REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

REVIEW PETITION (C) NO.1378 OF 2009

IN

WRIT PETITION (C) NO.457 OF 2005

Remdeo Chauhan @ Rajnath Chauhan ..Petitioner(s)

Versus

Bani Kant Das & Others ..Respondent(s)

J U D G M E N T

GANGULY, J.

1. This case has a chequered background. The facts, therefore, are to be appreciated in their sequence.

2. A criminal case was registered against the petitioner under section 302 IPC, on an FIR lodged by Bani Kant Das (first respondent),

elder brother of Bhabani Charan Das (the deceased), in view of the offences committed by the petitioner on 8.3.1992. After investigation and preparation of charge sheet, the case was committed for trial to the Court of Sessions and charges were framed against the petitioner under Sections 302, 323, 325 and 326 of IPC.

3. On 31.3.1998, the Trial Court held the petitioner guilty of murdering four members of Bhabani Charan Das's family and that all the charges under Sections 302, 323, 325 and 326 of IPC against him were proved beyond all reasonable doubt. The Trial Court also opined that the crime fell within the category of 'rarest of rare cases' and the petitioner deserved death penalty.

4. However, the defence raised the plea that at the time of commission of the crime, the petitioner was below 16 years of age. To determine the actual age of the petitioner, Dr. Bhushan Chandra Roy, Associate Professor of Forensic

Medicine of Guwahati Medical College, with a team of doctors, examined him on 23.12.1997. The defence examined the father of the petitioner, Mr. Firato Chauhan and also placed reliance on the school admission register. The school register was held to be unreliable, as it was not properly maintained. Further, the petitioner's father estimated the petitioner's age to be 19 years at the time of occurrence of the crime.

5. However, on the basis of the physical and radiological examination done of the petitioner, the doctor was definitely of the opinion that his age was above 20 years but could not be more than 21 years on the date of the examination. This examination was conducted more than 5½ years after the date of commission of the crime.

6. Dr. Bhushan Chandra Roy, who was a prosecution witness, subjected the petitioner to scientific tests including radiological tests. The medical opinion of Dr. Bhushan Chandra Roy was a joint

opinion and he consulted the doctor in the Department of Radiology and Dr. Kanak Chandra Das, the Medical Officer on duty in the Department of Radiology.

7. About the age of the petitioner, trial Court accepted the opinion of the team of doctors headed by Dr. Bhushan Chandra Roy.

8. The Trial Court's finding about the age of the petitioner is as follows:

> "On the basis of the physical examination and radiological examination done on Ramdeo Chauhan alias Raj Nath Chauhan, they are of opinion that the age of the individual is above 20 years."

9. The Trial Court, after considering the medical evidence about the age of the petitioner along with the evidence of the father of the petitioner, came to the following conclusion:

> "Then the accused cannot be below sixteen years of age at the time of alleged occurrence to attract the provisions of Juvenile Justice Act, 1986 as the alleged occurrence took place before six years."

10. On appeal by the petitioner, the High Court, vide its judgment dated 1.2.1999, confirmed the conviction and sentence of death against the petitioner. Before the High Court the Counsel for the petitioner specifically submitted, that he was not challenging the finding of the Trial Court on the point of age of the accused-petitioner.

11. The appeal from the High Court judgment was dismissed by a Bench of this Court, comprising K.T. Thomas and R.P. Sethi, JJ, on 31.7.2000 and death sentence was upheld. In that judgment, this court did not advert to the question of age of the petitioner as it was possibly not argued.

12. A review petition (hereinafter, the first review petition) was filed against the abovementioned judgment of this Court. After notice was issued, a two Judge Bench of this Court held that the question of conviction of the petitioner under

section 302 IPC cannot be reopened. However, considering the fact that the petitioner raised an important question that he was a juvenile at the relevant time and there is a legal prohibition against sentencing a juvenile, the first review petition was referred to a larger Bench comprising K.T. Thomas, R.P. Sethi and S.N. Phukan, JJ.

13. In the larger Bench decision dated 10.5.2001, Sethi, J., inter-alia, held- "From the evidence produced and the material placed before the courts below, there is not an iota of doubt in my mind to hold that the petitioner was not a child or near or about the age of being a child within the meaning of the Juvenile Justice Act or the Children Act."

