitution. What is prescribed in the proviso to Article 73(1)(a) is in relation to “matters with respect to which the legislature of the State has also power to make laws” (Emphasis supplied). In other words, having regard to the fact that ‘criminal law is one of the items prescribed in List III, under Article 246(2), the State Legislature has also got power to make laws in that subject. It is also to be borne in mind that The Indian Penal Code and The Code of Criminal Procedure are the laws made by the Parliament.

Page 20 JUDGMENT 22. Therefore, the resultant position would be that, the Executive Power of the Union and its authorities in relation to grant of remission, commutation etc., are available and can be exercised by virtue of the implication of Article 73(1)(a) read along with its proviso and the exercise of such power by the State would be controlled and limited as stipulated in the proviso to Article 162 to the extent to which such control and limitations are prescribed in the Code of Criminal Procedure. 23. On an analysis of the above-referred Constitutional provisions, namely, 72, 73, 161 and 162 what emerges is: (a) The President is vested with 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 in 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 as has been provided under Article 73(1)(a) subject, however, to the stipulations contained in the proviso therein. (b) Insofar as cases where the sentence is sentence of death such power to suspend, remit or commute the sentence provided under Article 72(1) would be available even to the Governor of a State wherever such sentence of death came to be made under any law for the time being in force. (c) The Executive Power of the Union as provided under Article 73(1)(a) will also extend to a State if such Executive Power is expressly provided in the

Page 21 JUDGMENT Constitution or in any law made by the Parliament even with respect to matters with respect to which the Legislature of a State has also got the power to make laws. (d) The power of the Governor of any State to grant pardon etc., or to suspend, remit or commute sentence etc., would be available in respect of sentence of any person convicted of any offence against any law relating to a matter to which the Executive Power of the State extends and not beyond. (e) The extent of Executive Power of the State which extend to all matters with respect to which the legislature of the State has power to make laws is, however, subject to and limited by the Executive Power expressly conferred under the Constitution or by any law made by Parliament upon the Union or the authorities of the Union. 24. Keeping the above legal principles that emerge from a reading of Articles 72, 73, 161 and 162, further analysis will have to be made as to the extent to which any such restrictions have been made providing for exclusive power of the Union or co-extensive power of the State under the Constitution as well as the laws made by the Parliament with reference to which the Legislature of the State has also got the power to make laws. 25. The express provision contained in the Constitution prescribing the Executive Power of the Union as well as on its authorities can be found in Article 53. However, the nature of power stated therein has

Page 22 JUDGMENT nothing to do with the one referred to either in Article 73 (1)(a) or 162 of the Constitution. Under Articles 53 and 156 of the Constitution, the Executive Power of the Union and the State are to be exercised in the name of the President and the Governor of the State respectively. Though, under Articles 123, 213 and 239B of the Constitution, the power to issue Ordinance is vested with the President, the Governor and the Administrator of the Union, the State and the Union Territory of Puducherry respectively by way of an executive action, this Court has clarified that the exercise of such power would be on par with the Legislative action and not by way of an administrative action. Reference can be had to the decisions reported as K. Nagaraj and others v. State of Andhra Pradesh and another - 1985(1) SCC 523 @ 548 paragraph 31 and T. Venkata Reddy and others v. State of Andhra Pradesh - 1985(3) SCC 198 paragraph 14. 26. Under Article 246(2) of the Constitution, Parliament and the State have equal power to make laws with respect to any of the matters enumerated in List III of the Seventh Schedule. Under Article 246(4), the Parliament is vested with the power to make laws for any part of the territory of India which is not part of any State. Article 247 of the Constitution is referable to Entry 11A of List III of Seventh Schedule. The said Entry is for administration of justice, Constitution and organization of all Courts, except the Supreme Court and the

Page 23 JUDGMENT High Courts. Under Article 247, Parliament is empowered to provide for establishment of certain additional Courts. Whereas under Articles 233, 234 and 237 falling under Chapter VI of the Constitution appointment of District Judges, recruitment of persons other than District Judges, their service conditions and application of the provisions

under the said Chapter are all by the Governor of the State as its Executive Head subject, however in 'Consultation' with the High Court exercising jurisdiction in relation to such State. Here and now it can be noted that having regard to the specific provisions contained in Article 247 of the Constitution, the Central Government may enact a law providing for establishment of additional Courts but unless the Executive Power of the Union to the specific extent is expressly provided in the said Article or in the Statute if any, enacted for making the appointments then the saving clause under the proviso to Article 73(1) (a) will have no application. 27. Under Articles 249 and 250 of the Constitution, Parliament is empowered to legislate with respect to a matter in the State List in the National Interest and if a Proclamation of Emergency is in operation. Therefore, in exercise of said superscriptive power any law is made, it must be stated that exercise of any action by way of executive action would again be covered by the proviso to Article 73(1)(a) of the

Page 24 JUDGMENT Constitution. Similarly, under Article 251 of the Constitution where any inconsistency between the laws made by Parliament under Articles 249 and 250 and the laws made by State Legislature, the laws made by the Parliament whether made before or after the laws made by the State would to the extent of repugnancy prevail so long as the law made by the Parliament continues to have effect. Under Article 252 of the Constitution, de hors the powers prescribed under Articles 249 and 250, with the express resolution of two or more of State Legislatures, the Parliament is empowered to make laws applicable to such States. Further any such laws made can also be adopted by such other States whose Legislature passes necessary resolution to the said effect. Here again in the event of such situations governed by Articles 251 and 252 of Constitution emerge, the saving clause prescribed in the proviso to Article 73(1)(a) will have application. 28. Irrespective of special situations under which the laws made by the Parliament would prevail over any State to the extent of repugnancy, as stipulated in Articles 249, 250 and 251 of the Constitution, Article 254 provides for supervening power of the laws made by the Parliament by virtue of its competence, in respect of Entries found in the Concurrent List if any repugnancy conflicting with the such laws of Parliament by any of the laws of the State is

Page 25 JUDGMENT found, to that extent such laws of the State would become inoperative and the laws of the Parliament would prevail, subject, however, to stipulations contained in sub-Article (2) of Article 254 and the proviso. 29. Article 256 of the Constitution is yet another superscriptus (Latin) Executive Power of the Union obligating the Executive Power of the State to be subordinate to such power. Under the head Administrative relations falling under Chapter II of Part XI of the Constitution, Articles 256, 257, 258 and 258A are placed. Article 257(1) prescribes the Executive Power of the State to ensure that it does not impede or prejudice the exercise of the Executive Power of the Union apart from the authority to give such directions to State as may appear to the Government of India to be necessary for that purpose. Under Article 258, the Executive Head of the Union, namely, the President is empowered to confer the Executive Power of the Union on the States in certain cases. A converse provision is contained in Article 258A of the Constitution by which, the Executive Head of the State, namely, the Governor can entrust the Executive Power of the State with the Centre. Here again, we find that all these Articles are closely referable to the saving clause provided under the proviso to Article 73(1)(a) of the Constitution.

Page 26 JUDGMENT 30. The saving clause contained in Article 277 of the Constitution is yet another provision, whereunder, the authority of the Union in relation to levy of taxes can be allowed to be continued to be levied by the States and the local bodies, having regard to such levies being in vogue prior to the commencement of the Constitution. However, the Union is empowered to assert its authority by making a specific law to that effect by the Parliament under the very same Article. 31. Under the head 'Miscellaneous Financial Provisions' the Union or the State can make any grant for any public purpose, notwithstanding that the purpose is not one with respect to which Parliament or the Legislative of the State, as the case may be, can make laws. 32. Article 285 of the Constitution is yet another provision where the power of the Union to get its properties lying in a State to be exempted from payment of any tax. Similarly, under Article 286 restrictions on the State as to imposition of tax on the sale or purchase of goods outside the State is prescribed, which can be ascribed by a law of the Parliament. 33. Article 289 prescribes the extent of the executive and legislative power of the Union and the Parliament in relation to exemption of property and income of a State from Union taxation.

Page 27 JUDGMENT 34. The Executive Power of the Union and of each State as regards carrying on of any trade or business as to the acquisition, holding and disposal of property and the making of contracts for any purpose is prescribed under Article 298. 35. The above Articles 277, 282, 285, 286 and 289 fall under Part XII, Chapter I and Article 298 under Chapter III. 36. Articles 302, 303, 304 and 307 falling under Part XIII of the Constitution read along with Entry 42 of List

I, Entry 26 of List II and Entry 33 of List III provides the relative and corresponding executive and legislative power of the Union and the States with reference to Trade, Commerce and intercourse within the territory of India. 37. Articles 352 and 353 of the Constitution falling under Part XVIII of the Constitution prescribe the power of the President to declare Proclamation of Emergency under certain contingencies and the effect of proclamation of emergency. Under Article 355 of the Constitution, the duty has been cast on the Union to protect every State against external aggression and internal disturbance and to ensure that the Government of every State is carried on in accordance with the provisions of the Constitution. 38. Article 369 of the Constitution falling under Part XXI empowers the Parliament to make laws with respect to certain matters in the

Page 28 JUDGMENT State Lists for a limited period of five years and to cease after the said period by way of temporary and transitional measure. 39. Thus a close reading of the various Constitutional provisions on the Executive Power of the Centre and the State disclose the Constitutional scheme of the framers of the Constitution to prescribe different types of such Executive Powers to be exercised befitting different situations. However, the cardinal basic principle which weighed with the framers of the Constitution in a democratic federal set up is clear to the pointer that it should be based on “a series of agreements as well as series of compromises”. In fact, the temporary Chairman of the Constituent Assembly, the Late Dr. Sachidananda Sinha, the oldest Parliamentarian in India, by virtue of his long experience, advised; “that reasonable agreements and judicious compromises are nowhere more called for than in framing a Constitution for a country like India”. His ultimate request was that; “the Constitution that you are going to plan, may similarly be reared for ‘immortality’, if the rule of man may justly aspire to such a title, and it may be a structure of adamantine strength, which will outlast and overcome all present and future destructive forces”. With those lofty ideas, the Constitution came to be framed.

Page 29 JUDGMENT 40. We are, therefore, able to discern from a reading of the various provisions of the Constitution referred to above, to be read in conjunction with Articles 72, 73, 161 and 162, which disclose the dichotomy of powers providing for segregation, combination, specific exclusion (temporary or permanent), interrelation, voluntary surrender, one time or transitional or temporary measures, validating, superscriptus, etc. We are also able to clearly note that while the Executive Power of the State is by and large susceptible to being controlled by the Executive Power of the Union under very many circumstances specifically warranting for such control, the reverse is not the case. It is quite apparent that while the federal fabric of the set up is kept intact, when it comes to the question of National Interest or any other emergent or unforeseen situations warranting control in the nature of a super-terrestrial order (celestial) the Executive Power of the Union can be exercised like a bull in the China shop. 41. At the risk of repetition we can even quote some of such provisions in the Constitution which by themselves expressly provide for such supreme control, as well as, some other provisions which enable the Parliament to prescribe such provisions by way of an enactment as and when it warrants. For instance, under Article 247 of the Constitution, by virtue of Entry 11A of List III of the Seventh

Page 30 JUDGMENT Schedule, the Parliament is empowered to provide for establishment of certain additional Courts at times of need. In fact, it can be validly stated that the establishment of Fast Track Courts in the various States and appointment of ad hoc Judges at the level of Entry level District Judges though not in the cadre strength, came to be made taking into account the enormous number of undertrial prisoners facing Sessions cases of grievous offences in different States. This is one such provision which expressly provided for remedying the situation in the Constitution itself specifically covered by the proviso to Article 73(1)(a) and the proviso to Article 162 of the Constitution. Similar such provisions in the Constitution containing express powers can be noted in Articles 256, 257, 258, 285 and 286 of the Constitution. We can quote any number such Articles specifically and expressly providing for higher Executive Power of the Union governed by Article 73(1)(a) of the Constitution. 42. Quite apart, we can also cite some of the Articles under which the Parliament is enabled to promulgate laws which can specifically provide for specific Executive Power vesting with the Union to be exercisable in supersession of the Executive Power of the State. Such provisions are contained in Articles 246(2), 249, 250, 277, 286 and 369 of the Constitution.

Page 31 JUDGMENT 43. Having thus made an elaborate analysis of the Constitutional provisions relating to the relative Executive Power of the Union and the State as it exists and exercisable by the respective authorities in the given situations, we wish to examine the provisions specifically available in the Indian Penal Code, Criminal Procedure Code, as well as the Special enactment, namely, the Delhi Special Police Establishment Act under which the CBI operates, to understand the

extent of powers exercisable by the State and the Centre in order to find an answer to the various questions referred for our consideration. 44. In the Indian Penal Code, the provisions for our purpose can be segregated into two categories, namely, those by which various terms occurring in the Penal Code are defined or explained and those which specifically provide for particular nature of punishments that can be imposed for the nature of offence involved. Sections 17, 45, 46, 53, 54, 55, 55A are some of the provisions by which the expressions occurring in the other provisions of the Code are defined or explained. Under Section 17, the word 'Government' would mean the 'Central Government' or the 'State Government'. Under Section 45, the expression 'life' would denote the life of a human being, unless the contrary appears from the context. Similarly, the expression 'death' would mean death of a human being unless the contrary appears

Page 32 JUDGMENT from the context. Section 53 prescribes five kinds of punishments that can be imposed for different offences provided for in the Penal Code which ranges from the imposition of 'fine' to the capital punishment of 'death'. Section 54 empowers the Appropriate Government to commute the punishment of death imposed on an offender for any other punishment even without the consent of the offender. Similar such power in the case of life imprisonment is prescribed under Section 55 to be exercised by the Appropriate Government, but in any case for a term not exceeding fourteen years. Section 55A defines the term "Appropriate Government" with particular reference to Sections 54 and 55 of the Penal Code. 45. Having thus noted those provisions which highlight the various expressions used in the Penal Code to be understood while dealing with the nature of offences committed and the punishments to be imposed, the other provisions which specify the extent of punishment to be imposed are also required to be noted. For many of the offences, the prescribed punishments have been specified to be imposed upto a certain limit, namely, number of years or fine or with both. There are certain offences for which it is specifically provided that such punishment of imprisonment to be either life or a specific term, namely, seven years or ten years or fourteen years and so on. To quote a few, under Section 370(5), (6) and (7) for the offence of

Page 33 JUDGMENT trafficking in person, such punishments shall not be less than fourteen years, imprisonment for life to mean imprisonment for the remainder of that person's natural life apart from fine. Similar such punishments are provided under Sections 376(2), 376A, 376D and 376E. 46. At this juncture, without going into much detail, we only wish to note that the Penal Code prescribes five different punishments starting from fine to the imposition of capital punishment of Death depending upon the nature of offence committed. As far as the punishment of life imprisonment and death is concerned, it is specifically explained that it would mean the life of a human being or the death of a human being, with a rider, unless the contrary appears from the context, which means something written or spoken that immediately precede or follow or that the circumstances relevant to something under consideration to be seen in the context. For instance, when we refer to the punishment provided for the offence under Section 376A or 376D while prescribing life imprisonment as the maximum punishment that can be imposed, it is specifically stipulated that such life imprisonment would mean for the remainder of that person's natural life. We also wish to note that under Sections 54 and 55 of the Penal Code, the power of the Appropriate Government to commute the Death sentence and life sentence is

Page 34 JUDGMENT provided which exercise of power is more elaborately specified in the Code of Criminal Procedure. While dealing with the provisions of Criminal Procedure Code on this aspect we will make reference to such of those provisions in the Penal Code which are required to be noted and considered. In this context, it is also relevant to note the provisions in the Penal Code wherein the punishment of death is provided apart from other punishments. Such provisions are Sections 120B(1), 121, 132, 194, 195A, 302, 305, 307, 376A, 376E, 396 and 364A. The said provisions are required to be read along with Sections 366 to 371 and 392 of Code of Criminal Procedure. We will make a detailed reference to the above provisions of Penal Code and Code of Criminal Procedure while considering the second part of the first question referred for our consideration. 47. When we come to the provisions of Criminal Procedure Code, for our present purpose, we may refer to Sections 2(y), 432, 433, 433A, 434 and 435. Section 2(y) of the Code specifies that words and expressions used in the Code and not defined but defined in the Indian Penal Code (45 of 1860) will have the same meaning respectively assigned to them in that Code. Section 432 prescribes the power of the Appropriate Government to suspend or remit sentences. Section 432 (7) defines the expression 'Appropriate Government' for the purpose of Sections 432 and 433. Section 433

Page 35 JUDGMENT enumerates the power of the Appropriate Government for commutation of sentences, namely, fine, simple imprisonment, rigorous imprisonment, life imprisonment as well as the punishment of death. Section 433A which

came to be inserted by Act 45 of 1978 w.e.f. 18.12.1978, imposes a restriction on the power of Appropriate Government for remissions or suspensions or commutation of punishments provided under Sections 432 and 433 by specifying that exercise of such power in relation to the punishment of death or life imprisonment to ensure at least fourteen years of imprisonment. Under Section 434 in regard to sentences of death, concurrent powers of Central Government are prescribed which is provided for in Sections 432 and 433 upon the State Government. Section 435 of the Code imposes a restriction upon the State Government to consult the Central Government while exercising its powers under Sections 432 and 433 of the Code under certain contingencies. 48. In the case on hand, we are also obliged to refer to the provisions of the Delhi Special Police Establishment Act of 1946 (hereinafter referred to as the "Special Act") as the Reference which arose from the Writ Petition was dealt with under the said Act. The Special Act came to be enacted to make provision for the Constitution of special force in Delhi for the investigation of certain offences in the Union Territory. Under Section 3 of the Special Act, the Central Government can, by

Page 36 JUDGMENT Notification in the official Gazette, specify the offences or classes of offences which are to be investigated by the Delhi Special Police Establishment. Under Section 4, the superintendence of the Delhi Special Police Establishment vests with the Central Government. Section 5 of the Special Act, however, empowers the Central Government to extend the application of the said Act to any area of any State other than Union Territories, the powers and jurisdiction of the members of the Special Police Establishment for the investigation of any offences or classes of offences specified in a Notification under Section 3. However, such empowerment on the Central Government is always subject to the consent of the concerned State Government over whose area the Special Police Establishment can be allowed to operate. 49. Having noted the scope and ambit of the said Special Act, it is also necessary for our present purpose to refer to the communication of the Principal Secretary (Home) to Government of Tamil Nadu addressed to the Joint Secretary to Government of India, Department of Personal and Training dated 22.05.1991 forwarding the order of Government of Tamil Nadu, conveying its consent under Section 6 of the Special Act for the extension of the powers and jurisdiction of members of Special Police Establishment to investigate the case in Crime No.329/91 under Sections 302, 307, 326 IPC and under

Page 37 JUDGMENT Sections 3 and 5 of The Indian Explosive Substances Act, 1908 registered in Sriperumbudur P.S., Changai Anna (West) District, Tamil Nadu relating to the death of Late Rajiv Gandhi, former Prime Minister of India on 21.05.1991. Pursuant to the said communication and order of State of Tamil Nadu dated 22.05.1991, the Government of India, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training issued the Notification dated 23rd May, 1991 extending the powers and jurisdiction of the members of the Delhi Special Police Establishment to the whole of the State of Tamil Nadu for investigation of the offences registered in Crime No.329/91 in Sriperumbudur Police Station of Changai Anna (West) District of Tamil Nadu. Relevant part of the said Notification reads as under:- "a) Offences punishable under Section 302, 307, 326 of the Indian Penal Code, 1860 (Act No.45 of 1860) and under Section 5 and 6 of the Indian Explosive Substances Act 1908 (Act No.6 of 1903) relating to case in Crime No.329/91 registered in Sriperumbudur Police Station Changai-Anna (West) District, Tamil Nadu; b) Attempts, abetments and conspiracies in relation to or in connection with the offences mentioned above and any other offence or offences committed in the course of the same transaction arising out of the same facts."

Page 38 JUDGMENT 50. Having thus noted the relevant provisions in the Constitution, the Penal Code, Code of Criminal Procedure and the Special Act, we wish to deal with the question referred for our consideration in seriatim. The first question framed for the consideration of the Constitution Bench reads as under: 'Whether imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission and whether as per the principles enunciated in paras 91 to 93 of Swamy Shraddananda (supra), a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission'. 51. This question contains two parts. The first part poses a question as to whether life imprisonment as a punishment provided for under Section 53 of the Penal Code and as defined under Section 45 of the said Code means imprisonment for the rest of one's life or a convict has a right to claim remission. The second part is based on the ruling of Swamy Shraddananda (2) alias Murali Manohar Mishra v. State of Karnataka reported in (2008) 13 SCC 767. 52. Before answering the first part of this question, it will be worthwhile to refer to at least

two earlier Constitution Bench

Page 39 JUDGMENT decisions which cover this very question. The first one is reported as Gopal Vinayak Godse v. The State of Maharashtra and others - (1961) 3 SCR 440. The first question that was considered in that decision was: “whether, under the relevant statutory provisions, an accused who was sentenced to transportation for life could legally be imprisoned in one of the jails in India; and if so what was the term for which he could be so imprisoned”. We are concerned with the second part of the said question, namely, as to what was the term for which a life convict could be imprisoned. This Court answered the said question in the following words: “A sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or imprisonment for the whole of the remaining period of the convicted person’s natural life”. The learned Judges also took note of the various punishments provided for in Section 53 of the Penal Code before rendering the said answer. However, we do not find any reference to Section 45 of the Penal Code which defines ‘life’ to denote the life of a human being unless the contrary appears from the context.

Page 40 JUDGMENT 53. Having noted the ratio of the above said decision in this question, we can also profitably refer to a subsequent Constitution Bench decision reported as Maru Ram etc., etc. v. Union of India and another - 1981 (1) SCR 1196. At pages 1222-1223, this Court while endorsing the earlier ratio laid down in Godse (supra) held as under: “A possible confusion creeps into this discussion by equating life imprisonment with 20 years imprisonment. Reliance is placed for this purpose on Section 55 IPC and on definitions in various Remission Schemes. All that we need say, as clearly pointed out in Godse, is that these equivalents are meant for the limited objective of computation to help the State exercise its wide powers of total remissions. Even if the remissions earned have totaled upto 20 years, still the State Government may or may not release the prisoner and until such a release order remitting the remaining part of the life sentence is passed, the prisoners cannot claim his liberty. The reason is that life sentence is nothing less than life-long imprisonment. Moreover, the penalty then and now is the same – life term. And remission vests no right to release when the sentence is life imprisonment. No greater punishment is inflicted by Section 433A than the law annexed originally to the crime. Nor is any vested right to remission cancelled by compulsory 14 years jail life once we realize the truism that a life sentence is a sentence for a whole life. See Sambha Ji Krishan Ji. v. State of Maharashtra, AIR 1974 SC 147 and State of Madhya Pradesh v. Ratan Singh & Ors. [1976] Supp. SCR 552” (Emphasis added) Again at page 1248 it is held as under: “We follow Godse’s case (supra) to hold that imprisonment for life lasts until the last breath, and whatever the length of remissions earned, the prisoner can claim release only if the remaining sentence is remitted by Government”.

Page 41 JUDGMENT 54. In an earlier decision of this Court reported as Sambha Ji Krishan Ji v. State of Maharashtra - AIR 1974 SC 147, in paragraph 4 it is held as under: “4.…….As regards the third contention, the legal position is that a person sentenced to transportation for life may be detained in prison for life. Accordingly, this Court cannot interfere on the mere ground that if the period of remission claimed by him is taken into account, he is entitled to be released. It is for the Government to decide whether he should be given any remissions and whether he should be released earlier.” 55. Again in another judgment reported as State of Madhya Pradesh v. Ratan Singh and others - (1976) 3 SCC 470, it was held as under in paragraph 9: “9. From a review of the authorities and the statutory provisions of the Code of Criminal Procedure the following proposition emerge: (i) 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;” (Emphasis added)

Page 42 JUDGMENT It will have to be stated that Section 401 referred to therein is the corresponding present Section 432. 56. We also wish to make reference to the statement of law made by the Constitution Bench in Maru Ram (supra) at pages 1221 and 1222. At page 1221, it was held: “Here, again, if the sentence is to run until life lasts, remissions, quantified in time cannot reach a point of zero. This is the ratio of Godse.” 57. In the decision reported as Ranjit Singh alias Roda v. Union Territory of Chandigarh - (1984) 1 SCC 31 while commuting the death to life imprisonment, it was held that: “the two life sentences should run consecutively, to ensure that even if any remission is granted for the first life sentence, the second one can commence thereafter”. It is quite apparent that this Court by stating as above has affirmed the legal position that the life imprisonment only means the entirety of the life unless it is curtailed by remissions validly granted

under the Code of Criminal Procedure by the Appropriate Government or under Articles 72 and 161 of the Constitution by the Executive Head viz., the President or the Governor of the State, respectively.

Page 43 JUDGMENT 58. In the decision reported as Ashok Kumar alias Golu v. Union of India and others - (1991) 3 SCC 498, it was specifically ruled that the decision in Bhagirath (supra) does not run counter to Godse (supra) and Maru Ram (supra), paragraph 15 is relevant for our purpose, which reads as under: "15. It will thus be seen from the ratio laid down in the aforesaid two cases that where a person has been sentenced to imprisonment for life the remissions earned by him during his internment in prison under the relevant remission rules have a limited scope and must be confined to the scope and ambit of the said rules and do not acquire significance until the sentence is remitted under Section 432, in which case the remission would be subject to limitation of Section 433-A of the Code, or Constitutional power has been exercised under Article 72/161 of the Constitution. In Bhagirath case the question which the Constitution Bench was required to consider was whether a person sentenced to imprisonment for life can claim the benefit of Section 428 of the Code which, inter alia, provides for setting off the period of detention undergone by the accused as an undertrial against the sentence of imprisonment ultimately awarded to him. Referring to Section 57, IPC, the Constitution Bench reiterated the legal position as under: "The provision contained in Section 57 that imprisonment for life has to be reckoned as equivalent to imprisonment for 20 years is for the purpose of calculating fractions of terms of punishment. We cannot press that provision into service for a wider purpose." These observations are consistent with the ratio laid down in Godse and Maru Ram cases. Coming next to the question of set off under Section 428 of the Code, this Court held:

Page 44 JUDGMENT "The question of setting off the period of detention undergone by an accused as an undertrial prisoner against the sentence of life imprisonment can arise only if an order is passed by the appropriate authority under Section 432 or Section 433 of the Code. In the absence of such order, passed generally or specially, and apart from the provisions, if any, of the relevant Jail Manual, imprisonment for life would mean, according to the rule in Gopal Vinayak Godse, imprisonment for the remainder of life." We fail to see any departure from the ratio of Godse case; on the contrary the aforequoted passage clearly shows approval of that ratio and this becomes further clear from the final order passed by the court while allowing the appeal/writ petition. The court directed that the period of detention undergone by the two accused as undertrial prisoners would be set off against the sentence of life imprisonment imposed upon them, subject to the provisions contained in Section 433-A and, 'provided that orders have been passed by the appropriate authority under Section 433 of the Code of Criminal Procedure'. These directions make it clear beyond any manner of doubt that just as in the case of remissions so also in the case of set off the period of detention as undertrial would enure to the benefit of the convict provided the Appropriate Government has chosen to pass an order under Sections 432/433 of the Code. The ratio of Bhagirath case, therefore, does not run counter to the ratio of this Court in the case of Godse or Maru Ram." (underlining is ours) 59. In Subash Chander v. Krishan Lal and others - (2001) 4 SCC 458, this Court followed Godse (supra) and Ratan Singh (supra) and held that a sentence for life means a sentence for entire life of the

Page 45 JUDGMENT prisoner unless the Appropriate Government chooses to exercise its discretion to remit either the whole or part of the sentence under Section 401 of Code of Criminal Procedure. 60. Paragraphs 20 and 21 can be usefully referred to which read as under: "20. Section 57 of the Indian Penal Code provides that in calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for 20 years. It does not say that the transportation for life shall be deemed to be for 20 years. The position at law is that unless the life imprisonment is commuted or remitted by appropriate authority under the relevant provisions of law applicable in the case, a prisoner sentenced to life imprisonment is bound in law to serve the life term in prison. In Gopal Vinayak Godse v. State of Maharashtra the petitioner convict contended that as the term of imprisonment actually served by him exceeded 20 years, his further detention in jail was illegal and prayed for being set at liberty. Repelling such a contention and referring to the judgment of the Privy Council in Pandit Kishori Lal v. King Emperor this Court held: (SCR pp. 444-45) "If so, the next question is whether there is any provision of law whereunder a sentence for life imprisonment, without any formal remission by Appropriate Government, can be automatically treated as one for a definite period. No such provision is found in the Indian Penal Code, Code of Criminal Procedure or the Prisons Act. Though the Government of India stated before the Judicial Committee in the case cited supra that, having regard to Section 57 of the Indian Penal Code, 20 years' imprisonment was equivalent to a sentence of transportation for life, the Judicial Committee did not express its final opinion on that question. The Judicial Committee observed in that case thus at p. 10:

Page 46 JUDGMENT ‘Assuming that the sentence is to be regarded as one of twenty years, and subject to remission for good conduct, he had not earned remission sufficient to entitle him to discharge at the time of his application, and it was therefore rightly dismissed, but in saying this, their Lordships are not to be taken as meaning that a life sentence must and in all cases be treated as one of not more than twenty years, or that the convict is necessarily entitled to remission.’ Section 57 of the Indian Penal Code has no real bearing on the question raised before us. For calculating fractions of terms of punishment the section provides that transportation for life shall be regarded as equivalent to imprisonment for twenty years. It does not say that transportation for life shall be deemed to be transportation for twenty years for all purposes; nor does the amended section which substitutes the words ‘imprisonment for life’ for ‘transportation for life’ enable the drawing of any such all-embracing fiction. A sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or imprisonment for the whole of the remaining period of the convicted person’s natural life.” 21. In State of M.P. v. Ratan Singh this Court held that a sentence of imprisonment for life does not automatically expire at the end of 20 years, including the remissions. “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”, observed the Court (at SCC p. 477, para 9). To the same effect are the judgments in Sohan Lal v. Asha Ram, Bhagirath v. Delhi Admn. and the latest judgment in Zahid Hussein v. State of W.B. (Emphasis added) 61. Having noted the above referred to two Constitution Bench decisions in Godse (supra) and Maru Ram (supra) which were

Page 47 JUDGMENT consistently followed in the subsequent decisions in Sambha Ji Krishan Ji (supra), Ratan Singh (supra), Ranjit Singh (supra), Ashok Kumar (supra) and Subash Chander (supra). The first part of the first question can be conveniently answered to the effect that imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code only means imprisonment for rest of the life of the prisoner subject, however, to the right to claim remission, etc. as provided under Articles 72 and 161 of the Constitution to be exercisable by the President and the Governor of the State and also as provided under Section 432 of the Code of Criminal Procedure. 62. As far as remissions are concerned, it consists of two types. One type of remission is what is earned by a prisoner under the Prison Rules or other relevant Rules based on his/her good behavior or such other stipulations prescribed therein. The other remission is the grant of it by the Appropriate Government in exercise of its power under Section 432 Code of Criminal Procedure Therefore, in the latter case when a remission of the substantive sentence is granted under Section 432, then and then only giving credit to the earned remission can take place and not otherwise. Similarly, in the case of a life imprisonment, meaning thereby the entirety of one’s life, unless there is a commutation of such sentence for any specific period, there would be no scope to count the earned remission. In either case, it will again

Page 48 JUDGMENT depend upon an answer to the second part of the first question based on the principles laid down in Swamy Shraddananda (supra). 63. With that when we come to the second part of the first question which pertains to the special category of sentence to be considered in substitute of Death Penalty by imposing a life sentence i.e., the entirety of the life or a term of imprisonment which can be less than full life term but more than 14 years and put that category beyond application of remission which has been propounded in paragraphs 91 and 92 of Swamy Shraddananda (supra) and has come to stay as on this date. 64. To understand and appreciate the principle set down in the said decision, it will be necessary to note the special features analysed by this Court in the said judgment. At the very outset, it must be stated that the said decision was a well thought out one. This Court before laying down the principles therein noted the manner in which the appellant in that case comprehended a scheme with a view to grab the wealth of the victim, who was a married woman and who was seduced by the appellant solely with a view to make an unholy accumulation of the wealth at the cost of the victim, who went all out to get separated from her first husband by getting a divorce, married the appellant whole heartedly reposing very high amount of faith, trust and confidence and went to the extent of executing a Power of Attorney in

Page 49 JUDGMENT favour of the appellant for dealing with all her valuable properties. This Court has stated that when the victim at some point of time realized the evil designs of the appellant and found total mistrust in him, the appellant set the clock for her elimination. It will be more appropriate to note the observation made in the said judgment after noting the manner in which the process of elimination was schemed by the appellant. Paragraphs 28, 29 and 30 of the Swamy Shraddananda (2) (supra) judgment gives graphic description of the ‘witchcrafted’ scheme formulated and executed with

all perfection by the appellant and the said paragraphs can be extracted herein which are as under: “28. These are, in brief, the facts of the case. On these facts, Mr. Sanjay Hegde, learned counsel for the State of Karnataka, supported the view taken by Katju, J. (as indeed by the High Court and the trial court) and submitted that the appellant deserved nothing less than death. In order to bring out the full horror of the crime Mr. Hegde reconstructed it before the Court. He said that after five years of marriage Shakereh’s infatuation for the appellant had worn thin. She could see through his fraud and see him for what he was, a lowly charlatan. The appellant could sense that his game was up but he was not willing to let go of all the wealth and the lavish lifestyle that he had gotten used to. He decided to kill Shakereh and take over all her wealth directly. 29. In furtherance of his aim he conceived a terrible plan and executed it to perfection. He got a large pit dug up at a “safe” place just outside their bedroom. The person who was to lie into it was told that it was intended for the construction of a soak pit for the toilet.