14. Thomas, J gave a dissenting judgment with respect to imposition of death sentence upon the accused. His Lordship observed that the Court had already held on facts that the petitioner had been unable to prove that he was below 16

years of age on the date of the crime. However, Thomas J. approached the question from a different angle and questioned whether death sentence could be awarded to a person whose age was not positively established by the prosecution as above 16 years on the crucial date? The learned Judge opined that if the age of the petitioner could not be held to be unquestionably above 16 on the relevant date (and there was a doubt created in view of the medical report of Dr. Bhushan Chandra Roy), its corollary was that the lesser sentence also could not unquestionably be foreclosed, as per the Constitution Bench judgment in the case of **Bachan Singh** v. **State of Punjab**, [(1982) 3 SCC 24]. Thus, the learned Judge opined that the sentence of death be altered to one of imprisonment for life.

15. Phukan, J., gave a concurring opinion with Sethi, J. and opined that the imposition of sentence of death could not be reopened on review. However, His Lordship observed that if

any motion was made in terms of Sections 432, 433 and 433A of the Code of Criminal Procedure and/or Article 72 or Article 161 of the Constitution, the same may be appropriately dealt with.

16. In the words of Phukan, J., "the factors which have weighed with my learned Brother Mr. Justice Thomas can be taken note of in the context of section 432(2) of the Code."

17. Even before the judgment on the first review petition was pronounced on 10.5.2001, the petitioner had already filed on 17.8.2000 a petition before the Governor of Assam praying for mercy and for commutation of his death sentence to one of life imprisonment.

18. At about the same time when the petition for commutation was pending, Dr. Ved Kumari, Professor of the Faculty of Law, University of Delhi, wrote a fairly detailed article titled "Has a child been executed in India?" The said

article came to be noticed by National Human Rights Commission (NHRC). Thereupon, NHRC sent a notice to Dr. Ved Kumari. In the meantime, the judgment in the review petition, as aforesaid, was pronounced by this Court on 10.5.2001.

19. On 21.5.2001, the full Commission of NHRC, consisting of the Chairperson, Mr. Justice J.S. Verma, as also two of its judicial members, namely, Dr. Justice K. Ramaswany and Justice Ms. Sujata
V. Manohar, and the other member Sri Virendra Dayal, held its proceedings, in which the judgment rendered in the review proceeding was perused.

20. NHRC, upon considering the materials on record, made the following recommendations:

> "The Commission is of the view that the above opinion of Thomas, J. in the judgment disposing of the review petition and the above quoted observations of Phukan, J. are very strong reasons to support the view and this is a fit case for commutation of the sentence of Ram Deo Chauhan @ Raj Nath Chauhan in the above

case from death sentence to that of imprisonment for life. This Commission is of the considered view that the case, placing reliance on the views of Thomas, J. and Phukan, J., who were two of the three learned Judges, constituting the Bench deserves the highest consideration by the executive authority while considering the question of commutation of sentence of the said Ram Deo Chauhan @ Raj Nath Chauhan.

Accordingly, this Commission makes the above recommendation in terms of the opinion of Thomas, J. for due consideration by the Governor of Assam and/or the President of India, as the case may be, in the event of a mercy petition being filed for the purpose."

21. Thereafter, on 28.1.2002, the Governor of Assam commuted the death sentence of the petitioner to one of life imprisonment. The Order of the Governor runs as under:

"The Governor of Assam after careful consideration of the mercy petition and other relevant records is pleased to commute the sentence of death to that of imprisonment for life of the above named condemned prisoner."

22. Challenging the aforesaid order of the Governor, of Assam, the relatives of the deceased filed a writ petition under Article 32 of the

Constitution of India before this Court. In that proceeding, Secretary NHRC was impleaded. However, this court, by an order dated 21.1.2009, issued notice to Prof. Ved Kumari, asking her to state how her complaint before NHRC was maintainable. Pursuant thereto, Prof. Ved Kumari submitted an affidavit before this Court on 3.2.2009, stating that the Juvenile Justice (Care & Protection of Children) Act, 2000 applied to all pending cases and was extended to all children who had not completed 18 years of age; and thus it would also be applicable to the present case.

23. After hearing the matter, the Bench comprising of one of us passed an order on 8.5.2009, setting aside the Governor's order dated 28.1.2002 of commutation of death sentence to life imprisonment.

24. In passing that order, the Bench was of the opinion that the NHRC proceedings were not in line with the procedure established under the

Protection of Human Rights Act, 1993 (hereinafter, 'the 1993 Act') and therefore, NHRC's recommendations were void. Further, the order of the Governor of Assam directing commutation did not indicate any reason and was based on the recommendations of NHRC, which itself were without jurisdiction. Thus, the writ petition was allowed and the order of the Governor of Assam was quashed and this Court directed re-consideration afresh of the petitioner's prayer for commutation of sentence.

25. This instant review petition (hereinafter, the second review) is directed against this Court's order dated 8.5.2009.

26. In this second review, notice was issued by this Bench for formal hearing by an order dated 3rd September, 2009. One of the reasons for issuing notice was that one of the grounds put forward was that the judgment under review was passed without hearing Ram Deo Chauhan, the petitioner, and without providing him legal aid. However,

almost at the conclusion of the hearing of this proceeding, this Court found that the aforesaid representation was not correct. The correct position was that by an order dated 19th November, 2005, Mr. Muralidhar was appointed by the Registrar of this Court to represent the petitioner. After Mr. Muralidhar, became a Judge of Delhi High Court, the Registrar appointed one Mr. Vijay Panjwani, an advocate of this Court, to represent the review petitioner. Mr. Panjwani filed a counter affidavit in the Article 32 proceeding. However, from the judgment under review, it does not appear that Mr. Panjwani appeared before the Court and made his submissions.

27. Be that as it may, it is not correct to say that no notice was given to the petitioner. Therefore, one of the grounds on which notice for review was issued became non-existent.

28. The question is whether this second review should be dismissed in view of such misleading

stand having been taken by the petitioner while invoking this Court's jurisdiction of review.

29. On a very careful consideration of this issue, this Court thinks that in view of various other questions of far reaching importance having been raised in this second review, it may be a travesty of justice if this petition is dismissed on only the ground mentioned above.

30. This Court on a contested hearing is of the opinion that the second review should still be entertained and decided as it raises various questions of signal significance, touching the rights of the petitioner to seek commutation as also touching questions regarding the jurisdiction of the NHRC, as also various constitutional provisions relating to life and freedom. Various concerns of public law have come up for consideration in this second review and in the context of these issues the constitutional provision of Article 137 for

review of judgment and order of this Court may have to be examined. Article 137 of the Constitution provides as follows:

> "137. **Review of judgments or orders by the Supreme Court:** Subject to the provisions of any law made by Parliament or any rules made under article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it.

31. In terms of Article 137, Rules have been framed under Article 145 of the Constitution and Part VIII Order XL of the said Rules deals with review.

32. Order XL Rule 1 provides that in reviewing the judgment in a civil proceeding, the Court will follow the grounds in Order XLVII Rule 1 of the CPC. However, in case of review of criminal proceedings, no review is permissible except on the ground of error apparent on the face of the record.

33. The extent of the review power of this Court came up for consideration in several cases. In

M/s Northern India Caterers (India) Ltd. v. **Lieutenant Governor of Delhi** reported in 1980 (2) SCC 167, a three Judge Bench of this Court examined the scope of this power and held that if the attention of the Court is not drawn to any material statutory provision during the original hearing, that is a ground of review. The Court also held that it may reopen its own judgment if a manifest wrong has been done and it is necessary to pass an order to do full and effective justice.

34. In **Ram Chandra Singh** v. **Savitri Devi and others** reported in 2004 (12) SCC 713, this Court dealing with its power of review held in para 19:

> "19. It is no doubt true that in appropriate cases this Court may pass an order ex debito justitiae by correcting mistakes in the judgment but inherent power of this Court can be exercised only when there does not exist any other provision in that behalf……"

35. In a three Judge Bench of this Court in the case of **Suthendra Raja alias Suthenthira Raja alias Santhan & Ors**. v. **State through DSP/CBI, SIT, Chennai** reported in 1999 (9) SCC 323, this Court held that the scope of review in criminal proceedings has been considerably widened in the **P.N. Eswara Iyer and others** v. **Registrar, Supreme Court of India** [1980 (4) SCC 680]. To maintain a review in a criminal case, what has to be considered is whether there has been a miscarriage of justice.