Page 50 JUDGMENT He got the bottom of one of the walls of the bedroom knocked off making a clearing to push the wooden box through; God only knows saying what to the person who was to pass through it. He got a large wooden box (7 × 2 × 2 ft) made and brought to 81, Richmond Road where it was kept in the guest house, mercifully out of sight of the person for whom it was meant. Having thus completed all his preparations he administered a very heavy dose of sleeping drugs to her on 28-5-1991 when the servant couple, on receiving information in the morning regarding a death in their family in a village in Andhra Pradesh asked permission for leave and some money in advance. However, before giving them the money asked for and letting them go, the appellant got the large wooden box brought from the guest house to the bedroom by Raju (with the help of three or four other persons called for the purpose) where, according to Raju, he saw Shakereh (for the last time) lying on the bed, deep in sleep. After the servants had gone away and the field was clear the appellant transferred Shakereh along with the mattress, the pillow and the bed sheet from the bed to the box, in all probability while she was still alive. He then shut the lid of the box and pushed it through the opening made in the wall into the pit, dug just outside the room, got the pit filled up with earth and the surface cemented and covered with stone slabs. 30. What the appellant did after committing murder of Shakereh was, according to Mr. Hegde even more shocking. He continued to live, like a ghoul, in the same house and in the same room and started a massive game of deception. To Sabah, who desperately wanted to meet her mother or at least to talk to her, he constantly fed lies and represented to the world at large that Shakereh was alive and well but was simply avoiding any social contacts. Behind the facade of deception he went on selling Shakereh’s properties as quickly as possible to convert those into cash for easy appropriation. In conclusion, Mr. Hegde submitted that it was truly a murder most foul and Katju, J. was perfectly right in holding that this case came under the first, second and the fifth of the five categories, held by

Page 51 JUDGMENT this Court as calling for the death sentence in Machhi Singh v. State of Punjab.” 65. After noting the beastly character of the appellant, this Court made a detailed reference to those decisions in which the “rarest of rare case” principle was formulated and followed subsequently, namely, Machhi Singh and ors. v. State of Punjab reported in (1983) 3 SCC 470, Bachan Singh v. State of Punjab reported in (1980) 2 SCC 684, Jag Mohan Singh v. State of U.P. reported in (1973) 1 SCC 20. While making reference to the said decisions and considering the submissions made at the Bar that for the sake of saving the Constitutional validity of the provision providing for “Death Penalty” this Court must step in to clearly define its scope by unmistakably making the types of grave murders and other capital offence that would attract death penalty rather than the alternative punishment of imprisonment for life. His Lordship Justice Aftab Alam, the author of the judgment has expressed the impermissibility of this Court in agreeing to the said submission in his own inimitable style in paragraphs 34, 36, 43, 45 and 47 in the following words: "34. As on the earlier occasion, in Bachan Singh too the Court rejected the submission. The Court did not accept the contention that asking the Court to state special reasons for awarding death sentence amounted to leaving the Court to do something that was essentially a legislative function. The Court held that the exercise of judicial discretion on well-established

Page 52 JUDGMENT principles and on the facts of each case was not the same as to legislate. On the contrary, the Court observed, any attempt to standardise or to identify the types of cases for the purpose of death sentence would amount to taking up the legislative function. The Court said that a “standardisation or sentencing discretion is a policy matter which belongs to the sphere of legislation” and “the Court would not by overleaping its bounds rush to do what Parliament, in its wisdom, warily did not do”. 36. Arguing against standardisation of cases for the purpose of death sentence the Court observed that even within a single category offence there are infinite, unpredictable and unforeseeable variations. No two

cases are exactly identical. There are countless permutations and combinations which are beyond the anticipatory capacity of the human calculus. The Court further observed that standardisation of the sentencing process tends to sacrifice justice at the altar of blind uniformity. 43. In Machhi Singh the Court crafted the categories of murder in which "the community" should demand death sentence for the offender with great care and thoughtfulness. But the judgment in Machhi Singh was rendered on 20-7-1983, nearly twenty-five years ago, that is to say a full generation earlier. A careful reading of the Machhi Singh categories will make it clear that the classification was made looking at murder mainly as an act of maladjusted individual criminal(s). In 1983 the country was relatively free from organised and professional crime. Abduction for ransom and gang rape and murders committed in the course of those offences were yet to become a menace for the society compelling the legislature to create special slots for those offences in the Penal Code. At the time of Machhi Singh , Delhi had not witnessed the infamous Sikh carnage. There was no attack on the country's Parliament. There were no bombs planted by terrorists killing completely innocent people, men, women and children in dozens with sickening frequency. There were no private armies. There were

Page 53 JUDGMENT no mafia cornering huge government contracts purely by muscle power. There were no reports of killings of social activists and "whistle-blowers". There were no reports of custodial deaths and rape and fake encounters by police or even by armed forces. These developments would unquestionably find a more pronounced reflection in any classification if one were to be made today. Relying upon the observations in Bachan Singh, therefore, we respectfully wish to say that even though the categories framed in Machhi Singh provide very useful guidelines, nonetheless those cannot be taken as inflexible, absolute or immutable. Further, even in those categories, there would be scope for flexibility as observed in Bachan Singh itself. 45. But the relative category may also be viewed from the numerical angle, that is to say, by comparing the case before the Court with other cases of murder of the same or similar kind, or even of a graver nature and then to see what punishment, if any was awarded to the culprits in those other cases. What we mean to say is this, if in similar cases or in cases of murder of a far more revolting nature the culprits escaped the death sentence or in some cases were even able to escape the criminal justice system altogether, it would be highly unreasonable and unjust to pick on the condemned person and confirm the death penalty awarded to him/her by the courts below simply because he/she happens to be before the Court. But to look at a case in this perspective this Court has hardly any field of comparison. The Court is in a position to judge "the rarest of rare cases" or an "exceptional case" or an "extreme case" only among those cases that come to it with the sentence of death awarded by the trial court and confirmed by the High Court. All those cases that may qualify as the rarest of rare cases and which may warrant death sentence but in which death penalty is actually not given due to an error of judgment by the trial court or the High Court automatically fall out of the field of comparison. 47. We are not unconscious of the simple logic that in case five crimes go undetected and unpunished that is

Page 54 JUDGMENT no reason not to apply the law to culprits committing the other five crimes. But this logic does not seem to hold good in case of death penalty. On this logic a convict of murder may be punished with imprisonment for as long as you please. But death penalty is something entirely different. No one can undo an executed death sentence." (underlining is ours) 66. After noting the above principles, particularly culled out from the decision in which the very principle namely "the rarest of rare cases", or an "exceptional case" or an "extreme case", it was noted that even thereafter, in reality in later decisions neither the rarest of rare case principle nor Machhi Singh (supra) categories were followed uniformly and consistently. In this context, the learned Judges also noted some of the decisions, namely, Aloke Nath Dutta and Ors. v. State of West Bengal reported in (2007) 12 SCC 230. This Court in Swamy Shraddananda (supra) also made a reference to a report called "Lethal Lottery, the Death Penalty in India" compiled jointly by Amnesty International India and People's Union for Civil Liberties, Tamil Nadu, and Puduchery wherein a study of the Supreme Court judgments in death penalty cases from 1950 to 2006 was referred and one of the main facets made in the report (Chapters 2 to 4) was about the Court's lack of uniformity and consistency in awarding death sentence. This Court also noticed the ill effects it caused by reason of such

Page 55 JUDGMENT inconsistencies and lamented over the same in the following words in paragraph 52: "52. The inability of the criminal justice system to deal with all major crimes equally effectively and the want of uniformity in the sentencing process by the Court lead to a marked imbalance in the end results. On the one hand there appears a small band of cases in which the murder convict is sent to the gallows on confirmation of his death penalty by this Court and on the

other hand there is a much wider area of cases in which the offender committing murder of a similar or a far more revolting kind is spared his life due to lack of consistency by the Court in giving punishments or worse the offender is allowed to slip away unpunished on account of the deficiencies in the criminal justice system. Thus the overall larger picture gets asymmetric and lopsided and presents a poor reflection of the system of criminal administration of justice. This situation is a matter of concern for this Court and needs to be remedied." 67. We fully endorse the above anguish expressed by this Court and as rightly put, the situation is a matter of serious concern for this Court and wish to examine whether the approach made thereafter by this Court does call for any interference or change or addition or mere confirmation. After having expressed its anguish in so many words this Court proceeded to examine the detailed facts of the appellant's role in that case and noted the criminal magnanimity shown by him in killing the victim by stating that he devised a plan so that the victim could not know till the end and even for a moment that she was betrayed by the one she trusted most and that the way of killing

Page 56 JUDGMENT appears quite ghastly it may be said that it did not cause any mental or physical pain to the victim and that at least before the High Court he confessed his guilt. It must be stated that the manner in which the victim was sedated and buried while she was alive in the chamber no one would knew whether at all she regained her senses and if so what amount of torments and trauma she would have undergone before her breath came to a halt. Nevertheless, nobody had the opportunity ever to remotely imagine the amount of such ghastly, horrendous gruesome feeling the victim would have undergone in her last moments. In these circumstances, it was further expressed by this Court that this Court must not be understood to mean that the crime committed by the appellant in that case was not grave or the motive behind the crime was not highly depressed. With these expressions, it was held that this Court was hesitant in endorsing the death penalty awarded to him by the trial court and confirmed by the High Court. The hangman's noose was thus taken off the appellant's neck. 68. If one were to judge the case of the said appellant in the above background of details from the standpoint of the victim's side, it can be said without any hesitation that one would have unhesitatingly imposed the death sentence. That may be called as the human reaction of anyone who is affected by the conduct of the convict of such a ghastly crime. That may even be called as the reaction or

Page 57 JUDGMENT reflection in the common man's point of view. But in an organized society where the Rule of Law prevails, for every conduct of a human being, right or wrong, there is a well set methodology followed based on time tested, well thought out principles of law either to reward or punish anyone which was crystallized from time immemorial by taking into account very many factors, such as the person concerned, his or her past conduct, the background in which one was brought up, the educational and knowledge base, the surroundings in which one was brought up, the societal background, the wherewithal, the circumstances that prevailed at the time when any act was committed or carried out whether there was any preplan prevalent, whether it was an individual action or personal action or happened at the instance of anybody else or such action happened to occur unknowingly, so on so forth. It is for this reason, we find that the criminal law jurisprudence was developed by setting forth very many ingredients while describing the various crimes, and by providing different kinds of punishment and even relating to such punishment different degrees, in order to ensure that the crimes alleged are befitting the nature and extent of commission of such crimes and the punishments to be imposed meets with the requirement or the gravity of the crime committed.

Page 58 JUDGMENT 69. Keeping the above perception of the Rule of Law and the settled principle of Criminal Law Jurisprudence, this Court expressed its concern as to in what manner even while let loose of the said appellant of the capital punishment of death also felt that any scope of the appellant being let out after 14 years of imprisonment by applying the concept of remission being granted would not meet the ends of justice. With that view, this Court expressed its well thought out reasoning for adopting a course whereby such heartless, hardened, money minded, lecherous, paid assassins though are not meted out with the death penalty are in any case allowed to live their life but at the same time the common man and the vulnerable lot are protected from their evil designs and treacherous behavior. Paragraph 56 can be usefully referred to understand the lucidity with which the whole issue was understood and a standard laid down for others to follows: "56. But this leads to a more important question about the punishment commensurate to the appellant's crime. The sentence of imprisonment for a term of 14 years, that goes under the euphemism of life imprisonment is equally, if not more, unacceptable. As a matter of fact, Mr. Hegde informed us that the appellant was taken in custody on 28-3-1994 and submitted that by virtue of the provisions relating to remission, the sentence of life imprisonment, without any

qualification or further direction would, in all likelihood, lead to his release from jail in the first quarter of 2009 since he has already completed more than 14 years of incarceration. This eventuality is simply not acceptable to this Court. What then is the answer? The answer lies in breaking this standardisation that, in practice, renders the

Page 59 JUDGMENT sentence of life imprisonment equal to imprisonment for a period of no more than 14 years; in making it clear that the sentence of life imprisonment when awarded as a substitute for death penalty would be carried out strictly as directed by the Court. This Court, therefore, must lay down a good and sound legal basis for putting the punishment of imprisonment for life, awarded as substitute for death penalty, beyond any remission and to be carried out as directed by the Court so that it may be followed, in appropriate cases as a uniform policy not only by this Court but also by the High Courts, being the superior courts in their respective States. A suggestion to this effect was made by this Court nearly thirty years ago in Dalbir Singh v. State of Punjab. In para 14 of the judgment this Court held and observed as follows: (SCC p. 753) "14. The sentences of death in the present appeal are liable to be reduced to life imprisonment. We may add a footnote to the ruling in Rajendra Prasad case. Taking the cue from the English legislation on abolition, we may suggest that life imprisonment which strictly means imprisonment for the whole of the men's life but in practice amounts to incarceration for a period between 10 and 14 years may, at the option of the convicting court, be subject to the condition that the sentence of imprisonment shall last as long as life lasts, where there are exceptional indications of murderous recidivism and the community cannot run the risk of the convict being at large. This takes care of judicial apprehensions that unless physically liquidated the culprit may at some remote time repeat murder." We think that it is time that the course suggested in Dalbir Singh should receive a formal recognition by the Court." (underlining is ours) 70. Even after stating its grounds for the above conclusion, this Court also noticed the earlier decisions of this Court wherein such

Page 60 JUDGMENT course was adopted, namely, in Dalbir Singh and ors. v. State of Punjab - (1979) 3 SCC 745, Subash Chander (supra), Shri Bhagavan v. State of Rajasthan - (2001) 6 SCC 296, Ratan Singh (supra), Bhagirath v. Delhi Administration - (1985) 2 SCC 580, Prakash Dhawal Khairnar (Patil) v. State of Maharashtra - (2002) 2 SCC 35, Ram Anup Singh and Ors. v. State of Bihar - (2002) 6 SCC 686, Mohd. Munna v. Union of India and Ors. - (2005) 7 SCC 417, Jayawant Dattatraya Suryarao v. State of Maharashtra - (2001) 10 SCC 109, Nazir Khan and others v. State of Delhi - (2003) 8 SCC 461, Ashok Kumar (supra) and Satpal alias Sadhu v. State of Haryana and ors.-(1992) 4 SCC 172. 71. Having thus noted the need for carrying out a special term of imprisonment to be imposed, based on sound legal principles, this Court also considered some of the decisions of this Court wherein the mandate of Section 433 Code of Criminal Procedure was considered at length wherein it was held that exercise of power under Section 433 was an executive discretion and the High Court in its review jurisdiction had no power to commute the sentence imposed where a minimum sentence was provided. It was a converse situation which this Court held has no application and the submissions were rejected as wholly misconceived. Thereafter, a detailed reference was made to

Page 61 JUDGMENT Sections 45, 53, 54, 55, 55A, 57 and other related provisions in the Indian Penal Code to understand the sentencing procedure prevalent in the Code and after making reference to the provisions relating to grant of remission in Sections 432, 433, 433A, 434 and 435 of Code of Criminal Procedure concluded as under in paragraphs 91 and 92: "91. The legal position as enunciated in Pandit Kishori Lal, Gopal Vinayak Godse, Maru Ram, Ratan Singh and Shri Bhagwan and the unsound way in which remission is actually allowed in cases of life imprisonment make out a very strong case to make a special category for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond the application of remission. 92. The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the

Page 62 JUDGMENT options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all." (Emphasis added) 72. Thus on a detailed reference to Swamy Shraddananda (supra) judgment, it can be straight away held in our view, that no more need be stated. But we wish to make reference to certain paragraphs from the concurring judgment of Justice Fazal Ali in Maru Ram (supra), pages 1251, 1252 and 1256 are relevant which are as under: "The dominant purpose and the avowed object of the legislature in introducing Section 433-A in the Code of Criminal Procedure unmistakably seems to be to secure a deterrent punishment for heinous offences committed in a dastardly, brutal or cruel fashion or offences committed against the defence or security of the country. 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 realizes 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. xxx xxx xxx The question, therefore, is — should the country take the risk of innocent lives being lost at the hands of

Page 63 JUDGMENT 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. xxx xxx xxx xxx xxx xxx Taking into account the modern trends in penology there are very rare cases where the courts impose a sentence of death and even if in some cases where such sentences are given, by the time the case reaches this Court, a bare minimum of the cases are left where death sentences are upheld. Such cases are only those in which imposition of a death sentence becomes an imperative necessity having regard to the nature and character of the offences, the antecedents of the offender and other factors referred to in the Constitution Bench judgment of this Court in Bachan Singh v. State of Punjab. In these circumstances, I am of the opinion that the Parliament in its wisdom chose to act in order to prevent criminals committing heinous crimes from being released through easy remissions or substituted form of punishments without undergoing at least a minimum period of imprisonment of fourteen years which may in fact act as a sufficient deterrent which may prevent criminals from committing offences. In most parts of our country, particularly in the north, cases are not uncommon where even a person sentenced to imprisonment for life and having come back after earning a number of remissions has committed repeated offences. The mere fact that a long-term sentence or for that matter a sentence of death has not produced useful results cannot support the argument either for abolition of death sentence or for reducing the sentence of life imprisonment from 14 years to something less. The question is not what has happened because of the provisions of the Penal Code but what would have happened if deterrent

Page 64 JUDGMENT punishments were not given. In the present distressed and disturbed atmosphere we feel that if deterrent punishment is not resorted to, there will be complete chaos in the entire country and criminals will be let loose endangering the lives of thousands of innocent people of our country. In spite of all the resources at its hands, it will be difficult for the State to protect or guarantee the life and liberty of all the citizens, if criminals are let loose and deterrent punishment is either abolished or mitigated. Secondly, while reformation of the criminal is only one side of the picture, rehabilitation of the victims and granting relief from the tortures and sufferings which are caused to them as a result of the offences committed by the criminals is a factor which seems to have been completely overlooked while defending the cause of the criminals for abolishing deterrent sentences. Where one person commits three murders it is illogical to plead for the criminal and to argue that his life should be spared, without at all considering what has happened to the victims and their family. A person who has deprived another person completely of his liberty forever and has endangered the liberty of his family has no right to ask the court to uphold his liberty. Liberty is not a one-sided concept, nor does Article 21 of the Constitution contemplate such a concept. If a person commits a criminal offence and punishment has been given to him by a procedure established by law which is free and fair and where the accused has been fully heard, no question of violation of Article 21 arises when the question of punishment is being considered. Even so, the provisions of the Code of Criminal Procedure of 1973 do provide an opportunity to the offender, after his guilt is proved, to show circumstances under which

an appropriate sentence could be imposed on him. These guarantees sufficiently comply with the provisions of Article 21. Thus, it seems to me that while considering the problem of penology we should not overlook the plight of victimology and the sufferings of the people who die, suffer or are maimed at the hands of criminals." (Emphasis added)

Page 65 JUDGMENT 73. The above chiseled words of the learned Judge throw much light on the sentencing aspect of different criminals depending upon the nature of crimes committed by them. Having noted the above observations of the learned Judge which came to be made about three and a half decades ago, we find that what was anticipated by the learned Judge has now come true and today we find that criminals are let loose endangering the lives of several thousand innocent people in our country. Such hardened criminals are in the good books of several powerful men of ill-gotten wealth and power mongers for whom they act as paid assassins and Goondas. Lawlessness is the order of the day. Having got the experience of dealing with cases involving major crimes, we can also authoritatively say that in most of the cases, even the kith and kin, close relatives, friends, neighbours and passersby who happen to witness the occurrence are threatened and though they initially give statements to the police, invariably turn hostile, apparently because of the threat meted out to them by the hardened and professional criminals and gangsters. As was anticipated by the learned Judge, it is the hard reality that the State machinery is not able to protect or guarantee the life and liberty of common man. In this scenario, if any further lenience is shown in the matter of imposition of sentence, at least in respect of capital punishment or life imprisonment, it can only be said that that will only lead to further

Page 66 JUDGMENT chaos and there will be no Rule of Law, but only anarchy will rule the country enabling the criminals and their gangs to dictate terms. Therefore, any sympathy shown will only amount to a misplaced one which the courts cannot afford to take. Applying these well thought out principles, it can be said that the conclusions drawn by this Court in Swamy Shraddananda (supra) is well founded and can be applied without anything more, at least until as lamented by Justice Fazal Ali the necessary facilities, the requisite education and the appropriate climate created to foster a sense of repentance and penitence in a criminal is inducted so that he may undergo such a mental or psychological revolution that he realizes the consequence of playing with human lives. It is also appropriate where His Lordship observed that in the world of today and particularly in our country, this ideal is yet to be achieved and that it will take a long time to reach that goal. 74. Therefore, in the present juncture, when we take judicial notice of the crime rate in our country, we find that criminals of all types of crimes are on the increase. Be it white collar crimes, vindictive crimes, crimes against children and women, hapless widow, old aged parents, sexual offences, retaliation murder, planned and calculated murder, through paid assassins, gangsters operating in the developed cities indulging in killing for a price, kidnapping and killing for ransom, killing by terrorists and militants, organized crime syndicates, etc., are

Page 67 JUDGMENT the order of the day. While on the one side peace loving citizens who are in the majority are solely concerned with their peaceful existence by following the Rule of Law and aspire to thrive in the society anticipating every protection and support from the governance of the State and its administration, it is common knowledge, as days pass on it is a big question mark whether one will be able to lead a normal peaceful life without being hindered at the hands of such unlawful elements, who enjoy in many cases the support of very many highly placed persons. In this context, it will be relevant to note the PRECEPTS OF LAW which are: to live honourably, to injure no other man and to render everyone his due. There are murders and other serious offences orchestrated for political rivalry, business rivalry, family rivalry, etc., which in the recent times have increased manifold and in this process, the casualty are the common men whose day to day functioning is greatly prejudiced and people in the helm of affairs have no concern for them. Even those who propagate for lessening the gravity of imposition of severe punishment are unmindful of such consequences and are only keen to indulge in propagation of rescuing the convicts from being meted out with appropriate punishments. We are at a loss to understand as to for what reason or purpose such propagation is carried on and what benefit the society at large is going to derive.

Page 68 JUDGMENT 75. Faced with the above situation prevailing in the Society, it is also common knowledge that the disposal of cases by Courts is getting delayed for variety of reasons. Major among them are the disproportionate Judges: population ratio and lack of proper infrastructure for the institution of judiciary. Sometime in 2009 when the statistics was taken it was found that the Judges:population ratio was 8 Judges for 1 million population in India, whereas it was 50 Judges per million population in western countries. The above factors also added to the large pendency of criminal and civil cases in the Courts which results in abnormal delay in the guilty getting punished then and there. In the normal course, it takes a minimum of a year for a murder case being tried and concluded, while the appeal arising out of such

concluded trial at the High Court level takes not less than 5 to 10 years and when it reaches this Court, it takes a minimum of another 5 years for the ultimate conclusion. Such enormous delay in the disposal of cases also comes in handy for the criminals to indulge in more and more of such heinous crimes and in that process, the interest of the common man is sacrificed. 76. Keeping the above hard reality in mind, when we examine the issue, the question is 'whether as held in Shraddananda (supra), a special category of sentence; instead of death; for a term exceeding 14 years and putting that category beyond application of remission is

Page 69 JUDGMENT good in law? When we analyze the issue in the light of the principles laid down in very many judgments starting from Godse (supra), Maru Ram (supra), Sambha Ji Krishan Ji (supra), Ratan Singh (supra), it has now come to stay that when in exceptional cases, death penalty is altered as life sentence, that would only mean rest of one's life span. 77. In this context, the principles which weighed with this Court in Machhi Singh (supra) to inflict the capital punishment of death were the manner of commission of murder, motive for commission of murder, anti-social or socially abhorrent nature of the crime, magnitude of crime and the targeted personality of victim of murder. The said five categories cannot be held to be exhaustive. It cannot also be said even if a convict falls under one or the other of the categories, yet, this Court has in numerable causes by giving adequate justification to alter the punishment from 'Death' to 'Life'. Therefore, the law makers entrusted the task of analyzing and appreciating the gravity of the offence committed in such cases with the institution of judiciary reposing very high amount of confidence and trust. Therefore, when in a case where the judicial mind after weighing the pros and cons of the crime committed, in a golden scale and keeping in mind the paramount interest of the society and to safeguard it from the unmindful conduct of such offenders, takes a decision to ensure that such offenders don't deserve to be let loose in the society for a

Page 70 JUDGMENT certain period, can it be said that such a decision is impermissible in law. In the first instance, as noted earlier, life sentence in a given case only means the entirety of the life of a person unless the context otherwise stipulates. Therefore, where the life sentence means, a person's life span in incarnation, the Court cannot be held to have in anyway violated the law in doing so. Only other question is how far the Court will be justified in stipulating a condition that such life imprisonment will have to be served by an offender in jail without providing scope for grant of any remission by way of statutory executive action. As has been stated by this Court in Maru Ram (supra) by the Constitution Bench, that the Constitutional power of remission provided under Articles 72 and 161 of the Constitution will always remain untouched, inasmuch as, though the statutory power of remission, etc., as compared to Constitution power under Articles 72 and 161 looks similar, they are not the same. Therefore, we confine ourselves to the implication of statutory power of remission, etc., provided under the Criminal Procedure Code entrusted with the Executive of the State as against the well thought out judicial decisions in the imposition of sentence for the related grievous crimes for which either capital punishment or a life sentence is provided for. When the said distinction can be clearly ascertained, it must be held that there is a vast difference between an executive action for the

Page 71 JUDGMENT grant of commutation, remission etc., as against a judicial decision. Time and again, it is held that judicial action forms part of the basic structure of the Constitution. We can state with certain amount of confidence and certainty, that there will be no match for a judicial decision by any of the authority other than Constitutional Authority, though in the form of an executive action, having regard to the higher pedestal in which such Constitutional Heads are placed whose action will remain unquestionable except for lack of certain basic features which has also been noted in the various decisions of this Court including Maru Ram (supra). 78. Though we are not attempting to belittle the scope and ambit of executive action of the State in exercise of its power of statutory remission, when it comes to the question of equation with a judicial pronouncement, it must be held that such executive action should give due weight and respect to the latter in order to achieve the goals set in the Constitution. It is not to be said that such distinctive role to be played by the Executive of the State would be in the nature of a subordinate role to the judiciary. In this context, it can be said without any scope of controversy that when by way of a judicial decision, after a detailed analysis, having regard to the proportionality of the crime committed, it is decided that the offender deserves to be punished with the sentence of life imprisonment (i.e.) for the end of his

Page 72 JUDGMENT life or for a specific period of 20 years, or 30 years or 40 years, such a conclusion should survive without any interruption. Therefore, in order to ensure that such punishment imposed, which is legally provided for in the Indian Penal Code read along with Criminal Procedure Code to operate without any interruption, the inherent power of the

Court concerned should empower the Court in public interest as well as in the interest of the society at large to make it certain that such punishment imposed will operate as imposed by stating that no remission or other such liberal approach should not come into effect to nullify such imposition. 79. In this context, the submission of the learned Solicitor General on the interpretation of Section 433-A assumes significance. His contention was that under Section 433-A what is prescribed is only the minimum and, therefore, there is no restriction to fix it at any period beyond 14 years and upto the end of one's life span. We find substance in the said submission. When we refer to Section 433-A, we find that the expression used in the said Section for the purpose of grant of remission relating to a person convicted and directed to undergo life imprisonment, it stipulates that "such person shall not be released from prison unless he had served at least fourteen years of imprisonment." Therefore, when the minimum imprisonment is prescribed under the Statute, there will be every justification for the

Page 73 JUDGMENT Court which considers the nature of offence for which conviction is imposed on the offender for which offence the extent of punishment either death or life imprisonment is provided for, it should be held that there will be every justification and authority for the Court to ensure in the interest of the public at large and the society, that such person should undergo imprisonment for a specified period even beyond 14 years without any scope for remission. In fact, going by the caption of the said Section 433-A, it imposes a restriction on powers of remission or commutation in certain cases. For a statutory authority competent to consider a case for remission after the imposition of punishment by Court of law it can be held so, then a judicial forum which has got a wider scope for considering the nature of offence and the conduct of the offender including his mens rea to bestow its judicial sense and direct that such offender does not deserve to be released early and required to be kept in confinement for a longer period, it should be held that there will be no dearth in the Authority for exercising such power in the matter of imposition of the appropriate sentence befitting the criminal act committed by the convict. In this context, the concurring judgment of Justice Fazal Ali in Maru Ram (supra), as stated in pages 1251, 1251 and 1258 on the sentencing aspect noted in earlier paragraphs requires to be kept in view.

Page 74 JUDGMENT 80. There is one other valid ground for our above conclusion. In paragraph 46 of this judgment, we have noted the provision in the Penal Code which provides for imposing the punishment of death. There are also several dimensions to this view to be borne in mind. In this context, it will be worthwhile to refer to the fundamental principles which weighed with our Constitution makers while entrusting the highest power with the head of the State, namely, the President in Article 72 of the Constitution. In the leading judgment of the Constitution Bench in Kehar Singh v. Union of India - (1989) 1 SCC 204, this Court prefaced its judgment in paragraph 7 highlighting the said principle in the following words: "7.The Constitution of India, in keeping with modern constitutional practice, is a constitutive document, fundamental to the governance of the country, whereby, according to accepted political theory, the people of India have provided a constitutional polity consisting of certain primary organs, institutions and functionaries to exercise the powers provided in the Constitution. 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 Preambular statement of the Constitution begins with the significant recital: "We, the people of India, having solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic ... do hereby adopt, enact and give to ourselves this Constitution." To any civilised society, there can be no attributes more important than the life and personal liberty of its members. That is evident from the paramount position

Page 75 JUDGMENT given by the courts to Article 21 of the Constitution. These twin attributes enjoy a fundamental ascendancy over all other attributes of the political and social order, and consequently, the Legislature, the Executive and the Judiciary are more sensitive to them than to the other attributes of daily existence. The deprivation of personal liberty and the threat of the deprivation of life by the action of the State is in most civilised societies regarded seriously and, recourse, either under express constitutional provision or through legislative enactment is provided to the judicial organ. But, the fallibility of human judgment being undeniable even in the most trained mind, a mind resourced by a harvest of experience, it has been considered appropriate that in the matter of life and personal liberty, the protection should be extended by entrusting power further to some high authority to scrutinise the validity of the threatened denial of life or the threatened or continued denial of personal liberty. The power so entrusted is a power belonging to the people and reposed in the highest dignitary of the State. In England, the power is regarded as the royal prerogative of pardon exercised by the Sovereign, generally through the Home Secretary. It is a power which is capable of exercise on a variety of grounds, for

reasons of State as well as the desire to safeguard against judicial error. It is an act of grace issuing from the Sovereign. In the United States, however, after the founding of the Republic, a pardon by the President has been regarded not as a private act of grace but as a part of the constitutional scheme. In an opinion, remarkable for its erudition and clarity, Mr.Justice Holmes, speaking for the Court in W.I. Biddle v. Vuco Perovich enunciated this view, and it has since been affirmed in other decisions. The power to pardon is a part of the constitutional scheme, and we have no doubt, in our mind, that it should be so treated also in the Indian Republic. It has been reposed by the people through the Constitution in the Head of the State, and enjoys high status. It is a constitutional responsibility of great significance, to be exercised when occasion arises in accordance with the discretion contemplated by the context. It is not denied, and indeed it has been repeatedly affirmed in the course of

Page 76 JUDGMENT argument by learned counsel, Shri Ram Jethmalani and Shri Shanti Bhushan, appearing for the petitioners that the power to pardon rests on the advice tendered by the Executive to the President, who subject to the provisions of Article 74(1) of the Constitution, must act in accordance with such advice. We may point out that the Constitution Bench of this Court held in Maru Ram v. Union of India, that the power under Article 72 is to be exercised on the advice of the Central Government and not by the President on his own, and that the advice of the Government binds the Head of the State." (Underlining is ours) 81. Again in paragraphs 8 and 10, this Court made a detailed analysis of the effect of the grant of pardon or remission vis-à-vis the judicial pronouncement and explained the distinguishing features in their respective fields in uncontroverted terms. Paragraphs 8 and 10 can also be usefully extracted which are as under: 8. To what areas does the power to scrutinise extend? In Ex parte William Wells the United States Supreme Court pointed out that it was to be used "particularly when the circumstances of any case disclosed such uncertainties as made it doubtful if there should have been a conviction of the criminal, or when they are such as to show that there might be a mitigation of the punishment without lessening the obligation of vindicatory justice". And in Ex parte Garland decided shortly after the Civil War, Mr. Justice Field observed: "The inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence … if granted after conviction, it removes the

Page 77 JUDGMENT penalties and disabilities and restores him to all his civil rights…." The classic exposition of the law is to be found in Ex parte Philip Grossman where Chief Justice Taft explained: "Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or the enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments." 10. We are of the view that it is open to the President in the exercise of the power vested in him by Article 72 of the Constitution to scrutinise the evidence on the record of the criminal case and come to a different conclusion from that recorded by the court in regard to the guilt of, and sentence imposed on, the accused. In doing so, the President does not amend or modify or supersede the judicial record. The judicial record remains intact, and undisturbed. The President acts in a wholly different plane from that in which the Court acted. He acts under a constitutional power, the nature of which is entirely different from the judicial power and cannot be regarded as an extension of it. And this is so, notwithstanding that the practical effect of the Presidential act is to remove the stigma of guilt from the accused or to remit the sentence imposed on him. In U.S. v. Benz Sutherland, J., observed: The judicial power and the executive power over sentences are readily distinguishable. To render judgment is a judicial function. To carry the judgment into effect is an executive function. 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 a judgment. To reduce a sentence by amendment alters the terms of the

Page 78 JUDGMENT judgment itself and is a judicial act as much as the imposition of the sentence in the first instance. The legal effect of a pardon is wholly different from a judicial supersession of the original sentence. It is the nature of the power which is determinative. In Sarat Chandra Rabha v. Khagendranath Nath, Wanchoo, J., speaking for the Court addressed himself to the question whether the order of remission by the Governor of Assam had the effect of reducing the sentence imposed on the appellant in the same way in which an order of an appellate or revisional criminal court has the effect of reducing the sentence passed by a trial court, and after discussing the law relating to the power to grant pardon, he

said: “Though, therefore, the effect of an order of remission is to wipe out that part of the sentence of imprisonment which has not been served out and thus in practice to reduce the sentence to the period already undergone, in law the order of remission merely means that the rest of the sentence need not be undergone, leaving the order of conviction by the court and the sentence passed by it untouched. In this view of the matter the order of remission passed in this case though it had the effect that the appellant was released from jail before he had served the full sentence of three years’ imprisonment and had actually served only about sixteen months’ imprisonment, did not in any way affect the order of conviction and sentence passed by the court which remained as it was. and again: Now where the sentence imposed by a trial court is varied by way of reduction by the appellate or revisional court, the final sentence is again imposed by a court; but where a sentence imposed by a court is remitted in part under Section 401 of the Code of Criminal Procedure that has not the effect in law of reducing the sentence imposed by the court, though in effect the result may be that the convicted person suffers less imprisonment than that imposed by the court. The order of remission affects the execution of the sentence

Page 79 JUDGMENT imposed by the court but does not affect the sentence as such, which remains what it was in spite of the order of remission.” It is apparent that the power under Article 72 entitles the President to examine the record of evidence of the criminal case and to determine for himself whether the case is one deserving the grant of the relief falling within that power. We are of opinion that the President is entitled to go into the merits of the case notwithstanding that it has been judicially concluded by the consideration given to it by this Court. (Underlining is ours) 82. Having thus noted the well thought out principles underlying the exercise of judicial power and the higher Executive power of the State without affecting the core of the judicial pronouncements, we wish to refer to some statistics noted in that very judgment in paragraph 17 as to the number of convicts hanged as compared to the number of murders that had taken place during the relevant period, namely, between 1974 to 1978. It was found that there were 29 persons hanged during that period while the number of murders was noted as 85,000. It reveals that in a period of almost four years as against the huge number of victims, the execution of death penalty was restricted to the minimal i.e. it was 0.034%. We only point out that great care and caution weighed with the Courts and the Executive to ensure that under no circumstance an innocent is subjected to the capital punishment even if the real culprit may in that process be benefited. After all in a civilized society, the rule of law should prevail and the

Page 80 JUDGMENT right of a human being should not be snatched away even in the process of decision making which again is entrusted with another set of human beings as they are claimed to be experts and well informed legally as well as are men in the know of things. 83. Keeping the above principles in mind, when we make a study of the vexed question, we find that the law makers have restricted the power to impose death sentence to only 12 Sections in the Penal Code, namely, Sections 120B(1), 121, 132, 194, 195A, 302, 305, 307(2nd para), 376A, 376E, 396 and 364A. Apart from the Penal Code such punishments of death are provided in certain other draconian laws like TADA, MCOCA etc. Therefore, it was held by this Court in umpteen numbers of judgments that death sentence is an exception rather than a rule. That apart, even after applying such great precautionary prescription when the trial Courts reach a conclusion to impose the maximum punishment of death, further safe guards are provided under the Criminal Procedure Code and the Special Acts to make a still more concretized effort by the higher Courts to ensure that no stone is left unturned for the imposition of such capital punishments. 84. In this context, we can make specific reference to the provisions contained in Chapter XXVIII of Code of Criminal Procedure wherein Sections 366 to 371, are placed for the relevant consideration to be

Page 81 JUDGMENT mandatorily made when a death penalty is imposed by the trial Court. Under Section 366, whenever a Sessions Court passes a sentence of death, the proceedings should be mandatorily submitted to the High Court and the sentence of death is automatically suspended until the same is confirmed by the High Court. Under Chapter XXVIII of the Code, even while exercising the process of confirmation by the High Court, very many other safe guards such as, further enquiries, letting in additional evidence, ordering a new trial on the same or amended charge or amend the conviction or convict the accused of any other offence of lesser degree is provided for. Further in order to ensure meticulous and high amount of precaution to be undertaken, the consideration of such confirmation process is to be carried out by a minimum of two Judges of the High Court. In the event of difference of opinion amongst them, the case is to be placed before a third Judge as provided under Section 392 of the Code. Statutory prescriptions apart, by way of judicial pronouncements, it has been repeatedly held that imposition of death penalty should be restricted to in the rarest of rare cases again to ensure that the Courts adopt a precautionary principle of very high order when it comes to the question of imposition of death penalty.