36. In this connection, this Court finds that in the Supreme Court Rules framed under Article 145 of the Constitution, there is a clear provision in Order XL Rule 6 of the Rules to the following effect:

> "6. Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

37. In **Girdhari Lal Gupta** v. **D.N. Mehta & Anr.** reported in AIR 1971 SC 2162, this Court held when the attention of this Court is not drawn to any particular provision of a statute, this court can review the decision and it is not the case of a mere mistaken judgment. (Para 16, pg 2164)

38. On a bare reading of the provision of Order XL Rule 1 of the Supreme Court Rules, one may get the impression that the extent of review in criminal cases is more restricted than in civil cases. But the said impression has been given a quietus by this Court in its Constitution Bench judgment in **Eswara** case (supra).

39. Delivering the main judgment, Justice Krishna Iyer held- "So it is reasonable to assume that the framers of the rules could not have intended a restrictive review over criminal orders or judgments. It is likely to be the other way about. Supposing an accused is sentenced to death by the Supreme Court and the 'deceased'

shows up in court and the court discovers the tragic treachery of the recorded testimony. Is the court helpless to review and set aside the sentence of hanging? We think not. The power to review is in Article 137 and it is equally wide in all proceedings. The Rule merely canalizes the flow from the reservoir of power. The stream cannot stifle the source. Moreover, the dynamics of interpretation depend on the demand of the context and the lexical limits of the test. Here 'record' means any material which is already on record or may, with the permission of the court, be brought on record. If justice summons the judges to allow a vital material in, it becomes part of the record; and if apparent error is there, correction becomes necessitous." (See para 34, pg. 695)

40. Keeping those parameters in mind, let us consider the extent to which power of review can be extended in the facts of this second review.

41. In our view several aspects of this Court's judgment dated 8.5.2009, rendered on the Article 32 petition, call for a review.

42. In the judgment which is under review in the second review petition, the Court concluded:

(a) NHRC has no jurisdiction to interfere and make a recommendation, and

(b) The order of the Governor in commuting the sentence of death to one of life is bad in law as it did not disclose any reason.

43. On a review, we are constrained to hold that both findings on (a) and (b) are vitiated by errors apparent on the face of the record.

A. <u>Jurisdiction of NHRC</u>

44. The NHRC was constituted under Section 3 of the 1993 Act for better protection of human rights. The term 'human rights' as defined in Section 2(d) of the 1993 Act, reads as follows:

"**2. (d) "Human rights"** means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India."

45. The functions of NHRC have been set out in Section 12 of the 1993 Act. Section 12 reads as follows:

"**12. Functions of the Commission**- The Commission shall perform all or any of the following functions namely:

a. inquire, suo motu or on a petition presented to it by a victim or any person on his behalf or on a direction or order of any court, into complaint of

(i) violation of human rights or abetment thereof; or

(ii) negligence in the prevention of such violation, by a public servant;

b. intervene in any proceeding involving any allegation of violation of human rights pending before a court with the approval of such court;

c. visit, notwithstanding anything contained in any other law for the time being in force, any jail or other institution under the control of the State Government, where persons are detained or lodged for purposes of

treatment, reformation or protection, for the study of the living conditions of the inmates thereof and make recommendations thereon to the Government;

d. review the safeguards provided by or under the Constitution or any law for the time being in force for the protection of human rights and recommend measures for their effective implementation;

e. review the factors, including acts of terrorism, that inhibit the enjoyment of human rights and recommend appropriate remedial measures;

f. study treaties and other international instruments on human rights and make recommendations for their effective implementation;

g. undertake and promote research in the field of human rights;

h. spread human rights literacy among various sections of society and promote awareness of the safeguards available for the protection of these rights through publications, the media, seminars and other available means;

i. encourage the efforts of non-governmental organization and institutions working in the field of human rights;

j. such other functions as it may consider necessary for the promotion of human rights."

46. The NHRC has been constituted to inquire into cases of violation of and for protection and promotion of human rights. This power is an extensive one, which should not be narrowly viewed.

47. It must be jurisprudentially accepted that human right is a broad concept and cannot be straitjacketed within narrow confines. Any attempt to do so would truncate its all-embracing scope and reach, and denude it of its vigour and vitality. That is why, in seeking to define human rights, the Legislature has used such a wide expression in section 2(d) of the Act. It is also significant to note that while defining the powers and functions of NHRC under section 12 of the Act, the said broad vision has been envisioned in the residuary clause in Section 12(j).

48. Therefore, it is imperative that while interpreting the powers and jurisdiction of NHRC, the Court construes section 2(d) of the 1993 Act along with its long title and also the Statement of Objects and Reasons of the said Act. The relevant portion of the statement of objects and reasons are excerpted below:

> "2. However, there has been growing concern in the country and abroad about issues relating to human rights. Having regard to this, changing social realities and the emerging trends in the nature of crime and violence, Government has been reviewing the existing laws, procedures, and system of administration of justice; with a view to bringing about greater accountability and transparency in them, and devising efficient and effective methods of dealing with the situation."

49. In his Tagore Law Lecture (The Dialectics and Dynamics of Human Rights in India), Justice V.R. Krishna Iyer describes the width and sweep of human rights in his matchless words and which are worth quoting:

> "Human rights are writ on a large canvas, as large as the sky. The law makers,

lawyers and particularly, the judges, must make the printed text vibrant with human values, not be scared of consequences on the *status quo* order. The militant challenges of today need a mobilization of revolutionary consciousness sans which civilized systems cease to exist. Remember, we are all active navigators, not idle passengers, on spaceship earth as it ascends to celestial levels of the glorious human future."

50. We share the same view.

51. What was said by Alexander Hamilton, the great constitutional expert and political philosopher, way back in 1775, is poignant still today for having a clear perception of what human rights are. The words of Hamilton still resonate with a strange relevance and immediacy, and are quoted below:

"The sacred rights of mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with a sun beam in the whole volume of human nature, by the hand of divinity itself; and can never be erased or obscured by mortal power."

52. Keeping those broad principles in our mind if we look at Section 12(j) of the 1993 Act, we find that it confers on NHRC "such other functions as it may consider necessary for the promotion of human rights." It is not necessary that each and every case relating to the violation of human rights will fit squarely within the four corners of section 12 of the 1993 Act, for invoking the jurisdiction of the NHRC. One must accept that human rights are not like edicts inscribed on a rock. They are made and unmade on the crucible of experience and through irreversible process of human struggle for freedom. They admit of a certain degree of fluidity. Categories of human rights, being of infinite variety, are never really closed. That is why the residuary clause in sub-section (j) has been so widely worded to take care of situations not covered by sub-sections (a) to (i) of Section 12 of the 1993 Act. The jurisdiction of NHRC thus stands enlarged by section 12(j) of the 1993 Act, to take necessary action for the protection of human rights. Such action would include

inquiring into cases where a party has been denied the protection of any law to which he is entitled, whether by a private party, a public institution, the government or even the Courts of law. We are of the opinion that if a person is entitled to benefit under a particular law, and benefits under that law have been denied to him, it will amount to a violation of his human rights.

53. Human rights are the basic, inherent, immutable and inalienable rights to which a person is entitled simply by virtue of his being born a human. They are such rights which are to be made available as a matter of right. Constitution and Legislations of civilized country recognise them since they are so quintessentially part of every human being. That is why every democratic country committed to rule of Law put into force mechanisms for their enforcement and protection. Human rights are universal in nature. The Universal Declaration of Human Rights (hereinafter referred to as UDHR) adopted by the

General Assembly of the United Nations on 10th December 1948 recognizes and requires the observance of certain universal rights, articulated therein, to be human rights, and these are acknowledged and accepted as equal and inalienable and necessary for the inherent dignity and development of an individual. Consequently, though the term 'human rights' itself has not been defined in UDHR, the nature and content of human rights can be understood from the rights enunciated therein.

54. Possibly considering the wide sweep of such basic rights, the definition of 'human rights' in the 1993 Act has been designedly kept very broad to encompass within it all the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by Courts in India.