85. Again keeping in mind the above statutory prescriptions relating to imposition of capital punishment or the alternate punishment of

Page 82 JUDGMENT life imprisonment, meaning thereby till the end of the convict's life, we wish to analyze the scope and extent to which such alternate punishment can be directed to be imposed. In the first place, it must be noted that the law makers themselves have bestowed great care and caution when they decided to prescribe the capital punishment of death and its alternate to life imprisonment, restricted the scope for such imposition to the least minimum of 12 instances alone. As has been noted by us earlier, by way of interpretation process, this Court has laid down that such imposition of capital punishment can only be in the rarest of rare cases. In the later decisions, as the law developed, this court laid down and quoted very many circumstances which can be said to be coming within the four corners of the said rarest of rare principle, though such instances are not exhaustive. The above legal principle come to be introduced in the first instance in the decision reported as Bachan Singh v. State of Punjab - AIR 1980 SC 898. It was held as under: "151…… A sentence of death is the extreme penalty of law and it is but fair that when a Court awards that sentence in a case where the alternative sentence of imprisonment for life is also available, it should give special reasons in support of the sentence….. 207: There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. "We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society." Nonetheless, it

Page 83 JUDGMENT cannot be over-emphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354(3). Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and figures albeit incomplete, furnished by the Union of India, show that in the past Courts have inflicted the extreme penalty with extreme infrequency - a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3), viz., that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed. Subsequently, it was elaborated in the decision reported as Machhi Singh and Others v. State of Punjab – AIR 1983 SC 957 it was held as under: "32: The reasons why the community as a whole does not endorse the humanistic approach reflected in "death sentence-in-no-case" doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of "reverence for life" principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realized that every member of the community is able to live with safety

Page 84 JUDGMENT without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. 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. Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by 'Killing' a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so (in rarest of rare cases) when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entrain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti- social or abhorrent nature of the crime, such as for instance: I Manner of Commission of Murder When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community. For instance, (i) when the house of the victim is set aflame with the end in view to roast him alive in the house. (ii) when the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death. (iii) when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

Page 85 JUDGMENT II. Motive for commission of murder When the murder is committed for a motive which evinces total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward (b) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust, or (c) a murder is committed in the course for betrayal of the motherland. III. Anti-social or socially abhorrent nature of the crime (a) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance. (b) In cases of “bride burning” and what are known as “dowry deaths” or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation. IV. Magnitude of crime When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed. V. Personality of victim of murder When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder (b) a helpless woman or a person rendered helpless by old age or

Page 86 JUDGMENT infirmity (c) when the victim is a person vis-a-vis whom the murderer is in a position of domination or trust (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons. 33: In this background the guidelines indicated in Bachan Singh's case (supra) will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentences arises. The following propositions emerge from Bachan Singh's case: (i) the extreme penalty of death need not be inflicted except in gravest cases of extreme culpability; (ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration alongwith the circumstances of the 'crime'. (iii)Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances. (iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised. 34: In order to apply these guidelines inter-alia the following questions may be asked and answered:

Page 87 JUDGMENT (a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence? (b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender ? If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed here in above, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so.” (Emphasis added) These revered principles were subsequently adopted or explained or upheld in following cases reported as Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra – 2009 (6) SC 498, Aloke Nath Dutta (supra), Prajeet Kumar Singh v. State of Bihar - (2008) 4 SCC 434, B.A. Umesh v. Registrar General, High Court of Karnataka - (2011) 3 SCC 85, State of Rajasthan v. Kashi Ram - (2006) 12 SCC 254 and Atbir v. Government of NCT of Delhi - (2010) 9 SCC 1 and also in a peculiar case of D.K. Basu v. State of West Bengal – AIR 1997 SC 610 where this Court took the view that custodial torture and consequential death in custody was an offence which fell in the category of the rarest of rare cases. While specifying

Page 88 JUDGMENT the reasons in support of such decision, the Court awarded death penalty in that case. 86. In a recent decision of this Court reported as Vikram Singh alias Vicky & another v. Union of India & others – AIR 2015 SC 3577 this Court had occasion to examine the sentencing aspect. That case arose out of an order passed by the High Court in a writ petition moved before the High Court of Punjab and Haryana praying for a Mandamus to strike down Section 364A of IPC and for an order restraining the execution of death sentence awarded to the appellant therein. A Division Bench of the High Court of Punjab and Haryana while dismissing the writ petition took the view that the question whether Section 364A

of IPC was attracted to the case at hand and whether a person found guilty of an offence punishable under the provision could be sentenced to death was not only raised by the appellant therein as an argument before the High Court in an appeal filed by them against their conviction and sentence imposed which was noticed and found against them. The High Court dismissed the writ petition by noting the regular appeal filed earlier by the appellant therein against the conviction and sentence which was also upheld by this Court while dismissing the subsequent writ petition. While upholding the said judgment of the High Court on the sentencing aspect, this Court has noticed as under in paragraph 49:

Page 89 JUDGMENT “49. To sum up: (a)Punishments must be proportionate to the nature and gravity of the offences for which the same are prescribed. (b)Prescribing punishments is the function of the legislature and not the Courts. (c)The legislature is presumed to be supremely wise and aware of the needs of the people and the measures that are necessary to meet those needs. (d)Courts show deference to the legislative will and wisdom and are slow in upsetting the enacted provisions dealing with the quantum of punishment prescribed for different offences. (e)Courts, however, have the jurisdiction to interfere when the punishment prescribed is so outrageously disproportionate to the offence or so inhuman or brutal that the same cannot be accepted by any standard of decency. (f) Absence of objective standards for determining the legality of the prescribed sentence makes the job of the Court reviewing the punishment difficult. (g)Courts cannot interfere with the prescribed punishment only because the punishment is perceived to be excessive. (h) In dealing with questions of proportionality of sentences, capital punishment is considered to be different in kind and degree from sentence of imprisonment. The result is that while there are several instances when capital punishment has been considered to be disproportionate to the offence committed, there are very few and rare cases of sentences of imprisonment being held disproportionate.” When we are on the question of sentencing aspect we feel it appropriate to make a reference to the principles culled out in the said judgment. 87. Having thus noted the serious analysis made by this Court in the imposition of Death sentence and the principle of rarest of rare cases

Page 90 JUDGMENT formulated in the case of Bachan Singh (supra) which was subsequently elaborated in Machhi Singh (supra), followed in the later decisions and is being applied and developed, we also wish to note some of the submissions of the counsel for the respondents by relying upon the report of Justice Malimath Committee on Reform in Criminal Justice System submitted in 2003 and the report of Justice Verma’s Committee on Amendment to Criminal Law and the introduction of some of the punishments in the Penal Code, namely, Sections 370(6), 376A, 376D and 376E which prescribe the punishment of imprisonment for life which shall mean imprisonment for the remainder of that persons’ natural life. It was further contended that some special Acts like TADA specifically prescribe that the imposition of such punishment shall remain and no remission can be considered. The submission was made to suggest that in law when a punishment is prescribed it is only that punishment that can be inflicted and nothing more. In other words, when the penal provision prescribes the punishment of Death or Life, the Court should at the conclusion of the trial or at its confirmation, should merely impose the punishment of Death or Life and nothing more. Though the submission looks attractive, on a deeper scrutiny, we find that the said submission has no force. As has been noted by us in the earlier paragraphs where we have discussed the first part of this

Page 91 JUDGMENT question, namely, what is meant by life imprisonment, we have found an answer based on earlier Constitution Bench decisions of this Court that life imprisonment means rest of one’s life who is imposed with the said punishment. In the report relied upon and the practices followed in various other countries were also highlighted to support the above submission. Having thus considered the submissions, with utmost care, we find that it is nowhere prescribed in the Penal Code or for that matter any of the provisions where Death Penalty or Life Imprisonment is provided for, any prohibition that the imprisonment cannot be imposed for any specific period within the said life span. When life imprisonment means the whole life span of the person convicted, can it be said, that the Court which is empowered to impose the said punishment cannot specify the period upto which the said sentence of life should remain befitting the nature of the crime committed, while at the same time apply the rarest of rare principle, the Court’s conscience does not persuade it to confirm the death penalty. In such context when we consider the views expressed in Shraddananda (supra) in paragraphs 91 and 92, the same is fully justified and needs to be upheld. By stating so, we do not find any violation of the statutory provisions prescribing the extent of punishment provided in the Penal Code. It cannot also be said that by stating so, the Court has carved out a new punishment. What all it

Page 92 JUDGMENT seeks to declare by stating so was that within the prescribed limit of the punishment of life imprisonment, having regard to the nature of offence committed by imposing the life imprisonment for a specified period would be proportionate to the crime as well as the interest of the victim, whose interest is also to be taken care of by the Court, when considering the nature of punishment to be imposed. We also note that when the report of Justice Malimath Committee was submitted in 2003, the learned Judge and the members did not have the benefit of the law laid down in Swamy Shraddananda (supra). Insofar as Justice Verma Committee report of 2013 was concerned, the amendments introduced after the said report in Sections 370(6), 376A, 376D and 376E, such prescription stating that life imprisonment means the entirety of the convict's life does not in any way conflict with the well thought out principles stated in Swamy Shraddananda (supra). In fact, Justice Verma Committee report only reiterated the proposition that a life imprisonment means the whole of the remaining period of the convict's natural life by referring to Mohd. Munna (supra), Rameshbhai Chandubhai Rathod v. State of Gujarat – 2011 (2) SCC 764 and State of Uttar Pradesh v. Sanjay Kumar - 2012 (8) SCC 537 and nothing more. Further, the said Amendment can only be construed to establish that there should not be any reduction in the life sentence and it should remain till the end

Page 93 JUDGMENT of the convict's life span. As far as the reference to prescription of different type of punishments in certain other countries need not dissuade us to declare the legal position based on the punishment prescribed in the Penal Code and the enormity of the crimes that are being committed in this country. For the very same reasons, we are not able to subscribe to the submissions of Mr. Dwivedi and Shri Andhyarujina that by awarding such punishment of specified period of life imprisonment, the Court would be entering the domain of the Executive or violative of the principle of separation of powers. By so specifying, it must be held that, the Courts even while ordering the punishment prescribed in the Penal Code only seek to ensure that such imposition of punishment is commensurate to the nature of crime committed and in that process no injustice is caused either to the victim or the accused who having committed the crime is bound to undergo the required punishment. It must be noted that the highest executive power prescribed under the Constitution in Articles 72 and 161 remains untouched for grant of pardon, suspend, remit, reprieve or commute any sentence awarded. As far as the apprehension that by declaring such a sentencing process, in regard to the offences falling under Section 302 and other offences for which capital punishment or in the alternate life imprisonment is prescribed, such powers would also be available to the trial Court,

Page 94 JUDGMENT namely, the Sessions Court is concerned, the said apprehension can be sufficiently safeguarded by making a detailed reference to the provisions contained in Chapter XXVIII of Code of Criminal Procedure which we shall make in the subsequent paragraphs of this judgment. As far as the other apprehension that by prohibiting the consideration of any remission the executive power under Sections 432 and 433 are concerned, it will have to be held that such prohibition will lose its force the moment, the specified period is undergone and the Appropriate Government's power to consider grant of remission will automatically get revived. Here again, it can be stated at the risk of repetition that the higher executive power provided under the Constitution will always remain and can be exercised without any restriction. 88. As far as the argument based on ray of hope is concerned, it must be stated that however much forceful, the contention may be, as was argued by Mr. Dwivedi, the learned Senior Counsel appearing for the State, it must be stated that such ray of hope was much more for the victims who were done to death and whose dependents were to suffer the aftermath with no solace left. Therefore, when the dreams of such victims in whatever manner and extent it was planned, with reference to oneself, his or her dependents and everyone surrounding him was demolished in an unmindful and in some cases in a diabolic

Page 95 JUDGMENT manner in total violation of the Rule of Law which is prevailing in an organized society, they cannot be heard to say only their rays of hope should prevail and kept intact. For instance, in the case relating to the murder of the former Prime Minister, in whom the people of this country reposed great faith and confidence when he was entrusted with such great responsible office in the fond hope that he will do his best to develop this country in all trusts, all the hope of the entire people of this country was shattered by a planned murder which has been mentioned in detail in the judgment of this Court which we have extracted in paragraph No.147. Therefore, we find no scope to apply the concept of ray of hope to come for the rescue of such hardened, heartless offenders, which if considered in their favour will only result in misplaced sympathy and again will be not in the interest of the society. Therefore, we reject the said argument outright. 89. Having thus noted the various submissions on this question, we have highlighted the various prescriptions in the cited judgments to

demonstrate as to how the highest Court of this land is conscious of the onerous responsibility reposed on this institution by the Constitution makers in order to ensure that even if there is a Penal provision for the imposition of capital punishment of death provided for in the statute, before deciding to impose the said sentence, there would be no scope for anyone to even remotely suggest that there was

Page 96 JUDGMENT any dearth or deficiency or lack of consideration on any aspect in carrying out the said onerous duty and responsibility. When the highest Court of this land has thus laid down the law and the principles to be applied in the matter of such graver punishments and such principles are dutifully followed by the High Courts, when the cases are placed before it by virtue of the provisions contained in Chapter XXVIII of Code of Criminal Procedure, it must be held that it will also be permissible for this Court to go one step further and stipulate as to what extent such great precautionary principle can be further emphasized. 90. Before doing so, we also wish to note each one of the 12 crimes for which, the penalty of death and life is prescribed. Under Section 120B, when prescribing the penalty for criminal conspiracy in respect of offence for which death penalty or life imprisonment is provided for in the Penal Code, every one of the accused who was a party to such criminal conspiracy in the commission of the offence is to be treated as having abetted the crime and thereby liable to be punished and imposed with the same punishment as was to be imposed on the actual offender. Under Section 121 the provision for capital punishment is for the offence of waging or attempting to wage a war or abetting the waging of war against the Government of India. In other words, in the event of such offence found proved, such a convict

Page 97 JUDGMENT can be held to have indulged in a crime against the whole of the NATION meaning thereby against every other Indian citizen and the whole territory of this country. Under Section 132, the punishment of death is provided for an offender who abets the committing of MUTINY by an officer, soldier, sailor or airman in the Army, Navy or Air Force of the Government of India and in the event of such MUTINY been committed as a sequel to such abetment. MUTINY in its ordinary dictionary meaning is an open revolt against Constitutional authority, especially by soldiers or sailors against their officers. It can be, therefore, clearly visualized that in the event of such MUTINY taking place by the Army personnel what would be plight of this country and the safety and interest of more than 120 million people living in this country. Under the later part of Section 194 whoever tenders or fabricates false evidence clearly intending thereby that such act would cause any innocent person be convicted of capital punishment and any such innocent person is convicted of and executed of such capital punishment, the person who tendered such fake and fabricated evidence be punished with punishment of death. Under the Second Part of Section 195A if any person threatens any other person to give false evidence and as a consequence of such Act any other person is though innocent, but convicted and sentenced to death in consequence of such false evidence, the person at whose threat the

Page 98 JUDGMENT false evidence came to be tendered is held to be liable to be meted out with the same punishment of death. 91. Under Section 302, whoever commits murder of another person is liable to be punished with death or life imprisonment. Under Section 305, whoever abets the commission of suicide of a person under 18 years of age i.e. a minor or juvenile, any insane person, any idiot or any person in a state of intoxication is liable to be punished with death or life imprisonment. It is relevant to note that the categories of persons whose suicide is abetted by the offender would be persons who in the description of law are supposedly unaware of committing such act which they actually perform but for the abetment of the offender. 92. Under the Second Part of Section 307, if attempt to murder is found proved against an offender who has already been convicted and sentenced to undergo life imprisonment, then he is also liable to be inflicted with the sentence of death. Under Section 376A whoever committed the offence of rape and in the course of commission of such offence, also responsible for committing the death of the victim or such injury caused by the offence is such that the victim is in a persistent vegetative state, then the minimum punishment provided for is 20 years or life imprisonment or death.

Page 99 JUDGMENT 93. Under Section 376E whoever who was once convicted for the offence under Sections 376, 376A or 376D is subsequently convicted of an offence under any of the said Sections would be punishable for life imprisonment meaning thereby imprisonment for the remainder of his life span or with death. Under Section 376D for the offence of gang rape, the punishment provided for is imprisonment for a minimum period of 20 years and can extend upto life imprisonment meaning thereby the remainder of that person’s life. 94. Under Section 364A kidnapping for ransom, etc. in order to compel the Government or any foreign State or international, intergovernmental organization or another person to

do or abstain from doing any act to pay a ransom shall be punishable with death or life imprisonment. 95. Under Section 396, if any one of five or more persons conjointly committed decoity, everyone of those persons are liable to be punished with death or life imprisonment. 96. Thus, each one of the offences above noted, for which the penalty of death or life imprisonment or specified minimum period of imprisonment is provided for, are of such magnitude for which the imposition of anyone of the said punishment provided for cannot be held to be excessive or not warranted. In each individual case, the manner of commission or the modus operandi adopted or the

Page 100 JUDGMENT situations in which the act was committed or the situation in which the victim was situated or the status of the person who suffered the onslaught or the consequences that ensued by virtue of the commission of the offence committed and so on and so forth may vary in very many degrees. It was for this reason, the law makers, while prescribing different punishments for different crimes, thought it fit to prescribe extreme punishments for such crimes of grotesque (monstrous) nature. 97. While that be so it cannot also be lost sight of that it will be next to impossible for even the law makers to think of or prescribe in exactitude all kinds of such criminal conduct to fit into any appropriate pigeon hole for structured punishments to run in between the minimum and maximum period of imprisonment. Therefore, the law makers thought it fit to prescribe the minimum and the maximum sentence to be imposed for such diabolic nature of crimes and leave it for the adjudication authorities, namely, the Institution of Judiciary who is fully and appropriately equipped with the necessary knowledge of law, experience, talent and infrastructure to study the detailed parts of each such case based on the legally acceptable material evidence, apply the legal principles and the law on the subject, apart from the guidance it gets from the jurists and judicial pronouncements revealed earlier, to determine from the

Page 101 JUDGMENT nature of such grave offences found proved and depending upon the facts noted what kind of punishment within the prescribed limits under the relevant provision would appropriately fit in. In other words, while the maximum extent of punishment of either death or life imprisonment is provided for under the relevant provisions noted above, it will be for the Courts to decide if in its conclusion, the imposition of death may not be warranted, what should be the number of years of imprisonment that would be judiciously and judicially more appropriate to keep the person under incarceration, by taking into account, apart from the crime itself, from the angle of the commission of such crime or crimes, the interest of the society at large or all other relevant factors which cannot be put in any straitjacket formulae. 98. The said process of determination must be held to be available with the Courts by virtue of the extent of punishments provided for such specified nature of crimes and such power is to be derived from those penal provisions themselves. We must also state, by that approach, we do not find any violation of law or conflict with any other provision of Penal Code, but the same would be in compliance of those relevant provisions themselves which provide for imposition of such punishments.

Page 102 JUDGMENT 99. That apart, as has been noted by us earlier, while the description of the offences and the prescription of punishments are provided for in the Penal Code which can be imposed only through the Courts of law, under Chapter XXVIII of Code of Criminal Procedure, at least in regard to the confirmation of the capital punishment of death penalty, the whole procedure has been mandatorily prescribed to ensure that such punishment gets the consideration by a Division Bench consisting of two Hon’ble Judges of the High Court for its approval. As noted earlier, the said Chapter XXVIII can be said to be a separate Code by itself providing for a detailed consideration to be made by the Division Bench of the High Court, which can do and undo with the whole trial held or even order for retrial on the same set of charges or of different charges and also impose appropriate punishment befitting the nature of offence found proved. 100. Such prescription contained in the Code of Criminal Procedure, though procedural, the substantive part rests in the Penal Code for the ultimate Confirmation or modification or alteration or amendment or amendment of the punishment. Therefore, what is apparent is that the imposition of death penalty or life imprisonment is substantively provided for in the Penal Code, procedural part of it is prescribed in the Code of Criminal Procedure and significantly one does not conflict with the other. Having regard to such a dichotomy being set out in

Page 103 JUDGMENT the Penal Code and the Code of Criminal Procedure, which in many respects to be operated upon in the adjudication of a criminal case, the result of such thoroughly defined distinctive features have to be clearly understood while operating the definite provisions, in particular, the provisions in the Penal Code providing for capital punishment and in the alternate the life imprisonment. 101. Once we steer clear of such distinctive features in the two enactments, one substantive and the other procedural, one will have no hurdle or difficulty in working out the different

provisions in the two different enactments without doing any violence to one or the other. Having thus noted the above aspects on the punishment prescription in the Penal Code and the procedural prescription in the Code of Criminal Procedure, we can authoritatively state that the power derived by the Courts of law in the various specified provisions providing for imposition of capital punishments in the Penal Code such power can be appropriately exercised by the adjudicating Courts in the matter of ultimate imposition of punishments in such a way to ensure that the other procedural provisions contained in the Code of Criminal Procedure relating to grant of remission, commutation, suspension etc. on the prescribed authority, not speaking of similar powers under Articles 72 and 162 of the Constitution which are

Page 104 JUDGMENT untouchable, cannot be held to be or can in any manner overlap the power already exercised by the Courts of justice. 102. In fact, while saying so we must also point out that such exercise of power in the imposition of death penalty or life imprisonment by the Sessions Judge will get the scrutiny by the Division Bench of the High Court mandatorily when the penalty is death and invariably even in respect of life imprisonment gets scrutinized by the Division Bench by virtue of the appeal remedy provided in the Code of Criminal Procedure. Therefore, our conclusion as stated above can be reinforced by stating that the punishment part of such specified offences are always examined at least once after the Sessions Court's verdict by the High Court and that too by a Division Bench consisting of two Hon'ble Judges. 103. That apart, in most of such cases where death penalty or life imprisonment is the punishment imposed by the trial Court and confirmed by the Division Bench of the High Court, the concerned convict will get an opportunity to get such verdict tested by filing further appeal by way of Special Leave to this Court. By way of abundant caution and as per the prescribed law of the Code and the criminal jurisprudence, we can assert that after the initial finding of guilt of such specified grave offences and the imposition of penalty either death or life imprisonment when comes under the scrutiny of

Page 105 JUDGMENT the Division Bench of the High Court, it is only the High Court which derives the power under the Penal Code, which prescribes the capital and alternate punishment, to alter the said punishment with one either for the entirety of the convict's life or for any specific period of more than 14 years, say 20, 30 or so on depending upon the gravity of the crime committed and the exercise of judicial conscience befitting such offence found proved to have been committed. 104. We, therefore, reiterate that, the power derived from the Penal Code for any modified punishment within the punishment provided for in the Penal Code for such specified offences can only be exercised by the High Court and in the event of further appeal only by the Supreme Court and not by any other Court in this country. To put it differently, the power to impose a modified punishment providing for any specific term of incarceration or till the end of the convict's life as an alternate to death penalty, can be exercised only by the High Court and the Supreme Court and not by any other inferior Court. 105. Viewed in that respect, we state that the ratio laid down in Swamy Shraddananda (supra) that a special category of sentence; instead of Death; for a term exceeding 14 years and put that category beyond application of remission is well founded and we answer the said question in the affirmative. We are, therefore, not in agreement with the opinion expressed by this Court in Sangeet and Anr. v.

Page 106 JUDGMENT State of Haryana – 2013 (2) SCC 452 that the deprival of remission power of the Appropriate Government by awarding sentences of 20 or 25 years or without any remission as not permissible is not in consonance with the law and we specifically overrule the same. 106. With that we come to the next important question, namely: "Whether the Appropriate Government is permitted to grant remission under Section 432/433 of Code of Criminal Procedure after the pardon power is exercised under Article 72 by the President and under Article 161 by the Governor of the State or by the Supreme Court of its Constitutional Power under Article 32." For the above discussion the relevant provisions of Code of Criminal Procedure, 1973 are extracted as under: "Section 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,

Page 107 JUDGMENT 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. Section 433.-Power to commute sentence- The appropriate Government may, without the consent of the person sentenced commute- (a) A sentence of death, for any other punishment provided by the Indian Penal Code (b) A sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine;

Page 108 JUDGMENT (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, or fine." 107. Last part of the second question refers to the exercise of power by this Court under Article 32 of the Constitution pertaining to a case of remission. To understand the background in which the said part of the question was framed, we can look into paragraphs 29 to 31 of the Order of Reference. On behalf of the Union of India, it was contended that once the power of commutation/remission has been exercised in a particular case of a convict by a Constitutional forum particularly this Court, then there cannot be a further exercise of the Executive Power for the purpose of commuting/remitting the sentence of the said convict in the same case by invoking Sections 432 and 433 of Code of Criminal Procedure. 108. While stoutly resisting the said submission made on behalf of the Union of India, Mr. Dwivedi, learned Senior Counsel, who appeared for the State of Tamil Nadu contended that in the case on hand, this Court while commuting the death sentence of some of the convicts did not exercise the Executive Power of the State, and that it only exercised its judicial power in the context of breach of Article 21 of the Constitution. It was further contended that if the stand of Union of India is accepted then in every case where this Court thought it fit to

Page 109 JUDGMENT commute sentence for breach of Article 21 of the Constitution, that would foreclose even the right of a convict to seek for further commutation or remission before the Appropriate Government irrespective of any precarious situation of the convict, i.e., even if the physical condition of the convict may be such that he may be vegetable by virtue of his old age or terminal illness. It was also pointed out that in V. Sriharan alias Murugan v. Union of India & Ors. - (2014) 4 SCC 242 dated 18.02.2014, this Court while commuting the sentence of death into one of life also specifically observed that such commutation was independent of the power of remission under the Constitution, as well as, the Statute. In this context, when we refer the power of commutation/remission as provided under Code of Criminal Procedure, namely, Sections 432, 433, 433A, 434 and 435, it is quite apparent that the exercise of power under Article 32 of the Constitution by this Court is independent of the Executive Power of the State under the Statue. As rightly pointed out by Mr. Dwivedi, learned Senior Counsel in his submissions made earlier, such exercise of power was in the context of breach of Article 21 of the Constitution. In the present case, it was so exercised to commute the sentence of death into one of life imprisonment. It may also arise while considering wrongful exercise or perverted exercise of power of remission by the Statutory or Constitutional authority.

Page 110 JUDGMENT Certainly there would have been no scope for this Court to consider a case of claim for remission to be ordered under Article 32 of the Constitution. In other words, it has been consistently held by this Court that when it comes to the question of reviewing order of remission passed which is patently illegal or fraught with stark illegality on Constitutional violation or rejection of a claim for remission, without any justification or colourful exercise of power, in

either case by the Executive Authority of the State, there may be scope for reviewing such orders passed by adducing adequate reasons. Barring such exceptional circumstances, this Court has noted in numerous occasions, the power of remission always vests with the State Executive and this Court at best can only give a direction to consider any claim for remission and cannot grant any remission and provide for premature release. It was time and again reiterated that the power of commutation exclusively rest with the Appropriate Government. To quote a few, reference can be had to the decisions reported as State of Punjab v. Kesar Singh - (1996) 5 SCC 495, Delhi Administration (now NCT of Delhi) v. Manohar Lal - (2002) 7 SCC 222 which were followed in State (Government of NCT of Delhi) v. Prem Raj - (2003) 7 SCC 121. Paragraph 13 of the last of the decision can be quoted for its lucid expression on this issue which reads as under:

Page 111 JUDGMENT “13. An identical question regarding exercise of power in terms of Section 433 of the Code was considered in Delhi Admn. (now NCT of Delhi) v. Manohar Lal. The Bench speaking through one of us (Doraiswamy Raju, J.) was of the view that exercise of power under Section 433 was an executive discretion. The High Court in exercise of its revisional jurisdiction had no power conferred on it to commute the sentence imposed where a minimum sentence was provided for the offence. In State of Punjab v. Kesar Singh this Court observed as follows [though it was in the context of Section 433(b)]: (SCC pp. 495-96, para 3) “The mandate of Section 433 Code of Criminal Procedure enables the Government in an appropriate case to commute the sentence of a convict and to prematurely order his release before expiry of the sentence as imposed by the courts…… That apart, even if the High Court could give such a direction, it could only direct consideration of the case of premature release by the Government and could not have ordered the premature release of the respondent itself. The right to exercise the power under Section 433 CrPC vests in the Government and has to be exercised by the Government in accordance with the rules and established principles. The impugned order of the High Court cannot, therefore, be sustained and is hereby set aside.” (Underlining is ours) 109. The first part of the said question pertains to the power of the Appropriate Government to grant remission after the parallel power is exercised under Articles 72 and 161 of the Constitution by the President and the Governor of the State respectively. In this context, a reference to Articles 72 and 161 of the Constitution on the one hand and Sections 432 and 433 of Code of Criminal Procedure on the other needs to be noted. When we refer to Article 72, necessarily a reference will have to be made to Articles 53 and 74 as well. Under Article 53 of

Page 112 JUDGMENT the Constitution the Executive Power of the Union vests in the President and such power should be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. Under Article 74, the exercise of the functions of the President should always be based on the aid and advise of the Council of Ministers headed by the Prime Minister. Under the proviso to the said Article, the President can at best seek for reconsideration of any such advice and should act based on such reconsidered advice. Article 74(2) in fact, has insulated any such advice being enquired into by any Court. Identical provisions are contained in Articles 154, 161 and 163 of the Constitution relating to the Governor of the State. Reading the above provisions, it is clear that the president of the Union and the Governor of the State while functioning as the Executive Head of the respective bodies, only have to act based on the advice of the Council of Ministers of the Union or the State. While so, when we look into the statutory prescription contained in Sections 432 and 433 of the Code of Criminal Procedure though the exercise of the power under both the provisions vests with the Appropriate Government either State or the Centre, it can only be exercised by the Executive Authorities headed by the President or the Governor as the case may be. In the first blush though it may appear that exercise of such power under Sections 432 and 433 is nothing but the one

Page 113 JUDGMENT exercisable by the same authority as the Executive Head, it must be noted that the real position is different. For instance, when we refer to Section 432, the power is restricted to either suspend the execution of sentence or remit the whole or any part of the punishment. Further under sub-section (2) of Section 432, it is stipulated that exercise of power of suspension or remission may require the opinion of the presiding Judge of the Court before or by which the conviction was held or confirmed. There is also provision for imposing conditions while deciding to suspend or remit any sentence or punishment. There are other stipulations contained in Section 432. Likewise, when we refer to Section 433 it is provided therein that the Appropriate Government may without the consent of the persons sentenced commute any of the sentence to any other sentence which ranges from Death sentence to fine. One significant feature in the Constitutional power which is apparent is that the President is empowered under Article 72 of the Constitution to grant pardons, reprieves, respites or remission, suspend or commute the sentence. Similar such power is also vested with the Governor of

the State. Whereas under Sections 432 and 433 of the Code of Criminal Procedure the power is restricted to suspension, remission and commutation. It can also be noted that there is no specific provision prohibiting the execution of the power under Sections 432 and 433 of Code of Criminal Procedure when once

Page 114 JUDGMENT similar such power was exercised by the Constitutional Authorities under Articles 72 and 161 of the Constitution. There is also no such implied prohibition to that effect. 110. In this context, learned Solicitor General submitted that while the power under Articles 72 and 161 of the Constitution can be exercised more than once, the same is not the position with Sections 432 and 433 of Code of Criminal Procedure. The learned Solicitor General contended that since the exercise of power under Articles 72 and 161 is with the aid of the Council of Ministers, it must be held that Sections 432 and 433 of Code of Criminal Procedure are only enabling provisions for exercise of power under Articles 72 and 161 of the Constitution. In support of the said submission, the learned Solicitor General, sought to rely upon the passage in Maru Ram (supra) to the effect that: "since Sections 432 and 433(a) are statutory expression and modus operandi of the Constitutional power ……..". Though the submission looks attractive, we are not convinced. We find that the said set of expression cannot be strictly stated to be the conclusion of the Court. In fact, if we read the entire sentence, we find that it was part of the submission made which the Court declined. On the other hand, in the ultimate analysis, the Majority view was summarized wherein it was held at page 1248 as under:

Page 115 JUDGMENT "4. We hold that Sections 432 and 433 are not a manifestation of Articles 72 and 161 of the Constitution but a separate, though similar, power, and Section 433A, by nullifying wholly or partially these prior provisions does not violate or detract from the full operation of the Constitutional power to pardon, commute and the like." 111. Therefore, it must be held that there is every scope and ambit for the Appropriate Government to consider and grant remission under Sections 432 and 433 of the Code of Criminal Procedure even if such consideration was earlier made and exercised under Article 72 by the President and under Article 161 by the Governor. As far as the implication of Article 32 of the Constitution by this Court is concerned, we have already held that the power under Sections 432 and 433 is to be exercised by the Appropriate Government statutorily, it is not for this Court to exercise the said power and it is always left to be decided by the Appropriate Government, even if someone approaches this Court under Article 32 of the Constitution. We answer the said question on the above terms. 112. The next questions for consideration are: "Whether Section 432(7) of the Code clearly gives primacy to the Executive Power of the Union and excludes the Executive Power of the State where the power of the Union is coextensive? Whether the Union or the State has primacy over the subject-matter enlisted in List III of the Seventh Schedule to the Constitution of India for exercise of power of remission? Whether there can be two Appropriate Governments in a

Page 116 JUDGMENT given case under Section 432(7) of the Code?" 113. According to the respondents, it is the State Government which is the Appropriate Government in a case of this nature, unless it is specifically taken over by way of a Statute from the State Government. Reference was made to proviso to Article 162 of the Constitution as well as Section 432(7) of Code of Criminal Procedure where the expression used is "subject to and limited by" which has got greater significance. It was also contended on behalf of the respondents that Penal Code is a compilations of offences, in different situations for which different consequence will follow. By way of an analysis it was pointed out that Penal Code is under the concurrent list and when the conviction is one under Section 302 simpliciter, then, the jurisdiction for consideration of remission would be with the State Government and that if the said Section also attracted the provisions of TADA, then the Centre would get exclusive jurisdiction. By making reference to Section 55A(a) of the Penal Code and Section 434 of Code of Criminal Procedure it was contended that when the conviction and sentence is under Section 302 I.P.C., without the aid of TADA or any other Central Act, State Government gets jurisdiction which will be the Appropriate Government. In this context, our attention was drawn to the fact that in the Rajiv Gandhi murder case, respondents Santhan, Murugan, Nalini and Arivu @ Perarivalan were awarded death sentence, while 3

Page 117 JUDGMENT other accused, namely, Ravichandran, Robert Payas and Jayakumar were given life imprisonment and that Nalini's death sentence was commuted by the Governor of the State in the year 2000, while the claim of 3 others was rejected. 114. Later, by the judgment dated 18.02.2014, the death sentence of three others was also commuted to life by this Court. In support of the submission reliance was placed upon the decisions of this Court in Ratan Singh (supra), State of Madhya Pradesh v. Ajit Singh and others - (1976) 3 SCC 616, Hanumant Dass v. Vinay Kumar and ors. - (1982) 2 SCC 177 and Govt. of A.P. and others v. M.T. Khan - (2004) 1 SCC 616. 115. Reference was also made to the Constituent

Assembly debates on Article 59 which corresponds to Article 72 in the present form and Article 60 which correspondents to Article 73(1)(a) of the present form. In the course of the debates, an amendment was sought to be introduced to Article 59(3) and in this context, the member who moved the amendment stated thus: “Sir, in my opinion, the President only should have power to suspend, remit or commute a sentence of death. He is the supreme Head of the State. It follows therefore that he should have the supreme powers also. I am of opinion that rulers of States or Provincial Government should not be vested with this supreme power……”

Page 118 JUDGMENT 116. Dr. Ambedkar while making his comment on the amendment proposed stated thus: “Yes: Sir: It might be desirable that I explain in a few words in its general outline the scheme embodied in article 59. It is this: the power of commutation of sentence for offences enacted by the Federal Law is vested in the President of the Union. The power to commute sentences for offences enacted by the State Legislatures is vested in the Governors of the State. In the case of sentences of death, whether it is inflicted under any law passed by Parliament or by the law of the States, the power is vested in both, the President as well as the State concerned. This is the scheme.” (Underlining is ours) 117. After the above discussions on the proposed amendments, when it was put to vote, the amendment was negatived. 118. Similarly the amendment to the proviso to Article 60 was preferred by a member who in his address stated thus: “ The object of my amendment is to preserve the Executive Power of the States or provinces at least in so far as the subjects which are included in the concurrent list. It has been pointed out during the general discussions that the scheme of the Draft Constitution is to whittle down the powers of the States considerably and, though the plan is said to be a federal one, in actual fact it is a unitary form of Government that is sought to be imposed in the Country by the Draft Constitution……” (Emphasis added) 119. After an elaborate discussion, when the opinion of Dr. Ambedkar was sought, he addressed the Assembly and stated thus: “The Hon’ble Dr. B.R. Ambedkar (Bombay:General): Mr. Vice- President, Sir, I am sorry that I cannot accept either of the two amendments which have been moved to

Page 119 JUDGMENT this proviso, but I shall state to the House very briefly the reasons why I am not in a position to accept these amendments. Before I do so, I think it is desirable that the House should know what exactly is the difference between the position as stated in the proviso and the two amendments which are moved to that proviso. Taking the proviso as it stands, it lays down two propositions. The first proposition is that generally the authority to executive laws which relate to what is called the concurrent field, whether the law is passed by the Central Legislature or whether it is passed by the provincial or State Legislature, shall ordinarily apply to the province or the State. That is the first proposition which this proviso lays down. The second proposition which the proviso lays down is that if in any particular case Parliament thinks that in passing the law which relates to the concurrent field the execution ought to be retained by the Central Government, Parliament shall have the power to do so. Therefore, the position is this; that in all cases, ordinarily, the executive authority so far as the concurrent list is concerned will rest with the union, the provinces as well as the States. It is only in exceptional cases that the Centre may prescribe that the execution of the concurrent law shall be with the Centre.” (Emphasis added) Thereafter further discussions were held and ultimately when the amendment was put to vote, the same was negatived. 120. It was, therefore, contended that in the absence of a specific law pertaining to the exercise of power under Sections 432 and 433, the States will continue to exercise their power of remission and commutation and that cannot be prevented. As against the above submissions, learned Solicitor General contended that a reference to the relevant provision of the Penal Code and the Code of Criminal

Page 120 JUDGMENT Procedure read along with the Constitutional provisions disclose that Entry I of List III of the Seventh Schedule makes a clear specification of the jurisdiction of the Centre and the State and any overlapping is taken care of in the respective entries themselves. The learned Solicitor General also brought to our notice the incorporation of Section 432(7) in the Code of Criminal Procedure providing for a comprehensive definition of ‘Appropriate Government’ based on the recommendations of the Law Commission in its Forty First Report. By the said report, the law Commission indicated that the definition of ‘Appropriate Government’ as made in Sections 54, 55 and 55A needs to be omitted in the Indian Penal Code as redundant while making a comprehensive provision in Section 402 (now the corresponding present Section 433). Paragraphs 29.10, 29.11 and 29.12 of the said report can be noted for the purpose for which the amendment was suggested and its implications: “29.10. Power to commute sentences.- Sub-section (1) of section 402 enables the Appropriate Government to commute sentences without the consent of the person sentenced. This general provision has, however, to be read with sections 54 and 55 of the Indian Penal Code which contain special provisions in regard to

commutation of sentences of death and of imprisonment for life. The definition of “Appropriate Government” contained in sub-section (3) of section 402 is substantially the same as that contained in section 55A of the Indian Penal Code. It would obviously be desirable to remove this duplication and to state the law in one place. In the present definition of “Appropriate

Page 121 JUDGMENT Government” in section 402(3), the reference to the State Government is somewhat ambiguous. It will be noticed that clause (b) of section 55A of the Indian Penal Code specifies the particulars State Government which is competent to order commutation as “the Government of the State within which the offender is sentenced”. 29.11. Section 402 revised: sections 54, 55 and 55A of I.P.C. to be omitted.- We, therefore, propose that sections 54,55 and 55A may be omitted from the Indian Penal Code and their substance incorporated in section 402 of the Criminal Procedure Code. This section may be revised as follows:- “402. Power to commute sentence.-(1) The Appropriate Government may, without the consent of the person sentenced,- (a)commute a sentence of death, for any other punishment provided by the Indian Penal Code; (b)commute a sentence of imprisonment for life, for imprisonment of either description for a term, not exceeding fourteen years or for fine; (c) commute a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced or for fine; (d) commute a sentence of simple imprisonment, for fine. (2) In this section and in section 401, the expression “Appropriate Government” means- (a) in cases where the sentence is for an offence against, or the order referred to in sub-section (4A) of section 401 is passed under, any law relating to a matter to which the Executive Power of the Union extends, the Central Government; and (b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed.” 29.12. The power to suspend or remit sentences under section 401 and the power to commute sentences under section 402 are thus divided between the Central Government and the State Government on the Constitutional lines indicated in Articles 72 and 161. If, for instance, a person is convicted at the same trial for an offence punishable under the Arms Act or the Explosives Act and for an offence punishable under the

Page 122 JUDGMENT Indian Penal Code and sentenced to different terms of imprisonment but running concurrently, both Governments will have to pass orders before the sentences are effectively suspended, remitted or commuted. Cases may occur where the State Government’s order simply mentions the nature of the sentence remitted or commuted and is treated as sufficient warrant by the prison authorities though strictly under the law, a corresponding order of the Central Government is required in regard to the sentence for the offence falling within the Union List. The legal provisions are, however, clear on the point and we do not consider that any clarification is required.” 121. The learned Solicitor General also relied upon the judgment of this Court in G.V. Ramanaiah v. The Superintendent of Central Jail, Rajahmundry and others - AIR 1974 SC 31 and contended that where the offence is dealt with by the prosecuting agency of the Central Government, by virtue of the proviso to Article 73 of the Constitution, the Executive Power of the Central Government is saved and, therefore, in such cases, it is the Central Government which is the Appropriate Government. 122. Having noted the respective submissions of the parties, the sum and substance of the submission of the respondent State as well as other respondents is that a conspectus consideration of the definition of the “Appropriate Government” under the Penal Code read along with Section 432(7) of Code of Criminal Procedure, where the conviction was under the penal provision of IPC and was not under

Page 123 JUDGMENT any Central Act, the whole authority for consideration of suspension of sentence or remission of sentence or commutation rests solely with the State Government within whose jurisdiction, the conviction came to be imposed. It was, however, submitted that if the conviction was also under any of the Central Act, then and then alone the Central Government becomes the ‘Appropriate Government’ and not otherwise. It was in support of the said submission, reliance was placed upon the decisions of this Court in Ratan Singh (supra), Ajit Singh (supra), Hanumant Dass (supra) and M.T. Khan (supra). The Constituent Assembly debates on the corresponding Articles viz., Articles 72 and 73 were also highlighted to show the intention of the Constituent Assembly while inserting the above said Articles to show the primacy of the State Government under certain circumstances and that of the Central Government under certain other circumstances which the Members of the Assembly wanted to emphasis. 123. The question posed for our consideration is whether there can be two Appropriate Governments under Section 432(7) of the Code of Criminal Procedure and whether Union or the State has primacy for the exercise of the power under Section 432(7) over the subject matter enlisted in List III of the Seventh Schedule for grant of remission as a co-extensive power. To find an answer to the combined questions, we can

make reference to Section 55A of the Penal Code which defines

Page 124 JUDGMENT "Appropriate Government" referred to in Sections 54 and 55 of the Penal Code. Sections 54 and 55 of the Penal Code pertain to commutation of sentence of death and imprisonment for life respectively by the Appropriate Government. In that context, in Section 55A, the expressions "Appropriate Government" has been defined to mean in cases where the sentence is a sentence of death or is for an offence against any law relating to a matter to which the Executive Power of the Union extends, the Central Government. The definition, therefore, makes it clear that insofar as it relates to commutation of death sentence, the Appropriate Government is the Central Government. That apart, if the sentence of death or life is for an offence against any law relating to a matter to which the Executive Power of the Union extends, then again, the 'Appropriate Government' is the Central Government. We have dealt with in extenso while examining Section 73(1) (a) with particular reference to the proviso as to under what circumstance the Executive Power of the Central Government will continue to remain as provided under Article 73(1)(a). We can make a reference to that part of our discussion, where we have explained the implication of the proviso to Article 73(1)(a) in order to note the extent of the Executive Power of the Central Government under the said Article. Therefore, in those cases, where by virtue of any law passed by the Parliament or any of the provisions of the

Page 125 JUDGMENT Constitution empowering the Central Government to act by specifically conferring Executive Authority, then in all those situations, the Executive Power of the Central Government will remain even if the State Government is also empowered to pass legislations under the Constitution. By virtue of the said Constitutional provision contained in the proviso to Article 73(1) (a), if the Executive Power of the Central Government remains, applying Section 55A (a) of the Penal Code, it can be stated without any scope of controversy that the Central Government would be the Appropriate Government in those cases, where the sentence is of death or is for an offence relating to a matter wherein the Executive Power of the Union gets extended. This is one test to be applied for ascertaining as who will be the Appropriate Government for passing order of commutation of sentence of death as well as life imprisonment in the context of Sections 54 and 55 of Penal Code. 124. Keeping it aside for a while, when we refer to Section 55A (b), it is provided therein that in cases where the sentence, whether of death or not, is for an offence against any law relating to a matter to which the Executive Power of the State extends, the Government of the State within which the offender is sentenced will be the Appropriate Government. Sub-clause (b) of Section 55A postulates different circumstances viz., the sentence whether of death or not is for an

Page 126 JUDGMENT offence relating to a matter to which the Executive Power of the State extends, then if the imposition of such sentence was within the four corners of the State concerned, then the Appropriate Government would be the State Government. In fact in this context, the submission made on behalf of the respondents needs to be appreciated that if there was a conviction for an offence under Section 302 IPC simpliciter, even if the prosecuting agency was the Central Government, the State Government would be the Appropriate Government within whose jurisdiction the imposition of sentence came to be made either of death or not. While analyzing Section 55A, vis-à- vis Sections 54 and 55 of the Penal Code, wherever the Executive Power of the Union extends, the Appropriate Government would be the Central Government and in all other cases, the Appropriate Government would be the concerned State within whose jurisdiction the sentence came to be imposed. 125. With that analysis made with reference to Section 55 of the Penal Code, when we refer to Section 432(7) of Code of Criminal Procedure, here again, we find the definition "Appropriate Government" is made with particular reference to and in the context of Sections 432 and 433 of Code of Criminal Procedure. Under Section 432(1) to (6) the prescription is relating to the power to suspend or remit sentences, the procedure to be followed, the conditions to be imposed and the

Page 127 JUDGMENT consequences in the event of breach of any conditions imposed. Similarly, Section 433 pertains to the power of the Appropriate Government to commute the sentence of death, imprisonment for life, sentence of rigorous imprisonment and sentence of simple imprisonment to some other lesser punishment up to imposition of fine. The power under Section 433 can be exercised only by the Appropriate Government. It is in the above context of the prescription contained in Sections 432 (1) to (6) and 433(a) to (d), the definition of 'Appropriate Government' under Section 432(7) has to be analysed. Section 432(7) defines the 'Appropriate Government' to mean; in cases where the sentence is for an offence against or the order referred to in sub-section (6) of Section 432 is passed under any law relating to a matter to which the Executive Power of the Union extends, it is the Central Government. Therefore, what is to be seen is whether the

sentence passed is for an offence against any law relating to a matter to which the Executive Power of the Union extends. Here again, our elaborate discussion on Article 73(1)(a) and its proviso need to be read together. It is imperative and necessary to refer to the discussions on Articles 72, 73, 161 and 162 of the Constitution, inasmuch as how to ascertain the Executive Power of the Centre and the State has been basically set out only in those Constitutional provisions. In other words, only by applying the said Constitutional provisions, the

Page 128 JUDGMENT Executive Power of the Centre and the State can be precisely ascertained. To put it differently, Section 432(7) does not prescribe or explain as to how to ascertain the Executive Power of the Centre and the State, which can be ascertained only by analyzing the above said Articles 72, 73, 161 and 162 of the Constitution. If the offence falls under any such law which the Parliament is empowered to enact as such law has been enacted, on which subject law can also be enacted by any of the States, then the Executive Power of the Centre by virtue of such enactment passed by the Parliament providing for enforcement of such Executive Power, would result in the Central Government becoming the Appropriate Government in respect of any sentence passed against such law. At the risk of repetition, we can refer to Article 73(1)(a) with its proviso to understand the Constitutional prescription vis-à-vis its application for the purpose of ascertaining the Appropriate Government under Section 432(7) of the Code. When we read the proviso to Article 73(1) (a) closely, we note that the emphasis is on the 'Executive Power' which should have been expressly provided in the Constitution or in any law made by the Parliament in order to apply the saving Clause under the proviso. Once the said prescription is clearly understood, what is to be examined in a situation where any question arises as to who is the 'Appropriate Government' in any particular case, then if either under the law in which the prosecution

Page 129 JUDGMENT came to be launched is exclusively under a Central enactment, then the Centre would be the 'Appropriate Government' even if the situs is in any particular State. Therefore, if the order passed by a Criminal Court covered by sub-section (6) of Section 432 was under any law relating to a matter where the Executive Power of the Union extends by virtue of enactment of such Executive Power under a law made by the Parliament or expressly provided in the Constitution, then, the Central Government would be the Appropriate Government. Therefore, what is to be noted is, whether the sentence passed under a law relating to a matter to which the Executive Power of the Union extends, as has been stipulated in the proviso to Article 73(1)(a). In this context, it will be worthwhile to make reference to what Dr. Ambedkar explained, when some of the Members of the Assembly moved certain amendments to enhance the powers of the State with particular reference to Article 60 of the Draft Constitution which corresponds to Article 73 as was ultimately passed. In the words of Dr. Ambedkar himself it was said: "The second proposition which the proviso lays down is that if in any particular case Parliament thinks that in passing the law which relates to the concurrent field the execution ought to be retained by the Central Government, Parliament shall have the power to do so…..It is only in exceptional cases that the Centre may prescribe that the execution of the concurrent law shall be with the Centre.

Page 130 JUDGMENT If the said prescription is satisfied than it would be the Central Government who will be the Appropriate Government. 126. For the purpose of ascertaining which Government would be the Appropriate Government as defined under Section 432(7), what is to be seen is the sentence imposed by the criminal court under the Code of Criminal Procedure or any other law which restricts the liberty of any person or imposes any liability upon him or his property. If such sentence imposed is under any of the Sections of the Penal Code, for which the Executive Power of the Central Government is specifically provided for under a Parliament enactment or prescribed in the Constitution itself then the 'Appropriate Government' would be the Central Government. To understand this position more explicitly, we can make reference to Article 72(1)(a) of the Constitution which while specifying the power of the Executive head of the country, namely, the President it is specifically provided that the power to grant pardons, etc. or grant of remissions etc. or commutation of sentence of any person convicted of any offence in all cases where the punishment or sentence is by a Court Martial, then it is clear to the effect that under the Constitution itself the Executive Power is specifically conferred on the Centre. While referring to various Constitutional provisions, we have also noted such express Executive Power conferred on the Centre

Page 131 JUDGMENT in respect of matters with reference to which the State is also empowered to make laws. If under the provisions of the Code the sentence is imposed, within the territorial jurisdiction of the State concerned, then the 'Appropriate Government' would be the State Government. Therefore, to ascertain who will be Appropriate Government whether the Centre or the State, the first test should be under what provision of the Code of Criminal Procedure the

criminal Court passed the order of sentence. If the order of sentence is passed under any other law which restricts the liberty of a person, then which is that law under which the sentence was passed to be ascertained. If the order of sentence imposed any liability upon any person or his property, then again it is to be verified under which provision of the Code of Criminal Procedure or any other law under which it was passed will have to be ascertained. In the ascertainment of the above questions, if it transpires that the implication to the proviso to Article 73(1)(a) gets attracted, namely, specific conferment of Executive Power with the Centre, then the Central Government will get power to act and consequently, the case will be covered by Section 432(7) (a) of the Code and as a sequel to it, Central Government will be the 'Appropriate Government' to pass orders under Sections 432 and 433 of the Code of Criminal Procedure.

Page 132 JUDGMENT 127. In order to understand this proposition of law, we can make a reference to the decision relied upon by the learned Solicitor General in G.V. Ramanaiah (supra). That was a case where the offence was dealt with and the conviction was imposed under Sections 489A to 489D of the Penal Code. The convicts were sentenced to rigorous imprisonment for a period of ten years. The conviction came to be made by the criminal Court of the State of A.P. The question that came up for consideration was as to who would be the 'Appropriate Government' for grant of remission as was provided under Section 401 of the Code of Criminal Procedure which is the corresponding Section for 432 of Code of Criminal Procedure. In that context, this Court noted that the four sections, viz., Sections 489(A) to 489(D) were added to the Penal Code under the caption "of currency notes and Bank notes" by the Currency Notes Forgery Act, 1899. This Court noted that the bunch of those Sections were the law by itself and that the same would be covered by the expression "currency coinage and legal tender" which are expressly included in Entry 36 of the Union List in the Seventh Schedule of the Constitution. Entry No.93 of the Union List in the same Schedule conferred on the Parliament the power to legislate with regard to offences against laws with respect to any of the matter in the Union List. It was, therefore, held that the offenses for which those persons were convicted were offences relating

Page 133 JUDGMENT to a matter to which the Executive Power of the Union extended and the Appropriate Government competent to remit the sentence would be the Central Government and not the State Government. The said decision throws added light on this aspect. 128. Therefore, whether under any of the provisions of the Criminal Procedure Code or under any Special enactment enacted by the Central Government by virtue of its enabling power to bring forth such enactment even though the State Government is also empowered to make any law on that subject, having regard to the proviso to Article 73(1)(a), if the conviction is for any of the offences against such provision contained in the Code of Criminal Procedure or under such special enactments of the Centre if the Executive Power is specified in the enactment with the Central Government then the Appropriate Government would be the Central Government. Under Section 432(7) (b) barring cases falling under 432(7)(a) in all other cases, where the offender is sentenced or the sentence order is passed within the territorial jurisdiction of the concerned State, then alone the Appropriate Government would be the State. 129. Therefore, keeping the above prescription in mind contained in Section 432(7) and Section 55A of the IPC, it will have to be ascertained whether in the facts and circumstances of a case, where

Page 134 JUDGMENT the Criminal Court imposes the sentence and if such sentence pertains to any Section of the Penal Code or under any other law for which the Executive Power of the center extends, then in those cases the Central Government would be the 'Appropriate Government'. Again in respect of cases, where the sentence is imposed by the Criminal Court under any law which falls within the proviso to Article 73(1)(a) of the Constitution and thereby the Executive Power of the Centre is conferred and gets attracted, then again, the Appropriate Government would be the Centre Government. In all other cases, if the sentence order is passed by the Court within the territorial jurisdiction of the concerned State, the concerned State Government would be the Appropriate Government for exercising its power of remission, suspension as well as commutation as provided under Sections 432 and 433 of the Code of Criminal Procedure. Keeping the above prescription in mind, every case will have to be tested to find out which is the Appropriate Government State or the Centre. 130. However, when it comes to the question of primacy to the Executive Power of the Union to the exclusion of the Executive Power of the State, where the power is co-extensive, in the first instance, it will have to be seen again whether, the sentence ordered by the Criminal Court is found under any law relating to which the Executive Power of the Union extends. In that respect, in our considered view,

Page 135 JUDGMENT the first test should be whether the offence for which the sentence was imposed was under a law with respect to which the Executive Power of the Union extends. For instance, if the sentence was imposed under TADA

Act, as the said law pertains to the Union Government, the Executive Power of the Union alone will apply to the exclusion of the State Executive Power, in which case, there will be no question of considering the application of the Executive Power of the State. 131. But in cases which are governed by the proviso to Article 73(1) (a) of the Constitution, different situations may arise. For instance, as was dealt with by this Court in G.V. Ramanaiah (supra), the offence was dealt with by the criminal Court under Section 489(A) to 489(D) of the Penal Code. While dealing with the said case, this Court noted that though the offences fell under the provisions of the Penal Code, which law was covered by Entry 1 of List III of the Seventh Schedule, namely, the Concurrent List which enabled both the Centre as well as the State Government to pass any law, having regard to the special feature in that case, wherein, currency notes and bank notes to which the offences related, were all matters falling under Entries 36 and 93 of the Union List of the Seventh Schedule, it was held that the power of remission fell exclusively within the competence of the Union. Therefore, in such cases the Union Government will get exclusive

Page 136 JUDGMENT jurisdiction to pass orders under Sections 432 and 433 Code of Criminal Procedure. 132. Secondly, in yet another situation where the law came to be enacted by the Union in exercise of its powers under Articles 248, 249, 250, 251 and 252 of the Constitution, though the legislative power of the States would remain, yet, the combined effect of these Articles read along with Article 73(1) (a) of the Constitution will give primacy to the Union Government in the event of any laws passed by the Centre prescribes the Executive Power to vest with it to the exclusion of the Executive Power of the State then such power will remain with the Centre. In other words, here again, the co-extensive power of the State to enact any law would be present, but having regard to the Constitutional prescription under Articles 248 to 252 of the Constitution by which if specific Executive Power is conferred then the Union Government will get primacy to the exclusion of State. 133. Thirdly, a situation may arise where the authority to bring about a law may be available both to the Union as well as the State, that the law made by the Parliament may invest the Executive Power with the Centre while, the State may also enjoy similar such Executive Power by virtue of a law which State Legislature was also competent to make. In these situations, the ratio laid down by this Court in the decision in G.V. Ramanaiah (supra) will have to be applied and ascertain which

Page 137 JUDGMENT of the two, namely, either the State or the Union would gain primacy to pass any order of remission, etc. In this context, it will be relevant to note the proviso to Article 162 of the Constitution, which reads as under: “Article 162.- Extent of executive power of State xxx xxx xxx Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof.” If the proviso applies to a case, the Executive Power of the State should yield to the Executive Power of the Centre expressly conferred by the Constitution or by any law made by Parliament upon the Union or its authorities. 134. Therefore, the answer to the question should be to the effect that where the case falls under the first test noted herein, it will be governed by Section 432(7)(a) of the Code of Criminal Procedure in which event, the power will be exclusive to the Union. In cases which fall under the situation as was dealt with by this Court in G.V. Ramanaiah (supra), there again the power would exclusively remain with the Centre. Cases falling under second situation like the one covered by Articles 248 to 252 of the Constitution, wherein, the

Page 138 JUDGMENT competence to legislate laws was with the State, and thereby if the Executive Power of the State will be available, having regard to the mandate of these Articles which empowers the Union also to make laws and thereby if the Executive Power of the Union also gets extended, though the power is co-extensive, it must be held that having regard to the special features set out in the Constitution in these situations, the Union will get the primacy to the exclusion of the State. 135. Therefore, we answer the question Nos.52.3, 52.4 and 52.5 to the above extent leaving it open for the parties concerned, namely, the Centre or the State to apply the test and find out who will be the ‘Appropriate Government’ for exercising the power under Sections 432 and 433 of the Criminal Procedure Code. 136. Next, we take up the question: “Whether suo motu exercise of power of remission under Section 432(1) is permissible in the scheme of the Section, if yes, whether the procedure prescribed in sub- section (2) of the same section is mandatory or not?” Section 432(1) and (2) reads as under: “432. Power to suspend or remit sentences.-(1) When any person has been sentenced to punishment for an offence, the Appropriate Government may, at any time, without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has

been sentenced.

Page 139 JUDGMENT (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." 137. Sub-section (1) of Section 432 empowers the Appropriate Government either to suspend the execution of a sentence or remit the whole or any part of the punishment to which he has been sentenced. While passing such orders, it can impose any conditions or without any condition. In the event of imposing any condition such condition must be acceptable to the person convicted. Such order can be passed at any time. 138. Sub-section (2) of Section 432 pertains to the opinion to be secured from the presiding Judge of the Court who convicted the person and imposed the sentence or the Court which ultimately confirmed such conviction. Whenever any application is made to the Appropriate Government for suspension or remission of sentence, such opinion to be rendered must say whether the prayer made in the application should be granted or refused. It should also contain reasons along with the opinion, certified copy of the record of the trial or such other record which exists should also be forwarded.

Page 140 JUDGMENT 139. Before making an analysis on the question referred for our consideration, certain observations of the Constitution Bench of this Court in Maru Ram (supra) which was stated in the context of the power exercisable under Articles 72 and 161 of the Constitution needs to be noted. Such observations relating to the Constitutional power of the President and Governor, of course with the aid and advice of the Council of Ministers, is on a higher plane and are stated to be 'untouchable' and 'unapproachable'. It was also held that the Constitutional power, as compared to the power exercisable under Sections 432 and 433 looks similar but not the same, in the sense that the statutory power under Sections 432 and 433 is different in source, substance and strength and it is not as that of the Constitutional power. Such statement of law was made by the Constitution Bench to hold that notwithstanding Sections 433A which provides for minimum of 14 years incarnation for a lifer to get the benefit of remission, etc., the President and the Governor can continue to exercise the power of Constitution and release without the requirement of the minimum period of imprisonment. But the significant aspect of the ruling is a word of caution even to such exercise of higher Constitutional power with high amount of circumspection and is always susceptible to be interfered with by judicial forum in the event of any such exercise being demonstrated to

Page 141 JUDGMENT be fraught with arbitrariness or mala fide and should act in trust to our Great Master, the Rule of Law. In fact the Bench quoted certain examples like the Chief Minister of a State releasing everyone in the prison in his State on his birthday or because a son was born to him and went to the extent of stating that it would be an outrage on the Constitution to let such madness to survive. 140. We must state that such observations and legal principles stated in the context of Articles 72 and 161 of the Constitution will have greater force and application when we examine the scope and ambit of the power exercisable by the Appropriate Government under Section 432(1) and (2) of Code of Criminal Procedure. 141. Keeping the above principles in mind, when we analyze Section 432(1), it must be held that the power to suspend or remit any sentence will have to be considered and ordered with much more care and caution, in particular the interest of the public at large. In this background, when we analyze Section 432(1), we find that it only refers to the nature of power available to the Appropriate Government as regards the suspension of sentence or remission to be granted at any length. Extent of power is one thing and the procedure to be followed for the exercise of the power is different thing. There is no indication in Section 432(1) that such power can be exercised based on any application. What is not prescribed in the statute cannot be

Page 142 JUDGMENT imagined or inferred. Therefore, when there is no reference to any application being made by the offender, cannot be taken to mean that such power can be exercised by the authority concerned on its own. More so, when a detailed procedure to be followed is clearly set out in Section 432(2). It is not as if by exercising such power under Section 432(1), the Appropriate Government will be involving itself in any great welfare measures to the public or the society at large. It can never be held that such power being exercised suo motu any great development act would be the result. After all such exercise of power of suspension or remission is only going to grant some relief to the offender who has been found to have committed either a heinous crime or at least a crime affecting the society at large. Therefore, when in the course of exercise of larger Constitutional powers of similar kind under Articles 72 and 161 of the Constitution it has

been opined by this Court to be exercised with great care and caution, the one exercisable under a statute, namely, under Section 432(1) which is lesser in degree should necessarily be held to be exercisable in tune with the adjunct provision contained in the same section. Viewed in that respect, we find that the procedure to be followed whenever any application for remission is moved, the safeguard provided under Section 432(2) should be the sine-quo-non for the ultimate power to be exercised under Section 432 (1).

Page 143 JUDGMENT 142. By following the said procedure prescribed under Section 432(2), the action of the Appropriate Government is bound to survive and stand the scrutiny of all concerned including judicial forum. It must be remembered, barring minor offences, in cases involving heinous crimes like, murder, kidnapping, rape robbery, dacoity, etc., and such other offences of such magnitude, the verdict of the trial Court is invariably dealt with and considered by the High Court and in many cases by the Supreme Court. Thus, having regard to the nature of opinion to be rendered by the presiding officer of the concerned Court will throw much light on the nature of crime committed, the record of the convict himself, his background and other relevant factors which will enable the Appropriate Government to take the right decision as to whether or not suspension or remission of sentence should be granted. It must also be borne in mind that while for the exercise of the Constitutional power under Articles 72 and 161, the Executive Head will have the benefit of act and advice of the Council of Ministers, for the exercise of power under Section 432(1), the Appropriate Government will get the valuable opinion of the judicial forum, which will definitely throw much light on the issue relating to grant of suspension or remission. 143. Therefore, it can safely be held that the exercise of power under Section 432(1) should always be based on an application of the person

Page 144 JUDGMENT concerned as provided under Section 432(2) and after duly following the procedure prescribed under Section 432(2). We, therefore, fully approve the declaration of law made by this Court in Sangeet (supra) in paragraph 61 that the power of Appropriate Government under Section 432(1) Code of Criminal Procedure cannot be suo motu for the simple reason that this Section is only an enabling provision. We also hold that such a procedure to be followed under Section 432(2) is mandatory. The manner in which the opinion is to be rendered by the Presiding Officer can always be regulated and settled by the concerned High Court and the Supreme Court by stipulating the required procedure to be followed as and when any such application is forwarded by the Appropriate Government. We, therefore, answer the said question to the effect that the suo motu power of remission cannot be exercised under Section 432(1), that it can only be initiated based on an application of the persons convicted as provided under Section 432(2) and that ultimate order of suspension or remission should be guided by the opinion to be rendered by the Presiding Officer of the concerned Court. 144. We are now left with the question namely: “Whether the term “‘Consultation’” stipulated in Section 435(1) of the Code implies “‘Concurrence’”?”