55. Thus, if a person has been guaranteed certain rights either under the Constitution or under an

International Covenant or under a law, and he is denied access to such a right, then it amounts to a clear violation of his human right and NHRC has the jurisdiction to intervene for protecting it.

56. The contrary finding in the judgment under review about the absence of jurisdiction of NHRC to make some recommendations to the Governor is thus vitiated by errors apparent on the face of the record. Of course NHRC cannot intervene in proceeding pending in Court without its approval [Section 12(6)] as it is assumed that Court will remedy any case of violation of human rights.

57. The assumption in the judgment under review that there can be no violation of a person's human right by a judgment of this Court is possibly not correct. This Court in exercise of its appellate jurisdiction has to deal with many judgments of High Courts and Tribunals in which the High Courts or the Tribunals, on an erroneous perception of facts and law, have

rendered decisions in breach of human rights of the parties and this Court corrects such errors in those judgments.

58. The instances of this Court's judgment violating the human rights of the citizens may be extremely rare but it cannot be said that such a situation can never happen.

59. We can remind ourselves of the majority decision of the Constitution Bench of this court in **Additional District Magistrate Jabalpur** v. **Shivakant Shukla** reported in (1976) 2 SCC 521.

60. The majority opinion was that in view of the Presidential order dated 27.6.1975 under Article 359(1) of the Constitution, no person has the locus standi to move any writ petition under Article 226 before a High Court for Habeas Corpus or any other writ to enforce any right to personal liberty of a person detained under the then law of preventive detention{ Maintenance of Internal Security Act of 1971}, on the ground

that the order is illegal or malafide or not in compliance with the Act.(See paras 78 and 136 of the report)

61. The lone dissenting voice of Justice Khanna interpreted the legal position differently by inter alia holding:

> "(8) Article 226 under which the High Courts can issue writs of Habeas Corpus is an integral part of the Constitution. No power has been conferred upon any authority in the Constitution for suspending the power of the High Court to issue writs in the nature of habeas corpus during the period of emergency. Such a result cannot be brought about by putting some particular construction on the Presidential order in question."(Point 8 at page 777 of the report)

62. There is no doubt that the majority judgment of this court in the **ADM Jabalpur** case (supra) violated the fundamental rights of a large number of people in this country. Commenting on the majority judgment, Chief Justice Venkatachalliah in the Khanna Memorial Lecture delivered on 25.2.2009, observed that the same be 'confined to the dustbin of history.' The

learned Chief Justice equated Justice Khanna's dissent with the celebrated dissent of Lord Atkins in **Liversidge** v. **Sir John Anderson** reported in (1942) AC 206.

63. In fact the dissent of Justice Khanna became the law of the land when, by virtue of the Forty Fourth Constitutional Amendment, Articles 20 and 21 were excluded from the purview of suspension during emergency.

64. But we hasten to add that NHRC cannot function as a parallel seat of justice to rectify or correct or comment upon orders passed by this Court or any other Courts of competent jurisdiction. For correcting an order in a judicial proceeding, the aggrieved party has to avail of the well established gamut of the corrective machinery of appeal, revision, review, curative petition and so on.

65. In fact in this case the NHRC did not send any recommendation as long as the first review

proceedings were pending in this court. The NHRC was keeping a track of the proceeding in the Court. From its order dated 16.10.09, it is revealed that NHRC was aware that a review petition was filed against the judgment of this Court in Criminal Appeal No. 4/2000, in addition to a mercy petition filed before the Governor of Assam. The NHRC closely followed the proceedings of the review petition.

66. The NHRC made its recommendations on 21.5.2001 only after the judgment in first review (No.1105/2000) was passed on 10.5.2001 by this Court.

67. About NHRC, this Court in **Paramjit Kaur** v. **State of Punjab and Ors.** – (1999) 2 SCC 131 held:

> "10. The Commission headed by a former Chief Justice of India is a unique expert body in itself. The Fundamental Rights, contained in Part III of the Constitution of India, represent the basic human rights possessed by every human being in this world inhabited by people of different continents, countries, castes, colours and religions. The country, the colour and the

religion may have divided them into different groups but as human beings, they are all one and possess the same rights."