Page 145 JUDGMENT It is relevant to extract Section 435(1) of Code of Criminal Procedure, which reads as under: “Section 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, 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, of (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.” Answer to this question depends wholly on the interpretation of Section 435 of Code of Criminal Procedure. After referring to the said Section, learned Solicitor General referred to the convictions imposed on the accused/respondents in the Late Rajiv Gandhi Murder case. Learned Solicitor General pointed out that though 26 accused were convicted by the Special Court, this Court confirmed the conviction only as against the 7 respondents in that Writ Petition and the rest of the accused were all acquitted, namely, 19 of them. He also pointed out that the conviction of the Special Court under TADA Act was set aside by this Court. While the conviction of the respondents under

Page 146 JUDGMENT Sections 212 and 216 of I.P.C, Section 14 of Foreigners Act, Section 25(1-B) of Arms Act, Section 5 of Explosive Substances Act, Section 12 of the Passport Act and Section 6(1-A) of The Wireless Telegraph Act were all confirmed by this Court. That apart conviction under Section 120-B I.P.C. read with Section 302 I.P.C. against all the

seven respondents was also confirmed by this Court. In the ultimate conclusion, this Court confirmed the death sentence against A-1 Nalini, A-2 Santhan, A-3 Murugan and A-18 Arivu and the sentence of Death against A-9 Robert Payas, A-10 Jayakumar and A-16 Ravichandran was altered as imprisonment for life. Subsequently in the judgment in V. Sriharan (supra) even the death sentence against A-2 Santhan, A-3 Murugan and A-18 Arivu was also commuted into imprisonment for life meaning thereby end of one's life, subject to remission granted by the Appropriate Government under Section 432 of the Code of Criminal Procedure, 1973, which in turn, subject to the procedural checks mentioned in the said provision and further substantive checks in Section 433 A of the Code. 145. As far as the remission provided under Section 432 is concerned, the same will consist of the remission of the sentence of a prisoner by virtue of good behavior, etc., under the Jail Manual, Prisoners' Act and Rules and other Regulations providing for earning of such remission and remission of the sentence itself by imposing conditions. Keeping

Page 147 JUDGMENT the above factual matrix in the Rajiv Gandhi Murder case, vis-à-vis the 7 respondents therein as a sample situation, we proceed to analyze these questions arising under Section 435 Code of Criminal Procedure Learned Solicitor General in his submissions contended that since the punishments imposed on the respondents under the various Central Acts such as Foreigners Act, Passport Act, etc., have all been completed by the respondents, the requirement of Section 435(2) does not arise and, therefore, there will be no impediment for the State Government to exercise its power under Section 435(2) of the Code of Criminal Procedure According to the learned Solicitor General, since the period of imprisonment under various Central Acts has already been suffered by the respondents, the requirement of passing order of suspension, remission or commutation by the Central Government does not arise and it is for the State Government to pass order of suspension, remission or commutation under Section 435(2) Code of Criminal Procedure The learned Solicitor General, however, contended that by virtue of the fact that whole investigation right from the beginning was entrusted with the C.B.I. under the Delhi Police Establishment Act and the ultimate conviction of the respondents under the provisions of Indian Penal Code came to be made by the Special Court and commutation of the same with certain modifications as regards the sentence part alone by this Court, by virtue of the

Page 148 JUDGMENT proviso to Article 73(1)(a) of the Constitution, the Executive Authority of the Union gets the power to pass order either under Article 72 of the Constitution or under Sections 432 to 435 of Code of Criminal Procedure and to that extent the scope and ambit of the power of the State Government gets restricted and, therefore, in the event of the State Government, in its right as the Appropriate Government seeks to exercise its power under Section 435(1) Code of Criminal Procedure such exercise of power in the present context can be exercised only with the 'Concurrence' of the Central Government and the expression 'Consultation' made in Section 435(1) should be held as such. In support of his submissions the learned Solicitor General relied upon Lalu Prasad Yadav & Anr. v. State of Bihar & Anr. - (2010) 5 SCC 1, Supreme Court Advocates on Record Association and ors. v. Union of India - (1993) 4 SCC 441, State of Gujarat and Anr. v. Justice R.A. Mehta (Retired) and ors. - (2013) 3 SCC 1 and N. Kannadasan v. Ajoy Khose and Ors. - (2009) 7 SCC 1. 146. As against the above submissions, Mr. Dwivedi, learned Senior Counsel for the State of Tamil Nadu prefaced his submissions by contending that while proposing to grant remission to the respondents, the State Government did not undermine the nature of crime committed and the impact of the remission that may be caused on the society, as well as, the concern of the State Government in this

Page 149 JUDGMENT case. The learned Senior Counsel also submitted that the State Government is not going to act in haste and is very much alive to the fact that the person murdered was a former Prime Minister of this country and the State cannot take things lightly while considering the remission to be granted to the Respondents. The learned Senior Counsel, therefore, contended that in the process of 'Consultation', the views of the Central Government will be duly considered before passing final orders on the proposed remission. According to learned Senior Counsel under Section 435(1), the act of 'Consultation' prescribed is a rider to the exercise of Executive Power of the State to be exercised under Sections 432 and 433 in respect of cases falling under Sections 435(1)(a) to (c). By referring to Sections 435(2) the learned Senior Counsel contended that in the said sub-section cautiously the Parliament has used the expression 'Concurrence' while in Section 435(1) the expression used is 'Consultation'. It is, therefore, pointed out that the distinctive idea of 'Consultation' and 'Concurrence' has been clearly disclosed. The learned Senior Counsel then pointed out that while acting under Section 435(1), what is relevant is the Sentence and not the Conviction, which can be erased only by grant of pardon and grant of remission will have no implication on the conviction. By referring to Section 435(1)(b) & (c), the learned Senior Counsel

pointed out that with reference to those

Page 150 JUDGMENT offences where the investigation can be carried out entirely by the State Government and the offence would only relate to the property of the Central Government and the services of person concerned in the services of the Centre what is contemplated is only ‘Consultation’. It was contended that when the ‘Consultation’ process is invoked by the State Government, Union of India can suggest whatever safeguards to be made to ensure that even while granting remission, necessary safeguard is imposed. The learned Senior Counsel also submitted that paramount consideration should be the interest of the Nation which is the basic feature of the Constitution and, therefore, ‘Consultation’ means effective and meaningful ‘Consultation’ and that the State cannot act in an irresponsible manner keeping the Nation at peril. The learned Senior Counsel contended that though the CBI conducted the investigation and all the materials were gathered by the CBI, after the conviction, every material is open and, therefore, it cannot be said that the State Government had no material with it. The learned Senior Counsel also pointed out that the jail representation is with the State Government and it will be open to the State to consider the recorded materials by the Court and invoke its power under Sections 432 and 433 of Code of Criminal Procedure. The learned Senior Counsel further contended that in the process of ‘Consultation’, the Union Government will be able to consider any other material within its

Page 151 JUDGMENT knowledge and make an effective report. If such valuable materials reflected in the ‘Consultation’ process are ignored by the State, then the Court’s power of Review can always be invoked. The learned Senior Counsel relied upon the decisions reported in State of U.P. and another v. Johri Mal – (2004) 4 SCC 714, Justice Chandrashekaraiah (Retired) v. Janekere C. Krishna and others - (2013) 3 SCC 117 and S.R. Bommai and others v. Union of India and others - (1994) 3 SCC 1 in support of his submissions. 147. In order to appreciate the respective submissions, it will be necessary to refer to the relevant Government orders passed by the State of Tamil Nadu and the consequential Notification issued by the Government of India after the gruesome murder of Late Rajiv Gandhi, the former Prime Minister of India on 21.05.1991 at 10.19 p.m. at Sriperumbudur in Tamil Nadu. It will be worthwhile to trace back the manner by which the accused targeted their killing as has been succinctly narrated in the judgment reported in State through Superintendent of Police, CBI/SIT v. Nalini and others - (1999) 5 SCC 253. Paragraphs 23 to 29 are relevant which read as under: “23. On 21-5-1991, Haribabu bought a garland made of sandalwood presumably for using it as a camouflage (for murdering Rajiv Gandhi). He also secured a camera. Nalini (A-1) wangled leave from her immediate boss (she was working in a company as PA to the Managing Director) under the pretext that she wanted to go to Kanchipuram for buying a saree. Instead she went to

Page 152 JUDGMENT her mother’s place. Padma (A-21) is her mother. Murugan (A-3) was waiting for her and on his instruction Nalini rushed to her house at Villiwakkam (Madras). Sivarasan reached the house of Jayakumar (A-10) and he got armed himself with a pistol and then he proceeded to the house of Vijayan (A-12). 24. Sivarasan directed Suba and Dhanu to get themselves ready for the final event. Suba and Dhanu entered into an inner room. Dhanu was fitted with a bomb on her person together with a battery and switch. The loosely stitched salwar-kameez which was purchased earlier was worn by Dhanu and it helped her to conceal the bomb and the other accessories thereto. Sivarasan asked Vijayan (A-12) to fetch an auto- rickshaw. 25. The auto-rickshaw which Vijayan (A-12) brought was not taken close to his house as Sivarasan had cautioned him in advance. He took Suba and Dhanu in the auto-rickshaw and dropped them at the house of Nalini (A-1). Suba expressed gratitude of herself and her colleagues to Nalini (A-1) for the wholehearted participation made by her in the mission they had undertaken. She then told Nalini that Dhanu was going to create history by murdering Rajiv Gandhi. The three women went with Sivarasan to a nearby temple where Dhanu offered her last prayers. They then went to “Parry’s Corner” (which is a starting place of many bus services at Madras). Haribabu was waiting there with the camera and garland. 26. All the 5 proceeded to Sriperumbudur by bus. After reaching there they waited for the arrival of Rajiv Gandhi. Sivarasan instructed Nalini (A-1) to provide necessary cover to Suba and Dhanu so that their identity as Sri Lankan girls would not be disclosed due to linguistic accent. Sivarasan further instructed her to be with Suba and to escort her after the assassination to the spot where Indira Gandhi’s statue is situate and to wait there for 10 minutes for Sivarasan to reach.

Page 153 JUDGMENT 27. Nalini (A-1), Suba and Dhanu first sat in the enclosure earmarked for ladies at the meeting place at Sriperumbudur. As the time of arrival of Rajiv Gandhi was nearing Sivarasan took Dhanu alone from that place. He collected the garland from Suba and escorted Dhanu to go near the rostrum. Dhanu could reach near the red carpet where a little girl (Kokila) and her mother (Latha Kannan) were waiting to present a poem written by Kokila on Rajiv

Gandhi. 28. When Rajiv Gandhi arrived at the meeting place Nalini (A-1) and Suba got out of the enclosure and moved away. Rajiv Gandhi went near the little girl Kokila. He would have either received the poem or was about to receive the same, and at that moment the hideous battery switch was clawed by the assassin herself. Suddenly the pawn bomb got herself blown up as the incendiary device exploded with a deadening sound. All human lives within a certain radius were smashed to shreds. The head of a female, without its torso, was seen flinging up in the air and rolling down. In a twinkle, 18 human lives were turned into fragments of flesh among which was included the former Prime Minister of India Rajiv Gandhi and his personal security men, besides Dhanu and Haribabu. Many others who sustained injuries in the explosion, however, survived. 29. Thus the conspirators perpetrated their prime target achievement at 10.19 p.m. on 21-5-1991 at Sriperumbudur in Tamil Nadu. 148. Closely followed, after the above occurrence, the Principal Secretary to the Government of Tamil Nadu addressed a D.O. letter dated 22.05.1991 to the Joint Secretary to the Government of India, conveying the order of the Government of Tamil Nadu expressing its consent under Section 6 of the Delhi Special Police Establishment Act 1946 to the extension of powers and jurisdiction of members of the

Page 154 JUDGMENT Delhi Special Police Establishment to investigate the case in Crime No.329/91 under Sections 302, 307 and 326 IPC and under Section 3 & 5 of The Explosive Substances Act, registered in Sriperumbudur police station, Changai Anna (West) District, Tamil Nadu, relating to the death of Late Rajiv Gandhi, former Prime Minister of India on 21.05.1991. The Notification of the Government of Tamil Nadu under Section 6 of the 1946 Act mentioned the State of Tamil Nadu's consent to the extension of powers to the members of Delhi Special Police Establishment in the WHOLE of the State of Tamil Nadu for the investigation of the crime in Crime No.329/91. In turn, the Government of India, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training passed its Notification dated 23.05.1991 extending power and jurisdiction of the members of the Delhi Special Police Establishment to the WHOLE of the State of Tamil Nadu for investigation in respect of crime No.329/91. That is how the Central Government came into the picture in the investigation of the crime, the conviction by the Special Court of 26 persons and the ultimate confirmation insofar as it was against the present Respondents alone setting aside the conviction as against the 19 accused. 149. The above noted facts disclose that the case is covered by Section 435(1)(a) of Code of Criminal Procedure. Therefore, as per Section

Page 155 JUDGMENT 435(1) the power of State Government to remit or commute the sentence under Sections 432 and 433 Code of Criminal Procedure should not be exercised except after due 'Consultation' with the Central Government. Since the expression 'shall' is used in the said sub-section, it is mandatory for the State Government to resort to the 'Consultation' process without which, the power cannot be exercised. As rightly submitted by the learned Senior Counsel for the State of Tamil Nadu, such 'Consultation' cannot be an empty formality and it should be an effective one. While on the one hand the power to grant remission under Section 432 and commute the sentence under Section 433 conferred on the Appropriate Government is available, as we have noted, the exercise of such power insofar as it related to remission or suspension under Section 432 is not suo motu, but can be made only based on an application and also circumscribed by the other provisions, namely, Section 432(2), whereby the opinion of the Presiding Judge who imposed or confirmed the conviction should be given due consideration. Further, we have also explained how to ascertain as to who will be the Appropriate Government as has been stipulated under Section 432(7) of Code of Criminal Procedure which applied to the exercise of power both under Section 432 and as well as 433 Code of Criminal Procedure In this context, we have also analyzed as to how far the proviso to Article 73(1) (a) of the Constitution will

Page 156 JUDGMENT ensure greater Executive Power on the Centre over the State wherever the State Legislature has also got power to make laws. Having analyzed the implication of the said proviso, vis-à-vis, Articles 161, 162 and Entry 1 and 2 of List III of the Seventh Schedule, by virtue of which, the Central Government gets primacy as an Appropriate Government in matter of this kind. Having regard to our above reasoning on the interpretation of the Constitutional provisions read along with the provisions of Code of Criminal Procedure, our conclusion as to who will be the Appropriate Government has to be ascertained in every such case. In the event of the Central Government becoming the Appropriate Government by applying the tests which we have laid based on Section 432(7) read along with the proviso to Article 73(1)(a) of the Constitution and the relevant entries of List III of the Seventh Schedule of the Constitution, then in those cases there would be no scope for the State Government to exercise its power at all under Section 432 Code of Criminal Procedure In the event of the State Government getting jurisdiction as the Appropriate Government and after complying

with the requirement, namely, any application for remission being made by the person convicted and after obtaining the report of the concerned Presiding Officer as required under Section 432(2), if Section 435(1)(a) or (b) or (c) is attracted, then the question for consideration would be whether the expression ‘‘Consultation’’ is

Page 157 JUDGMENT mere ‘Consultation’ or to be read as ‘‘Concurrence’’ of the Central Government. 150. In this context, it will be advantageous to refer to the Nine-Judge Constitution Bench decision of this Court reported in Supreme Court Advocates on Record Association (supra). In the majority judgment authored by Justice J.S. Verma, the learned Judge while examining the question referred to the Bench on the interpretation of Articles 124(2) and 217(1) of the Constitution as it stood which related to appointment of Judges to the Supreme Court and High Courts quoted the precautionary statement made by Dr. Rajendra Prasad in his speech as President of the Constituent Assembly while moving for adoption of the Constitution of India. A portion of the said quote relevant for our purpose reads as under: “429…….There is a fissiparous tendency arising out of various elements in our life. We have communal differences, caste differences, language differences, provincial differences and so forth. It requires men of strong character, men of vision, men who will not sacrifice the interests of the country at large for the sake of smaller groups and areas and who will rise over the prejudices which are born of these differences. We can only hope that the country will throw up such men in abundance. … In India today I feel that the work that confronts us is even more difficult than the work which we had when we were engaged in the struggle. We did not have then any conflicting claims to reconcile, no loaves and fishes to distribute, no power to share. We have all these now, and the temptations are really great. Would to God that we shall have the wisdom and the strength to rise above them and to serve the country which we have succeeded

Page 158 JUDGMENT in liberating”. 151. Again in paragraph 432, the principle is stated as to how construction of a Constitutional Provision is to be analyzed which reads as under: “432. …….A fortiori any construction of the Constitutional provisions which conflicts with this Constitutional purpose or negates the avowed object has to be eschewed, being opposed to the true meaning and spirit of the Constitution and, therefore, an alien concept.” (Emphasis added) 152. By thus laying down the broad principles to be applied, considered the construction of the expression ‘‘Consultation’’ to be made with the Chief Justice of India for the purpose of composition of higher judiciary as used in Article 124(2) and 217(1) of the Constitution and held as under in paragraph 433: “433. It is with this perception that the nature of primacy, if any, of the Chief Justice of India, in the present context, has to be examined in the Constitutional scheme. The hue of the word ‘‘Consultation’’, when the ‘Consultation’ is with the Chief Justice of India as the head of the Indian Judiciary, for the purpose of composition of higher judiciary, has to be distinguished from the colour the same word ‘‘Consultation’’ may take in the context of the executive associated in that process to assist in the selection of the best available material.” 153. Thereafter tracing the relevant provisions in the pre- Constitutional era, namely, the Government of India Act, 1919, and the Government of India Act, 1935, wherein the appointment of

Page 159 JUDGMENT Judges of the Federal Court and the High Courts were in the absolute discretion of the Crown or in other words, of the Executive with no specific provision for ‘Consultation’ with the Chief Justice in the appointment process, further noted, the purpose for which the obligation of ‘‘Consultation’’ with the Chief Justice of India and the Chief Justice of the High Court in Articles 124(2) and 217(1) came to be incorporated was highlighted. Thereafter, the Bench expressed its reasoning as to why in the said context, the expression ‘‘Consultation’’ was used instead of ‘‘Concurrence’’. Paragraph 450 of the said judgment gives enough guidance to anyone dealing with such issue which reads as under: “450. It is obvious, that the provision for ‘Consultation’ with the Chief Justice of India and, in the case of the High Courts, with the Chief Justice of the High Court, was introduced because of the realisation that the Chief Justice is best equipped to know and assess the worth of the candidate, and his suitability for appointment as a superior Judge; and it was also necessary to eliminate political influence even at the stage of the initial appointment of a Judge, since the provisions for securing his independence after appointment were alone not sufficient for an independent judiciary. At the same time, the phraseology used indicated that giving absolute discretion or the power of veto to the Chief Justice of India as an individual in the matter of appointments was not considered desirable, so that there should remain some power with the executive to be exercised as a check, whenever necessary. The indication is, that in the choice of a candidate suitable for appointment, the opinion of the Chief Justice of India should have the greatest weight; the selection should be made as a result of a participatory consultative process in which the

Page 160 JUDGMENT executive should have power to act as a mere check on the exercise of power by the Chief Justice of India, to achieve the Constitutional purpose. Thus, the executive element in the appointment process is reduced to the minimum and any political influence is eliminated. It was for this reason that the word ‘‘Consultation’’ instead of ‘‘Concurrence’’ was used, but that was done merely to indicate that absolute discretion was not given to anyone, not even to the Chief Justice of India as an individual, much less to the executive, which earlier had absolute discretion under the Government of India Acts.” (Emphasis added) 154. We must state that in the first place, whatever stated by the said larger Constitution Bench while interpreting an expression in a Constitutional provision, having regard to its general application can be equally applied while interpreting a similar expression in any other statute. We find that the basic principles set out in the above quoted paragraphs of the said decision can be usefully referred to, relied upon and used as a test while examining a similar expression used, namely, in Section 435(1) of Code of Criminal Procedure. While quoting the statement of Dr. Rajendra Prasad, what was highlighted was the various differences that exist in our country including ‘provincial differences’, the necessity to ensure that men will not sacrifice the interests of the country at large for the sake of smaller groups and areas, the existence of conflicting claims to reconcile after our liberation, and the determination to save the country rather than yielding to the pressure of smaller groups. It was also stated in the

Page 161 JUDGMENT context of Articles 124(2) and 217(1) as to how the independence of judiciary to be the paramount criteria and any construction that conflict with such said avowed object of the Constitution to be eschewed. Thereafter, while analyzing the primacy of the Chief Justice of India for the purpose of appointment of Judges, analyzed as to how our Constitutional functionary qua the others who together participate in the performance of the function assumes significance only when they cannot reach an agreed conclusion. It was again stated as to see who would be best equipped and likely to be more correct for achieving the purpose and perform the task satisfactorily. It was stated that primacy should be in one who qualifies to be treated as the ‘expert’ in the field and comparatively greater weight to his opinion may then to be attached. We find that the above tests indicated in the larger Constitution Bench judgment can be applied in a situation like the one which we are facing at the present juncture. 155. Again in a recent decision of this Court reported in R.A. Mehta (Retired) (supra) to which one of us was a party (Fakkir Mohamed Ibrahim Kalifulla, J.) it was held as under in paragraph 32: “32. Thus, in view of the above, the meaning of “Consultation’” varies from case to case, depending upon its fact situation and the context of the statute as well as the object it seeks to achieve. Thus, no straitjacket formula can be laid down in this regard. Ordinarily, ‘Consultation’ means a free and fair discussion on a

Page 162 JUDGMENT particular subject, revealing all material that the parties possess in relation to each other and then arriving at a decision. However, in a situation where one of the consultees has primacy of opinion under the statute, either specifically contained in a statutory provision, or by way of implication, ‘Consultation’ may mean ‘Concurrence’. The court must examine the fact situation in a given case to determine whether the process of ‘Consultation’ as required under the particular situation did in fact stand complete.” (Emphasis added) 156. The principles laid down in the larger Constitution Bench decision reported in Supreme Court Advocates on Record Association (supra) was also followed in N. Kannadasan (supra). 157. While noting the above principles laid down in the larger Constitution Bench decision and the subsequent decisions on the interpretation of the expression, we must also duly refer to the reliance placed upon the decision in S.R. Bommai (supra), Johri Mal (supra) and Justice Chandrashekaraiah (Retired) (supra). The judgment in S.R. Bommai (supra) is again a larger Constitution Bench of Nine-Judges known as Bommai case (supra), in which our attention was drawn to paragraphs 274 to 276, wherein, Justice B.P. Jeevan Reddy pointed out that ‘federation’ or ‘federal form of Government’ has no fixed meaning, that it only broadly indicates a division of powers between the Centre and the States, and that no two

Page 163 JUDGMENT federal Constitutions are alike. It was stated that, therefore, it will be futile to try to ascertain and fit our Constitution into any particular mould. It was also stated that in the light of our historical process and the Constitutional evolution, ours is not a case of independent States coming together to form a federation as in the case of U.S.A. The learned judge also explained that the founding fathers of our Constitution wished to establish a strong Centre and that in the light of the past history of this sub-continent such a decision was inevitably taken perforce. It was also stated that the establishment of a strong Centre was a necessity. It will be appropriate to extract paragraph 275 to appreciate the analysis of the scheme of the Constitution made by the learned Judge which reads as under: “275. A review of the provisions of the Constitution shows unmistakably that while creating a federation, the Founding Fathers wished to

establish a strong Centre. In the light of the past history of this sub-continent, this was probably a natural and necessary decision. In a land as varied as India is, a strong Centre is perhaps a necessity. This bias towards Centre is reflected in the distribution of legislative heads between the Centre and States. All the more important heads of legislation are placed in List I. Even among the legislative heads mentioned in List II, several of them, e.g., Entries 2, 13, 17, 23, 24, 26, 27, 32, 33, 50, 57 and 63 are either limited by or made subject to certain entries in List I to some or the other extent. Even in the Concurrent List (List III), the parliamentary enactment is given the primacy, irrespective of the fact whether such enactment is earlier or later in point of time to a State enactment on the same subject-matter. Residuary powers are with the Centre. By the 42nd Amendment, quite a few of the entries in List II were omitted and/or transferred to other lists. Above all, Article 3

Page 164 JUDGMENT empowers Parliament to form new States out of existing States either by merger or division as also to increase, diminish or alter the boundaries of the States. In the process, existing States may disappear and new ones may come into existence. As a result of the Reorganisation of States Act, 1956, fourteen States and six Union Territories came into existence in the place of twenty-seven States and one area. Even the names of the States can be changed by Parliament unilaterally. The only requirement, in all this process, being the one prescribed in the proviso to Article 3, viz., ascertainment of the views of the legislatures of the affected States. There is single citizenship, unlike USA. The judicial organ, one of the three organs of the State, is one and single for the entire country — again unlike USA, where you have the federal judiciary and State judiciary separately. Articles 249 to 252 further demonstrate the primacy of Parliament. If the Rajya Sabha passes a resolution by 2/3rd majority that in the national interest, Parliament should make laws with respect to any matter in List II, Parliament can do so (Article 249), no doubt, for a limited period. During the operation of a Proclamation of emergency, Parliament can make laws with respect to any matter in List II (Article 250). Similarly, Parliament has power to make laws for giving effect to International Agreements (Article 253). So far as the finances are concerned, the States again appear to have been placed in a less favourable position, an aspect which has attracted a good amount of criticism at the hands of the States and the proponents of the States' autonomy. Several taxes are collected by the Centre and made over, either partly or fully, to the States. Suffice it to say that Centre has been made far more powerful vis-a-vis the States. Correspondingly, several obligations too are placed upon the Centre including the one in Article 355 — the duty to protect every State against external aggression and internal disturbance. Indeed, this very article confers greater power upon the Centre in the name of casting an obligation upon it, viz., "to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution". It is both a responsibility and a power." 158. After making reference to the division of powers set out in the

Page 165 JUDGMENT various Articles as well as the Lists I to III of Seventh Schedule and its purported insertion in the Constitutional provisions, highlighted the need for empowering the Centre on the higher side as compared with the States while also referring to the corresponding obligations of the Centre. While referring to Article 355 of the Constitution in that context, it was said "the duty to protect every State against external aggression and internal disturbance. Indeed this very Article confers greater power upon the Centre in the name of casting an obligation upon it (viz.) to ensure that the Government of every State is carried on in accordance with the provisions of this Constitution". It is both a responsibility and a power. Simultaneously, in paragraph 276, the learned Judge also noted that while under the Constitution, greater power is conferred upon the Centre viz-a-viz the States, it does not mean that States are mere appendages of the Centre and that within the sphere allotted to them, States are supreme. It was, therefore, said that Courts should not adopt and approach, an interpretation which has the effect of or tend to have the effect of whittling down the powers reserved to the States. Ultimately, the learned Judge noted a word of caution to emphasize that Courts should be careful not to upset the delicately crafted Constitutional scheme by a process of interpretation. 159. In Johri Mal (supra), this Court considered the effect of the expression ''Consultation'' contained in The Legal Remembrancer's

Page 166 JUDGMENT Manual, in the State of Uttar Pradesh which provides in Clause 7.03 the requirement of 'Consultation' by the District Officer with the District Judge before considering anyone for being appointed as District Government council. In the said judgment it was noticed that in Uttar Pradesh, the State government by way of amendment omitted sub-sections (1), (4) (5) and (6) of Section 24 which provided for ''Consultation'' with the High Court for appointment of Public Prosecutor for the High Court and with District Judge for appointment of such posts at the District level. Therefore, the only proviso akin to such prescription was made only in The Legal Remembrancer's Manual which is

a compilation of executive order and not a ‘Law’ within the meaning of Article 13 of the Constitution. In the light of the said situation, this Court while referring to Supreme Court Advocates on Record Association (supra) made a distinction as to how the appointment of District Government counsel cannot be equated with the appointment of High Court Judges and Supreme Court Judges in whose appointment this Court held that the expression ‘‘Consultation’’ would amount to ‘‘Concurrence’’. It was, however, held that even in the case of appointment of District Government counsel, the ‘Consultation’ by the District Magistrate with the District Judge should be an effective one. Similarly, in the judgment reported in Justice Chandrasekaraiah (Retd.) (supra) this

Page 167 JUDGMENT Court considered the expression ‘‘Consultation’’ occurring in Section 3 (2) (a) (b) of the Karnataka Lok Ayukta Act, 1984 relating to appointment of Lokayukta and Upa-Lokayukta, took the view that while ‘Consultation’ by the Chief Minister with the Chief Justice as one of the consultees is mandatory, since the appointment to those positions is not a judicial or Constitutional authority but is a sui generis quasi judicial authority, ‘Consultation’ will not amount to ‘‘Concurrence’’. Therefore, the said judgment is also clearly distinguishable. 160. Having considered the submissions of the respective counsel for the Union of India, State of Tamil Nadu and the other counsel and also the larger Constitution Bench decisions and the subsequent decisions of this Court as well as the specific prescription contained in Section 435(1)(a) read along with Articles 72, 73(i)(a), 161 and 162 of the Constitution, the following principles can be derived to note how and in what manner the expression ‘‘Consultation’’ occurring in Section 435(1)(a) can be construed:- (a) Section 435(1) mandatorily requires the State Government, if it is the ‘Appropriate Government’ to consult the Central Government if the consideration of grant of remission or commutation under Section 432 or 433 in a case which falls within any of the three sub-clauses (a)(b)(c) of Section 435(1).

Page 168 JUDGMENT (b) The expression ‘‘Consultation’’ may mean differently in different situation depending on the nature and purpose of the statute. (c) When it came to the question of appointment of judges to the High Court and the Supreme Court, since it pertains to high Constitutional office, the status of Chief Justice of India assumed greater significance and primacy and, therefore, in that context, the expression ‘‘Consultation’’ would only mean ‘‘Concurrence’’. (d) While considering the appointment to the post of Chairman of State Consumer Forum, since the said post comes within four corners of judicial post having regard to the nature of functions to be performed, ‘Consultation’ with the Chief Justice of the High Court would give primacy to the Chief Justice. (e) The founding fathers of our Nation wished to establish a strong Centre taking into account the past history of this subcontinent which was under the grip of very many foreign forces by taking advantage of the communal differences, caste differences, language differences, provincial differences and so on which necessitated men of strong character, men of vision, men who will not sacrifice the interest of the Nation for the sake of smaller groups and areas and who will rise above the prejudices which are born of these differences, as visualized by the first

Page 169 JUDGMENT President of this Nation Dr. Rajendra Prasad. (f) Again in the golden words of that great personality, in the pre-independence era while we were engaged in the struggle we did not have any conflicting claims to reconcile, no loaves and fishes to distribute, no power to share and we have all these now and the temptations are really great. Therefore, we should rise above all these, have the wisdom and strength and save the country which we got liberated after a great struggle. (g) The ratio and principles laid down by this Court as regards the interpretation and construction of Constitutional provisions which conflicts with the Constitutional goal to be achieved should be eschewed and interest of the Nation in such situation should be the paramount consideration. Such principles laid down in the said context should equally apply even while interpreting a statutory provision having application at the National, level in order to achieve the avowed object of National integration and larger public interest. (h) The nature of ‘Consultation’ contemplated in Section 435(1) (a) has to be examined in the touchstone of the above principles laid down by the larger Bench judgment in Supreme Court Advocates on Record Association (supra). In this context, the specific reference made therein to the statement of Dr. Rajendra

Page 170 JUDGMENT Prasad, namely, where various differences that exist, in our country including provincial differences, the necessity to ensure that men will not sacrifice the interest of the country at large, for the sake of smaller groups and areas assumes significance. (i) To ascertain, in this context, when more than one authority or functionary participate together in the performance of a function, who assumes significance, keeping in mind the various above principles and objectives to be achieved, who would be best equipped and likely to be more correct for achieving the

purpose and perform the task satisfactorily in safeguarding the interest of the entire community of this Great Nation. Accordingly, primacy in one who qualifies to be treated as in know of things far better than any other, then comparatively greater weight to their opinion and decision to be attached. (j) To be alive to the real nature of Federal set up, we have in our country, which is not comparable with any other country and having extraordinarily different features in different States, say different religions, different castes, different languages, different cultures, vast difference between the poor and the rich, not a case of independent States coming together to form a Federation as in the case of United States of America. Therefore, the absolute necessity to establish a strong Centre to ensure that

Page 171 JUDGMENT when it comes to the question of Unity of the Nation either from internal disturbance or any external aggression, the interest of the Nation is protected from any evil forces. The establishment of a strong Centre was therefore a necessity as felt by our founding fathers of the Nation. In this context Article 355 of the Constitution requires to be noted under which, the Centre is entrusted with the duty to protect every State against external aggression and internal disturbance and also to ensure that the Government of every State is carried on in accordance with the provisions of the Constitution. However, within the spheres allotted to the respective States, they are supreme. (k) In the light of the above general principles, while interpreting Section 435(1)(a) which mandates that any State Government while acting as the 'Appropriate Government' for exercising its powers under Sections 432 and 433 of Code of Criminal Procedure and consider for remission or commutation to necessarily consult the Central Government. In this context the requirement of the implication of Section 432(7) (a) has to be kept in mind, more particularly in the light of the prescription contained in Article 73(1)(a) and Article 162 read along with its proviso, which asserts the status of the Central Government Authorities as possessing all pervasive right to hold the Executive

Page 172 JUDGMENT Power by virtue of express conferment under the Constitution or under any law made by the Parliament though the State Legislature may also have the power to make laws on those subjects. (l) In a situation as the one arising in the above context, it must be stated, that by virtue of such status available with the Central Government possessing the Executive Power, having regard to the pronouncement of the larger Constitution Bench decision of this Court in Supreme Court Advocates on Record Association (supra) and S.R. Bommai (supra), the Executive Power of the Center should prevail over the State as possessing higher Constitutional power specifically adorned on the Central Government under Article 73(1)(a). (m) Cases, wherein, the investigation is held by the agencies under the Delhi Special Police Establishment Act, 1946 or by any other agency engaged to make investigation into an offence under the Central Act other than the Code of Criminal Procedure, and where such offences investigated assumes significance having regard to the implication that it caused or likely to cause in the interest of the Nation or in respect of National figures of very high status by resorting to diabolic criminal conduct at the instance of any person whether such person belong to this country or of any

Page 173 JUDGMENT foreign origin, either individually or representing anybody of personnel or an organization or a group, it must be stated that such situation should necessarily be taken as the one coming within the category of internal or external aggression or disturbance and thereby casting a duty on the Centre as prescribed under Article 355 of the Constitution to act in the interest of the Nation as a whole and also ensure that the Government of every State is carried in accordance with the provisions of the Constitution. Such situation cannot held to be interfering with the independent existence of the State concerned. (n) Similar test should be applied where application of Section 435(1) (b) or (c). It can be visualized that where the property of the Central Government referred to relates to the security borders of this country or the property in the control and possession of the Army or other security forces of the country or the warships or such other properties or the personnel happen to be in the services of the Centre holding very sensitive positions and in possession of very many internal secrets or other vulnerable information and indulged in conduct putting the interest of the Nation in peril, it cannot be said that in such cases, the nature of 'Consultation' will be a mere formality. It

Page 174 JUDGMENT must be held that even in those cases the requirement of 'Consultation' will assume greater significance and primacy to the Center. 161. It must also be noted that the nature of requirement contemplated and prescribed in Section 435(1) and (2) is distinct and different. As because the expression ''Concurrence'' is used in sub-section (2) it cannot be held that the expression ''Consultation'' used in sub-section (1) is lesser in force. As was pointed out by us in sub- para 'n', the situations arising under sub-section (1) (a) to (c) will have far more far reaching consequences if allowed to be operated upon without proper check. Therefore, even though the expression used in

sub-section (1) is ‘Consultation’, in effect, the said requirement is to be expressed far more strictly and with utmost care and caution, as each one of the sub-clauses (a) to (c) contained in the said sub-section, if not properly applied in its context may result in serious violation of Constitutional mandate as has been set out in Article 355 of the Constitution. It is therefore imperative that it is always safe and appropriate to hold that in those situations covered by sub-clauses (a) to (c) of Section 435(1) falling within the jurisdiction of Central Government, it will assume primacy and consequently the process of ‘‘Consultation’’ should in reality be held as the requirement of ‘‘Concurrence’’.

Page 175 JUDGMENT 162. For our present purpose, we can apply the above principles to the cases which come up for consideration, including the one covered by the present Writ Petition. Having paid our detailed analysis as above on the various questions, we proceed to answer the questions in seriatim. 163. Answer to the preliminary objection as to the maintainability of the Writ Petition: Writ Petition at the instance of Union of India is maintainable. Answers to the questions referred in seriatim Question 52.1 Whether imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission and whether as per the principles enunciated in paras 91 to 93 of Swamy Shraddananda (2), a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission? Ans. Imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code only means imprisonment for rest of life of the convict. The right to claim remission, commutation, reprieve etc. as provided under Article 72 or Article 161 of the Constitution will always be available being Constitutional Remedies untouchable by the

Page 176 JUDGMENT Court. We hold that the ratio laid down in Swamy Shraddananda (supra) that a special category of sentence; instead of death can be substituted by the punishment of imprisonment for life or for a term exceeding 14 years and put that category beyond application of remission is well-founded and we answer the said question in the affirmative. Question No.52.2 Whether the “Appropriate Government” is permitted to exercise the power of remission under Sections 432/433 of the Code after the parallel power has been exercised by the President under Article 72 or the Governor under Article 161 or by this Court in its Constitutional power under Article 32 as in this case? Ans. The exercise of power under Sections 432 and 433 of Code of Criminal Procedure will be available to the Appropriate Government even if such consideration was made earlier and exercised under Article 72 by the President or under Article 161 by the Governor. As far as the application of Article 32 of the Constitution by this Court is concerned, it is held that the powers under Sections 432 and 433 are to be exercised by the Appropriate Government statutorily and it is not for this Court to exercise the said power and it is always left to be decided by the Appropriate Government. Question Nos. 52.3, 52.4 and 52.5 52.3 Whether Section 432(7) of the Code clearly gives primacy to the Executive Power of the Union and excludes the

Page 177 JUDGMENT Executive Power of the State where the power of the Union is coextensive? 52.4 Whether the Union or the State has primacy over the subject-matter enlisted in List III of the Seventh Schedule to the Constitution of India for exercise of power of remission? 52.5 Whether there can be two Appropriate Governments in a given case under Section 432(7) of the Code? Ans. The status of Appropriate Government whether Union Government or the State Government will depend upon the order of sentence passed by the Criminal Court as has been stipulated in Section 432(6) and in the event of specific Executive Power conferred on the Centre under a law made by the Parliament or under the Constitution itself then in the event of the conviction and sentence covered by the said law of the Parliament or the provisions of the Constitution even if the Legislature of the State is also empowered to make a law on the same subject and coextensive, the Appropriate Government will be the Union Government having regard to the prescription contained in the proviso to Article 73(1)(a) of the Constitution. The principle stated in the decision in G.V. Ramanaiah (supra) should be applied. In other words, cases which fall within the four corners of Section 432(7)(a) by virtue of specific Executive Power conferred on the Centre, the same will clothe the Union Government the primacy with the status of Appropriate Government. Barring cases falling under Section 432(7)(a), in all other cases where the

Page 178 JUDGMENT offender is sentenced or the sentence order is passed within the territorial jurisdiction of the concerned State, the State Government would be the Appropriate Government. Question 52.6 Whether suo motu exercise of power of remission under Section 432(1) is permissible in the scheme of the section, if yes, whether the procedure prescribed in sub- section (2) of the same section is mandatory or not? Ans. No suo motu power of remission is exercisable

under Section 432(1) of Code of Criminal Procedure It can only be initiated based on an application of the person convicted as provided under Section 432 (2) and that ultimate order of suspension or remission should be guided by the opinion to be rendered by the Presiding Officer of the concerned Court. Question No.52.7 Whether the term "Consultation" stipulated in Section 435(1) of the Code implies "Concurrence"? Ans. Having regard to the principles culled out in paragraph 160 (a) to (n), it is imperative that it is always safe and appropriate to hold that in those situations covered by sub-clauses (a) to (c) of Section 435(1) falling within the jurisdiction of the Central Government it will assume primacy and consequently the process of ''Consultation'' in reality be held as the requirement of ''Concurrence''. We thus answer the above questions accordingly.

Page 179 JUDGMENT …...…..……..……C.J.I. [H.L. Dattu] ……..……..J. [Fakkir Mohamed Ibrahim Kalifulla] …….……..…….J. [Pinaki Chandra Ghose] New Delhi December 02, 2015

Page 180 JUDGMENT REPORTABLE IN THE SUPREME COURT OF INDIA CRIMINAL ORIGINAL JURISDICTION WRIT PETITION (CRL.) NO.48 OF 2014 UNION OF INDIA ETC. …. PETITIONERS Versus V. SRIHARAN @ MURUGAN & ORS. ETC. .… RESPONDENTS WITH WRIT PETITION (CRL.) NO.185 OF 2014 WRIT PETITION (CRL.) NO.150 OF 2014 WRIT PETITION (CRL.) NO.66 OF 2014 & CRIMINAL APPEAL NO.1215 OF 2011 J U D G M E N T Uday Umesh Lalit, J. WRIT PETITION (CRL.) NO.48 OF 2014 1. This Writ Petition has been placed before the Constitution Bench pursuant to reference made by a Bench of three learned Judges of this Court in its order dated 25.04.20141, hereinafter referred to as the Referral Order. Background Facts:- 2. On the night of 21.05.1991 Rajiv Gandhi, former Prime Minister of India was assassinated by a human bomb at Sriperumbudur in Tamil Nadu. With him 2014(11) SCC 1

Page 181 JUDGMENT fifteen persons including nine policemen died and forty three persons suffered injuries. Crime No.329 of 1991 of Sriperumbudur Police Station was immediately registered. On 22.05.1991 a notification was issued by the Governor of Tamil Nadu under Section 6 of Delhi Special Police Establishment Act (Act No.25 of 1946) according consent to the extension of the powers and jurisdiction of the members of the Delhi Police Establishment to the whole of the State of Tamil Nadu for the investigation of the offences in relation to Crime No.329 of 1991. This was followed by a notification issued by the Government of India on 23.05.1991 under Section 5 read with Section 6 of Act No.25 of 1946 extending such powers and jurisdiction to the whole of the State of Tamil Nadu for investigation of offences relating to Crime No. 329 of 1991. After due investigation, a charge of conspiracy for offences under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA for short), Indian Penal Code (IPC for short), Explosive Substances Act, 1908, Arms Act, 1959, Passport Act, 1967, Foreigners Act, 1946 and the Indian Wireless Telegraphy Act, 1933 was laid against forty-one persons, twelve of whom were already dead and three were marked as absconding. Remaining twenty six persons faced the trial before the Designated Court which found them guilty of all the charges and awarded punishment of fine of varying amounts, rigorous imprisonment of different periods and sentenced all of them to death. The Designated Court referred the case to this Court for confirmation of death sentence of all the convicts. The convicts also filed appeals against their

Page 182 JUDGMENT conviction and the sentence awarded to them. These cases were heard together. 3. In the aforesaid Death Reference Cases and the appeals, this Court rendered its judgment on 11.05.1999, reported in State through Superintendent of Police, CBI/SIT v. Nalini and others2. At the end of the judgment, the following order was passed by this Court: "732. The conviction and sentence passed by the trial court of the offences of Section 3(3), Section 3(4) and Section 5 of the TADA Act are set aside in respect of all those appellants who were found guilty by the trial court under the said counts. 733. The conviction and sentence passed by the trial court of the offences under Sections 212 and 216 of the Indian Penal Code, Section 14 of the Foreigners Act, 1946, Section 25(1-B) of the Arms Act, Section 5 of the Explosive Substances Act, Section 12 of the Passport Act and Section 6(1-A) of the Wireless Telegraphy Act, 1933, in respect of those accused who were found guilty of those offences, are confirmed. If they have already undergone the period of sentence under those counts it is for the jail authorities to release such of those against whom no other conviction and sentence exceeding the said period have been passed. 734. The conviction for the offence under Section 120-B read with Section 302 Indian Penal Code as against A-1 (Nalini), A-2 (Santhan @ Raviraj), A-3 (Murugan @ Thas), A-9 (Robert Payas), A-10 (Jayakumar), A-16 (Ravichandran @ Ravi) and A-18 (Perarivalan @ Arivu) is confirmed. 735. We set aside

the conviction and sentence of the offences under Section 302 read with Section 120-B passed by the trial court on the remaining accused. 736. The sentence of death passed by the trial court on A-1 (Nalini), A-2 (Santhan), A-3 (Murugan) and A-18 (Arivu) is confirmed. The death sentence passed on A-9 (Robert), A-10 (Jayakumar) and A-16 (Ravichandran) is altered to imprisonment for life. The Reference is answered accordingly. 1999 (5) SCC 253

Page 183 JUDGMENT 737. In other words, except A-1 (Nalini), A-2 (Santhan), A-3 (Murugan), A-9 (Robert Payas), A-10 (Jayakumar), A-16 (Ravichandran) and A-18 (Arivu), all the remaining appellants shall be set at liberty forthwith." 4. Two sets of Review Petitions were preferred against the aforesaid judgment dated 11.05.1999. One was by convicts A-1, A-2, A-3 and A-18 on the question of death sentence awarded to them. These convicts did not challenge their conviction. The other was by the State through Central Bureau of Investigation (CBI for short), against that part of the judgment which held that no offence under Section 3(3) of TADA was made out. These Review Petitions were dismissed by order dated 08.10.19993. Wadhwa, J. with whom Quardi J. concurred, did not find any error in the judgment sought to be reviewed and therefore dismissed both sets of Review Petitions. Thomas J. opined that the Review Petition filed in respect of A-1 (Nalini) alone be allowed and her sentence be altered to imprisonment for life. Thus, in the light of the order of the majority, these Review Petitions were dismissed. 5. The convicts A-1, A-2, A-3 and A-18 then preferred Mercy Petitions before the Governor of Tamil Nadu on 17.10.1999 which were rejected on 27.10.1999. The rejection was challenged before Madras High Court which by its order dated 25.11.1999 set-aside the order of rejection and directed reconsideration of those Mercy Petitions. Thereafter Mercy Petition of A-1 (Nalini) was allowed while those in respect of the convicts A-2, A-3 and A-18 Suthendraraja alias Suthenthira Raja alias Santhan and others vs. State through DSP/CBI, SIT, CHENNAI (1999) 9 SCC 323

Page 184 JUDGMENT were rejected by the Governor on 25.04.2000. Said convicts A-2, A-3 and A-18 thereafter preferred Mercy Petitions on 26.4.2000 to the President of India under Article 72 of the Constitution. The Mercy Petitions were rejected by the President on 12.08.2011 which led to the filing of Writ Petitions in Madras High Court. Those Writ Petitions were transferred by this Court to itself by order dated 01.05.20124. By its judgment dated 18.02.2014 in V. Sriharan @ Murugan v. Union of India and others5 a Bench of three learned Judges of this Court commuted the death sentences awarded to convicts A-2, A-3 and A-18 to that of imprisonment for life and passed certain directions. Paragraph 32 of the judgment is quoted hereunder: "32.8 In the light of the above discussion and observations, in the cases of V. Sriharan alias Murugan, T. Suthendraraja alias Santhan and A.G. Perarivalan alias Arivu, we commute their death sentence into imprisonment for life. Life imprisonment means end of one's life, subject to any remission granted by the appropriate Government under Section 432 of the Code of Criminal Procedure, 1973 which, in turn, is subject to the procedural checks mentioned in the said provision and further substantive check in Section 433- A of the Code. All the writ petitions are allowed on the above terms and the transferred cases are, accordingly, disposed of." 6. On the next day i.e. 19.02.2014 Chief Secretary, Government of Tamil Nadu wrote to the Secretary, Government of India, Ministry of Home Affairs that Government of Tamil Nadu proposed to remit the sentence of life imprisonment imposed on convicts A-2, A-3 and A-18 as well as on the other convicts namely A-9, A-10 and A-16. It stated that these six convicted accused L.K. Venkat v. Union of India and others (2012) 5 SCC 292 2014 (4) SCC 242

Page 185 JUDGMENT had already served imprisonment for 23 years, that since the crime was investigated by the CBI, as per Section 435 of Cr.P.C. the Central Government was required to be consulted and as such the Central Government was requested to indicate its views within three days on the proposal to remit the sentence of life imprisonment and release those six convicts. 7. Union of India immediately filed Crl.M.P. Nos.4623-25 of 2014 on 20.02.2014 in the cases which were disposed of by the judgment dated 18.02.20145 praying that the State of Tamil Nadu be restrained from releasing the convicts. On 20.02.2014 said Crl.M.P. Nos.4623-25 of 2014 were taken up by this Court and the following order was passed: "Taken on Board. Issue notice to the State of Tamil Nadu; Inspector General of Prisons, Chennai; the Superintendent, Central Prison, Vellore and the convicts viz. V. Sriharan @ Murugan, T. Suthendraraja @ Santhan and A.G. Perarivalan @ Arivu returnable on 6th March, 2014. Mr. Rakesh Dwivedi, learned senior counsel accepts notice on behalf of the State of Tamil Nadu and other two officers. Till such date, both parties are directed to maintain status quo prevailing as on date in respect of convicts viz. V. Sriharan @ Murugan, T. Suthendraraja @ Santhan and A.G. Perarivalan @ Arivu. List on 6th March, 2014." 8. On 20.02.2014 Union of India filed Review Petitions being R.P. (Crl.) Nos.247-249 of 2014 against the judgment dated 18.02.20145 which were later

Page 186 JUDGMENT dismissed on 01.04.2014. It also filed Writ Petition No.48 of 2014 i.e. the present writ petition on 24.02.2014 with following prayer: "(a) Issue an appropriate writ in the nature of a mandamus, or certiorari, and quash the letter no.58720/Cts IA/2008 dated 19.02.2014 and the Decision of the Respondent no.8, Government of Tamil Nadu to consider commutation/remission of the sentences awarded to the Respondents No.1 to 7;" 9. After hearing rival submissions in the present writ petition, the Referral Order was passed which formulated and referred seven questions for the consideration of the Constitution Bench. Paragraph Nos. 49 and 52 to 54 of the Referral Order were to the following effect:- "49. The issue of such a nature has been raised for the first time in this Court, which has wide ramification in determining the scope of application of power of remission by the executives, both the Centre and the State. Accordingly, we refer this matter to the Constitution Bench to decide the issue pertaining to whether once power of remission under Articles 72 or 161 or by this Court exercising constitutional power under Article 32 is exercised, is there any scope for further consideration for remission by the executive." 52. The following questions are framed for the consideration of the Constitution Bench: 52.1. Whether imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission and whether as per the principles enunciated in paras 91 to 93 of Swamy Shraddananda(2)6 a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission? (2008) 13 SCC 767

Page 187 JUDGMENT 52.2. Whether the "appropriate Government" is permitted to exercise the power of remission under Sections 432/433 of the Code after the parallel power has been exercised by the President under Article 72 or the Governor under Article 161 or by this Court in its constitutional power under Article 32 as in this case? 52.3. Whether Section 432(7) of the Code clearly gives primacy to the executive power of the Union and excludes the executive power of the State where the power of the Union is co-extensive? 52.4. Whether the Union or the State has primacy over the subject- matter enlisted in List III of the Seventh Schedule to the Constitution of India for exercise of power of remission? 52.5. Whether there can be two appropriate Governments in a given case under Section 432(7) of the Code? 52.6. Whether suo motu exercise of power of remission under Section 432(1) is permissible in the scheme of the section, if yes, whether the procedure prescribed in sub-section (2) of the same section is mandatory or not? 52.7. Whether the term "consultation" stipulated in Section 435(1) of the Code implies "concurrence"? 53. All the issues raised in the given case are of utmost critical concern for the whole of the country, as the decision on these issues will determine the procedure for awarding sentences in the criminal justice system. Accordingly, we direct to list Writ Petition (Crl.) No. 48 of 2014 before the Constitution Bench as early as possible, preferably within a period of three months. 54. All the interim orders granted earlier will continue till a final decision is taken by the Constitution Bench in Writ Petition (Crl.) No. 48 of 2014." 10. In terms of the Referral Order, this petition came up before the Constitution Bench on 09.03.2014 which issued notices to all the State Governments and pending notice the State Governments were restrained from

Page 188 JUDGMENT exercising power of remission to life convicts. This order was subsequently varied by this Court on 23.07.2015 and the order so varied is presently in operation. While the present writ petition was under consideration by this Court, Curative Petitions Nos.22-24 of 2015 arising out of the dismissal of the review petition vide order dated 01.04.2014 came up before this Court which were dismissed by order dated 28.07.2015. PRELIMINARY OBJECTIONS 11. At the outset when the present writ petition was taken up for hearing, Mr. Rakesh Dwivedi, learned Senior Advocate appearing for the State of Tamil Nadu and Mr. Ram Jethmalani, learned Senior Advocate appearing for the respondents convicts raised preliminary objections regarding maintainability of this writ petition at the instance of Union of India. It was argued that in the petition as originally filed, nothing was indicated about alleged violation of any fundamental right of any one and it was only when the State had raised preliminary submissions, that additional grounds were preferred by Union of India seeking to espouse the cause of the victims. It was submitted that the issues sought to be raised by Union of India as regards the powers and jurisdiction of the State of Tamil Nadu were essentially federal in nature and that the only remedy available for agitating such issues could be through a suit under Article 131 of the Constitution. In response, it was submitted by Mr. Ranjit Kumar, learned Solicitor General that neither at the stage when the

Page 189 JUDGMENT Referral Order was passed, nor at the stage when notices were issued to various State Governments, such preliminary objections were advanced and that the issue had now receded in the background. It was

submitted that after Criminal Law Amendment Act 2013, rights of victims stand duly recognized and that the instant crime having been investigated by the CBI, Union of India in its capacity as parens patriae was entitled to approach this Court under Article 32. It was submitted that since private individuals, namely the convicts were parties to this lis, a suit under Article 131 would not be a proper remedy. We find considerable force in the submissions of the learned Solicitor General. Having entertained the petition, issued notices to various State Governments, entertained applications for impleadment and granted interim orders, it would not be appropriate at this stage to consider such preliminary submissions. At this juncture, the following passage from the judgment of the Constitution Bench in Mohd. Aslam alias Bhure v. Union of India and others7 would guide us:- "10. On several occasions this Court has treated letters, telegrams or postcards or news reports as writ petitions. In such petitions, on the basis of pleadings that emerge in the case after notice to different parties, relief has been given or refused. Therefore, this Court would not approach matters where public interest is involved in a technical or a narrow manner. Particularly, when this Court has entertained this petition, issued notice to different parties, new parties have been impleaded and interim order has also been granted, it would not be appropriate for this Court to dispose of the petition on that ground." In the circumstances, we reject the preliminary submissions and proceed (2003)4 SCC 1

Page 190 JUDGMENT to consider the questions referred to us. DISCUSSION 12. We have heard Mr. Ranjit Kumar, learned Solicitor General, assisted by Ms. V. Mohana, learned Senior Advocate for Union of India. The submissions on behalf of the State Governments were led by Mr. Rakesh Dwivedi, learned Senior Advocate who appeared for the States of Tamil Nadu and West Bengal, Mr. Ram Jethmalani, learned Senior Advocate and Mr. Yug Mohit Chaudhary, learned Advocate appeared for respondents – convicts, namely, A-2, A-3, A-18, A-9, A-10 and A-16. We have also heard Mr. Ravi Kumar Verma, learned Advocate General for Karnataka, Mr. A.N.S. Nadkarni, learned Advocate General for Goa, Mr. V. Giri, learned Senior Advocate for State of Kerala, Mr. Gaurav Bhatia, learned Additional Advocate General for State of Uttar Pradesh, Mr. T.R. Andhyarujina, learned Senior Advocate for one of the intervenors and other learned counsel appearing for other State Governments, Union Territories and other intervenors. We are grateful for the assistance rendered by the learned Counsel. 13. The Challenge raised in the instant matter is principally to the competence of the State Government in proposing to remit or commute sentences of life imprisonment of the respondents-convicts and the contention is that either the State Government has no requisite power or that such power stands excluded. The questions referred for our consideration in the Referral

Page 191 JUDGMENT Order raise issues concerning power of remission and commutation and as to which is the "appropriate Government" entitled to exercise such power and as regards the extent and ambit of such power. It would therefore be convenient to deal with questions 3, 4 and 5 as stated in Paras 52.3, 52.4 and 52.5 at the outset. Re: Question Nos.3, 4 and 5 as stated in para Nos.52.3, 52.4 and 52.5 of the Referral Order 52.3. Whether Section 432(7) of the Code clearly gives primacy to the executive power of the Union and excludes the executive power of the State where the power of the Union is co-extensive? 52.4. Whether the Union or the State has primacy over the subject- matter enlisted in List III of the 7th Schedule to the Constitution of India for exercise of power of remission? 52.5. Whether there can be two appropriate Governments in a given case under Section 432(7) of the Code? 14. Powers to grant pardon and to suspend, remit or commute sentences are conferred by Articles 72 and 161 of the Constitution upon the President and the Governor. Articles 72 and 161 are quoted here for ready reference: "72. Power of President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases.- (1) The President 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- (a) in all cases where the punishment or sentence is by a Court Martial;

Page 192 JUDGMENT (b) in 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; (c) in all cases where the sentence is a sentence of death. (2) Nothing in sub-clause (a) of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court Martial. (3) Nothing in sub-clause (c) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force. "161. Power of Governor to grant pardons, etc, and to suspend, remit or commute sentences in certain cases.-The Governor 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. 15. Before we turn to the matters in issue, a word about the

nature of power under Articles 72 and 161 of the Constitution. In K.M. Nanavati v. State of Bombay8 it was observed by Constitution Bench of this Court, "……. Pardon is one of the many prerogatives which have been recognized since time immemorial as being vested in the sovereign, wherever the sovereignty may lie…….". In Kehar Singh and another v. Union of India and another9 Constitution Bench of this Court quoted with approval the following passage from U.S. v. Benz [75 Lawyers Ed. 354, 358] "The judicial power and the executive power over sentences are (1961) 1 SCR 497 at 516 (1989) 1 SCC 204 at 213

Page 193 JUDGMENT readily distinguishable. To render judgment is a judicial function. To carry the judgment into effect is an executive function. 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 a judgment. To reduce a sentence by amendment alters the terms of the judgment itself and is a judicial act as much as the imposition of the sentence in the first instance." The Constitution Bench further observed: "It is apparent that the power under Article 72 entitles the President to examine the record of evidence of the criminal case and to determine for himself whether the case is one deserving the grant of the relief falling within that power. We are of opinion that the President is entitled to go into the merits of the case notwithstanding that it has been judicially concluded by the consideration given to it by this Court." In Epuru Sudhakar and another v. Government of Andhra Pradesh and others10 Pasayat J. speaking for the Court observed:- "16. The philosophy underlying the pardon power is that "every civilised country recognises, and has therefore provided for, the pardoning power to be exercised as an act of grace and humanity in proper cases. Without such a power of clemency, to be exercised by some department or functionary of a government, a country would be most imperfect and deficient in its political morality, and in that attribute of deity whose judgments are always tempered with mercy. 17. The rationale of the pardon power has been felicitously enunciated by the celebrated Holmes, J. of the United States' Supreme Court in Biddle v. Perovich [71 L Ed 1161: 274 US480(1927] in these words (L Ed at p. 1163):"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." (2006) 8 SCC 161

Page 194 JUDGMENT In his concurring judgment Kapadia J. (as the learned Chief Justice then was) stated: "65. Exercise of executive clemency is a matter of discretion and yet subject to certain standards. It is not a matter of privilege. It is a matter of performance of official duty. It is vested in the President or the Governor, as the case may be, not for the benefit of the convict only, but for the welfare of the people who may insist on the performance of the duty. This discretion, therefore, has to be exercised on public considerations alone. The President and the Governor are the sole judges of the sufficiency of facts and of the appropriateness of granting the pardons and reprieves. However, this power is an enumerated power in the Constitution and its limitations, if any, must be found in the Constitution itself. Therefore, the principle of exclusive cognizance would not apply when and if the decision impugned is in derogation of a constitutional provision. This is the basic working test to be applied while granting pardons, reprieves, remissions and commutations. 66. Granting of pardon is in no sense an overturning of a judgment of conviction, but rather it is an executive action that mitigates or sets aside the punishment for a crime. It eliminates the effect of conviction without addressing the defendant's guilt or innocence. The controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject-matter. It can no longer be said that prerogative power is ipso facto immune from judicial review. An undue exercise of this power is to be deplored. Considerations of religion, caste or political loyalty are irrelevant and fraught with discrimination. These are prohibited grounds. The Rule of Law is the basis for evaluation of all decisions. The supreme quality of the Rule of Law is fairness and legal certainty. The principle of legality occupies a central plan in the Rule of Law. Every prerogative has to be subject to the Rule of Law. That rule cannot be compromised on the grounds of political expediency. To go by such considerations would be subversive of the fundamental principles of the Rule of Law and it would amount to setting a dangerous precedent. The Rule of Law principle comprises a requirement of "Government according to law". The ethos of "Government according to law" requires the prerogative to be exercised in a manner which is consistent with the basic principle of fairness and certainty.

Page 195 JUDGMENT Therefore, the power of executive clemency is not only for the benefit of the convict, but while exercising such a power the President or the Governor, as the case may be, has to keep in mind the effect of his decision on the family of the victims, the society as a whole and the precedent it sets for the future." 16. The power conferred upon the

President under Article 72 is under three heads. The Governor on the other hand is conferred power under a sole head i.e. in respect of sentence for an offence against any law relating to the matter to which the executive power of the State extends. Apart from similar such power in favour of the President in relation to matter to which the executive power of the Union extends, the President is additionally empowered on two counts. He is given exclusive power in all cases where punishment or sentence is by a Court Martial. He is also conferred power in all cases where the sentence is a sentence of death. Thus, in respect of cases of sentence of death, the power in favour of the President is regardless whether it is a matter to which the executive power of the Union extends. Therefore a person convicted of any offence and sentenced to death sentence under any law relating to a matter to which the executive power of the State extends, can approach either the Governor by virtue of Article 161 or the President in terms of Article 72(1)(c) or both. To this limited extent there is definitely an overlap and powers stand conferred concurrently upon the President and the Governor. 17. Articles 73 and 162 of the Constitution delineate the extent of executive powers of the Union and the State respectively. Said Articles 73 and 162 are as

Page 196 JUDGMENT under:- “73. Extent of executive power of the Union-(1) Subject to the provisions of this Constitution, the executive power of the Union shall extend- (a) to the matters with respect to which Parliament has power to make laws; and (b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement: Provided that the executive power referred to in sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws. (2) until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer of authority thereof could exercise immediately before the commencement of this Constitution. 162. Extent of executive power of State.- Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws: Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof. ” 18. As regards clause (b) of Article 73(1) there is no dispute that in such matters the executive power of the Union is absolute. The area of debate is with respect to clause (a) of Article 73(1) and the Proviso to Article 73(1) and the inter-relation with Article 162. Clause (a) of Article 73(1) states that the executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws. Parliament has exclusive power in respect

Page 197 JUDGMENT of legislative heads mentioned in List I of the 7th Schedule whereas in respect of the entries in the Concurrent List namely List III of the 7th Schedule, both Parliament and the State have power to legislate in accordance with the scheme of the Constitution. The Proviso to Article 73(1) however states, subject to the saving clause therein, that the executive power so referred to in sub-clause (a) shall not extend in any State to matters with respect to which the legislature of the State has also power to make laws. The expression “also” is significant. Under the Constitution the State has exclusive power to make laws with respect to List II of the 7th Schedule and has also concurrent power with respect to entries in Concurrent List namely List III of the Constitution. The Proviso thus deals with situations where the matter relates to or is with respect to subject where both Parliament and the Legislature of the State are empowered to make laws under the Concurrent List. Subject to the saving clause mentioned in the Proviso, it is thus mandated that with respect to matters which are in the Concurrent List namely where the Legislature of the State has also power to make laws, the executive power of the Union shall not extend. The saving clause in the Proviso deals with two exceptions namely, where it is so otherwise expressly provided in the Constitution or in any law made by Parliament. In other words, only in those cases where it is so expressly provided in the Constitution itself or in any law made by Parliament, the executive power of the Union will be available. But for such express provision either in the Constitution or in the law made by Parliament which is in the nature of an

Page 198 JUDGMENT exception, the general principle which must govern is that the executive power under sub-clause (a) of Article 73 shall not extend in any State to matters with respect to which the legislature of the State has also power to make laws. In the absence of such express provision either in the Constitution or in the law made by Parliament, the

normal rule is that the executive power of the Union shall not extend in a State to matters with respect to which the legislature of the State has also power to make laws. 19. It will be instructive at this stage to see the debates on the point in the Constituent Assembly. The proceedings dated 30th December, 1948 in the Constituent Assembly11 show that while draft Article 60 which corresponds to present Article 73 was being discussed, an Hon'ble Member voiced his concern in following words: "B. Pocker Sahib Bahadur (Madras : Muslim): Mr. Vice- President, this clause as it stands is sure to convert the Federation into an entirely unitary form of Government. This is a matter of very grave importance. Sir, we have been going on under the idea, and it is professed, that the character of the Constitution which we are framing is a federal one. I submit, Sir, if this article, which gives even executive powers with reference to the subjects in the Concurrent List to the Central Government, is to be passed as it is, then there will be no justification at all in calling this Constitution a federal one. It will be a misnomer to call it so. It will be simply a camouflage to call this Constitution a federal one with provisions like this. It is said that it is necessary to give legislative powers to the Centre with regard to certain subjects mentioned in the Concurrent List, but it is quite another thing, Sir, to give even the executive powers with reference to them to the Centre. These provisions will have the effect of practically leaving the provinces with absolutely nothing. Even in the Concurrent List there is a large number of subjects which ought not to have found place in it. Constituent Assembly Debate Vol. 7 Page 1129

Page 199 JUDGMENT We shall have to deal with them when the time comes. But this clause gives even executive powers to the Centre with reference to the subjects which are detailed in the Concurrent List.……." After considerable debate on the point the clarification by Hon'ble Member Dr. B.R. Ambedkar is noteworthy. His view was as under: "The Honourable Dr. B.R. Ambedkar (Bombay : General): Mr. Vice-President, Sir, I am sorry that I cannot accept either of the two amendments which have been moved to this proviso, but I shall state to the House very briefly the reasons why I am not in a position to accept these amendments. Before I do so I think I think it is desirable that the House should know what exactly is the difference between the position as stated in the proviso and the two amendments which are moved to that proviso. Taking the proviso as it stands, it lays down two propositions. The first proposition is that generally the authority to execute laws which relate to what is called the Concurrent field, whether the law is passed by the Central Legislature or whether it is passed by the Provincial or State Legislature, shall ordinarily apply to the Province or the State. That is the first proposition which this proviso lays down. The second proposition which the proviso lays down is that if in any particular case Parliament thinks that in passing a law which relates to the Concurrent field the execution ought to be retained by the Central Government, Parliament shall have the power to do so. Therefore, the position is this; that in all cases, ordinarily, the executive authority so far as the Concurrent List is concerned will rest with the units, the Provinces as well as the States. It is only in exceptional cases that the Centre may prescribe that the execution of a Concurrent law shall be with the centre." The first proposition as stated by Dr. Ambedkar was that generally the authority to execute laws which relate to subjects in the Concurrent field, whether the law was passed by the Central Legislature or by the State Legislature, was ordinarily to be with the State. The second proposition pertaining to the Proviso was quite eloquent in that if in any particular case

Page 200 JUDGMENT Parliament thinks the execution ought to be retained by the Centre, Parliament shall have the power to do so and that save and except such express provision, in all cases, the authority to execute insofar as the Concurrent List is concerned shall rest with the States. 20. In Rai Sahib Ram Jawaya Kapur and others v. State of Punjab12 this Court while dealing with Article 162 of the Constitution, observed as under:- "….Thus under this article the executive authority of the State is exclusive in respect to matters enumerated in List II of Seventh Schedule. The authority also extends to the Concurrent List except as provided in the Constitution itself or in any law passed by the Parliament. Similarly, Article 73 provides that the executive powers of the Union shall extend to matters with respect to which the Parliament has power to make laws and to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or any agreement. The proviso engrafted on clause (1) further lays down that although with regard to the matters in the Concurrent List the executive authority shall be ordinarily left to be State it would be open to the Parliament to provide that in exceptional cases the executive power of the Union shall extend to these matters also. "(Emphasis added) 21. The same principle as regards the extent of Executive Power of the Union and the State as stated in Articles 73 and 162 of the Constitution finds echo in Section 55A of the Indian Penal Code which defines appropriate Government as under: "55A. Definition of "appropriate Government". -- In Sections 54 and 55 the expression "appropriate Government" means:- (a) in cases where the sentence is a sentence of death or is for an offence against any law relating to

a matter to which the executive power of the Union extends, the Central Government; and 1955 (2) SCR 225

Page 201 JUDGMENT (b) in cases where the sentence (whether of death or not) is for an offence against any law relating to a matter to which the executive power of the State extends, the Government of the State within which the offender is sentenced." 22. At this stage we may quote Sections 432 to 435 of the Code of Criminal Procedure, 1973 (hereinafter referred to as Cr.P.C.) :- "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

Page 202 JUDGMENT 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; (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,

Page 203 JUDGMENT 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. 434. Concurrent power of Central Government in case of death sentences. The powers conferred by sections 432 and 433 upon the State Government may, in the case of sentences of death, also be exercised by the Central Government. 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."