11. The Chairman of the Commission, in his capacity as a Judge of the High Court and then as a Judge of this Court and also as the Chief Justice of India, and so also two other members who have held high judicial offices as Chief Justices of the High Courts, have throughout their tenure, considered, expounded and enforced the Fundamental Rights and are, in their own way, experts in the field. The Commission, therefore, is truly an expert body to which a reference has been made by this Court in the instant case."

68. After the aforesaid observations this court decided that when in exercise of its power under Article 32, this Court gives any directions to NHRC, then like all other authorities in this country, NHRC is bound by such directions. In such situations, NHRC acts 'sui-generis'. The statutory bar of limitation under Section 36(2) of the 1993 Act will not stand in the way (paras 12 and 15, pages 137-138 of the report).

69. Therefore, NHRC, a statutory body, in a given situation, may have to act under the order or direction given by this Court in exercise of its constitutional power of judicial review.

70. However, in the facts of this case, NHRC has not committed any illegality by taking into consideration the article written by Professor Ved Kumari and then making a mere recommendation to the Governor, for considering the petitioner's plea for commutation. We are of the opinion that in doing so, NHRC acted within its jurisdiction.

B. <u>Whether non-disclosure of reason vitiates the Order of the Governor under Article 161 of the Constitution?</u>

71. In the judgment on Article 32 petition, it was noted that the order of the Governor directing commutation "does not indicate any reason" and this, according to the judgment is contrary to a decision of this Court in **<u>Epuru Sudhakar and another</u>** v. **<u>Government of A.P. & Ors.,</u>** reported in 2006 (8) SCC 161. The impugned judgment quotes para 38 from **Epuru** (supra).

72. After quoting that, the impugned judgment quashes the order of commutation by the Governor and directed reconsideration.

73. On review of the aforesaid reasoning, we find that this finding in the judgment is vitiated by errors apparent on the face of the record.

74. In this case, the entire record relating to exercise of power by the Governor was always available for perusal of the Court.

75. It is well-settled that while exercising power of commutation under Article 161 of the Constitution, the Governor is to act on the aid and advice of the Council of Ministers.

76. From a perusal of the materials on the file, it appears that detailed consideration has been made in the Chief Minister's Secretariat and notes in detail have been put up by the Chief Minister's Secretariat, wherein the entire factual aspect of the case has been considered.

The different judgments given in the first review petition were part of the note, and on a consideration of the detailed note, the Chief Minister approved on 22.10.2001 the note put up before him by the Secretary, Judicial Department for commutation. Thereafter, the matter was placed before the Governor's Secretariat with the entire record. The Hon'ble Governor approved the proposal on 12.1.2002. Therefore, more than adequate reasons are available on the records of the case.

77. It was open to the Bench passing the judgment under review to peruse the entire record.

78. However, on the extent of judicial review in respect of exercise of power by the Governor under Article 161, or by the President under Article 72, there are authoritative pronouncements by this Court and the matter is no longer res-integra.

79. In **G. Krishta Goud & J. Bhoomaiah** v. **State of Andhra Pradesh & Ors.** reported in (1976) 1 SCC 157, this Court while construing the extent of judicial review in connection with exercise of clemency power by the President or the Governor respectively under Articles 72 and 161 held that even though the power granted to the highest executive authority is not totally immune from judicial review, but Court makes an almost extreme presumption in favour of bonafide exercise of such power (Para 8). However, in para 9 the Court sounded a note of caution that where the exercise of power is just by way of a rule of thumb and totally arbitrarily or out of personal vendetta, the Court is not helpless. (See para 9)

80. This question again came up for detailed consideration before the Constitution Bench in the case of **Maru Ram** v. **Union of India & Ors.** reported in (1981) 1 SCC 107. In para 72 at page 153 of the report, this court was summarizing its conclusions and in sub-para 9 it was held

that only in rare cases the Court would examine the exercise of power by the appropriate authority. Subsequently, in **Kehar Singh & Anr.** v. **Union of India & Anr.** reported in (1989) 1 SCC 204, again by a Constitution Bench of this Court, the extent of exercise of this power of clemency was considered. In para 13, Chief Justice Pathak, speaking for the Constitution Bench, held-

> "Nor do we dispute that the power to pardon belongs exclusively to the President and the Governor under the Constitution. There is also no question involved in this case of asking for the reasons for the President's order. And none of the cases cited for the respondents beginning with *Mohinder Singh Gill* (1977 (3) SCC 346) advance the case of the respondent any further." (emphasis added)

81. It also appears from para 11 of **Kehar Singh** (supra) that it relies on the formulations of principles in **Maru Ram** (supra). Paras 7 and 15 of **Kehar Singh** (supra) would also show that **Maru Ram** (supra) ratio was followed in **Kehar Singh** (supra).