Page 204 JUDGMENT 23. As regards definition of appropriate Government, Section 432(7) of Cr.P.C. adopts a slightly different approach. It defines Central Government to be the appropriate Government in cases where the sentence is for an offence against any law relating to a matter to which the executive power of the Union extends. In that sense it goes by the same principle as in Article 73 of the Constitution and Section 55A of the IPC. The residuary area is then left for the State Government and it further states that in cases other than those where the Central Government is an appropriate Government, the Government of the State within which the offender is sentenced shall be the appropriate Government. In other words, it carries the same essence and is not in any way different from the principle in Article 73 read with Article 162 on one hand and Section 55A of the IPC on the other. The specification as to the State where the offender is sentenced serves an entirely different purpose and helps in finding amongst more than one State Governments which is the appropriate Government as found in State of Madhya Pradesh v. Ratan Singh and others13, State of Madhya Pradesh v. Ajit Singh and others14, Hanumant Dass v. Vinay Kumar and others15and Govt. of A.P. and others v. M.T. Khan16. According to this provision, even if an offence is committed in State A but if the trial takes place and the sentence is passed in State B, it is the latter State which (1976) 3 SCC 470 (1976) 3 SCC 616 (1982) 2 SCC 177 (2004) 1 SCC 616

Page 205 JUDGMENT shall be the appropriate Government. 24. There is one more provision namely Section 435(2) of Cr. P.C. which needs to be considered at this stage. It is possible that in a given case the accused may be convicted and sentenced for different offences, in respect of some of which the executive power of the Union may extend and to the rest the executive power of the State may extend. Since the executive power either of the Union or the State is offence specific, both shall be appropriate Governments in respect of respective offence or offences to which the executive power of the respective government extends. For instance, an offender may be sentenced for an offence punishable under an enactment relatable to subject under List I of the Constitution and additionally under the Indian Penal Code. Such eventuality is taken care of by sub-section (2) of Section 435 and it is stipulated that even if the State Government in its capacity as an appropriate Government in relation to an offence to which the executive power of the State Government extends, were to order suspension, remission or commutation of sentence in respect of such offence, the order of the State Government shall not have effect unless an appropriate order of suspension, remission or commutation is also passed by the Central Government in relation to the offence(s) with respect to which executive power of the Union extends. Relevant to note that it is not with respect to a specific offence that both the Central Government and State Government have concurrent power but if the offender is sentenced on two different counts, both could be the appropriate

Page 206 JUDGMENT governments in respect of that offence to which the respective executive power extends. 25. It was submitted on behalf of the petitioner that if the Executive Power is co-extensive with the Legislative Power and the law making power of the State must yield to the Legislative Power of the Union in respect of a subject in the Concurrent List, reading of these two principles would inevitably lead to the conclusion that the executive power of the Union takes primacy over that of the State thereby making it i.e. the Central Government the appropriate Government under Section 432(7) of Cr. P.C. It was further submitted that it was Parliament which made law contained in Cr.P.C. in exercise of power relatable to Entry 1 and 2 of List III and that the provisions in the IPC (existing law under Article 13) and under the Cr. P.C., both relatable to the powers of Parliament, which provide for "appropriate Government" as prescribed in Section 55A of the IPC and 432(7) of the Cr.P.C. without any validity enacted conflicting or amending law by the State, would clearly show that it is the Union which has the primacy. In our considered view, that is not the correct way to approach the issue. For the purposes of Article 73(1) it is not material whether there is Union law holding the field but what is crucial is that such law made by Parliament must make an express provision or there must be such express provision in the Constitution itself as regards executive power of the Union, in the absence of which the general principle as stated above must apply. If the submission that since the IPC and Cr. P.C. are relatable to the powers of

Page 207 JUDGMENT Parliament, it is the executive power of the Union which must extend to aspects covered by these legislations is to be accepted, the logical sequitor would be that for every offence under IPC the appropriate Government

shall be the Central Government. This is not only against the express language of Article 73(1) but would completely overburden the Central Government. 26. In the instant case as the order passed by this Court in State v. Nalini and others2, the respondents-convicts were acquitted of the offences punishable under Section 3(3), 3(4) and 5 of the TADA. Their conviction under various central laws like Explosive Substances Act, Passport Act, Foreigners Act and Wireless Telegraphy Act were all for lesser terms which sentences, as on the date, stand undergone. Consequently, there is no reason or occasion to seek any remission in or commutation of sentences on those counts. The only sentence remaining is one under Section 302 IPC which is life imprisonment. It was submitted by Mr. Rakesh Dwivedi, learned Senior Advocate that Section 302 IPC falls in Chapter XVI of the IPC relating to offences affecting the human body. In his submission, Sections 299 to 377 IPC involve matters directly related to "public order" which are covered by Entry 1 List II. It being in the exclusive executive domain of the State Government, the State Government would be the appropriate Government. It was further submitted that assuming Sections 302 read with Section 120B IPC are relatable to Entry 1 of List III being part of the Indian Penal Code itself, then the issue may arise whether Central Government or the State Government shall be the appropriate

Page 208 JUDGMENT Government and resort has to be taken to provisions of Articles 73 and 162 of the Constitution to resolve the issue. 27. At this stage it would be useful to consider the decision of this Court in G.V. Ramanaiah v. The Superintendent of Central Jail Rajahmundry and others.17. In that case the appellant was convicted of offences punishable under Section 489-A to 489-D of IPC and sentenced to imprisonment for 10 years. On a question whether the State Government would be competent to remit the sentence of the appellant, this Court observed as under: "9. The question is to be considered in the light of the above criterion. Thus considered, it will resolve itself into the issue: Are the provisions of Sections 489-A to 489-D of the Penal Code, under which the petitioner was convicted, a law relating to a matter to which the legislative power of the State or the Union extends? 10. These four Sections were added to the Penal Code under the caption, "Of Currency Notes and Bank Notes", by Currency Notes Forgery Act, 1899, in order to make better provisions for the protection of Currency and Bank Notes against forgery. It is not disputed; as was done before the High Court in the application under Section 491(1), Criminal Procedure Code, that this bunch of Sections is a law by itself. "Currency, coinage and legal tender" are matters, which are expressly included in Entry No. 36 of the Union List in the Seventh Schedule of the Constitution. Entry No. 93 of the Union List in the same Schedule specifically confers on the Parliament the power to legislate with regard to "offences against laws with respect to any of the matters in the Union List". Read together, these entries put it beyond doubt that Currency Notes and Bank Notes, to which the offences under Sections 489-A to 489-D relate, are matters which are exclusively within the legislative competence of the Union Legislature. It follows therefrom that the offences for which the petitioner has been convicted, are offences relating to a matter to which the executive power of the Union extends, and the "appropriate Government" competent to remit the (1974) 3 SCC 531

Page 209 JUDGMENT sentence of the petitioner, would be the Central Government and not the State Government." This Court went on to observe that the Indian Penal Code is a compilation of penal laws, providing for offences relating to a variety of matters, referable to the various entries in the different lists of the 7th Schedule to the Constitution and that many of the offences in the Penal Code related to matters which are specifically covered by entries in the Union list. Since the offences in question pertained to subject matter in the Union list, this Court concluded that the Central Government was the appropriate Government competent to remit the sentence of the appellant. The decision in G.V. Ramanaiah thus clearly lays down that it is the offence, the sentence in respect of which is sought to be commuted or remitted, which determines the question as to which Government is the appropriate Government. 28. In Zameer Ahmed Latifur Rehman Sheikh v. State of Maharashtra and others18 challenge was raised to the competence of the State Legislature to enact Maharashtra Control of Organised Crime Act, 1999. While rejecting the challenge, it was observed by this Court as under:- "48. From the ratio of the judgments on the point of public order referred to by us earlier, it is clear that anything that affects public peace or tranquillity within the State or the Province would also affect public order and the State Legislature is empowered to enact laws aimed at containing or preventing acts which tend to or actually affect public order. Even if the said part of MCOCA incidentally encroaches upon a field under Entry 1 of the Union List, the same cannot (2010) 5 SCC 246

Page 210 JUDGMENT be held to be ultra vires in view of the doctrine of pith and substance as in essence the said part relates to maintenance of public order which is essentially a State subject and only incidentally trenches upon a matter falling under the Union List. Therefore, we are of the considered view that it is within the legislative competence of the

State of Maharashtra to enact such a provision under Entries 1 and 2 of List II read with Entries 1, 2 and 12 of List III of the Seventh Schedule of the Constitution." While considering the ambit of expression "public order" as appearing in Entry 1 List II of the 7th Schedule to the Constitution this Court referred to earlier decisions on the point and arrived at the aforesaid conclusion. Similarly in People's Union for Civil Liberties and another v. Union of India19 the validity of Prevention of Terrorism Act, 2002 and in Kartar Singh v. State of Punjab20 validity of TADA were questioned. In both the cases it was observed that the Entry "public order" in List II empowers the State to enact the legislation relating to public order or security insofar as it affects or relates to a particular State and that the term has to be confined to disorder of lesser gravity having impact within the boundaries of the State and that activity of more serious nature which threatens the security and integrity of the country as a whole would not be within the field assigned to Entry 1 of List II. In both these cases the validity of Central enactments were under challenge on the ground that they in pith and substance were relatable to the subject under Entry 1 of List II. In both the cases the challenges were negatived as the legislations in question dealt with "terrorism" in contra-distinction to the normal issues of (2004) 9 SCC 580 (1994) 3 SCC 569

Page 211 JUDGMENT "public order". 29. We are however concerned in the present case with offence under Section 302 IPC simplicitor. The respondents-convicts stand acquitted insofar as offences under the TADA are concerned. We find force in the submissions of Mr. Rakesh Dwivedi, learned Senior Advocate that the offence under Section 302 IPC is directly related to "public order" under Entry 1 of List II of the 7th Schedule to the Constitution and is in the exclusive domain of the State Government. In our view the offence in question is within the exclusive domain of the State Government and it is the executive power of the State which must extend to such offence. Even if it is accepted for the sake of argument that the offence under Section 302 IPC is referable to Entry 1 of List III, in accordance with the principles as discussed hereinabove, it is the executive power of the State Government alone which must extend, in the absence of any specific provision in the Constitution or in the law made by Parliament. Consequently, the State Government is the appropriate Government in respect of the offence in question in the present matter. It may be relevant to note that right from K.M. Nanavati v. State of Bombay (supra)8 in matters concerning offences under Section 302 IPC it is the Governor under Article 161 or the State Government as appropriate Government under the Cr.P.C. who have been exercising appropriate powers. 30. In the light of the aforesaid discussion our answers to questions 3, 4 and 5

Page 212 JUDGMENT as stated in paragraph 52.3, 52.4 and 52.5 are as under: Our answer to Question 52.3 in Para 52.3 is:- Question 52.3. Whether Section 432(7) of the Code clearly gives primacy to the executive power of the Union and excludes the executive power of the State where the power of the Union is co- extensive? Answer: The executive powers of the Union and the State normally operate in different fields. The fields are well demarcated. Keeping in view our discussion in relation to Articles 73 and 162 of the Constitution, Section 55A of the IPC and Section 432 (7) of Cr.P.C. it is only in respect of sentence of death, even when the offence in question is referable to the executive power of the State, that both the Central and State Governments have concurrent power under Section 434 of Cr.P.C. If a convict is sentenced under more than one offences, one or some relating to the executive power of the State Government and the other relating to the Executive Power of the Union, Section 435(2) provides a clear answer. Except the matters referred herein above, Section 432 (7) of Cr. P.C. does not give primacy to the executive power of the Union. Our Answer to Question posed in Para 52.4. is:- Question 52.4. Whether the Union or the State has primacy over the subject-matter enlisted in List III of the 7th Schedule to the Constitution of India for exercise of power of remission? Answer: In respect of matters in list III of the 7th Schedule to the Constitution, ordinarily the executive power of the State alone must extend. To this general principle there are two exceptions as stated in Proviso to Articles 73(1) of the

Page 213 JUDGMENT Constitution. In the absence of any express provision in the Constitution itself or in any law made by Parliament, it is the executive power of the State which alone must extend. Our Answer to Question posed in Para 52.5. is:- Question 52.5. Whether there can be two appropriate Governments in a given case under Section 432(7) of the Code? Answer: There can possibly be two appropriate Governments in a situation contemplated under Section 435 (2) of Cr.P.C.. Additionally, in respect of cases of death sentence, even when the offence is one to which the executive power of the State extends, Central Government can also be appropriate Government as stated in Section 434 of Cr.P.C.. Except these two cases as dealt with in Section 434 and 435 (2) of Cr.P.C. there cannot be two appropriate Governments. Re: Question No.6 as stated in para 52.6 of the Referral Order 52.6. Whether suo motu exercise of power of remission under Section 432(1) is permissible in the scheme of the section, if yes, whether the procedure prescribed in sub-section (2) of the same section is

mandatory or not? 31. We now turn to the exercise of power of remission under Section 432(1) of Cr.P.C.. Remissions are of two kinds. The first category is of remissions under the relevant Jail Manual which depend upon the good conduct or behavior of a convict while undergoing sentence awarded to him. These are generally referred to as 'earned remissions' and are not referable to Section 432

Page 214 JUDGMENT of Cr.P.C. but have their genesis in the Jail Manual or any such Guidelines holding the field. In Shraddananda(2)6 this aspect was explained thus: "80. From the Prisons Acts and the Rules it appears that for good conduct and for doing certain duties, etc. inside the jail the prisoners are given some days' remission on a monthly, quarterly or annual basis. The days of remission so earned by a prisoner are added to the period of his actual imprisonment (including the period undergone as an undertrial) to make up the term of sentence awarded by the Court. This being the position, the first question that arises in mind is how remission can be applied to imprisonment for life. The way in which remission is allowed, it can only apply to a fixed term and life imprisonment, being for the rest of life, is by nature indeterminate." The exercise of power in granting remission under Section 432 is done in a particular or specific case whereby the execution of the sentence is suspended or the whole or any part of the punishment itself is remitted. The effect of exercise of such power was succinctly put by this Court in Maru Ram etc. etc. v. Union of India & Another21 in following words:- "……. In the first place, 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, though the order of conviction and sentence passed by the court still stands as it was. The power of grant remission is executive power and cannot have the effect of reducing the sentence passed by the trial court and substituting in its place the reduced sentence adjudged by the appellate or revisional court…….. …….. Though, therefore, the effect of an order of remission (1981)1 SCC 106

Page 215 JUDGMENT is to wipe out that part of the sentence of imprisonment which has not been served out and thus in practice to reduce the sentence to the period already undergone, in law the order of remission merely means that the rest of the sentence need not be undergone, leaving the order of conviction by the court and the sentence passed by it untouched." 32. The difference between earned remissions "for good behaviour" and the remission of sentence under Section 432 is clear. The first depends upon the Jail Manual or the Policy in question and normally accrues and accumulates to the credit of the prisoner without there being any specific order by the appropriate Government in an individual case while the one under Section 432 requires specific assessment in an individual matter and is case specific. Could such exercise be undertaken under Section 432 by the appropriate Government on its own, without there being any application by or on behalf of the prisoner? This issue has already been dealt with in following cases by this Court. A]. In Sangeet and another. v. State of Haryana22, it was observed in paras 59, 61 and 62 as under:- "59. 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 CrPC. But it does appear to us that sub-section (2) to sub-section (5) of Section 432 CrPC lay down the basic procedure, which is making an application to the appropriate Government for the suspension or remission of a sentence, either by the convict or someone on his behalf. In fact, this is what was suggested in Samjuben Gordhanbhai Koli v. State of Gujarat when it was observed that since remission can only be granted by the executive authorities, the appellant therein would be free to seek redress from the appropriate Government by making a representation in terms of Section 432 CrPC. 61. It appears to us that an exercise of power by the (2013)2 SCC 452

Page 216 JUDGMENT appropriate Government under sub-section (1) of Section 432 Cr.P.C. cannot be suo motu for the simple reason that this sub-section is only an enabling provision. The appropriate Government is enabled to "override" a judicially pronounced sentence, subject to the fulfilment of certain conditions. Those conditions are found either in the Jail Manual or in statutory rules. Sub-section (1) of Section 432 Cr.P.C. 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. The process of granting "additional" remission under this section is set into motion in a case only through an application for remission by the convict or on his behalf. 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. Apart from anything else, this statutory procedure seems quite reasonable inasmuch as there is an application of mind to the issue of grant of remission. It also eliminates “discretionary” or en masse release of convicts on “festive” occasions since each release requires a case-by-case basis scrutiny. 62. It must be remembered in this context that it was held in State of Haryana v. Mohinder Singh that the power of remission cannot be exercised arbitrarily. The decision to grant remission has to be well informed, reasonable and fair to all concerned. The statutory procedure laid down in Section 432 Cr.P.C does provide this check on the possible misuse of power by the appropriate Government.” B] In Mohinder Singh v. State of Punjab23 the observations in para 27 were to the following effect: “27. In order to check all arbitrary remissions, the Code itself provides several conditions. Sub-sections (2) to (5) of Section 432 of the Code lay down basic procedure for making an application to the appropriate Government for suspension or remission of sentence either by the convict or someone on his behalf. We are of the view that exercise of power by the appropriate Government under sub-section (1) of Section 432 of the Code cannot be suo motu for the simple reason that this is only an enabling provision and the same would be (2013)3 SCC 294

Page 217 JUDGMENT possible subject to fulfilment of certain conditions. Those conditions are mentioned either in the Jail Manual or in statutory rules. This Court in various decisions has held that the power of remission cannot be exercised arbitrarily. In other words, the decision to grant remission has to be well informed, reasonable and fair to all concerned. The statutory procedure laid down in Section 432 of the Code itself provides this check on the possible misuse of power by the appropriate Government. As rightly observed by this Court in Sangeet v. State of Haryana, there is a misconception that a prisoner serving life sentence has an indefeasible right to release on completion of either 14 years’ or 20 years’ imprisonment. 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 Code which in turn is subject to the procedural checks mentioned in the said provision and further substantive check in Section 433-A of the Code.” C] In Yakub Abdul Razak Memon v. State of Maharashtra through CBI, Bombay24, it was observed in paras 921 and 922 as under: “921. In order to check all arbitrary remissions, the Code itself provides several conditions. Sub-sections (2) to (5) of Section 432 of the Code lay down basic procedure for making an application to the appropriate Government for suspension or remission of sentence either by the convict or someone on his behalf. We are of the view that exercise of power by the appropriate Government under sub-section (1) of Section 432 of the Code cannot be automatic or claimed as a right for the simple reason, that this is only an enabling provision and the same would be possible subject to fulfilment of certain conditions. Those conditions are mentioned either in the Jail Manual or in statutory rules. This Court, in various decisions, has held that the power of remission cannot be exercised arbitrarily. In other words, the decision to grant remission has to be well informed, reasonable and fair to all concerned. The statutory procedure laid down in Section 432 of the Code itself provides this check on the possible misuse of power by the appropriate Government. 922. As rightly observed by this Court in Sangeet v. State of Haryana, there is misconception that a prisoner serving life sentence has an indefeasible right to release on completion of either 14 years or 20 years’ imprisonment. A convict (2013) 13 SCC 1

Page 218 JUDGMENT 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 Code, which in turn is subject to the procedural checks mentioned in the said provision and to further substantive check in Section 433-A of the Code.” 33. Relying on the aforesaid decisions of this Court, it was submitted by the learned Solicitor General that there cannot be suo motu exercise of power under Section 432 and that even when the power is to be exercised on an application made by or on behalf of the prisoner, opinion of the Presiding Judge of the Court before or by which the conviction was confirmed, must be sought. In the submission of Mr. Rakesh Dwivedi, learned Senior Advocate, power under Section 432(1) can be exercised suo motu and that Section 432(2) applies only when an application is made and not where power is exercised suo motu. 34. We find force in the submission of the learned Solicitor General. By exercise of power of remission, the appropriate Government is enabled to wipe out that part of the sentence which has not been served out and over-ride a judicially pronounced sentence. The decision to grant remission must, therefore, be well informed, reasonable and fair to all concerned. The procedure prescribed in Section 432(2) is designed to achieve this purpose. The power exercisable under Section 432(1) is an enabling provision and must be in accord with the procedure under Section 432(2). Thus, our answer to question posed in para 52.6 is:- Question 52.6. Whether suo motu exercise of power of remission under Section 432(1) is permissible in the

scheme of the section, if yes, whether the procedure prescribed in sub-section (2) of the

Page 219 JUDGMENT same section is mandatory or not? Answer: That suo motu exercise of power of remission under Section 432(1) is not permissible and exercise of power under Section 432(1) must be in accordance with the procedure under Section 432(2) of Cr.P.C. Re: Question No. 7 as stated in Para 52.7 of the Referral Order: 52.7. Whether the term "consultation" stipulated in Section 435(1) of the Code implies "concurrence"? 35. Section 435(1) of Cr.P.C. sets out three categories under clauses (a), (b) and (c) thereof and states inter alia that the powers conferred by Sections 432 and 433 of Cr.P.C. upon the State Government shall not be exercised except after consultation with the Central Government. The language used in this provision and the expressions "… shall not be exercised" and "except after consultation", signify the mandatory nature of the provision. Consultation with the Central Government must, therefore, be mandatorily undertaken before the State Government in its capacity as appropriate Government intends to exercise powers under Sections 432 and 433. This is an instance of express provision in a law made by Parliament as referred to in proviso to Article 73(1) of the Constitution. The question is whether such consultation stipulated in Section 435(1) implies concurrence on part of the Central Government as regards the action proposed by the State Government. Relying on the decisions of this Court in L&T McNeil Ltd. v. Govt. of Tamil Nadu25, State of U.P. & another (2001) 3 SCC 170

Page 220 JUDGMENT v. Johri Mal26, State of Uttar Pradesh and others v. Rakesh Kumar Keshari and another27, Justice Chandrashekaraiah (Retd.) v. Janekere C. Krishna and others28 Mr. Rakesh Dwivedi, learned Senior Advocate submitted that the term consultation as appearing in Section 435 ought not to be equated with concurrence and that the action on part of the State of Tamil Nadu in seeking views of the Central Government as regards the proposed action did satisfy the requirement under Section 435. On the other hand, the learned Solicitor General relied upon Supreme Court Advocates-on-Record Association and others v. Union of India29 and State of Gujarat and another v. Justice R.A. Mehta(Retd.) and others30 to submit that the consultation referred to in the provision must mean concurrence on part of the Central Government. In his submission without such concurrence, no action could be undertaken. 36. Speaking for the majority in Supreme Court Advocates-on-Record Association (supra) J.S. Verma, J (as the learned Chief Justice then was) considered the effect of the phrase "consultation with the Chief Justice of India " appearing in Article 222 of the Constitution . The observations in paragraphs 438 to 441 are quoted hereunder: "438. The debate on primacy is intended to determine who amongst the constitutional functionaries involved in the integrated process of appointments is best equipped to discharge the greater burden attached to the role of primacy, of making the proper choice; and this debate is not to (2004) 4 SCC 714 (2011) 5 SCC 341 (2013) 3 SCC 117 (1993)4 SCC 441 (2013) 3 SCC 1

Page 221 JUDGMENT determine who between them is entitled to greater importance or is to take the winner's prize at the end of the debate. The task before us has to be performed with this perception. 439. The primacy of one constitutional functionary qua the others, who together participate in the performance of this function assumes significance only when they cannot reach an agreed conclusion. The debate is academic when a decision is reached by agreement taking into account the opinion of everyone participating together in the process, as primarily intended. The situation of a difference at the end, raising the question of primacy, is best avoided by each constitutional functionary remembering that all of them are participants in a joint venture, the aim of which is to find out and select the most suitable candidate for appointment, after assessing the comparative merit of all those available. This exercise must be performed as a pious duty to discharge the constitutional obligation imposed collectively on the highest functionaries drawn from the executive and the judiciary, in view of the great significance of these appointments. The common purpose to be achieved, points in the direction that emphasis has to be on the importance of the purpose and not on the comparative importance of the participants working together to achieve the purpose. Attention has to be focussed on the purpose, to enable better appreciation of the significance of the role of each participant, with the consciousness that each of them has some inherent limitation, and it is only collectively that they constitute the selector. 440. The discharge of the assigned role by each functionary, viewed in the context of the obligation of each to achieve the common constitutional purpose in the joint venture will help to transcend the concept of primacy between them. However, if there be any disagreement even then between them which cannot be ironed out by joint effort, the question of primacy would arise to avoid stalemate. 441. For this reason, it must be seen who is best equipped and likely to be more correct in his view for achieving the purpose and performing the task satisfactorily. In other words, primacy should be in him who qualifies to be treated as the 'expert' in the field. Comparatively greater weight to his opinion may then be attached." The principle which emerges is that while construing

the term

Page 222 JUDGMENT ‘consultation’ it must be seen who is the best equipped and likely to be more correct in his view for achieving the purpose and performing the tasks satisfactorily and greater weight to his opinion may then be attached. While considering the phrase “after consultation of the Chief Justice of the High Court”, this Court in State of Gujarat v. R.A. Mehta(supra) stated the principles thus: “32. Thus, in view of the above, the meaning of “consultation” varies from case to case, depending upon its fact situation and the context of the statute as well as the object it seeks to achieve. Thus, no straitjacket formula can be laid down in this regard. Ordinarily, consultation means a free and fair discussion on a particular subject, revealing all material that the parties possess in relation to each other and then arriving at a decision. However, in a situation where one of the consultees has primacy of opinion under the statute, either specifically contained in a statutory provision, or by way of implication, consultation may mean concurrence. The court must examine the fact situation in a given case to determine whether the process of consultation as required under the particular situation did in fact stand complete.” It is thus clear that the meaning of consultation varies from case to case depending upon the fact situation and the context of the statute as well as the object it seeks to achieve. 37. In the light of the aforesaid principles, we now consider the object that sub-clauses (a), (b) and (c) of Section 435(1) of the Cr.P.C. seek to achieve. Clause (a) deals with cases which are investigated by the Delhi Special Police Establishment i.e. the Central Bureau of Investigation or by any other agency empowered to make investigation into an offence under any Central Act.

Page 223 JUDGMENT The investigation by CBI in a matter may arise as a result of express consent or approval by the concerned State Government under Sections 5 and 6 of the Delhi Special Police Establishment Act or as a result of directions by a Superior Court in exercise of its writ jurisdiction in terms of the law laid down by this Court in State of West Bengal and others v. Committee for Protection of Democratic Rights, West Bengal and others31. For instance, in the present case the investigation into the crime in question i.e. Crime No. 3 of 1991 was handed over to the CBI on the next day itself. The entire investigation was done by the CBI who thereafter carried the prosecution right up to this Court. 38. In a case where the investigation is thus handed over to the CBI, entire carriage of the proceedings including decisions as to who shall be the public prosecutor, how the prosecution be conducted and whether appeal be filed or not are all taken by the CBI and at no stage the concerned State Government has any role to play. It has been laid down by this Court in Lalu Prasad Yadav and another v. State of Bihar and another32 that in matters where investigation was handed over to the CBI, it is the CBI alone which is competent to decide whether appeal be filed or not and the State Government cannot even challenge the order of acquittal on its own. In such cases could the State Government then seek to exercise powers under Sections 432 and 433 on its own? (2010) 3 SCC 571 (2010) 5 SCC 1

Page 224 JUDGMENT 39. Further, in certain cases investigation is transferred to the CBI under express orders of the Superior Court. There are number of such examples and the cases could be of trans-border ramifications such as stamp papers scam or chit fund scam where the offence may have been committed in more than one States or it could be cases where the role and conduct of the concerned State Government was such that in order to have transparency in the entirety of the matter, the Superior Court deemed it proper to transfer the investigation to the CBI. It would not then be appropriate to allow the same State Government to exercise power under Sections 432 and 433 on its own and in such matters, the opinion of the Central Government must have a decisive status. In cases where the investigation was so conducted by the CBI or any such Central Investigating Agency, the Central Government would be better equipped and likely to be more correct in its view. Considering the context of the provision, in our view comparatively greater weight ought to be attached to the opinion of the Central Government which through CBI or other Central Investigating Agency was in- charge of the investigation and had complete carriage of the proceedings. 40. The other two clauses, namely, clauses (b) and (c) of Section 435 deal with offences pertaining to destruction of any property belonging to the Central Government or where the offence 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. Here again, it would be the Central Government which would be better equipped and more correct in taking the appropriate view which could

Page 225 JUDGMENT achieve the purpose satisfactorily. In such cases, the question whether the prisoner ought to be given the benefit under Section 432 or 433 must be that of the Central Government. Merely because the State Government happens to be the appropriate Government in respect of such offences, if the prisoner were to be granted benefit under Section 432 or 433 by the State Government on its own, it would in fact defeat the very purpose. Our Answer to Question

post in Para 52.7 is:- Question 52.7. Whether the term “consultation” stipulated in Section 435(1) of the Code implies “concurrence”? Answer: In the premises as aforesaid, in our view the expression “consultation” ought to be read as concurrence and primacy must be accorded to the opinion of the Central Government in matters covered under clauses (a), (b) and (c) of Section 435(1) of the Cr.P.C. Re: Question No.2 as stated in para 52.2 of the Referral Order 52.2. Whether the “appropriate Government” is permitted to exercise the power of remission under Sections 432/433 of the Code after the parallel power has been exercised by the President under Article 72 or the Governor under Article 161 or by this Court in its constitutional power under Article 32 as in this case? 41. As regards this question, the submissions of the learned Solicitor General were two-fold. According to him the Governor while exercising power under Article 161 of the Constitution, having declined remission in or commutation of sentences awarded to the respondents-convicts, second or subsequent exercise

Page 226 JUDGMENT of executive power under Section 432/433 by the State Government was not permissible and it would amount to an over-ruling or nullification of the exercise of constitutional power vested in the Governor. In his submission, the statutory power under Section 432/433 Cr.P.C. could not be exercised in a manner that would be in conflict with the decision taken by the constitutional functionary under Article 161 of the Constitution. It was his further submission that Sections 432 and 433 of Cr.P.C. only prescribe a procedure for remission, while the source of substantive power of remission is in the Constitution. According to him Sections 432 and 433, Cr.P.C. are purely procedural and in aid of constitutional power under Article 72 of 161. He further submitted that as laid down in Maru Ram (supra), while exercising powers under Articles 72 and 161, the President or the Governor act on the aid and advice of the Council of Ministers and thus the Council of Ministers, that is to say the executive having already considered the matter and rejected the petition, a subsequent exercise by the same executive is impermissible. On the other hand, it was submitted by Mr. Rakesh Dwivedi, learned Senior Advocate that there was nothing in the statute which would bar or prohibit exercise of power on the second or subsequent occasion and in fact Section 433A of Cr.P.C. itself gives an indication that such exercise is permissible. It was further submitted that the power conferred upon an authority can be exercised successively from time to time as occasion requires. 42. We would first deal with the submission of the learned Solicitor General

Page 227 JUDGMENT that the provisions of Section 432/433 Cr.P.C. are purely procedural and in aid of the constitutional power. This Court had an occasion to deal with the issue, though in a slightly different context, in Maru Ram (supra). We may quote paragraphs 58 and 59 of the decision, which are as under: “58. ……..What is urged is that by the introduction of Section 433-A, Section 432 is granted a permanent holiday for certain classes of lifers and Section 433(a) suffers eclipse. Since Sections 432 and 433(a) are a statutory expression and modus operandi of the constitutional power, Section 433-A is ineffective because it detracts from the operation of Sections 432 and 433(a) which are the legislative surrogates, as it were, of the pardon power under the Constitution. We are unconvinced by the submissions of counsel in this behalf. 59. It is apparent that superficially viewed, the two powers, one constitutional and the other statutory, are coextensive. But two things may be similar but not the same. That is precisely the difference. We cannot agree that the power which is the creature of the Code can be equated with a high prerogative vested by the Constitution in the highest functionaries of the Union and the States. The source is different, the substance is different, the strength is different, although the stream may be flowing along the same bed. We see the two powers as far from being identical, and, obviously, the constitutional power is “untouchable” and “unapproachable” and cannot suffer the vicissitudes of simple legislative processes. Therefore, Section 433-A cannot be invalidated as indirectly violative of Articles 72 and 161. What the Code gives, it can take, and so, an embargo on Sections 432 and 433(a) is within the legislative power of Parliament.” 43. The submission that Sections 432 and 433 are a statutory expression and modus operandi of the constitutional power was not accepted in Maru Ram (supra). In fact this Court went on to observe that though these two powers, one constitutional and the other statutory, are co-extensive, the source is different, the substance is different and the strength is different. This Court saw

Page 228 JUDGMENT the two powers as far from being identical. The conclusion in para 72(4) in Maru Ram (supra) was as under: “72. (4) We hold that Section 432 and Section 433 are not a manifestation of Articles 72 and 161 of the Constitution but a separate, though similar power, and Section 433-A, by nullifying wholly or partially these prior provisions does not violate or detract from the full operation of the constitutional power to pardon, commute and the like.” It is thus well settled that though similar, the powers under Section 432/433 Cr.P.C. on one hand and those under Article 72 and 161 on the other, are distinct and different. Though they flow along the same bed and in same direction, the source

and substance is different. We therefore reject the submission of the learned Solicitor General. 44. Section 433A of Cr.P.C. inter alia states, "…… 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 14 years of imprisonment. It thus contemplates an earlier exercise of power of commuting the sentence under Section 433 Cr.P.C. It may be relevant to note that under Section 433 a sentence of death can be commuted for any other punishment including imprisonment for life. A prisoner having thus been granted a benefit under Section 433 Cr.P.C. can certainly be granted further benefit of remitting the remainder part of the life sentence, subject of course to statutory minimum period of 14 years of actual imprisonment. We therefore accept the submission of Mr. Rakesh Dwivedi, learned Senior

Page 229 JUDGMENT Advocate that there is nothing in the statute which either expressly or impliedly bars second or subsequent exercise of power. In fact Section 433A contemplates such subsequent exercise of power. At this stage, the observations in G. Krishta Goud and J. Bhoomaiah v. State of Andhra Pradesh and others33 in the context of constitutional power of clemency are relevant: "10. …… The rejection of one clemency petition does not exhaust the power of the President or the Governor." This principle was re-iterated in para 7 of the decision in Krishnan and others v. State of Haryana and others34 as follows:- "In fact, Articles 72 and 161 of the Constitution provide for residuary sovereign power, thus, there could be nothing to debar the authorities concerned to exercise such power even after rejection of one clemency petition and even in the changed circumstances." 45. In State of Haryana and others v. Jagdish35it was observed by this Court 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." In Kehar Singh v. Union of India (supra) it was observed, "…….. the power under Article 72 is of the widest amplitude, can contemplate myriad kinds and categories of cases with facts and situations varying from case to

Page 230 JUDGMENT case, in which the merits and reasons of States may be profoundly assisted by prevailing occasion and passing of time". Having regard to its wide amplitude and the status of the functions to be discharged thereunder, it was found unnecessary to spell out any specific guidelines for exercise of such power. The observations made in the context of power under Article 72 will also be relevant as regards exercise under Section 432/433 Cr.P.C. In State (Govt. of NCT of Delhi) v. Prem Ram36 it was observed thus: "14. The powers conferred upon the appropriate Government under Section 433 have to be exercised reasonably and rationally keeping in view the reasons germane and relevant for the purpose of law, mitigating circumstances and/or commiserative facts necessitating the commutation and factors like interest of the society and public interest." 46. We see no hindrance or prohibition in second or subsequent exercise of power under Section 432/433 Cr.P.C. As stated above, such exercise is in fact contemplated under Section 433A. An exercise of such power may be required and called for depending upon exigencies and fact situation. A person may be on the death bed and as such the appropriate Government may deem fit to grant remission so that he may breathe his last in the comfort and company of his relations. Situations could be different. It would be difficult to put the matter in any straight jacket or make it subject to any guidelines, as was found in Kehar Singh. The aspects whether "the convict had lost his potentiality in committing the crime and whether there was any fruitful purpose of confining the convict any more" as stated in State of Haryana v. Jagdish (supra) could (2003) 7 SCC 121

Page 231 JUDGMENT possibly yield different assessment after certain period and can never be static. Every case will depend on its individual facts and circumstances. In any case, if the repeated exercise is not for any genuine or bona fide reasons, the matter can be corrected by way of judicial review. Further, in the light of our decision as aforesaid, in any case an approach would be required to be made under Section 432(2) Cr.P.C. to the concerned court which would also result in having an adequate check. 47. In the instant case, A-1 Nalini and other convicts A-2, A-3 and A-18 who were awarded death sentence had initially preferred mercy petition under Article 161 of the Constitution. The petition preferred by A-1 Nalini was allowed, while those of other three were rejected. Those three convicts then preferred mercy petition under Article 72 of the Constitution which was rejected after considerable delay. On account of such delay in disposal of the matters, this Court commuted the sentence of those three convicts to that of life imprisonment. The other convicts namely A-9, A-10 and A-16 had not preferred any petition under Article 161 against their life imprisonment. Thus the Governor

while exercising power under Article 161 on the earlier occasion had considered the cases of only three of the convicts and that too when they were facing death sentence. The cases of other three were not even before the Governor. In the changed scenario namely the death sentence having been commuted to that of the imprisonment for life under the orders of this Court, the approach would not be on the same set of circumstances. Each of the convicts

Page 232 JUDGMENT having undergone about 23 years of actual imprisonment, there is definitely change in circumstances. An earlier exercise of power under Article 72 or 161 may certainly have taken into account the gravity of the offence, the effect of such offence on the society in general and the victims in particular, the age, capacity and conduct of the offenders and the possibility of any retribution. Such assessment would naturally have been as on the day it was made. It is possible that with the passage of time the very same assessment could be of a different nature. It will therefore be incorrect and unjust to rule out even an assessment on the subsequent occasion. 48. While commuting the death sentence to that of imprisonment for life, on account of delay in disposal of the mercy petition, this Court in its jurisdiction under Article 32 concentrates purely on the factum of delay in disposal of such mercy petition as laid down by this Court in Shatrughan Chauhan and another v. Union of India and others37. The merits of the matter are not required and cannot be gone into. The commutation by this Court in exercise of power under Article 32 is therefore completely of a different nature. On the other hand, the consideration under Section 432/433 is of a different dimension altogether. Our Answer to Question posed in Para 52.2 is :- Question 52.2. Whether the “appropriate Government” is permitted to exercise the power of remission under Sections 432/433 of the Code after the parallel power has been exercised by the President under Article 72 or the Governor under Article 161 or

Page 233 JUDGMENT by this Court in its constitutional power under Article 32 as in this case? Answer: In the circumstances, in our view it is permissible to the appropriate Government to exercise the power of remission under Section 432/433 Cr.P.C. even after the exercise of power by the President under Article 72 or the Governor under Article 161 or by this Court in its constitutional power under Article 32. Re: Question No.1 as stated in para 52.1 of the Referral Order 49. Question no. 1 as formulated in the Referral Order comprises of two sub- questions, as set out hereunder: (a) Whether imprisonment for life in terms of Section 53 read with Section 45 of the Indian Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission? And (b) Whether as per the principles enunciated in paragraphs 91 to 93 of Swamy Shraddananda(2)6, a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment for imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission? Re: Sub-question (a) of question No.1 in Para 52.1 (a) Whether imprisonment for life in terms of Section 53 read with Section 45 of the Indian Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission? 50. In Gopal Vinayak Godse v. The State of Maharashtra and others38, the (1961) 3 SCR 440

Page 234 JUDGMENT petitioner was convicted on 10.02.1949 and given sentences including one for transportation for life. According to him, he had earned remissions to the tune of 2893 days upto 30.09.1960 and if such earned remissions were added, his actual term of imprisonment would exceed 20 years and therefore he prayed that he be set at liberty forthwith. Repelling these submissions, it was observed by the Constitution Bench of this Court that in order to get the benefit of earned remissions the sentence of imprisonment must be for a definite and ascertainable period, from and out of which the earned remissions could be deducted. However, transportation for life or life imprisonment meant that the prisoner was bound in law to serve the entire life term i.e. the remainder of his life in prison. Viewed thus, unless and until his sentence was commuted or remitted by an appropriate authority under the relevant provisions, the prisoner could not claim any benefit. It was observed: “…….. As the sentence of transportation for life or its prison equivalent, the life imprisonment, is one of indefinite duration, the remissions so earned do not in practice help such a convict as it is not possible to predicate the time of his death.” 51. In Maru Ram (supra) while considering the effect of Section 433A of Cr.P.C. this Court summed up the issue as under: “…Ordinarily, where a sentence is for a definite term, the calculus of remissions may benefit the prisoner to instant-release at that point where the subtraction results in zero. Here, we are concerned with life imprisonment and so we come upon another concept