82. In view of such consistent view of the two Constitution Benches of this court clearly stating that unless the exercise of power by the Governor under Article 161, is ex facie perverse or is based on a rule of thumb, the Court should not interfere for mere non-disclosure of reason, the finding to the contrary in the judgment under review, by relying on a two-judge Bench decision in **Epuru** (supra) case, is vitiated by errors apparent on the face of the record. Even in para 37 in **Epuru** (supra), the observation of **Kehar Singh** (supra), underlined hereinabove were noted.

83. In the instant case, a perusal of the record shows that upon a detailed consideration of the relevant facts, the Governor exercised his power of commutation. Such an exercise does not call for any interference, in view of the law laid down both in **Maru Ram** (supra) and **Kehar Singh** (supra).

84. From the perusal of the file this Court also notes that in passing the order, the Governor considered all the relevant materials, including the judgment of three learned Judges in the first review petition filed by the petitioner, as also the recommendation of NHRC.

85. This Court has already held that NHRC has the jurisdiction, in the facts of this case, to make its recommendation to the Governor to take into account the materials which NHRC considered. This court also finds that the Governor considered, apart from the said recommendation of NHRC, other relevant materials also and, therefore, the order of the Governor is not vitiated in as much as it is not solely based on the recommendations of NHRC.

86. Now the only question which remains to be considered is whether the petitioner is entitled to insist on a fresh look at his juvenility and a fresh consideration of his rights in view of the changes in the Juvenile Justice (Care &

Protection of Children) Act, 2000 by 2006 amendment.

87. This point has not been stated in the review petition even though this was argued by the learned counsel for the petitioner.

88. Mr. P.S. Patwalia, the amicus appearing in the case, objected to this Court making a pronouncement on this question which is argued for the first time in review even though it is not pleaded in the review petition as a ground for review.

89. This court finds some substance in the said objection. We have already indicated that in the Article 32 petition notice was served on the review petitioner and it was open to him to raise these points in that proceeding as by that time the Juvenile Justice (Care and Protection of Children) Act, 2000 as amended by the 2006 amendment Act had come into force.

90. Even though the ambit of the review petition has been widened by this Court in **Eswara** (supra), it has to follow broadly the principles of review under Order XLVII Rule 1 of the Code of Civil Procedure.

91. Following the discipline of Order XLVII, Rule 1 or the concept of 'an error apparent on the face of the record', we possibly cannot pronounce in a review petition on a question, which was open to be raised in the original proceeding, but was not raised. That apart, it has not at all been pleaded in the review petition. For these reasons, this Court refrains itself from pronouncing on the rights of the petitioner under Juvenile Justice (Care and Protection) Act, 2000 as amended by the 2006 Amendment. If he is so advised, it is open to the petitioner to agitate on his rights under the said Act before the appropriate Forum and in appropriate proceedings.

92. If such a proceeding is initiated by the petitioner, the same will be dealt with without being impeded by any observation made or finding reached in any of the judgments arising out of the concerned criminal

case against the petitioner, by any Court, including this Court.

93. For the reasons discussed above and considering the aforesaid legal issues, this Court concludes as follows:

(i) The judgment of this Court dated 8.5.2009 on Article 32 petition and which is under Review is set aside.

(ii) The order of the Governor dated 28.1.2002 passed under Article 161 of the Constitution is restored and the order of commutation of death sentence awarded to the petitioner to one of life imprisonment stands.

(iii) This Court holds that in the facts of this case, NHRC had the jurisdiction to make the relevant recommendation.

94. The review petition is allowed to the extent indicated hereinabove.

95. Parties are left to bear their own costs.

.....J.
(AFTAB ALAM)

.....J.
(ASOK KUMAR GANGULY)

New Delhi
November 19, 2010