Page 235 JUDGMENT bearing on the nature of the sentence which has been highlighted in Godse's case Where the sentence is indeterminate and of 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. Godse was sentenced to imprisonment for life. He had earned considerable remissions which would have rendered him eligible for release had life sentence been equated with 20 years of imprisonment a la Section 55 I. P. C. On the basis of a rule which did make that equation, Godse sought his release through a writ petition under Article 52 of the Constitution. He was rebuffed by this Court. A Constitution Bench, speaking through Subba Rao, J., took the view that a sentence of imprisonment for life was nothing less and nothing else than an imprisonment which lasted till the last breath. Since death was uncertain, deduction by way of remission did not yield any tangible date for release and so the prayer of Godse was refused. The nature of a life sentence is incarceration until death, judicial sentence of imprisonment for life cannot be in jeopardy merely because of long accumulation of remissions. Release would follow only upon an order under Section 401 of the Criminal Procedure Code, 1898 (corresponding to Section 432 of the 1973 Code) by the appropriate Government or on a clemency order in exercise of power under Article 72 or 161 of the Constitution. Godse (supra) is 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" Conclusion No.6 in Maru Ram was to the following effect: “We follow Godse's case (supra) to hold that imprisonment for life lasts until the last breath, and whatever the length of remissions earned, the prisoner can claim release only if the remaining sentence is remitted by Government.” 52. Section 53 of the IPC envisages different kinds of punishments while Section 45 of the IPC defines the word ‘life’ as the life of a human being unless the contrary appears from the context. The life of a human being is till he is alive that is to say till his last breath, which by very nature is one of indefinite

Page 236 JUDGMENT duration. In the light of the law laid down in Godse and Maru Ram, which law has consistently been followed the sentence of life imprisonment as contemplated under Section 53 read with Section 45 of the IPC means imprisonment for rest of the life or the remainder of life of the convict. The terminal point of the sentence is the last breath of the convict and unless the appropriate Government commutes the punishment or remits the sentence such terminal point would not change at all. The life imprisonment thus means imprisonment for rest of the life of the prisoner. 53. In paras 27 and 38 of the decision in State of Haryana v. Mahender Singh and others39 , this Court observed:- “27. It is true that no convict has a fundamental right of remission or shortening of sentences. It is also true that the State in exercise of its executive power of remission must consider each individual case keeping in view the relevant factors. The power of the State to issue general instructions, so that no discrimination is made, is also permissible in law. 38. 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, he in view of the policy decision itself must be held to have 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. (State of Mysore v. H. Srinivasmurthy)” 54. The convict undergoing the life imprisonment can always apply to the 2007(13) SCC 606

Page 237 JUDGMENT concerned authority for obtaining remission either under Articles 72 or 161 of the Constitution or under Section 432 Cr.P.C. and the authority would be obliged to consider the same reasonably. This was settled in the case of Godse which view has since then been followed consistently in State of Haryana v. Mahender Singh (supra), State of Haryana Vs. Jagdish (supra), Sangeet Vs. State of Haryana (supra) and Laxman Naskar Vs. Union of India and others40 . The right to apply and invoke the powers under these provisions does not mean that he can claim such benefit as a matter of right based on any arithmetical calculation as ruled in Godse. All that he can claim is a right that his case be considered. The decision whether remissions be granted or not is entirely left to the discretion of the concerned authorities, which discretion ought to be exercised in a manner known to law. The convict only has right to apply to competent authority and have his case considered in a fair and reasonable manner. Our Answer to sub question (a) of Question in Para 52.1 is: (a) Whether imprisonment for life in terms of Section 53 read with Section 45 of the Indian Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission? Answer: The sentence of life imprisonment means imprisonment for the rest of life or the remainder of life of the convict. Such convict can always apply for obtaining remission either under Articles 72 of 161 of the Constitution or under Section 432 Cr. P.C. and the authority would be obliged to consider the same (2000) 2 SCC 595

Page 238 JUDGMENT reasonably. Re: sub-question (b) of Question No.1 in Para 52.1 (b) Whether as per the principles enunciated in paragraphs 91 to 93 of Swamy Shraddananda(2)6, a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment for imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission? 55. In Swamy Shraddananda(1)4 the appellant was convicted for the offence of murder and given death sentence, which conviction and sentence was under appeal in this Court. A Bench of two learned Judges of this Court affirmed the conviction of the appellant but differed on the question of sentence to be imposed. Sinha J. was of the view that instead of death sentence, life imprisonment would serve the ends of justice. He however, directed that the appellant would not be released from the prison till the end of his life. Katju J. was of the view that the appellant deserved death sentence. The matter therefore came up before a Bench of three learned Judges. While dealing with the question of sentence to be imposed, this Court was hesitant in endorsing the death penalty awarded by the trial court and confirmed by the High Court. Paragraph nos. 55 and 56 of the judgment in Swamy Shraddananda(2)6 may be quoted here: "55. We must not be understood to mean that the crime committed by the appellant was not very grave or the motive behind the crime was not highly depraved. Nevertheless, in view of the above discussion we feel hesitant in endorsing the death penalty awarded to him by the trial court and confirmed by the High Court. The

Page 239 JUDGMENT absolute irrevocability of the death penalty renders it completely incompatible to the slightest hesitation on the part of the Court. The hangman's noose is thus taken off the appellant's neck. 56. But this leads to a more important question about the punishment commensurate to the appellant's crime. The sentence of imprisonment for a term of 14 years, that goes under the euphemism of life imprisonment is equally, if not more, unacceptable. As a matter of fact, Mr Hegde informed us that the appellant was taken in custody on 28-3-1994 and submitted that by virtue of the provisions relating to remission, the sentence of life imprisonment, without any qualification or further direction would, in all likelihood, lead to his release from jail in the first quarter of 2009 since he has already completed more than 14 years of incarceration. This eventuality is simply not acceptable to this Court. What then is the answer? The answer lies in breaking this standardisation that, in practice, renders the sentence of life imprisonment equal to imprisonment for a period of no more than 14 years; in making it clear that the sentence of life imprisonment when awarded as a substitute for death penalty would be carried out strictly as directed by the Court. This Court, therefore, must lay down a good and sound legal basis for putting the punishment of imprisonment for life, awarded as substitute for death penalty, beyond any remission and to be carried out as directed by the Court so that it may be followed, in appropriate cases as a uniform policy not only by this Court but also by the High Courts, being the superior courts in their respective States. A suggestion to this effect was made by this Court nearly thirty years ago in Dalbir Singh v. State of Punjab. In para 14 of the judgment this Court held and observed as follows: (SCC p. 753) "14. The sentences of death in the present appeal are liable to be reduced to life imprisonment. We may add a footnote to the ruling in Rajendra Prasad case. Taking the cue from the English legislation on abolition, we may suggest that life imprisonment which strictly means imprisonment for the whole of the men's life but in practice amounts to incarceration for a period between 10 and 14 years may, at the option of the convicting court, be subject to the condition that the sentence of imprisonment shall last as long as life lasts, where there are exceptional indications of murderous recidivism and the community cannot run the risk of the convict being at large. This takes care of judicial apprehensions that unless physically liquidated the culprit may at some remote time repeat murder.

Page 240 JUDGMENT We think that it is time that the course suggested in Dalbir Singh should receive a formal recognition by the Court." 56. The discussion in aforesaid paragraph 56 shows the concern that weighed with this Court was the standardization rendering the sentence of life imprisonment in practice as equal to imprisonment for a period of no more than fourteen years. Relying on Dalbir Singh & others v. State of Punjab41 which in turn had considered Rajendra Prasad v. State of U.P.42, it was observed that the Court must in appropriate cases put the punishment of life imprisonment awarded as a substitute for death penalty, beyond any remission and direct it to be carried out as directed by the Court. Paragraphs 91 to 93 of the decision in Shraddananda(2) which gives rise to sub-question (b) of the first question in the Referral Order were as under: "91. The legal position as enunciated in Pandit Kishori Lal, Gopal Vinayak Godse, Maru Ram, Ratan Singh and Shri Bhagwan and the unsound way in which remission is actually allowed in cases of life imprisonment make out a very strong case to make a special category for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond the application of remission. 92. The matter may be looked at from a slightly different angle. The

issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the (1979) 3 SCC 745 (1979) 3 SCC 646

Page 241 JUDGMENT same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all. 93. Further, the formalisation of a special category of sentence, though for an extremely few number of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of rare cases. This would only be a reassertion of the Constitution Bench decision in Bachan Singh besides being in accord with the modern trends in penology." 57. Finally, in paragraph 95 of its Judgment in Shraddananda(2)6 this Court substituted the death sentence given to the appellant to that of imprisonment for life and directed that he would not be released from the prison till the rest of his life. While doing so, this Court made it clear that it was not dealing with powers of the President and the Governor under Article 72 and 161 of the Constitution but only with provisions of commutation, remission etc. as contained in the Cr.P.C. and the Prison Acts, as would be evident from paragraph 77 of the judgment which was to the following effect:- "77. This takes us to the issue of computation and remission, etc. of sentences. The provisions in regard to computation, remission,

Page 242 JUDGMENT suspension, etc. are to be found both in the Constitution and in the statutes. Articles 72 and 161 of the Constitution deal with the powers of the President and the Governors of the States respectively to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted for any offence. Here it needs to be made absolutely clear that this judgment is not concerned at all with the constitutional provisions that are in the nature of the State's sovereign power. What is said hereinafter relates only to provisions of commutation, remission, etc. as contained in the Code of Criminal Procedure and the Prisons Acts and the rules framed by the different States." 58. The decision in Shraddananda(2)6 is premised on the following: (a) The life imprisonment, though in theory is till the rest of the life or the remainder of life of the prisoner, in practice it is equal to imprisonment for a period of no more than 14 years. (b) Though in a given case, in the assessment of the Court the case may fall short of the "rarest of rare" category to justify award of death sentence, it may strongly feel that a sentence of life imprisonment which normally works out to a term of fourteen years may be grossly disproportionate and inadequate. (c) If the options are limited only to these two punishments the Court may feel tempted and find itself nudged into endorsing the death penalty, which course would be disastrous. (d) The Court may therefore take recourse to the expanded option namely the hiatus between imprisonment for fourteen years and the death sentence, if the facts of the case justify. (e) The unsound way in which remissions are granted in cases of life

Page 243 JUDGMENT imprisonment makes out a strong case to make a special category for the very few cases where the death penalty is substituted for imprisonment of life. (f) While awarding life imprisonment the Court may specify that the prisoner must actually undergo minimum sentence of period in excess of fourteen years or that he shall not be released till the rest of his life and/or put such sentence beyond the application of remission. The view so taken in Shraddananda(2)6 has been followed in some of the later Bench decisions of this Court. It is the correctness of this view and more particularly whether it is within the powers of the Court to put the sentence of life imprisonment so awarded beyond application of remissions, which is presently in question. 59. We must at the outset state that while commuting the death sentence to that of imprisonment for life, this Court in V. Sreedhar v. Union of India (supra)5 had not put any fetters or restrictions on the power of commutation and/or remission. In fact paragraph 32 of the decision expressly mentions that the sentence so awarded is subject to any remission granted by the Appropriate Government under Section 432 of Cr.P.C. Strictly speaking, sub-question (b) of the first question does not arise for consideration insofar as the present writ petition is

concerned and that precisely was the submission of Mr. Rakesh Dwivedi, learned Senior Advocate. However since the question has been referred for our decision we proceed to deal with said sub-question (b) of

Page 244 JUDGMENT question No.1. Further a doubt has been expressed in Sangeet v. State of Haryana (supra) regarding correctness of the decision in Shraddananda(2)6 in following words: “55. A reading of some recent decisions delivered by this Court seems to suggest that the remission power of the appropriate Government has effectively been nullified by awarding sentences of 20 years, 25 years and in some cases without any remission. Is this permissible? Can this Court (or any court for that matter) restrain the appropriate Government from granting remission of a sentence to a convict? What this Court has done in Swamy Shraddananda and several other cases, by giving a sentence in a capital offence of 20 years’ or 30 years’ imprisonment without remission, is to effectively injunct the appropriate Government from exercising its power of remission for the specified period. In our opinion, this issue needs further and greater discussion, but as at present advised, we are of the opinion that this is not permissible. The appropriate Government cannot be told that it is prohibited from granting remission of a sentence. Similarly, a convict cannot be told that he cannot apply for a remission in his sentence, whatever be the reason.” We therefore deal with the question. 60. The decision of this Court in Maru Ram (Supra) refers to the background which preceded the introduction of Section 433 A in Cr. P.C. The Joint Committee which went into the Indian Penal Code (Amendment) Bill had suggested that a long enough minimum sentence should be suffered by both classes of lifers namely, those guilty of offence where death sentence was one of the alternatives and where the death sentence was commuted to imprisonment for life. Paragraph 5 of the decision in Maru Ram sets out the

Page 245 JUDGMENT objects and reasons, relevant notes on clauses and the recommendations and was to the following effect: “5. The Objects and Reasons throw light on the “why” of this new provision: “The Code of Criminal Procedure, 1973 came into force on the 1st day of April, 1974. The working of the new Code has been carefully watched and in the light of the experience, it has been found necessary to make a few changes for removing certain difficulties and doubts. The notes on clauses explain in brief the reasons for the amendments.” The notes on clauses give the further explanation:- “Clause 33.—Section 432 contains provision relating to powers of the appropriate Government to suspend or remit sentences. The Joint Committee on the Indian Penal Code (Amendment) Bill, 1972, had suggested the insertion of a proviso to Section 57 of the Indian Penal Code to the effect that a person who has been sentenced to death and whose death sentence has been commuted into that of life imprisonment and persons who have been sentenced to life imprisonment for a capital offence should undergo actual imprisonment of 14 years in jail. Since this particular matter relates more appropriately to the Criminal Procedure Code, a new section is being inserted to cover the proviso inserted by the Joint Committee.” This takes us to the Joint Committee’s recommendation on Section 57 of the Penal Code that being the inspiration for clause 33. For the sake of completeness, we may quote that recommendation: “Section 57 of the Code as proposed to be amended had provided that in calculating fractions of terms of punishment, imprisonment for life should be reckoned as equivalent to rigorous imprisonment for twenty years. In this connection attention of the Committee was brought to the aspect that sometimes due to grant of remission even murderers sentenced or commuted to life imprisonment were released at the end of 5 to 6 years. The Committee feels that such a convict should not be released unless he has served at least fourteen years of imprisonment.”

Page 246 JUDGMENT Thus, as against the then prevalent practice or experience where murderers sentenced or commuted to life imprisonment, were being released at the end of 5-6 years, period of 14 years of actual imprisonment was considered sufficient. 61. Shraddananda(2)6 referred to earlier decision of this Court in Dalbir Singh and others v. State of Punjab (supra). In that decision, taking cue from English Legislation on abolition of death penalty, a suggestion was made in following words:- “14. The sentences of death in the present appeal are liable to be reduced to life imprisonment. We may add a footnote to the ruling in Rajendra Prasad case. Taking the cue from the English legislation on abolition, we may suggest that life imprisonment which strictly means imprisonment for the whole of the man’s life, but in practice amounts to incarceration for a period between 10 and 14 years may, at the option of the convicting court, be subject to the condition that the sentence of imprisonment shall last as long as life lasts where there are exceptional indications of murderous recidivism and the community cannot run the risk of the convict being at large. This takes care of judicial apprehensions that unless physically liquidated the culprit may at some remote time repeat murder.” 62. Committee of Reforms on Criminal Justice System under the Chairmanship of Dr. Justice Malimath in its report submitted in the year 2003 recommended suitable amendments to introduce a punishment higher than life imprisonment and lesser than death penalty,

similar to that which exists in USA namely “Imprisonment for life without commutation or remission”. The

Page 247 JUDGMENT relevant paragraphs of Malimath Committee Report namely paragraphs 14.7.1 and 14.7.2 were as under:- “ALTERNATIVE TO DEATH PENALTY 14.7.1 Section 53 of the IPC enumerates various kinds of punishments that can be awarded to the offenders, the highest being the death penalty and the second being the sentence of imprisonment for life. At present there is no sentence that can be awarded higher than imprisonment for life and lower than death penalty. In USA a higher punishment called “Imprisonment for life without commutation or remission” is one of the punishments. As death penalty is harsh and irreversible the Supreme Court has held that death penalty should be awarded only in the rarest of rare cases, the Committee considers that it is desirable to prescribe a punishment higher than that of imprisonment for life and lower than death penalty. Section 53 be suitably amended to include “Imprisonment for life without commutation or remission” as one of the punishments. 14.7.2 Wherever imprisonment for life is one of the penalties prescribed under the IPC, the following alternative punishment be added namely “Imprisonment for life without commutation or remission”. Wherever punishment of imprisonment for life without commutation or remission is awarded, the State Governments cannot commute or remit the sentence. Therefore, suitable amendment may be made to make it clear that the State Governments cannot exercise power of remission or commutation when sentence of “Imprisonment for life without remission or commutation” is awarded. This however cannot affect the Power of Pardon etc of the President and the Governor under Articles 72 and 161 respectively.”

Page 248 JUDGMENT 63. In its report submitted in January 2013, Committee on Amendment to Criminal Law under the chairmanship of Justice J.S. Verma made following recommendations on life imprisonment:- “On Life Imprisonment 13. Before making our recommendation on this subject, we would like to briefly examine the meaning of the expression “life” in the term “life imprisonment”, which has attracted considerable judicial attention. 14. Mohd. Munna v. Union of India reported in 2005 (7) SCC 417 reiterates the well settled judicial opinion that a sentence of imprisonment for life must, prima facie, be treated as imprisonment for the whole of the remaining period of the convict’s natural life. This opinion was recently restated in Rameshbhai Chandubhai Rathode v. State of Gujarat reported in 2011(2) SCC 764, and State of U.P. v. Sanjay Kumar reported in 2012(8) SCC 537, where the Supreme Court affirmed that life imprisonment cannot be equivalent to imprisonment for 14 or 20 years, and that it actually means (and has always meant) imprisonment for the whole natural life of the convict. 15. We therefore recommend a legislative clarification that life imprisonment must always mean imprisonment “for ‘the entire natural life of the convict’.” Pursuant to these recommendations, certain Sections were added in the IPC while other Sections were substantially amended by Criminal Law Amendment Act of 2013 (Act 13 of 2013). As a result Sections 370(6), 376-A, 376-D and 376-E now prescribe a punishment of “with imprisonment for life which shall mean imprisonment for the remainder of that persons natural life”. Thus what was implicit in the sentence for imprisonment of life as laid down in Godse and followed since then has now been made explicit by the Parliament in

Page 249 JUDGMENT certain Sections of the IPC. However, none of the amendments reflected the introduction of punishment suggested by Malimath Committee. 64. Thus despite recommendations of Justice Malimath Committee to introduce a punishment higher than life imprisonment and lesser than death penalty similar to the one which exists in USA, Parliament has chosen not to act in terms of recommendations for last 12 years. In this backdrop, it was submitted by Mr. Rakesh Dwivedi, learned Senior Advocate that in Shraddananda(2)6 this court in fact carved out and created a new form of punishment and resorted to making a legislation on the point. It was further submitted that Section 433A of Cr.P.C. prescribes minimum actual imprisonment which must be undergone in cases of life imprisonment on two counts, where death sentence is one of the alternatives or where death sentence is commuted to imprisonment for life. Even the prisoner who at one point of time was awarded a death sentence is entitled, upon his death sentence being commuted to life imprisonment, to be considered under Section 433A. In his submission, it would not be within the powers of the court to put the sentence of life imprisonment in such cases beyond application of remissions, in the teeth of the Statute. Mr. T.R. Andhyarujina, learned Senior Advocate appearing for one of the intervenors submitted that what is within the domain of the judiciary is power to grant or award sentence as prescribed and when it comes to its execution the domain is that of the executive. In his submission howsoever strong be the temptation on account of gravity of the crime, there could be no

Page 250 JUDGMENT trenching into the power of the executive. He submitted that it is not for the judiciary to say that there could be no commutation at all, which would be violative of the concept of separation of powers. Reliance was

placed on Section 32A of NDPS Act to contend that wherever the Parliament intended that there be no remissions in respect of any offence, it has chosen to say so in specific terms. 65. In a recent decision of this Court in Vikram Singh @ Vicky & another v. Union of India and others43, while considering challenge to the award of death sentence for an offence under Section 364A of the IPC this Court considered various decisions on the issue of punishment. It considered some American decisions holding that fixing of prison terms for specific crimes involves a substantive penalogical judgment which is properly within the province of legislatures and not courts and that the responsibility for making fundamental choices and implementing them lies with the legislature. In the end, the conclusions (b), (c) and (d) as summed up by this Court were as under: "(b) Prescribing punishment is the function of the legislature and not the Courts. (c) The legislature is presumed to be supremely wise and aware of the needs of the people and the measures that the necessary to meet those needs. (d) Court show deference to the legislative will and wisdom and are slow in upsetting the enacted provisions dealing with the quantum of punishment prescribed for different offences." AIR 2015 SC 3577

Page 251 JUDGMENT 66. Section 302 IPC prescribes two punishments, the maxima being the death sentence and the minima to be life sentence. Shraddananada(2)6 proceeds on the footing that the court may in certain cases take recourse to the expanded option namely the hiatus between imprisonment for 14 years and the death sentence, if the facts of the case so justify. The hiatus thus contemplated is between the minima i.e. 14 years and the maxima being the death sentence. In fact going by the punishment prescribed in the statute there is no such hiatus between the life imprisonment and the death sentence. There is nothing that can stand in between these two punishments as life imprisonment, going by the law laid down in Godse's case is till the end of one's life. What Shraddananda(2)6 has done is to go by the practical experience of the life imprisonment getting reduced to imprisonment for a period of not more that 14 years and assess that level to be the minima and then consider a hiatus between that level and the death sentence. In our view this assumption is not correct. What happens on the practical front cannot be made basis for creating a sentence by the Courts. That part belongs specifically to the legislature. If the experience in practice shows that remissions are granted in unsound manner, the matter can be corrected in exercise of judicial review. In any case in the light of our discussion in answer to Question in Para 52.6, in cases of remissions under Section 432/433 of Cr.P.C. an approach will necessarily have to be made to the Court, which will afford sufficient check and balance. 67. It may be relevant to note at this state that in England and Wales, the

Page 252 JUDGMENT mandatory life sentence for murder is contained in Section 1(1) of the Murder (Abolition of the Death Penalty) Act, 1965. The Criminal Justice Act, 2003 empowers a trial judge, in passing a mandatory life sentence, to determine the minimum term which the prisoner must serve before he is eligible for early release on licence. The statute allows the trial judge to decide that because of the seriousness of the offence, the prisoner should not be eligible for early release (in effect to make a "whole life order" that is to say till the end of his life. In effect, the recommendations of Malimath Committee were on similar lines to add a new form of punishment which could similarly empower the Courts to impose such punishment and state that the prisoner would not be entitled to remissions. Section 32A of the NDPS Act is also an example in that behalf. What is crucial to note is the specific empowerment under the Statute by which a prisoner could be denied early release or remissions. It ma 68. Shraddananda (2)6 does not proceed on the ground that upon interpretation of the concerned provision such as Section 302 of the IPC, such punishment is available for the court to impose. If that be so it would be available to even the first court i.e. Sessions Court to impose such sentence and put the matter beyond any remissions. In a given case the matter would not go

Page 253 JUDGMENT before the superior court and it is possible that there may not be any further assessment by the superior court. If on the other hand one were to say that the power could be traceable to the power of confirmation in a death sentence which is available to the High Court under Chapter XXVIII of Cr.P.C., even the High Court while considering death reference could pass only such sentence as is available in law. Could the power then be traced to Article 142 of the Constitution? 69. In Prem Chand Garg and another v. Excise Commissioner, U.P. and others44, Constitution Bench of this Court observed:- "….The powers of this Court are no doubt very wide and they are intended to be and will always be exercised in the interest of justice. But that is not to say that an order can be made by this Court which is inconsistent with the fundamental rights guaranteed by Part III of the Constitution. An order which this Court can make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws…."(emphasis added) In Supreme Court Bar Association v. Union of India & another45 while dealing with exercise of powers under

Article 142 of Constitution, it was observed :- “47. The plenary powers of this Court under Article 142 of the Constitution are inherent in the Court and are complementary to those powers which are specifically conferred on the Court by various statutes though are not limited by those statutes. These powers also exist independent of the statutes with a view to do complete justice between the parties. These powers are of very AIR 1963 SC 996 1998 (4) SCC 409

Page 254 JUDGMENT wide amplitude and are in the nature of supplementary powers. This power exists as a separate and independent basis of jurisdiction apart from the statutes. It stands upon the foundation and the basis for its exercise may be put on a different and perhaps even wider footing, to prevent injustice in the process of litigation and to do complete justice between the parties. This plenary jurisdiction is, thus, the residual source of power which this Court may draw upon as necessary whenever it is just and equitable to do so and in particular to ensure the observance of the due process of law, to do complete justice between the parties, while administering justice according to law. There is no doubt that it is an indispensable adjunct to all other powers and is free from the restraint of jurisdiction and operates as a valuable weapon in the hands of the Court to prevent “clogging or obstruction of the stream of justice”. It, however, needs to be remembered that the powers conferred on the Court by Article 142 being curative in nature cannot be construed as powers which authorise the Court to ignore the substantive rights of a litigant while dealing with a cause pending before it. This power cannot be used to “supplant” substantive law applicable to the case or cause under consideration of the Court. Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly which cannot be achieved directly. Punishing a contemner advocate, while dealing with a contempt of court case by suspending his licence to practice, a power otherwise statutorily available only to the Bar Council of India, on the ground that the contemner is also an advocate, is, therefore, not permissible in exercise of the jurisdiction under Article 142. The construction of Article 142 must be functionally informed by the salutary purposes of the article, viz., to do complete justice between the parties. It cannot be otherwise. As already noticed in a case of contempt of court, the contemner and the court cannot be said to be litigating parties.”(emphasis added) 70. Further, in theory it is possible to say that even in cases where court were to find that the offence belonged to the category of “rarest of rare” and deserved death penalty, such death convicts can still be granted benefit under Section 432/433 of Cr.P.C. In fact, Section 433A contemplates such a situation. On the

Page 255 JUDGMENT other hand, if the court were to find that the case did not belong to the “rarest of rare” category and were to put the matter beyond any remissions, the prisoner in the latter category would stand being denied the benefit which even the prisoner of the level of a death convict could possibly be granted under Section 432/433 of the Cr.P.C. The one who in the opinion of the Court deserved death sentence can thus get the benefit but the one whose case fell short to meet the criteria of “rarest of rare” and the Court was hesitant to grant death sentence, would languish in Jail for entirety of his life, without any remission. If absolute ‘irrevocability of death sentence’ weighs with the Court in not awarding death sentence, can the life imprisonment ordered in the alternative be so directed that the prospects of remissions on any count stand revoked for such prisoner. In our view, it cannot be so ordered. 71. We completely share the concern as expressed in Shraddananda(2)6 that at times remissions are granted in extremely unsound manner but in our view that by itself would not and ought not to nudge a judge into endorsing a death penalty. If the offence in question falls in the category of the “rarest of rare” the consequence may be inevitable. But that cannot be a justification to create a new form of punishment putting the matter completely beyond remission. Parliament having stipulated mandatory minimum actual imprisonment at the level of 14 years, in law a prisoner would be entitled to apply for remission under the statute. If his case is made out, it is for the executive to consider and pass appropriate orders. Such orders would inter alia consider not only the

Page 256 JUDGMENT gravity of the crime but also other circumstances including whether the prisoner has now been de-sensitized and is ready to be assimilated in the society. It would not be proper to prohibit such consideration by the executive. While doing so and putting the matter beyond remissions, the court would in fact be creating a new punishment. This would mean- though a model such a Section 32A was available before the Legislature and despite recommendation by Malimath Committee, no such punishment was brought on the Statute yet the Court would create such punishment and enforce it in an individual case. In our view, that would not be permissible. 72. In Pravasi Bhalai Sangathan v. Union of India and others 46, while emphasizing that the court cannot rewrite, recast or reframe the legislation it was observed as under:- “20. Thus, it is evident that the legislature had already provided sufficient and effective remedy for prosecution of the authors who indulge in such activities. In spite of the above, the petitioner sought reliefs which tantamount to

legislation. This Court has persistently held that our Constitution clearly provides for separation of powers and the court merely applies the law that it gets from the legislature. Consequently, the Anglo-Saxon legal tradition has insisted that the Judges should only reflect the law regardless of the anticipated consequences, considerations of fairness or public policy and the Judge is simply not authorised to legislate law. “If there is a law, Judges can certainly enforce it, but Judges cannot create a law and seek to enforce it.” The court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The very power to legislate has not been conferred on the courts. However, of lately, judicial activism of the superior courts in India has raised public eyebrows time and again.” 2014(11) SCC 477

Page 257 JUDGMENT Similarly in Sushil Kumar Sharma v. Union of India and others47, it was observed that if the provision of law is misused and subjected to the abuse, it is for the legislation to amend modify or repeal it, if deemed necessary. 73. The power under Section 432/433 Cr.P.C. and the one exercisable under Articles 72 and 161 of the Constitution, as laid down in Maru Ram (supra) are streams flowing in the same bed. Both seek to achieve salutary purpose. As observed in Kehar Singh (supra) in Clemency jurisdiction it is permissible to examine whether the case deserves the grant of relief and cut short the sentence in exercise of executive power which abridges the enforcement of a judgment. Clemency jurisdiction would normally be exercised in the exigencies of the case and fact situation as obtaining when the occasion to exercise the power arises. Any order putting the punishment beyond remission will prohibit exercise of statutory power designed to achieve same purpose under Section 432/433 Cr.P.C.. In our view Courts cannot and ought not deny to a prisoner the benefit to be considered for remission of sentence. By doing so, the prisoner would be condemned to live in the prison till the last breath without there being even a ray of hope to come out. This stark reality will not be conducive to reformation of the person and will in fact push him into a dark hole without there being semblance of the light at the end of the tunnel. (2005) 6 SCC 281

Page 258 JUDGMENT 74. As stated in Prem Chand Garg (supra) an order in exercise of power under Article 142 of the Constitution of India must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws. In A.R. Antulay v. R.S. Naik48a direction by which the petitioner was denied a statutory right of appeal was recalled. A fortiorari, a statutory right of approaching the authority under Section 432/433 Cr.P.C. which authority can, as laid down in Kehar Singh (supra) and Epuru Sudhakar (supra) eliminate the effect of conviction, cannot be denied under the orders of the Court. 75. The law on the point of life imprisonment as laid down in Godse’s case (supra) is clear that life imprisonment means till the end of one’s life and that by very nature the sentence is indeterminable. Any fixed term sentence characterized as minimum which must be undergone before any remission could be considered, cannot affect the character of life imprisonment but such direction goes and restricts the exercise of power of remission before the expiry of such stipulated period. In essence, any such direction would increase or expand the statutory period prescribed under Section 433A of Cr.P.C. Any such stipulation of mandatory minimum period inconsistent with the one in Section 433A, in our view, would not be within the powers of the Court. Our answer to Sub Question (b) of Question in Para 52.1 is: (1988) 2 SCC 602

Page 259 JUDGMENT Question b:Whether as per the principles enunciated in paragraphs 91 to 93 of Swamy Shraddananda(2)6, a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment for imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission? Answer. In our view, it would not be open to the Court to make any special category of sentence in substitution of death penalty and put that category beyond application of remission, nor would it be permissible to stipulate any mandatory period of actual imprisonment inconsistent with the one prescribed under Section 433A of Cr. P.C. 76. Reference answered accordingly. W. P (CRL.) Nos.185, 150, 66 OF 2014 & Crl. Appeal NO.1215 OF 2011 These Writ Petitions and Criminal Appeal are disposed of in terms of the decision in Writ Petition (Criminal) No.48 of 2014. 77. Our conclusions in respect of Questions referred in the Referral Order, except in respect of sub question (b) of Question in Para 52.1 of the Referral Order, are in conformity with those in the draft judgment of Hon’ble Kalifulla J. Since our view in respect of sub question (b) of Question in Para 52.1 of the Referral Order is not in agreement with that of Hon’ble Kalifulla J., while placing our view we have dealt with other questions as well.

Page 260 JUDGMENT ……..……J. (Abhay Manohar Sapre) ……..……J. (Uday Umesh Lalit) New Delhi, December 2, 2015

Page 261 JUDGMENT [Reportable IN THE SUPREME COURT OF INDIA CRIMINAL ORIGINAL JURISDICTION WRIT PETITION (Crl.) No. 48 OF 2014 Union of India …..….Petitioner(s) VERSUS V. Sriharan @ Murugan & Ors. ……Respondent(s) With Writ Petition (Crl.) No.185/2014 Writ Petition (Crl.) No.150/2014 Writ Petition (Crl.) No.66/2014 Criminal Appeal No.1215/2011 Abhay Manohar Sapre, J. 1. I have had the benefit of reading the elaborate, well considered and scholarly written two separate draft opinions proposed to be pronounced by my learned Brothers Justice Fakkir Mohamed Ibrahim Kalifulla and Justice Uday Umesh Lalit. 2. Having gone through the opinions of both the learned Brothers very carefully and minutely, with respect, I am in agreement with the reasoning and the conclusion arrived at by my Brother Justice Uday Umesh Lalit in answering the reference. 3. Since I agree with the line of reasoning and the conclusion

Page 262 JUDGMENT arrived at by my Brother Justice Uday Umesh Lalit while answering the questions referred to this Bench, I do not consider it necessary to give my separate reasoning nor do I wish to add anything more to what has been said by Brother Lalit J. in his opinion. 4. In my view, it is only when some issues are not dealt with or though dealt with but requires some elaboration, the same can be supplemented while concurring. I, however, do not find any scope to meet such eventuality in this case and therefore no useful purpose would be served in writing an elaborate concurring opinion. ..….....J. [ABHAY MANOHAR SAPRE] New Delhi; December 02, 2015.

Page 263 JUDGMENT Reportable IN THE SUPREME COURT OF INDIA CRIMINAL ORIGINAL/APPELLATE JURISDICTION WRIT PETITION (CRL.)NO.48 OF 2014 UNION OF INDIA … PETITIONER(S) VERSUS V. SRIHARAN @ MURUGAN AND ORS. ... RESPONDENT(S) WITH WRIT PETITION (CRL.) NO.185 OF 2014 WITH WRIT PETITION (CRL.) NO.150 OF 2014 WITH WRIT PETITION (CRL.) NO.66 OF 2014 AND WITH CRIMINAL APPEAL NO.1215 OF 2011 O R D E R Now that we have answered the Reference in the matters, the matters will now be listed before an appropriate three learned Judges' Bench for appropriate

Page 264 JUDGMENT orders and directions in the light of the majority Judgment of this Court. .....CJI (H.L. DATTU) ….....J. (FAKKIR MOHAMED IBRAHIM KALIFULLA) .....J. (PINAKI CHANDRA GHOSE) ….....J. (ABHAY MANOHAR SAPRE) ….....J. (UDAY UMESH LALIT) NEW DELHI, DECEMBER 02, 2015.